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•

CASES REPORTED

	Page		Page
Aachen & Munich Fire Ins. Co., Rimmer v. (R. I.).....	977	Bache v. Central Leather Co. (N. J. Ch.)..	571
Abbott v. Abbott (N. H.).....	699	Backes v. Movsoyich (N. J. Sup.).....	497
Abbott, Smith v. (N. J. Ch.).....	115	Bailey, Rogers v. (N. J.).....	1134
Adams v. Page (N. H.).....	1074	Baker, Glover v. (N. H.).....	1081
Adams Exp. Co., Hill v. (N. J.).....	859	Ball v. Ball (N. J.).....	724
Adleman v. Board of Health of City of Hartford (Conn.).....	1055	Ballantine v. Young (N. J. Ch.).....	119
A. E. Sanford Co., Manns v. (N. J. Sup.)..	491	Ballou, Webster v. (Me.).....	1009
Africa, Putt v. (Pa.).....	203	Baltimore Plate Ice Co., Ziellian v., four cases (Md.).....	22
Africa v. Trexler (Pa.).....	707	Baltimore & O. R. Co., Laurel Canning Co. of Prince George's County v. (Md.)....	126
Agostines & Co. v. C. E. Fenn & Co. (Vt.)	255	Bamford, Horton v. (N. J. Ch.).....	761
Albert, George Long Contracting Co. v. (Md.).....	265	Banks, Trustees of Dummer Academy v. (Me.).....	1132
Albert v. Haeberly (N. J. Ch.).....	660	Barcolini v. Atlantic City & S. R. Co. (N. J. Sup.).....	494
Albert, Leaverton v. (Md.).....	601	Bard v. Fireman's Ins. Co. (Me.).....	870
Alden v. Camden Anchor-Rockland Mach. Co. (Me.).....	866	Barnard, Smith v. (N. J.).....	734
Alexander, In re (N. J.).....	732	Barnard, Smith v. (N. J.).....	736
Al. Friedman & Co., Inlaid Co. v. (R. I.)..	722	Barrett v. Connecticut Co. (Conn.).....	963
Allen & Reed v. Russell (R. I.).....	438	Barrett, Hammell v. (N. J.).....	1106
Allgair v. Blew (N. J. Sup.).....	563	Barry, Appeal of (Pa.).....	815
Allgair v. Hickman (N. J.).....	752	Barthold, Champlin v. (N. J. Sup.).....	490
Alman v. United Brotherhood of Carpenters & Joiners of America (N. J. Ch.)....	116	Bayview Cemetery Ass'n v. Cole (N. J.)..	1132
Alpha Mills Co., Selectmen of Town of Montville v. (Conn.).....	1051	Beihl, Appeal of (Pa.).....	147
Altoona & L. V. Electric R. Co., Benson v. (Pa.).....	198	Beihl, Weiss v. (Pa.).....	148
Altoona & L. V. Electric R. Co., Walsh v. (Pa.).....	551	Belanger, Johnson v. (Vt.).....	621
Amazeen v. Newcastle (N. H.).....	1079	Belevicze v. Platt Bros. & Co. (Conn.)....	339
Ambrose, King v. (Pa.).....	714	Belknap Springs Land Co., Douglass v. (N. H.).....	1086
American Electric Works, New Jersey & H. R. Ry. & Ferry Co. v. (N. J.).....	989	Bell, Moudy v. (Pa.).....	551
American Law Book Co., Rockwell v. (N. J.).....	1134	Bell's Estate v. St. Johnsbury & L. O. R. Co. (Vt.).....	680
American Malleables Co. v. Bloomfield (N. J. Sup.).....	500	Bellefleur, Marsh Bros. & Co. v. (Me.)....	79
American Natural Gas Co., Owens v. (Pa.)	547	Bennett v. Association to Provide & Maintain a Home for the Friendless (N. J.)..	1098
Anderson v. Eastern Coupling Co. (Me.)..	167	Benson v. Altoona & L. V. Electric R. Co. (Pa.).....	198
Anderson & Son v. Shattuck (N. H.).....	781	Bergdoll v. Sopp (Pa.).....	62
Andrew & Thomas, Trustees of Seventh Baptist Church of Baltimore v. (Md.).....	1	Berlin Nat. Bank v. Guay (N. H.).....	475
Angell, Prescott v. (R. I.).....	194	Bernstein Mfg. Co., Holden v. (Pa.).....	428
Appleby, Gilson v. (N. J.).....	724	Betz v. P. Welty & Co. (Md.).....	382
Appleby, Gilson v. (N. J.).....	925	Biddleman, Davidson v. (N. J. Sup.).....	366
Appleby, Gilson v., two cases (N. J.).....	927	Bijur v. Standard Distilling & Distributing Co. (N. J.).....	1132
Archambault's Estate, In re (Pa.).....	313	Bishop v. Readsboro Chair Mfg. Co. (Vt.)..	454
Archambault's Estate, La re (Pa.).....	314	Bixby v. Roscoe (Vt.).....	255
Armn, Ruskin v. (N. J. Sup.).....	342	Black, Boyajian v. (R. I.).....	437
Arundel Realty Co. v. Maryland Electric Ry. Co. (Md.).....	787	Blair, Wentz v. (Pa.).....	144
Ashby v. Yetter (N. J.).....	730	Blair Co., Newingham v. (Pa.).....	556
Ashley Borough v. Lehigh & Wilkes-Barre Coal Co. (Pa.).....	442	Blanchard, Skeels v. (Vt.).....	913
Asmus, Colonial Land Co. v. (N. J. Sup.)..	867	Blew, Allgair v. (N. J. Sup.).....	563
Asmus, Colonial Land Co. v. (N. J.).....	827	Bloede v. Baltimore (Md.).....	67
Association to Provide & Maintain a Home for the Friendless, Bennett v. (N. J.)..	1098	Bloxham, Peer v. (N. J. Sup.).....	659
Atlantic City, Johnson v., four cases (N. J. Sup.).....	1106	Board of Alderman of City of Newport, Fletcher v. (R. I.).....	193
Atlantic City, Loudenslager v. (N. J.).....	1134	Board of Chosen Freeholders of Atlantic County, Bourgeois v. (N. J. Sup.).....	358
Atlantic City R. Co., Samkiwicz v. (N. J.)	833	Board of County Com'rs, Chesapeake & Potomac Tel. Co. of Baltimore v. (Md.)....	520
Atlantic City R. Co. v. Wood (N. J.).....	1132	Board of Education of Borough of Flemington v. State Board of Education (N. J. Sup.).....	163
Atlantic City & S. R. Co., Barcolini v. (N. J. Sup.).....	494	Board of Excise of Elizabeth, Dunbar v. (N. J. Sup.).....	347
Atlantic Refining Co. v. Stokes (N. J.)....	1132	Board of Health of City of Hartford, Adleman v. (Conn.).....	1065
Atticks v. Riverton Consol. Water Co. (Pa.)	707	Board of Health of Gloucester City, M. L. Shoemaker & Co. v. (N. J. Sup.).....	349
Austin, Hoffercker v. (N. J.).....	864	Board of License Com'rs, Winterbottom v. (R. I.).....	194
Austin v. Pennsylvania R. Co. (N. J.).....	739	Board of Public Utility Com'rs, Public Service R. Co. v. (N. J. Sup.).....	1117
Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank (Md.).....	294		
Averill, State v. (Vt.).....	461		

	Page		Page
Board of Riparian Com'rs, Van Schaick v. (N. J. Sup.).....	1099	Christiana Window Glass Co., Eberhardt v. (Del. Ch.).....	774
Bockelcamp v. Lackawanna & W. V. R. Co. (Pa.).....	93	Citizens' Gas Co. of Port Allegheny v. Whitney (Pa.).....	804
Boddington v. Wilbur (R. L.).....	977	Citizens' Water & Gas Co., City of Williamsport v. (Pa.).....	316
Boettner, Dayton v. (N. J.).....	726	City of Baltimore, Bloede v. (Md.).....	67
Bollinger v. Crystal Sand Co. (Pa.).....	712	City of Baltimore v. Brengle (Md.).....	677
Boody, Russell & Co. v. (Pa.).....	548	City of Baltimore, Wannenwetsch v. (Md.).....	3
Booth, Jurgens v. (N. J. Sup.).....	561	City of Baltimore, Wilmer v. (Md.).....	685
Bordo, Rand v. (Vt.).....	251	City of Bradford, Bovaird v. (Pa.).....	719
Borough of Hohokus, Hutches v. (N. J. Sup.).....	658	City of Danbury, Dyer v. (Conn.).....	958
Borough of Madison, Harrison v. (N. J.).....	755	City of East Orange, Strock v. (N. J.).....	826
Borough of North Wildwood, Voorhees v. (N. J. Sup.).....	264	City of Elizabeth v. Central R. Co. of New Jersey (N. J. Sup.).....	344
Bourgeois v. Board of Chosen Freeholders of Atlantic County (N. J. Sup.).....	358	City of Englewood, Eckerson v. (N. J. Sup.).....	1070
Bovaird v. Bradford (Pa.).....	719	City of Hoboken, Fagen v. (N. J. Sup.).....	365
Bowman, State v. (N. J. Sup.).....	561	City of Manchester, Dinsmore v. (N. H.).....	533
Boyajian v. Black (R. L.).....	437	City of Montpelier v. McMahon (Vt.).....	977
Bradley v. United Wireless Tel. Co. (N. J. Ch.).....	1107	City of Newark v. Clark (N. J.).....	723
Bradney v. Philadelphia Rapid Transit Co. (Pa.).....	187	City of Newark v. Conklin (N. J.).....	723
Brady Brass Co., Gaunon v. (N. J.).....	727	City of Newark v. Lewis (N. J. Sup.).....	1072
Brager, Joseph B. Dunn & Sons v. (Md.).....	516	City of Newark v. Plume (N. J.).....	724
Breintnall v. Sadler (N. J.).....	819	City of Newark v. Tunia (N. J.).....	722
Brengle, City of Baltimore v. (Md.).....	677	City of Newark, United States Fidelity & Guaranty Co. v. (N. J.).....	758
Briggs, Dougherty v. (Pa.).....	201	City of Norwalk v. New Canaan (Conn.).....	1027
Bristor's Estate, In re (Md.).....	25	City of Old Town, Powell v. (Me.).....	1068
Brown, Sutherland v. (Conn.).....	1033	City of Philadelphia, Commonwealth v. (Pa.).....	59
Brown v. Title Guaranty & Surety Co. (Pa.).....	410	City of Philadelphia, Selig v. (Pa.).....	308
Buckman v. Philadelphia & R. R. Co. (Pa.).....	332	City of Reading v. United Traction Co. (Pa.).....	304
Buffalo & Lake Erie Traction Co., Commonwealth v. (Pa.).....	932	City of Scranton v. Genet (Pa.).....	335
Burstow, Jourdan v. (N. J.).....	1133	City of Williamsport v. Citizens' Water & Gas Co. (Pa.).....	316
Bush v. Philadelphia & R. R. Co. (Pa.).....	409	City of Williamsport v. Williamsport Water Co. (Pa.).....	324
Cadwalader, Appeal of (Pa.).....	420	Clagett, D. E. Foote & Co. v. (Md.).....	511
Camden Anchor-Rockland Mach. Co., Alden v. (Me.).....	866	Clancy, Clendennin v. (N. J.).....	750
Campbell v. Weber (N. J. Ch.).....	732	Clark, City of Newark v. (N. J.).....	723
Cape May Sand Co., Knight v. (N. J. Sup.).....	361	Clark v. Clark (N. J.).....	1126
Carling v. Carling (N. J. Ch.).....	565	Clark, Lang v. (Vt.).....	625
Carlou, Goelz v. (N. J.).....	1133	Clark v. Southern Can Co. (Md.).....	271
Carpenter v. John M. Miller & Son (Pa.).....	439	Clark v. Wild (Vt.).....	536
Carpenter, United States v. (Del. Super.).....	1135	Clarke, McCarthy v. (Md.).....	12
Carr v. Hyattsville (Md.).....	8	Clausen v. De Medina (N. J.).....	924
Carr, Page v. (Pa.).....	430	Clendennin v. Clancy (N. J.).....	750
Carroll, Hassett v. (Conn.).....	1013	Clinton Hill Lumber & Mfg. Co., Cumberland Lumber Co. v. (N. J.).....	1133
Caruth, State v. (Vt.).....	922	Clough, Rogers v. (N. H.).....	1075
Caslow v. Strausbaugh (Pa.).....	927	Cobb v. Bradford Tp. (Pa.).....	199
Casualty Co. of America, Primrose v. (Pa.).....	212	Coblentz, Goldsborough v. (Md.).....	595
Catanzaro Di Giorgio Co. v. F. W. Stock & Sons (Md.).....	385	Coburn v. Connecticut Co. (Conn.).....	241
C. E. Fenn & Co., H. P. Agostines & Co. v. (Vt.).....	255	Cole, Bayview Cemetery Ass'n v. (N. J.).....	1132
Central Leather Co., Bache v. (N. J. Ch.).....	571	Cole, Yoder v. (Pa.).....	546
Central Pennsylvania Lumber Co., Appeal of (Pa.).....	204	Collins, Tonn's v. (Md.).....	219
Central R. Co. of New Jersey, City of Elizabeth v. (N. J. Sup.).....	344	Colonial Land Co. v. Asmus (N. J. Sup.).....	367
Central R. Co. of New Jersey, Keough v. (N. J.).....	989	Colonial Land Co. v. Asmus (N. J.).....	827
Central R. Co. of New Jersey, Walling v. (N. J.).....	987	Colonial Trust Co. v. Gerke, two cases (Md.).....	594
Central R. R. of New Jersey v. State Board of Assessors (N. J. Sup.).....	568	Columbia & P. D. R. Co., Mitchell v. (Pa.).....	898
Chambers v. Philadelphia Pickling Co. (N. J. Sup.).....	573	Columbia & P. D. R. Co., Quade v. (Pa.).....	813
Champlin v. Barthold (N. J. Sup.).....	490	Commercial Mut. Acc. Co., Erb v. (Pa.).....	207
Chancellor of State of New Jersey v. Morris (N. J. Sup.).....	347	Commonwealth v. Buffalo & Lake Erie Traction Co. (Pa.).....	932
Chapman, Cramton v. (Vt.).....	231	Commonwealth v. Comporto (Pa.).....	906
Chapman, Moulton v. (Me.).....	1007	Commonwealth v. Cunningham (Pa.).....	711
Charlott v. McMullen (Conn.).....	65	Commonwealth v. Excelsior Brick & Stone Co. (Pa.).....	933
Chase v. Hoosac Tunnel & W. R. Co. (Vt.).....	236	Commonwealth v. Huston (Pa.).....	1135
Chaumet v. De Galard de Brassac de Bearn (Md.).....	227	Commonwealth v. Independence Trust Co. (Pa.).....	928
C. H. Eddy & Co. v. Field (Vt.).....	249	Commonwealth v. Lee (Pa.).....	812
Chesapeake & Potomac Tel. Co. of Baltimore v. Board of County Com'rs (Md.).....	520	Commonwealth v. McAfee (Pa.).....	85
Chevalier, Fletcher-Crowell Co. v. (Me.).....	578	Commonwealth v. Marlon (Pa.).....	423
Christ, Huey v. (Pa.).....	159	Commonwealth v. Pennsylvania R. Co. (Pa.).....	196
		Commonwealth v. Philadelphia (Pa.).....	59
		Commonwealth v. Plymouth Coal Co. (Pa.).....	148
		Commonwealth v. Union Surety & Guaranty Co. (Pa.).....	910
		Commonwealth v. Vandegrift (Pa.).....	153
		Comporto, Commonwealth v. (Pa.).....	906
		Comstock v. Waterford (Conn.).....	1059
		Conard, Nagle v. (N. J. Ch.).....	841

	Page		Page
Conklin, City of Newark v. (N. J.).....	723	Dennery v. Great Atlantic & Pacific Tea Co. (N. J.).....	861
Conlan v. Leonard (N. J. Sup.).....	492	Denton Nat. Bank v. Kenney (Md.).....	227
Connecticut Co., Barrett v. (Conn.).....	963	Deubel v. Millard Const. Co. (N. J.).....	1133
Connecticut Co., Coburn v. (Conn.).....	241	Devitt, Day v. (N. J. Ch.).....	368
Connecticut Co., Murphy v. (Conn.).....	961	Dickinson v. Erie R. Co. (N. J.).....	104
Connell Anthracite Min. Co., Hood v. (Pa.)	56	Dinsmore v. Manchester (N. H.).....	533
Connolly, Kinter v. (Pa.).....	905	District Court of City of Orange, Shine v. (N. J. Sup.).....	499
Connolly, Land Title & Trust Co. v. (Pa.)	903	Doe ex dem. Littleton v. Roe (Del. Super.)	47
Conococheague Club of Washington County v. State (Md.).....	602	Doggett v. Tatham (Md.).....	376
Continuous Glass Press Co., Mississippi Wire Glass Co. v. (N. J. Ch.).....	374	Donnell, Harvey v. (Me.).....	865
Conway v. Philadelphia Hardware & Mal-leable Iron Works (Pa.).....	421	Donovan v. Selinas (Vt.).....	235
Cook v. Jack (N. J.).....	1110	Dordoni v. Smith (N. J.).....	743
Cook, Stout v. (N. J.).....	821	Dotson v. Foust (Pa.).....	911
Cook, Stout v. (N. J.).....	824	Dougherty v. Briggs (Pa.).....	201
Corliss v. Richford (Vt.).....	234	Dougherty v. Welshans (Pa.).....	997
Coulombe v. Eastman (N. H.).....	704	Douglass v. Belknap Springs Land Co. (N. H.).....	1086
Councilman, Moore v. (Md.).....	122	Doyle v. Melendy (Vt.).....	1129
Covey v. Rogers (Vt.).....	1130	Drake, Appeal of (Pa.).....	891
Coward, Wallace v. (N. J. Ch.).....	739	Dresser v. Kronberg (Me.).....	487
Cramton v. Chapman (Vt.).....	231	Drown, State v. (Vt.).....	641
Cray, State v. (Vt.).....	450	Dubron, Van Riper v. (N. J. Sup.).....	433
Crichton v. State (Md.).....	36	Duffy v. McKenna (N. J. Sup.).....	1101
Cronmuller v. Evening Telegraph (Pa.)...	58	Duffy v. York Haven Water & Power Co. (Pa.).....	908
Crotais v. Pennsylvania R. Co. (N. J.).....	107	Dukais, Karahalies v. (Me.).....	1011
Crystal Sand Co., Bollinger v. (Pa.).....	712	Dummer Academy v. Banks (Me.).....	1132
Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (N. J.).....	1133	Dunbar v. Board of Excise of Elizabeth (N. J. Sup.).....	347
Cummings v. Wildman (Md.).....	610	Dunn Worsted Mills, Perrier v. (R. I.)...	722
Cunningham, Commonwealth v. (Pa.).....	711	Dunn & Sons v. Brager (Md.).....	516
Curlett, Emmons v. (Del.).....	508	Du Pont v. Standard Arms Co. (Del. Ch.).....	1089
Dailey, Appeal of (Pa.).....	655	Dyer v. Danbury (Conn.).....	958
Daley, Hawken v. (Conn.).....	1053	Dyer, Odessa Loan Ass'n v. (Del. Super.)	469
Dallas, Ludlam v. (N. J. Sup.).....	489	Earl v. Earl (N. J. Ch.).....	575
Davidson v. Biddleman (N. J. Sup.).....	366	Eastern Coupling Co., Anderson v. (Me.)...	167
Davis v. Flesham (Pa.).....	412	Eastern Trust & Banking Co., Mullen v. (Me.).....	948
Davis, Hayford v. (Me.).....	1132	Eastman, Coulombe v. (N. H.).....	704
Davis v. Palmer (N. J. Ch.).....	573	E. A. Strout Co., Light v. (Me.).....	867
Davis v. Randall (Vt.).....	250	Eastwood v. Russell (N. J.).....	108
Davis, Slayton v. (Vt.).....	232	Eberhardt v. Christiana Window Glass Co. (Del. Ch.).....	774
Day v. Devitt (N. J. Ch.).....	368	Eckels v. Weibley (Pa.).....	645
Day v. Faulks (N. J. Ch.).....	354	Eckerson v. Englewood (N. J. Sup.).....	1070
Day, Hill v. (Me.).....	581	Eddy & Co. v. Field (Vt.).....	249
Day v. Towns (N. H.).....	405	Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby (Md.).....	284
Day v. Washburn (N. H.).....	474	Edgecomb v. Jenney (Me.).....	1091
Dayton v. Boettner (N. J.).....	726	Edison Portland Cement Co., Stout v. (N. J. Sup.).....	737
Deacon, Lippincott v. (N. J. Ch.).....	356	Edward Knapp & Co. v. Tidewater Coal Co. (Conn.).....	1063
Deacon, Mt. Holly Safe Deposit & Trust Co. v. (N. J. Ch.).....	356	Edwards v. Oakes (N. J.).....	1133
Deavitt, Gordon v. (Vt.).....	1128	Edwards, Taylor Provision Co. v. (N. J.)	1120
De Bearn v. De Galard de Brassac de Bearn (Md.).....	222	Egan, Turner v. (Md.).....	877
De Bearn v. De Galard de Brassac de Bearn (Md.).....	223	Ehrhart v. Esbenshade (Pa.).....	814
De Bearn v. De Galard de Brassac de Bearn, three cases (Md.).....	227	Elliott v. Mason (N. H.).....	701
Deerfield Lumber Co., Hartigan v. (Vt.)...	250	Emery, Norton v. (Me.).....	671
De Festetics v. De Festetics (N. J. Ch.)...	741	Emmons v. Curlett (Del.).....	508
D. E. Foote & Co. v. Clagett (Md.).....	511	English Co., Delaware, L. & W. R. Co. v. (N. J. Sup.).....	436
De Forest & Hotchkiss Co., Rosenbluth v. (Conn.).....	955	Epstein, Wilmer v. (Md.).....	379
De Galard de Brassac de Bearn, Chaumet v. (Md.).....	227	Erb v. Commercial Mut. Acc. Co. (Pa.)...	207
De Galard de Brassac de Bearn, De Bearn v. (Md.).....	222	Erie R. Co., Dickinson v. (N. J.).....	104
De Galard de Brassac de Bearn, De Bearn v. (Md.).....	223	Erie R. Co., Tischman v. (N. J. Sup.)...	114
De Galard de Brassac de Bearn, De Bearn v., three cases (Md.).....	227	Erie R. Co., Wells v. (Pa.).....	330
Delaware, L. & W. R. Co., Husvar v. (Pa.)	298	Esbenshade, Ehrhart v. (Pa.).....	814
Delaware, L. & W. R. Co. v. Joseph English Co. (N. J. Sup.).....	436	Evans v. Loomis (Pa.).....	652
Delaware, L. & W. R. Co., Leitzell v. (Pa.)	543	Evening Telegraph, Cronmuller v. (Pa.)...	58
Delaware, L. & W. R. Co. v. Tobyhanna Co. (Pa.).....	132	Excelsior Brick & Stone Co., Commonwealth v. (Pa.).....	933
Delaware, L. & W. R. Co. v. Weiser (Pa.).....	994	Eyre-Shoemaker Const. Co. v. Mackin (Md.)	267
Delinks v. New York, N. H. & H. R. Co. (Conn.).....	1036	Fagen v. Hoboken (N. J. Sup.).....	365
De Medina, Clausen v. (N. J.).....	924	Fales, Thorpe v. (R. I.).....	721
Denison, Frick v. (Md.).....	507	Fall v. Fall (Me.).....	865
		Farnsworth, Whiting v. (Me.).....	214
		Faulks, Day v. (N. J. Ch.).....	354
		Faux v. Fidler (Pa.).....	91

	Page		Page
Felin v. Locust Realty Co. (Pa.).....	158	Haerberly, Albert v. (N. J. Ch.).....	660
Fenn & Co., H. P. Agostines & Co. v. (Vt.)	255	Hamill Coal & Coke Co., State v. (Md.)..	695
Ferguson v. O'Brien (N. H.).....	479	Hammell v. Barrett (N. J.).....	1106
Ferry v. Philadelphia Rapid Transit Co. (Pa.).....	426	Hammermill Paper Co., Zuraw v. (Pa.)..	654
Ferschke, State v. (Del. Super.).....	401	Harmon, Fitzsimmons v. (Me.).....	667
Fetterolf v. Pennsylvania R. Co. (Pa.)...	539	Harrison v. Madison (N. J.).....	755
Field, C. H. Eddy & Co. v. (Vt.).....	249	Harrison v. Union Transp. Co. (N. J. Sup.).....	490
Field, Patten v. (Me.).....	77	Hart, Appeal of (Pa.).....	313
Fireman's Ins. Co., Bard v. (Me.).....	870	Hart, Appeal of (Pa.).....	314
Firor v. Taylor (Md.).....	389	Hartford Life Ins. Co., Sowles v. (Vt.)...	98
First Nat. Bank v. Gerli (Pa.).....	540	Hartford Trust Co. v. West Hartford (Conn.).....	244
First Nat. Bank, W. H. Shepherd & Sons v. (Pa.).....	715	Hartford Trust Co. v. Wolcott (Conn.)...	1057
Fitler, Faux v. (Pa.).....	91	Hartigan v. Deerfield Lumber Co. (Vt.)...	259
Fitzpatrick's Estate, In re (Pa.).....	815	Harvey v. Donnell (Me.).....	865
Fitzsimmons v. Harmon (Me.).....	667	Harvey v. Weitzenkorn (Pa.).....	447
Flaherty v. Libby (Me.).....	166	Hassett v. Carroll (Conn.).....	1013
Flanders, Magoon v. (Me.).....	665	Hastings, State v. (Del. Gen. Sess.).....	403
Fleck, Moseby v. (Pa.).....	930	Hauser v. Squire (N. J. Sup.).....	263
Fleshman, Davis v. (Pa.).....	412	Hawken v. Daley (Conn.).....	1063
Fletcher v. Board of Aldermen of City of Newport (R. I.).....	193	Hayford v. Davis (Me.).....	1132
Fletcher-Crowell Co. v. Chevalier (Me.)...	578	Healy, Mahoney v. (Del. Ch.).....	583
Flint Wagon Works v. Maloney (Del. Super.).....	502	Hendrick v. State (Md.).....	18
Focht, Urban v. (Pa.).....	55	Hendrick v. State (Md.).....	22
Foot & Co. v. Claggett (Md.).....	511	Henry v. Thompson (N. J.).....	840
Ford's Estate, In re (Pa.).....	200	Henry C. Patterson Co., Russell v. (Pa.)...	136
Fournier v. York Mfg. Co. (Me.).....	82	Hess v. Kimble (N. J. Ch.).....	363
Foust, Dotson v. (Pa.).....	911	Hibbler's Estate, In re (N. J.).....	1133
Fraser v. Fraser (N. J.).....	1133	Hickman, Allgair v. (N. J.).....	752
Frazier v. W. H. H. Slack & Bro. (Vt.)...	161	Higinbotham v. Pauch (Pa.).....	718
Freeholders of Gloucester County, New Jersey Imperial Road Co. v. (N. J.).....	725	Hill v. Adams Exp. Co. (N. J.).....	859
French v. Lawrence (N. H.).....	706	Hill v. Day (Me.).....	581
Frick v. Denison (Md.).....	597	Hill Lumber Mfg. Co., Rowe v. (Me.)....	669
Friedman & Co., Inland Co. v. (R. I.)...	722	Hillers v. Taylor (Md.).....	286
Fuchs & Lang Mfg. Co., Phelps v. (N. J.)	728	Hirsch v. Kaufman (R. I.).....	66
F. W. Stock & Sons, Catanzaro Di Giorgio Co. v. (Md.).....	385	Hoch v. Butler Tp. (Pa.).....	546
Gambrill, State v. (Md.).....	10	Hoffecker v. Austin (N. J.).....	864
Gannon v. Brady Brass Co. (N. J.).....	727	Holden v. Bernstein Mfg. Co. (Pa.).....	428
Gary v. Graham (Me.).....	666	Hollander, Semkin v. (N. J.).....	980
Genet, City of Scranton v. (Pa.).....	335	Holt, Illustrated Postal Card & Novelty Co. v. (Conn.).....	1061
George Long Contracting Co. v. Albert (Md.).....	265	Honesdale Ice Co. v. Lake Lodore Imp. Co. (Pa.).....	306
George's Creek Coal & Iron Co., Tyson v. (Md.).....	41	Hood v. Connell Anthracite Min. Co. (Pa.)	56
Gerke, Colonial Trust Co. v., two cases (Md.).....	594	Hoosac Tunnel & W. R. Co., Chase v. (Vt.)	236
Gerli, First Nat. Bank v. (Pa.).....	540	Hoosac Tunnel & W. R. Co., Jewell v. (Vt.).....	238
Geschke, Lionel C. Simpson Plumbing & Heating Co. v. (N. J.).....	1133	Horner v. Reynolds (N. H.).....	1078
Giddings v. Gillingham (Me.).....	951	Hornung v. West New York (N. J. Sup.)...	1116
Gillan v. West (Pa.).....	128	Horton v. Bamford (N. J. Ch.).....	761
Gillingham, Giddings v. (Me.).....	951	Hotel Cape May, Jefferson v. (N. J. Sup.)	349
Gilson v. Appleby (N. J.).....	724	Houghton, Huntley v. (Vt.).....	452
Gilson v. Appleby (N. J.).....	925	Houlehan v. Kennebec County (Me.)....	449
Gilson v. Appleby, two cases (N. J.).....	927	Howard, Mealey v. (N. J.).....	1108
Girardi v. Laquin Lumber Co. (Pa.).....	63	Howard v. Stillwagon (Pa.).....	807
Given's Estate, In re (Pa.).....	64	Hoyt's Estate, In re (Pa.).....	203
Glover v. Baker (N. H.).....	1081	H. P. Agostines & Co. v. C. E. Fenn & Co. (Vt.).....	255
Goetz v. Carlow (N. J.).....	1133	Huckins, McBride v. (N. H.).....	528
Goldsbrough v. Coblenz (Md.).....	595	Huey v. Christ (Pa.).....	159
Goodman v. Lehigh Val. R. Co. of New Jersey, two cases (N. J.).....	848	Hunsicker, Keator v. (Pa.).....	140
Goodman v. Lehigh Val. R. Co. of New Jersey (N. J.).....	851	Huntley v. Houghton (Vt.).....	452
Goodman v. Saperstein (Md.).....	695	Hurwitz, Nowlis v. (Pa.).....	143
Gordon v. Deavitt (Vt.).....	1128	Huston, Commonwealth v. (Pa.).....	1135
Gordon & Hoar, McKane v. (Vt.).....	637	Huston v. Roe (N. J.).....	848
Gould v. Randal (Pa.).....	809	Husvar v. Delaware, L. & W. R. Co. (Pa.)	293
Graham, Gary v. (Me.).....	666	Hutches v. Hohokus (N. J. Sup.).....	658
Graham, State v. (Md.).....	31	Idler, Scull v. (N. J. Ch.).....	746
Great Atlantic & Pacific Tea Co., Dennery v. (N. J.).....	861	Illustrated Postal Card & Novelty Co. v. Holt (Conn.).....	1061
Great Atlantic & Pacific Tea Co., Ondis' Adm'r v. (N. J.).....	856	Imperial Realty Co. v. West Jersey & S. R. Co. (N. J.).....	837
Griffiths v. Monongahela R. Co. (Pa.)....	713	Imperial Rolling Screen Co. v. Steinfeld Bros. (Pa.).....	413
Griffswold v. Wentworth (Vt.).....	622	Independence Trust Co., Commonwealth v. (Pa.).....	928
Grogan, Power v. (Pa.).....	416	Inhabitants of Eden v. Southwest Harbor (Me.).....	1003
Groton & S. St. R. Co., Thorson v. (Conn.)	1024	Inhabitants of Kennebec County, Houlehan v. (Me.).....	449
Guay, Berlin Nat. Bank v. (N. H.).....	475	Inhabitants of Linneus, Mitchell v. (Me.)	945
		Inhabitants of Southwest Harbor, Inhabitants of Eden v. (Me.).....	1003

	Page
Inhabitants of Town of Washington, Mc-Gown v. (Me.).....	1092
Inland Co. v. Al. Friedman & Co. (R. I.)..	722
Insurance Co. of North America, Williams Mfg. Co. v. (Vt.).....	916
Ireland v. Ireland Advertising Agency (Pa.)	716
Ireland Advertising Agency, Ireland v. (Pa.).....	716
Irondale Electric Light, Heat & Power Co., Vanderslice v. (Pa.).....	445
Isett v. Meehan (Pa.).....	544
Jack, Cook v. (N. J.).....	1110
Jackson, In re (Del. Ch.).....	992
Jackson, Lowentraut v. (N. J.).....	743
Jacques, Mundy v. (Md.).....	289
Japanese Importers Co. v. Walsh (R. I.)..	331
J. C. Blair Co., Newingham v. (Pa.).....	556
Jefferson v. Hotel Cape May (N. J. Sup.)	349
Jenney, Edgecomb v. (Me.).....	1091
Jersey City v. Jersey City Water Supply Co. (N. J.).....	1134
Jersey City, H. & P. St. R. Co., Riva v. (N. J.).....	847
Jersey City Water Supply Co., Jersey City v. (N. J.).....	1134
Jewell v. Hoosac Tunnel & W. R. Co. (Vt.)	238
Joffe & Mankowitz v. Niagara Ins. Co. (Md.).....	281
John M. Miller & Son, Carpenter v. (Pa.)	439
Johnson v. Atlantic City, four cases (N. J. Sup.).....	1105
Johnson v. Belanger (Vt.).....	621
Johnson, Manley v. (Vt.).....	919
Johnson v. Philadelphia & R. R. Co. (Pa.)	415
Johnson, Sallies v. (Conn.).....	974
Johnson v. Schmitt (N. J.).....	1133
Johnson, State v. (N. J. Sup.).....	657
Jones, Lord v. (Me.).....	169
Joseph English Co., Delaware, L. & W. R. Co. v. (N. J. Sup.).....	436
Joseph B. Dunn & Sons v. Brager (Md.)..	516
Jourdan v. Burstow (N. J.).....	1133
Jurgens v. Booth (N. J. Sup.).....	561
Karahalles v. Dukals (Me.).....	1011
Kaufman, Hirsch v. (R. I.).....	66
Kaufman v. National Lumber Ins. Co. (Pa.)	53
Kayhart v. Whitehead (N. J.).....	1133
Keally, Pennsylvania R. Co. v. (Pa.).....	646
Keating & S. R. Co., Pittsburg, S. & N. R. Co. v. (Pa.).....	935
Keator v. Hunsicker (Pa.).....	140
Kennebec Water Dist., People's Nat. Bank v. (Me.).....	866
Kennett v. Tudor (Vt.).....	633
Kenny, Denton Nat. Bank v. (Md.).....	227
Keough v. Central R. Co. of New Jersey (N. J.).....	989
Kerney, Murray v. (Md.).....	6
Keystone Coal Co., Stegmaier v. (Pa.).....	187
Kimble, Hess v. (N. J. Ch.).....	863
King v. Ambrose (Pa.).....	714
Kinter v. Connolly (Pa.).....	905
Kitchen v. Pennsylvania R. Co. (Pa.).....	711
Kleinman, Phillips v. (Pa.).....	648
Kleinman, Phillips v. (Pa.).....	650
Knapp & Co. v. Tidewater Coal Co. (Conn.)	1063
Knight v. Cape May Sand Co. (N. J. Sup.)	361
Knowles v. Massey (Del. Super.).....	470
Kohlrepp v. Ram (N. J. Ch.).....	1103
Krah v. Radcliffe (N. J.).....	1133
Kraucunas, Mazalka v. (Pa.).....	938
Kraut v. Public Service R. Co. (N. J.).....	751
Kronberg, Dresser v. (Me.).....	487
Labranche v. St. Jean Baptiste Soc. (N. H.)	698
Lackawanna & W. V. R. Co., Bockelcamp v. (Pa.).....	93
Lake Lodore Imp. Co., Honesdale Ice Co. v. (Pa.).....	306
Land Tide & Trust Co. v. Connolly (Pa.)	903
Larg v. Clark (Vt.).....	625
Lapp v. Stanton (Md.).....	675
Laguin Lumber Co., Girardi v. (Pa.).....	63
Larkin v. Wikoff (N. J.).....	365

	Page
Lauckner, McIntire v. (Me.).....	784
Laurel Canning Co. of Prince George's County v. Baltimore & O. R. Co. (Md.)..	126
Lawrence, French v. (N. H.).....	705
Lawrence, Leyden v. (N. J. Ch.).....	121
Leaverton v. Albert (Md.).....	601
Lee, Commonwealth v. (Pa.).....	812
Lehigh Valley Coal Co., Pierce v. (Pa.)..	141
Lehigh Valley Coal Co., Pierce v. (Pa.)..	142
Lehigh Valley Coal Co., Riffert v. (Pa.)..	810
Lehigh Val. R. Co., Smith v. (Pa.).....	554
Lehigh Val. R. Co. of New Jersey, Goodman v., two cases (N. J.).....	848
Lehigh Val. R. Co. of New Jersey, Goodman v. (N. J.).....	851
Lehigh Val. R. Co. of New Jersey, Mays v. (N. J.).....	848
Lehigh Val. R. Co. of New Jersey, Mays v. (N. J.).....	851
Lehigh & Wilkes-Barre Coal Co., Ashley Borough v. (Pa.).....	442
Lehmaier, McKiernan v. (Conn.).....	969
Leltzell v. Delaware, L. & W. R. Co. (Pa.)	543
Leonard, Conlan v. (N. J. Sup.).....	492
Levenson Wrecking Co., Schafer v. (N. J. Sup.).....	434
Levin, People's Brewing Co. of Trenton v. (N. J.).....	1114
Lewis, City of Newark v. (N. J. Sup.).....	1072
Lewisburg Bridge Co. v. Union County (Pa.).....	324
Leyden v. Lawrence (N. J. Ch.).....	121
Libby, Flaherty v. (Me.).....	168
Light v. E. A. Strout Co. (Me.).....	867
Linn, Steel v. (Pa.).....	92
Lionel C. Simpson Plumbing & Heating Co. v. Geschke (N. J.).....	1133
Lippincott v. Deacon (N. J. Ch.).....	356
Littleton v. Roe (Del. Super.).....	47
Liverpool & London & Globe Ins. Co., Pot- tle v. (Me.).....	481
Locust Realty Co., Felin v. (Pa.).....	158
Long Contracting Co. v. Albert (Md.).....	265
Long Dock Co. v. State Board of Assessors (N. J. Sup.).....	568
Loomis, Evans v. (Pa.).....	652
Lord v. Jones (Me.).....	169
Loudenslager v. Atlantic City (N. J.).....	1134
Lowe, Williams v. (N. J.).....	760
Lowentraut v. Jackson (N. J.).....	743
Ludlam v. Dallas (N. J. Sup.).....	489
Luery v. State (Md.).....	681
Luery v. State (Md.).....	685
Lusby, Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. (Md.).....	284
McAfee, Commonwealth v. (Pa.).....	85
McAvoy v. Renahan (Md.).....	673
McAvoy, Renahan v. (Md.).....	586
McBride v. Huckins (N. H.).....	528
McCarthy v. Clarke (Md.).....	12
McCarthy, McNulty v. (N. J. Ch.).....	568
McCarthy, McNulty v. (N. J.).....	1134
McCool v. West Jersey & S. R. Co. (N. J.)	111
McCormick v. Sawyer (Me.).....	482
McGown v. Washington (Me.).....	1092
McIntire v. Lauckner (Me.).....	784
McKane v. Gordon & Hoar (Vt.).....	637
McKenna, Duffy v. (N. J. Sup.).....	1101
McKiernan v. Lehmaier (Conn.).....	969
Mackin, Eyre-Shoemaker Const. Co. v. (Md.).....	267
McLean v. Windham Light & Lumber Co. (Vt.).....	613
McMahon, City of Montpelier v. (Vt.)....	977
McManamon v. Hanover Tp. (Pa.).....	440
McMullen, Charlott v. (Conn.).....	65
McNulty v. McCarthy (N. J. Ch.).....	568
McNulty v. McCarthy (N. J.).....	1134
McVey, Tapscott v. (N. J. Sup.).....	348
Magarity, Model Heating Co. v. (Del.)..	394
Magoon v. Flanders (Me.).....	665
Mahoney v. Healy (Del. Ch.).....	583
Maine Cent. R. Co., Tatro v. (Me.).....	216
Maloney, Flint Wagon Works v. (Del. Su- per.).....	502

	Page		Page
Manley v. Johnson (Vt.)	919	National Lumber Ins. Co., Kaufman v. (Pa.)	53
Manna v. A. E. Sanford Co. (N. J. Sup.)	491	National Salt Co., Strickland v. (N. J.)	828
Mantik, Miller v. (Md.)	797	National Salt Co., Strickland v. (N. J.)	832
Marion, Commonwealth v. (Pa.)	423	Naudain, Richards v. (Del. Super.)	872
Marsh Bros. & Co. v. Bellefleur (Me.)	79	Nevin v. Public Service Corp. of New Jersey (N. J. Sup.)	434
Marter v. Repp (N. J.)	1134	Newbold, Ward v. (Md.)	793
Martin, Wise v. (Pa.)	184	New Cumberland Borough v. Riverton Consol. Water Co. (Pa.)	548
Maryland Electric Rys. Co., Arundel Realty Co. v. (Md.)	787	New Cumberland Borough v. Riverton Consol. Water Co. (Pa.)	799
Mason, Stokes v. (Vt.)	162	Newhard, Rittenhouse v. (Pa.)	445
Massey, Knowles v. (Del. Super.)	470	Newingham v. J. C. Blair Co. (Pa.)	556
Maynard v. United States Health & Accident Co. (N. H.)	1077	New Jersey Imperial Road Co. v. Freeholders of Gloucester County (N. J.)	725
Mays v. Lehigh Val. R. Co. of New Jersey (N. J.)	848	New Jersey Soc. for Prevention of Cruelty to Animals v. Rosen (N. J. Sup.)	496
Mays v. Lehigh Val. R. Co. of New Jersey (N. J.)	851	New Jersey & H. R. Ry. & Ferry Co. v. American Electric Works (N. J.)	989
Mazaika v. Krauczunas (Pa.)	938	New York, C. & St. L. R. Co., Rick v. (Pa.)	650
Mealey v. Howard (N. J.)	1108	New York, N. H. & H. R. Co., Delinks v. (Conn.)	1036
Mechanics' Nat. Bank of Burlington, Part-ridge v. (N. J.)	1134	New York Shipbuilding Co., Pushcart v. (N. J. Sup.)	113
Meehan, Isett v. (Pa.)	544	Niagara Ins. Co., Joffe & Mankowitz v. (Md.)	281
Megraw, Siegel v. (Pa.)	84	Nichols v. Manchester (Conn.)	337
Melendy, Doyle v. (Vt.)	1129	North Mountain Water Supply Co. v. Troxell (Pa.)	157
Mellon v. Victor Talking Mach. Co. (N. J.)	755	Norton v. Emery (Me.)	671
Melville, Van Clief v. (N. J.)	824	Nowlis v. Hurwitz (Pa.)	143
Melvin, Wilkin Mfg. Co. (Md.)	879	Oakes, Edwards v. (N. J.)	1133
Merchants' Nat. Bank, Auto & Accessories Mfg. Co. v. (Md.)	294	Oberheim v. Reeside (Md.)	590
Merritt, Snelling & Potter v. (Conn.)	1030	O'Brien, Ferguson v. (N. H.)	479
Meyer's Estate, In re (Pa.)	145	Odessa Loan Ass'n v. Dyer (Del. Super.)	469
Meyer's Estate, In re (Pa.)	147	O'Ferrall, Schaub v. (Md.)	789
Middlecreek Electric Co., Shambach v. (Pa.)	802	O'Flaherty, Sims v. (Conn.)	1026
Miffin's Estate, In re (Pa.)	129	Ondis' Adm'x v. Great Atlantic & Pacific Tea Co. (N. J.)	856
Millard Const. Co., Deubel v. (N. J.)	1133	Opinion of the Justices, In re (N. H.)	170
Miller v. Mantik (Md.)	797	Owens v. American Natural Gas Co. (Pa.)	547
Miller v. Powell (Vt.)	921	Packard, Roschen v. (Md.)	174
Miller & Son, Carpenter v. (Pa.)	439	Page, Adams v. (N. H.)	1074
Mississippi Wire Glass Co. v. Continuous Glass Press Co. (N. J. Ch.)	374	Page v. Carr (Pa.)	430
Mitchell v. Columbia & P. D. R. Co. (Pa.)	898	Palmenberg v. Turk (Md.)	221
Mitchell v. Linneus (Me.)	945	Palmer, Davis v. (N. J. Ch.)	573
M. L. Shoemaker & Co. v. Board of Health of Gloucester City (N. J. Sup.)	349	Parker, Raymond v. (Conn.)	1030
Model Heating Co. v. Magarity (Del.)	394	Parshley, State v. (Me.)	484
Monongahela R. Co., Griffiths v. (Pa.)	713	Partridge v. Mechanics' Nat. Bank of Burlington (N. J.)	1134
Moore, In re (N. H.)	703	Patten v. Field (Me.)	77
Moore v. Councilman (Md.)	1071	Patterson Co., Russell v. (Pa.)	136
Moore, Wilcomb v. (N. H.)	1076	Pauch, Higginbotham v. (Pa.)	718
Moran v. Southard (Me.)	1132	Paul v. Wilson (N. J.)	835
Moriarty, Town of Winchester v. (Conn.)	985	Payne v. Twitchell (N. J. Sup.)	350
Morris, Chancellor of State of New Jersey v. (N. J. Sup.)	347	Peer v. Bloxham (N. J. Sup.)	659
Morris R. Co., Sisters of Charity of St. Elizabeth v. (N. J. Sup.)	817	Pennsylvania R. Co., Austin v. (N. J.)	739
Morris R. Co., Towmby v. (N. J. Sup.)	817	Pennsylvania R. Co., Commonwealth v. (Pa.)	196
Morris & E. R. Co. v. State Board of Assessors (N. J. Sup.)	568	Pennsylvania R. Co., Crotois v. (N. J.)	107
Moseby v. Fleck (Pa.)	930	Pennsylvania R. Co., Fetterolf v. (Pa.)	539
Moudy v. Bell (Pa.)	551	Pennsylvania R. Co. v. Keally (Pa.)	646
Moulton v. Chapman (Me.)	1007	Pennsylvania R. Co., Kitchen v. (Pa.)	711
Mt. Holly Safe Deposit & Trust Co. v. Deacon (N. J. Ch.)	356	People's Brewing Co. of Trenton v. Levin (N. J.)	1114
Movsovich, Backes v. (N. J. Sup.)	497	People's Nat. Bank v. Kennebec Water Dist. (Me.)	866
Moyer v. Moyer (N. J.)	1111	Perrier v. Dunn Worsted Mills (R. I.)	722
Moyer v. Rentschler (Pa.)	52	Phelps v. Fuchs & Lang Mfg. Co. (N. J.)	728
Mueller, Schneider v. (N. J.)	803	Philadelphia, B. & T. St. R. Co., Wagner v. (Pa.)	944
Mulcahy v. Mulcahy (Conn.)	242	Philadelphia Hardware & Malleable Iron Works, Conway v. (Pa.)	421
Mullen v. Eastern Trust & Banking Co. (Me.)	948	Philadelphia Pickling Co., Chambers v. (N. J. Sup.)	573
Mundy v. Jacques (Md.)	289	Philadelphia Rapid Transit Co., Bradney v. (Pa.)	187
Murphy v. Connecticut Co. (Conn.)	961	Philadelphia Rapid Transit Co., Ferry v. (Pa.)	426
Murphy, Town of Morristown v. (N. J. Sup.)	498	Philadelphia & R. R. Co., Buckman v. (Pa.)	332
Murray v. Kerney (Md.)	6	Philadelphia & R. R. Co., Bush v. (Pa.)	409
Mutual Ben. Electric Light & Power Co., United Electric Co. of New Jersey v. (N. J.)	754		
Mutual Loan Ass'n v. Tyre (Del. Super.)	48		
Nagle v. Conard (N. J. Ch.)	841		
Nagle v. Sondergaard (N. J. Ch.)	841		
National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. R. Co. (Del. Ch.)	70		

	Page		Page
Philadelphia & R. R. Co., Johnson v. (Pa.)	415	Riverton Consol. Water Co., Atticks v. (Pa.)	707
Philadelphia & R. R. Co., Smith v. (Pa.)	297	Riverton Consol. Water Co., New Cumberland Borough v. (Pa.)	548
Phillips v. Kleinman (Pa.)	648	Riverton Consol. Water Co., New Cumberland Borough v. (Pa.)	799
Phillips v. Kleinman (Pa.)	650	Rockwell v. American Law Book Co. (N. J.)	1134
Phillipsburg Horse Car R. Co. v. State Board of Assessors (N. J. Sup.)	1121	Roe, Doe ex dem. Littleton v. (Del. Super.)	47
Pierce v. Lehigh Valley Coal Co. (Pa.)	141	Roe, Huston v. (N. J.)	848
Pierce v. Lehigh Valley Coal Co. (Pa.)	142	Roe, Littleton v. (Del. Super.)	47
Pittsburg Const. Co. v. West Side Belt R. Co. (Pa.)	884	Rogers v. Bailey (N. J.)	1134
Pittsburg, S. & N. R. Co. v. Keating & S. R. Co. (Pa.)	935	Rogers v. Clough (N. H.)	1075
Platt Bros. & Co., Belevicse v. (Conn.)	339	Rogers, Covey v. (Vt.)	1130
Pleasanton's Estate, In re (Pa.)	420	Roschen v. Packard (Md.)	174
Plume, City of Newark v. (N. J.)	724	Roscoe, Bixby v. (Vt.)	255
Plymouth Coal Co., Commonwealth v. (Pa.)	148	Rosen, New Jersey Soc. for Prevention of Cruelty to Animals v. (N. J. Sup.)	490
Poe, Preston v. (Md.)	178	Rosenbluth v. De Forest & Hotchkiss Co. (Conn.)	955
Potomac Valley Coal Co. of Garrett County, State v. (Md.)	686	Rowe v. Hill Lumber Mfg. Co. (Me.)	669
Pottle v. Liverpool & London & Globe Ins. Co. (Me.)	481	Rowley v. Shephardson (Vt.)	917
Powell, Miller v. (Vt.)	921	Ruch v. York City (Pa.)	891
Powell v. Old Town (Me.)	1068	Rushe v. Hyattsville (Md.)	278
Power v. Grogan (Pa.)	416	Ruskin v. Arnn (N. J. Sup.)	842
Prescott v. Angell (R. I.)	194	Russell, Allen & Reed v. (R. I.)	438
Preston v. Poe (Md.)	178	Russell, Eastwood v. (N. J.)	108
Preston v. Safe Deposit & Trust Co. (Md.)	523	Russell v. Henry C. Patterson Co. (Pa.)	136
Price, Wood v. (N. J. Ch.)	664	Russell & Co. v. Boody (Pa.)	548
Price, Wood v. (N. J.)	983	Rutland Ry., Light & Power Co., State v. (Vt.)	252
Price, Wood v. (N. J. Ch.)	1093	Sadler, Breintnall v. (N. J.)	819
Primrose v. Casualty Co. of America (Pa.)	212	Safe Deposit & Trust Co., Preston v. (Md.)	523
Printz Degreasing Co., Standard Soap & Oil Co. v. (Pa.)	129	St. Jean Baptiste Soc., Labranche v. (N. H.)	608
Prout v. Prout (N. J.)	757	St. Johnsbury & L. C. R. Co., Bell's Estate v. (Vt.)	630
Public Service Corp. of New Jersey, Nevins v. (N. J. Sup.)	434	Sallies v. Johnson (Conn.)	974
Public Service Corp. of New Jersey, Reisman v. (N. J.)	838	Samkiwicz v. Atlantic City R. Co. (N. J.)	833
Public Service Corp. of New Jersey, Reisman v. (N. J.)	840	S. Anderson & Son v. Shattuck (N. H.)	781
Public Service Corp. of New Jersey, Taylor v. (N. J.)	1134	Sanford Co., Manns v. (N. J. Sup.)	481
Public Service R. Co. v. Board of Public Utility Com'rs (N. J. Sup.)	1117	Saperstein, Goodman v. (Md.)	695
Public Service R. Co., Kraut v. (N. J.)	751	Sawyer, McCormick v. (Me.)	482
Public Service R. Co., See v. (N. J. Sup.)	745	Sawyer, Smith v. (Me.)	868
Pushcart v. New York Shipbuilding Co. (N. J. Sup.)	113	Schaffer v. Levenson Wrecking Co. (N. J. Sup.)	434
Putt v. Africa (Pa.)	203	Schaub v. O'Ferrall (Md.)	789
P. Welty & Co., Bets v. (Md.)	382	Schmitt, Johnson v. (N. J.)	1133
Quade v. Columbia & P. D. R. Co. (Pa.)	813	Schneider v. Mueller (N. J.)	863
Radcliffe, Krah v. (N. J.)	1133	Schoenfeld v. Winter (N. J.)	1134
Ram, Kohlrepp v. (N. J. Ch.)	1103	Scull v. Idler (N. J. Ch.)	746
Rand v. Bordo (Vt.)	251	Sedgwick, State v. (Del. Gen. Sess.)	472
Randal, Gould v. (Pa.)	809	See v. Public Service R. Co. (N. J. Sup.)	745
Randall, Davis v. (Vt.)	250	Selectmen of Town of Montville v. Alpha Mills Co. (Conn.)	1051
Randell, Sprowl v. (Me.)	80	Selig v. Philadelphia (Pa.)	308
Raymond v. Parker (Conn.)	1030	Selinas, Donovan v. (Vt.)	235
Readsboro Chair Mfg. Co., Bishop v. (Vt.)	454	Semkin v. Hollander (N. J.)	980
Reeside, Oberheim v. (Md.)	590	Seventh Baptist Church of Baltimore v. Andrew & Thomas (Md.)	1
Reisman v. Public Service Corp. of New Jersey (N. J.)	838	Shambach v. Middlecreek Electric Co. (Pa.)	802
Reisman v. Public Service Corp. of New Jersey (N. J.)	840	Shattuck, S. Anderson & Son v. (N. H.)	781
Renehan v. McAvoy (Md.)	586	Shaw v. Thielbahr (N. J. Sup.)	497
Renehan, McAvoy v. (Md.)	673	Shephardson, Rowley v. (Vt.)	917
Rentschler, Moyer v. (Pa.)	52	Shepherd & Sons v. First Nat. Bank (Pa.)	715
Repp, Marter v. (N. J.)	1134	Shick, Appeal of (Pa.)	212
Reynolds, Horner v. (N. H.)	1078	Shine v. District Court of City of Orange (N. J. Sup.)	499
Reynolds, Trexler v. (Pa.)	194	Shoemaker & Co. v. Board of Health of Gloucester City (N. J. Sup.)	349
Rhodes' Estates, In re (Pa.)	643	Siegel v. Megraw (Pa.)	84
Rhone v. Sperry & Barnes Co. (Conn.)	100	Simpson Plumbing & Heating Co. v. Geschke (N. J.)	1133
Richards v. Naudain (Del. Super.)	872	Sims v. O'Flaherty (Conn.)	1026
Rick v. New York, C. & St. L. R. Co. (Pa.)	650	Singer's Estate, In re (Pa.)	898
Riefler & Sons v. Wayne Storage Water Power Co. (Pa.)	300	Sisters of Charity of St. Elizabeth v. Morris R. Co. (N. J. Sup.)	817
Riffert v. Lehigh Valley Coal Co. (Pa.)	810	Skeels v. Blanchard (Vt.)	913
Rimmer v. Aachen & Munich Fire Ins. Co. (R. I.)	977	Slack & Bro., Frazier v. (Vt.)	161
Rittenhouse v. Newhard (Pa.)	445	Slayton v. Davis (Vt.)	232
Riva v. Jersey City, H. & P. St. R. Co. (N. J.)	847	Smith, Appeal of (Pa.)	64
		Smith, Appeal of (Pa.)	643
		Smith v. Abbott (N. J. Ch.)	115

	Page		Page
Smith v. Barnard (N. J.)	734	Stout v. Edison Portland Cement Co. (N. J. Sup.)	737
Smith v. Barnard (N. J.)	736	Stover v. Steffey (Md.)	83
Smith, Dordon v. (N. J.)	743	Strausbaugh, Caslow v. (Pa.)	927
Smith v. Lehigh Val. R. Co. (Pa.)	554	Streeter, State v. (Vt.)	923
Smith v. Philadelphia & R. R. Co. (Pa.)	297	Strickland v. National Salt Co. (N. J.)	828
Smith v. Sawyer (Me.)	868	Strickland v. National Salt Co. (N. J.)	832
Smith v. Warrenfels (Md.)	275	Strock v. East Orange (N. J.)	826
Smith v. Wilson (N. J. Ch.)	851	Strong, Appeal of (Conn.)	1020
Smith Co., Sterner v. (Pa.)	889	Strout Co., Light v. (Me.)	867
S. Morgan Smith Co., Sterner v. (Pa.)	889	Sullivan, Zabriskie v. (N. J.)	1135
Snelling & Potter v. Merritt (Conn.)	1039	Sullivan County R. R., In re (N. H.)	473
Sondergaard, Nagle v. (N. J. Ch.)	841	Sutherland v. Brown (Conn.)	1033
Sopp, Bergdoll v. (Pa.)	62		
Southard, Moran v. (Me.)	1182	Tapscott v. McVey (N. J. Sup.)	345
Southern Can Co., Clark v. (Md.)	271	Tarlucki v. West Jersey & S. R. Co. (N. J. Sup.)	495
Sower, Appeal of (Pa.)	207	Tatham, Deggett v. (Md.)	376
Sowles v. Hartford Life Ins. Co. (Vt.)	98	Tatro v. Maine Cent. R. Co. (Me.)	216
Sperry & Barnes Co., Rhone v. (Conn.)	100	Taylor, Firor v. (Md.)	389
Sprowl v. Randell (Me.)	80	Taylor, Hillers v. (Md.)	286
Squire, Hauser v. (N. J. Sup.)	263	Taylor v. Public Service Corp. of New Jersey (N. J.)	1134
Standard Arms Co., Du Pont v. (Del. Ch.)	1089	Taylor Provision Co. v. Edwards (N. J.)	1120
Standard Distilling & Distributing Co., Bijur v. (N. J.)	1132	Thielbahr, Shaw v. (N. J. Sup.)	497
Standard Soap & Oil Co. v. Prints Degreasing Co. (Pa.)	129	Thomas, In re (Conn.)	972
Stanton, Lapp v. (Md.)	675	Thomas v. Thomas (N. J. Ch.)	748
State v. Averill (Vt.)	461	Thompson, Henry v. (N. J.)	840
State v. Bowman (N. J. Sup.)	561	Thorpe v. Fales (R. I.)	721
State v. Carruth (Vt.)	922	Thorson v. Groton & S. St. R. Co. (Conn.)	1024
State, Conococheague Club of Washington County v. (Md.)	602	Tidewater Coal Co., Edward Knapp & Co. v. (Conn.)	1063
State v. Cray (Vt.)	450	Tingier v. Woodruff (Conn.)	967
State, Crichton v. (Md.)	36	Tischman v. Erie R. Co. (N. J. Sup.)	114
State v. Drown (Vt.)	641	Title Guaranty & Surety Co., Brown v. (Pa.)	410
State v. Ferschke (Del. Super.)	401	Tobyhanna Co., Delaware, L. & W. R. Co. v. (Pa.)	132
State v. Gambrill (Md.)	10	Tomlinson, In re (Del. Orph.)	468
State v. Graham (Md.)	31	Tomlinson, In re (Del. Orph.)	585
State v. Hamill Coal & Coke Co. (Md.)	695	Tonns v. Collins (Md.)	219
State v. Hastings (Del. Gen. Sess.)	403	Townbly v. Morris R. Co. (N. J. Sup.)	817
State, Hendrick v. (Md.)	18	Town of Bloomfield, American Malleable Co. v. (N. J. Sup.)	500
State, Hendrick v. (Md.)	22	Town of Guilford, Town of Madison v. (Conn.)	1046
State v. Johnson (N. J. Sup.)	657	Town of Hyattsville, Carr v. (Md.)	8
State, Luery v. (Md.)	681	Town of Hyattsville, Rushe v. (Md.)	278
State, Luery v. (Md.)	685	Town of Madison v. Guilford (Conn.)	1046
State v. Parshley (Me.)	484	Town of Manchester, Nichols v. (Conn.)	337
State v. Potomac Valley Coal Co. of Garrett County (Md.)	686	Town of Mason, Elliott v. (N. H.)	701
State v. Rutland Ry., Light & Power Co. (Vt.)	252	Town of Morristown v. Murphy (N. J. Sup.)	498
State v. Sedgwick (Del. Gen. Sess.)	472	Town of New Canaan, City of Norwalk v. (Conn.)	1027
State v. Streeter (Vt.)	923	Town of New Castle, Amazeen v. (N. H.)	1079
State v. Tripp (Conn.)	247	Town of Waterford, Comstock v. (Conn.)	1059
State, Union Trust Co. of Maryland v. (Md.)	873	Town of West Hartford, Hartford Trust Co. v. (Conn.)	244
State, Weber v. (Md.)	606	Town of West New York, Hornung v. (N. J. Sup.)	1116
State Board of Assessors, Central R. R. of New Jersey v. (N. J. Sup.)	568	Town of Winchester v. Moriarty (Conn.)	965
State Board of Assessors, Long Dock Co. v. (N. J. Sup.)	568	Town of Winchester v. Stockwell, two cases (N. H.)	526
State Board of Assessors, Morris & E. R. Co. v. (N. J. Sup.)	568	Towns, Day v. (N. H.)	405
State Board of Assessors, Phillipsburg Horse Car R. Co. v. (N. J. Sup.)	1121	Township of Bradford, Cobb v. (Pa.)	199
State Board of Assessors, West Shore R. Co. v. (N. J. Sup.)	351	Township of Butler, Hoch v. (Pa.)	546
State Board of Education, Board of Education of Borough of Flemington v. (N. J. Sup.)	163	Township of Hanover, McManamon v. (Pa.)	440
Steel v. Linn (Pa.)	92	Trexler, Africa v. (Pa.)	707
Steffey, Stover v. (Md.)	33	Trexler v. Reynolds (Pa.)	194
Stegmaier v. Keystone Coal Co. (Pa.)	187	Tripp, State v. (Conn.)	247
Steinfeld Bros., Imperial Rolling Screen Co. v. (Pa.)	413	Troxell, North Mountain Water Supply Co. v. (Pa.)	157
Sterner v. S. Morgan Smith Co. (Pa.)	889	Trustees of Dummer Academy v. Banks (Me.)	1132
Stillwagon, Howard v. (Pa.)	807	Trustees of Mut. Loan Ass'n v. Tyre (Del. Super.)	48
Stinson's Estate, In re (Pa.)	207	Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas (Md.)	1
Stinson's Estate, In re (Pa.)	212	Tudor, Kennett v. (Vt.)	633
Stirk's Estate, In re (Pa.)	187	Tunis, City of Newark v. (N. J.)	722
Stock & Sons, Catanzaro Di Giorgio Co. v. (Md.)	385	Turk, Palmenberg v. (Md.)	221
Stockwell, Town of Winchester v., two cases (N. H.)	526	Turner v. Egan (Md.)	877
Stokes, Atlantic Refining Co. v. (N. J.)	1132		
Stokes v. Mason (Vt.)	162		
Stout v. Cook (N. J.)	821		
Stout v. Cook (N. J.)	824		

	Page		Page
Twitchell, Payne v. (N. J. Sup.).....	350	Wentz v. Blair (Pa.).....	144
Tyre, Trustees of Mut. Loan Ass'n v. (Del. Super.).....	48	West, Gillan v. (Pa.).....	128
Tyson v. George's Creek Coal & Iron Co. (Md.).....	41	West Jersey & S. R. Co., Imperial Realty Co. v. (N. J.).....	837
Union County, Lewisburg Bridge Co. v. (Pa.).....	324	West Jersey & S. R. Co., McCool v. (N. J.).....	111
Union Surety & Guaranty Co., Commonwealth v. (Pa.).....	910	West Jersey & S. R. Co., Tarlucki v. (N. J. Sup.).....	495
Union Transp. Co., Harrison v. (N. J. Sup.).....	490	West Shore R. Co. v. State Board of Assessors (N. J. Sup.).....	351
Union Trust Co. of Maryland v. State (Md.).....	873	West Side Belt R. Co., Pittsburg Const. Co. v. (Pa.).....	884
United Brotherhood of Carpenters & Joiners of America, Allman v. (N. J. Ch.).....	116	W. H. H. Slack & Bro., Frazier v. (Vt.).....	161
United Electric Co. of New Jersey v. Mutual Ben. Electric Light & Power Co. (N. J.).....	754	Whitcomb v. Whitcomb (Vt.).....	97
United States v. Carpenter (Del. Super.).....	1135	White, Woodruff v. (N. J.).....	1134
United States Casualty Co., Washburn v. (Me.).....	575	Whitehead, Kayhart v. (N. J.).....	1133
United States Fidelity & Guaranty Co. v. Newark (N. J.).....	758	Whiting v. Farnsworth (Me.).....	214
United States Health & Accident Co., Maynard v. (N. H.).....	1077	Whitney, Citizens' Gas Co. of Port Allegheeny v. (Pa.).....	804
United States Transfer Advertising Co. v. Young (N. J. Sup.).....	262	W. H. Shepherd & Sons v. First Nat. Bank (Pa.).....	715
United Traction Co., City of Reading v. (Pa.).....	304	Wikoff, Larkin v. (N. J.).....	365
United Wireless Tel. Co., Bradley v. (N. J. Ch.).....	1107	Wilbur, Boddington v. (R. I.).....	977
Urban v. Focht (Pa.).....	55	Wilcomb v. Moore (N. H.).....	1078
Van Clief v. Melville (N. J.).....	824	Wild, Clark v. (Vt.).....	536
Vandegrift, Commonwealth v. (Pa.).....	153	Wildman, Cummings v. (Md.).....	610
Vanderslice v. Irondale Electric Light, Heat & Power Co. (Pa.).....	445	Wiley v. Wiley (Md.).....	180
Van Riper v. Dubron (N. J. Sup.).....	433	Wilkin Mfg. Co. v. Melvin (Md.).....	879
Van Schaick v. Board of Riparian Com'rs (N. J. Sup.).....	1099	Williams v. Lowe (N. J.).....	760
Victor Talking Mach. Co., Mellon v. (N. J.).....	755	Williams v. Young (N. J.).....	1118
Vigneault v. Winchester Tannery Co. (N. H.).....	407	Williams Mfg. Co. v. Insurance Co. of North America (Vt.).....	916
Village of Richford, Corliss v. (Vt.).....	234	Williamsport Water Co., City of Williamsport v. (Pa.).....	324
Voorhees v. North Wildwood (N. J. Sup.).....	264	Wills v. Wright (Del. Super.).....	507
Wagner v. Philadelphia, B. & T. St. R. Co. (Pa.).....	944	Wilmer v. Baltimore (Md.).....	685
Wallace v. Coward (N. J. Ch.).....	739	Wilmer v. Epstein (Md.).....	379
Walling v. Central R. Co. of New Jersey (N. J.).....	987	Wilmington, N. C. & S. R. Co., National Bank of Wilmington & Brandywine v. (Del. Ch.).....	70
Walsh v. Altoona & L. V. Electric R. Co., (Pa.).....	551	Wilson, Paul v. (N. J.).....	835
Walsh, Japanese Importers Co. v. (R. I.).....	337	Wilson, Smith v. (N. J. Ch.).....	851
Wannenwetsch v. Baltimore (Md.).....	3	Winchester Tannery Co., Vigneault v. (N. H.).....	407
Ward v. Newbold (Md.).....	793	Windham Light & Lumber Co., McLean v. (Vt.).....	613
Warrenfeltz, Smith v. (Md.).....	275	Wing, Witham v. (Me.).....	100
Warrington's Will, In re (Del. Super.).....	501	Winter, Schoenfeld v. (N. J.).....	1134
Washburn, Day v. (N. H.).....	474	Winterbottom v. Board of License Com'rs (R. I.).....	194
Washburn v. United States Casualty Co. (Me.).....	575	Wise v. Martin (Pa.).....	184
Wayne Storage Water Power Co., Riefel & Sons v. (Pa.).....	300	Witham v. Wing (Me.).....	100
Weber, Campbell v. (N. J. Ch.).....	732	Wolcott, Hartford Trust Co. v. (Conn.).....	1057
Weber v. State (Md.).....	608	Wood, Appeal of (Pa.).....	187
Webster v. Ballou (Me.).....	1009	Wood, Atlantic City R. Co. v. (N. J.).....	1132
Weibley, Eckels v. (Pa.).....	645	Wood v. Price (N. J. Ch.).....	684
Weiss, Appeal of (Pa.).....	145	Wood v. Price (N. J.).....	983
Weiss v. Beihl (Pa.).....	148	Wood v. Price (N. J. Ch.).....	1093
Weitzenkorn, Harvey v. (Pa.).....	447	Woodruff, Tingier v. (Conn.).....	967
Wells v. Erie R. Co. (Pa.).....	330	Woodruff v. White (N. J.).....	1134
Welser, Delaware, L. & W. R. Co. v. (Pa.).....	994	Woolsey v. Woolsey (N. J.).....	1135
Welshans, Dougherty v. (Pa.).....	997	Wright, Wills v. (Del. Super.).....	507
Welty & Co., Betz v. (Md.).....	382	Yetter, Ashby v. (N. J.).....	730
Wentworth, Griswold v. (Vt.).....	622	Yoder v. Cole (Pa.).....	546
		York City, Ruch v. (Pa.).....	891
		York Haven Water & Power Co., Duffy v. (Pa.).....	908
		York Mfg. Co., Fournier v. (Me.).....	82
		Young, Ballantine v. (N. J. Ch.).....	119
		Young, United States Transfer Advertising Co. v. (N. J. Sup.).....	262
		Young, Williams v. (N. J.).....	1118
		Zabriskie v. Sullivan (N. J.).....	1135
		Zielian v. Baltimore Plate Ice Co., four cases (Md.).....	22
		Zuraw v. Hammermill Paper Co. (Pa.)...	654

THE ATLANTIC REPORTER

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TRUSTEES OF SEVENTH BAPTIST CHURCH OF BALTIMORE v. AN- DREW & THOMAS et al.

(Court of Appeals of Maryland. June 22,
1911.)

1. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—STRIKING EVIDENCE—AFFECTING ONE NOT ENTITLED TO SUCCEED.

Rulings in striking evidence became imma-
terial, where under all of the evidence a verdict
was properly directed for appellee.

[Ed. Note.—For other cases, see Appeal and
Error, Cent. Dig. §§ 4146-4152; Dec. Dig. §
1047.*]

2. PRINCIPAL AND SURETY (§ 100*)—CHANGE OF CONTRACT.

Where a building contract specified lime
mortar plaster as that which should be used,
the contractor's sureties would not be liable for
damages resulting from using a patent plaster
of a different kind with the approval of the
architect without their consent.

[Ed. Note.—For other cases, see Principal and
Surety, Cent. Dig. §§ 162-165; Dec. Dig. §
100.*]

3. PRINCIPAL AND SURETY (§ 59*)—CONSTRU- TION OF CONTRACT.

A surety's liability cannot be extended by
construction beyond the limits fixed by the con-
tract.

[Ed. Note.—For other cases, see Principal and
Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. §
59.*]

4. CONTRACTS (§ 284*)—BUILDING CONTRACTS —ARCHITECT'S APPROVAL—EFFECT.

Where a building contract made the ar-
chitect's decision conclusive on all matters re-
ferred to him, the owner could not recover dam-
ages for defective plastering if the plaster work
was approved by the architect after completion.

[Ed. Note.—For other cases, see Contracts,
Cent. Dig. §§ 1292-1302, 1308-1317, 1326-
1338; Dec. Dig. § 284.*]

Appeal from Superior Court of Baltimore
City; Alfred S. Niles, Judge.

Action by the Trustees of the Seventh Bap-
tist Church of Baltimore against Andrew &
Thomas and another. From a judgment for
defendants, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE,
PEARCE, PATTISON, and URNER, JJ.

S. S. Field and Alfred Bagby, Jr., for ap-
pellants. Edward Duffy, for appellees.

BRISCOE, J. On the 2d day of August,
1907, the appellant brought suit in the supe-
rior court of Baltimore city against Andrew
& Thomas, contractors, as principals, and the
appellee, as surety, on a bond, conditioned
for the faithful performance of a building
contract, for the erection and construction
of a church, at the northwest corner of North
avenue and St. Paul street, in the city of
Baltimore. On the 25th of September, 1909,
a judgment was entered in favor of the de-
fendants Andrew & Thomas, on a plea of
discharge in bankruptcy, and the case was
subsequently tried against the surety, the
American Bonding Company of Baltimore
city, the appellee here. The particular
breach of the bond assigned by the amended
declaration is that Andrew & Thomas, the
principals named in the bond, did not do and
finish the work on the church according to
the plans and specifications in the contract,
in that they did defective work and used
improper materials in plastering the church,
that the plastering became loose, a part of it
fell, and other parts thereof became and
were liable to fall at any time, and that the
plaintiff was compelled to remove the defec-
tive plaster and replace it with good and
proper plaster at a large cost and expense.
The bond, contract, specifications, and a bill
of particulars were filed with the amended
declaration and appear in the record. To
this declaration the defendant pleaded 19
special pleas, and to these were interposed in
turn by the plaintiff and defendant numer-
ous demurrers, replications, and rejoinders,
and finally resulted in 26 issues in form, be-
ing joined, but which as stated by the appel-
lant in its brief, actually and in fact, can be
treated as 6 issues.

We have examined the voluminous plead-
ings, as set out in the record in this case,
with considerable care, and we find no re-
versible error in the rulings of the court
thereon. None were seriously urged at the
hearing of the case in argument, and none
are pointed out or insisted upon in the ap-
pellants' brief.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The principal questions before us for review are presented by a single exception, and they appear from the rulings of the court, in granting the defendants' motion at the close of the testimony upon both sides to strike out the testimony of the witness Garrettson, which had been admitted in the course of the trial subject to exceptions, and in granting the defendants' six prayers.

[1] In the view we take of the case, the ruling of the court upon the motion to strike out the witness Garrettson's testimony becomes unimportant, because neither its admission or rejection would reflect upon the conclusion we have reached upon the record before us.

Nor do we deem it necessary to discuss or consider all the questions presented by the very able and carefully prepared brief of the counsel for the appellant, because we are of the opinion that the court below was entirely right, upon the whole proof, in granting the defendants' first prayer, which instructed the jury that there was no legally sufficient evidence under the pleadings in this case to show an indebtedness by the defendant to the plaintiff under its bond, and their verdict must be for the defendant.

The substantial facts, as disclosed by the record, appear to be as follows: The contract price for the work, materials, construction, and erection of the church was \$52,550, and was to be paid in four payments only upon the certificate of the architect, the first three of \$11,750 to be paid as one-fourth, one-half, and three-fourths of the work was completed, and the remaining fourth and final payment of \$17,800 was to be made within 30 days after the architect had certified that the entire work contemplated by the contract had been wholly completed and the building turned over by the contractors to the owner, and before each of the payments the architect should also certify in writing that all the work upon the performance of which the payment was due had been done to his entire satisfaction.

It appears from the evidence that the first, second, and third payments under the contract, was paid by the appellant to the contractors upon certificates of the architect.

On December 20, 1905, the appellant wrote the appellee the following letter: "Gentlemen: Messrs. David M. Andrew and George H. Thomas have this day notified us that they have completed the work under their contract with us dated December 16, 1904, for the faithful performance of which you are surety, see bond No. 173,826. We hereby give you due notice as provided in lines 53, 54 and 55 of said bond that we will make the last payment due Messrs. Andrew and Thomas under said contract in about thirty days from this date. Yours very truly, By Charles T. Bagby, President."

On January 1, 1906, the appellants took charge of the church, and it was used for

church purposes until the 1st day of March, 1907, when the ceiling of the main auditorium of the church was condemned by the inspector of buildings of Baltimore as a menace to the safety of persons and property, in that the plastering on the ceiling was cracked all over, very loose, and portions of it had already fallen. It appears that the final payment, amounting to \$18,776.16, was paid the contractors on the 1st day of February, 1906, as shown by their receipt: "Baltimore, Md., February 1, 1906. Received of the Trustees of the Seventh Baptist Church of Baltimore eighteen thousand, seven hundred and seventy-six dollars and sixteen cents in full settlement of all claims and demands growing out of or connected with the erection of the church at St. Paul street and North avenue and remodeling the chapel in the rear thereof under contract dated the 16th day of December, 1904, or otherwise. This receipt is to cover all charges for extra work. David M. Andrew. Geo. H. Thomas. Teste as to both: S. Scott Beck." While this payment was made without the final written certificate of the architect, he testified that he gave his approval of the plastering and reported that the plastering was a first-class job and was done in accordance with the contract.

The original specifications, as to plastering, provided for the use of lime mortar plaster; but this was changed by the subcontractor, Litzinger, with the approval of the architect to what is known as ivory or hard wall plaster, being a patent plaster with a sand coat finish. There was no specification for the installation of the patent plaster, and this change or alteration of the contract was made without the written order of the owner, and without the consent of the surety. By the fifth paragraph of the contract, it was provided "that no alteration should be made in the work shown or described by the drawings and specifications except upon the written order of the owner, and such addition or omission in the work required by the owner shall be carried out by the contractors without making void or in any manner affecting the contract."

The substantial ground of the plaintiffs' action here is that the patent plaster had not been mixed according to the manufacturer's directions, by the subcontractor, and that it fell for this reason. While the plaintiffs' testimony tended to show that there was too much sand put in the plaster, it failed to show that the contractors were responsible for the defective condition of the plastering. On the contrary, the evidence shows that the roof of the church was supported by two 70-foot trusses of wood, which ran from the front of the church to the rear of the church, and which were supported at each end by steel columns. These trusses had sunk and "had to be jacked up" and tightened before the plastering could be replaced.

[2] But, even if it be conceded that the

alteration and change of the contract without the written order of the owner would bind the contractors in this case, it was not made in a manner to bind the appellee, because the bond guaranteed the installation of lime mortar plaster called for by the contract and specifications, and not that of a different character of plaster, a patent plaster, such as was adopted and put in the church.

In *Wehr v. St. Matthews Cong.*, 47 Md. 177, it is said it is perfectly well settled that a surety has the right to stand upon the very terms of his contract, and, if such contract be altered or varied in any material point without his consent, so as to constitute a new agreement varying substantially from the original, he is no longer bound.

In *Plunkett v. Sewing Machine Co.*, 84 Md. 532, 36 Atl. 115, it was said the liability of a surety or a guarantor is created entirely by his contract. It is therefore strictly confined and limited to his contract. No material change can be made in them without his consent.

[3] All courts have maintained that his responsibility cannot be extended by construction beyond the limits which he has himself fixed. *Leppert v. Flaggs*, 101 Md. 74, 90 Atl. 450; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Lake v. Thomas*, 84 Md. 608, 36 Atl. 437; *Schaeffer v. Bond*, 72 Md. 501, 20 Atl. 176; *Mayhew v. Boyd*, 5 Md. 102, 59 Am. Dec. 101; *McConnell v. Poor*, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312; *Gibbs v. Girardville*, 195 Pa. 396, 46 Atl. 91.

[4] Besides this, it will be seen that by paragraph 4 of the contract the decision of the architect, on all matters referred to him, should be final and conclusive.

In this case the architect gave his approval of the plastering. He testified, "I did make a report, stating that the plastering was well executed and a very nice looking piece of work."

Mr. Bagby, the chairman of the board of trustees of the plaintiff church, testified that: "The architect reported, except as to some small matters, that the entire work had been done to his satisfaction. He reported that the plastering was a first-class job and had been done in accordance with the agreement." There was no allegation or proof of fraud, collusion, or mistake on the part of the architect as to his action in this regard, and his report was accepted as conclusive, at the time of the completion of the building and of the final payment by the appellant, that the work had been performed according to the contract. The building was accepted by the trustees and used for church purposes until the 1st day of March, 1907, when the ceiling of the main auditorium of the church was condemned by reason of the defective condition of the plastering. It was

not until the 19th day of March, 1907, that notice was given the appellee of the alleged breach of the contract and a demand to have the plastering replaced.

We think, upon the whole record, the case was devoid of legally sufficient evidence to permit the plaintiff to recover under the pleadings and evidence in the case, and the case was properly withdrawn from the jury by the defendants' first prayer. As this conclusion disposes of the case, it will not be necessary for us to pass upon the other granted prayers or the other questions presented on the record.

For the reasons stated, the judgment will be affirmed, with costs.

WANNENWETSCH et al. v. MAYOR AND CITY COUNCIL OF BALTIMORE et al.

(Court of Appeals of Maryland. April 5, 1911.)

1. TAXATION (§ 453*)—ASSESSMENT—REVIEW—JURISDICTION OF COURTS.

Under Laws 1908, c. 167, which re-enacts and amends Baltimore Charter (Laws 1898, c. 123) § 170, and provides that, on an appeal from an assessment to the city court, the court shall hear the cause de novo, and the action of the appeal tax court shall not be held void for any reason if due notice of the proceedings shall have been given, the city court is required to declare assessments and classifications void when made without due notice, so that one whose property has been assessed without due notice is not entitled to come into equity to have the assessment declared void, having a clear remedy at law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 809; Dec. Dig. § 453.*]

2. TAXATION (§ 363*)—ASSESSMENTS—MODE OF ASSESSMENT—NOTICE—DUE NOTICE.

Due notice required by Baltimore Charter (Laws 1898, c. 123) § 170, as amended and re-enacted in Laws 1908, c. 167, to sustain the validity of an assessment, need not be personal notice, the leaving of a notice at the house which is the subject of taxation being sufficient.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 603-606; Dec. Dig. § 363.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit by Mary Wannenwetsch and others against the Mayor and City Council of Baltimore and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

S. S. Field, for appellants. W. H. De C. Wright, for appellees.

PEARCE, J. This appeal is from an order or decree of the circuit court of Baltimore city dismissing a bill for an injunction against the mayor and city council of Baltimore city and Frank Brown, collector of state and city taxes for Baltimore city, restraining them from collecting taxes at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

full city rate upon the properties of the several plaintiffs, and requiring them to accept from the plaintiffs city taxes at the rate of 60 cents in each hundred dollars for the years 1909 and 1910.

[1] The bill alleges that all of the properties of the several plaintiffs mentioned in the proceedings are located in a block in that part of Baltimore city which was annexed thereto by Acts 1888, c. 98, and that said block contains more than 200,000 superficial square feet, and up to the year 1909 was not surrounded by streets improved as required by Acts 1902, c. 130, and that up to and until the year 1909 all said properties were classified for taxation for city purposes under said last-mentioned act at 60 cents on the \$100, and all those allegations are established by the undisputed evidence. The bill then further charges that said properties were classified for the years 1909 and 1910 at the full city rate of \$1.95 in the \$100, and that such classification by the appeal tax court of Baltimore city was illegal and void, both because said block was not subject to such classification, and because the same was made without any notice to any of the plaintiffs, and that none of the plaintiffs knew such classification had been made until after the time allowed by section 170 of the city charter (Acts 1908, c. 167) for appeal to the Baltimore city court. The appellants concede they would have had an adequate remedy at law for the alleged wrongful classification by the appeal thus provided, if due notice of the purpose to make such classification had been given them, but allege that the want of due notice rendered the classification void, and entitles them to relief in equity. To sustain this contention, they rely upon the case of *Baltimore City v. Poole & Son Co.*, 97 Md. 67, 54 Atl. 681, decided in 1903. In that case both the assessment and the classification of the plaintiffs' property had been changed, and the bill alleged that no notice of either purpose had been given to the plaintiff. Sections 150 (Laws 1898, c. 123) and 164A (Laws 1900, c. 347) of the city charter expressly required notice to the owner as respects assessments, but there was then no statutory declaration of the power of the appeal tax court to classify property, nor any statutory regulations of the procedure for the purpose of classification so as to determine when property in the annexed part of the city was brought within those conditions of the annexation acts which would permit its taxation at the full city rate. There was a demurrer to the bill which was sustained by the circuit court, and its decree was affirmed here on appeal, this court holding that the prescribed notice as to assessment and reasonable notice as to classification was necessary to give jurisdiction to the appeal tax court.

It was contended by the city in that case that, under section 170 of the city charter, the owner of the property, when he first

obtained knowledge of the increased assessment and of the classification bringing the property within the full city rate of taxation, had the right *then* to ask from the appeal tax court an abatement of the assessment and the restoration of the property to the 60-cent rate for city taxes, and that, upon its refusal to make the abatement or to order the restoration of the 60-cent rate, he could appeal within 30 days from such refusal to the Baltimore city court, and, thus having a clear legal remedy, that he could not resort to equity for relief. But we held that section 170, as it then stood, had no relation to the jurisdiction of the appeal tax court, whose jurisdiction was absolutely dependent as to the *assessment* upon the giving of the notice prescribed in sections 150 and 164A, and as to the classification, upon the giving of reasonable notice, and that section 170 had no relation to void assessments or classifications. We said section 170 "deals with questions arising after a *valid*, though *erroneous*, assessment has been made. The remedy against an invalid assessment, one made without jurisdiction to make it, is to strike it down, though the result may be to lose the taxes for that year. The remedy against an assessment *valid as an assessment*, but illegal because of the manner in which it was made, or erroneous because of under or over valuation, is by application recognizing the jurisdiction to assess, but attacking the legality or regularity of the form of the proceedings under the conceded jurisdiction." As the demurrer in that case conceded the jurisdictional defect of want of notice, and the charter contained no provision authorizing the appeal tax court or the Baltimore city court to declare an assessment to be null and void, but only "to reduce or abate" it, we held that relief against a void assessment could only be obtained in equity, and we consequently affirmed the decree of the circuit court. But section 170 of the charter has been repealed and re-enacted by chapter 167 of the Acts of 1908 with some very material changes, in consequence of which the city now renews the contention made by it in the *Poole Case*, *supra*, and in considering this contention it will be necessary carefully to compare the original with the amended section.

One obvious purpose of that act, disclosed by a cursory reading, was to give statutory recognition to the power of classification which in *Poole's Case* we said the appeal tax court must be held to possess; also, to place classification and assessment upon the same footing as respects procedure, and hence whenever the word "assessment" is mentioned in the original section the word "classification" is coupled with it in the amended section. Another purpose of the act of 1908 was to enlarge the power of the Baltimore city court on appeals from the appeal tax court, and to define more clearly the method of procedure in such appeals,

and, in that we may more readily compare the original and amended section in these respects, we have placed that portion of each section which relates to the trial of these appeals in parallel columns, as follows:

Original Section.

The person or the city appealing to the said Baltimore city court shall have a trial before the court without the intervention of a jury, and the court sitting without a jury shall ascertain or decide on the proper assessment, and shall not reject or set aside the record of the proceedings of the judges of the said appeal tax court for any defect or omission in either form or substance, but shall amend or supply all such defects or omissions, and assess, increase or reduce the amount of the assessment, and alter, modify and correct the record of proceedings in all or any of its parts as the said Baltimore city court shall deem just and proper.

Amended Section.

The person or the city appealing to the said Baltimore city court shall have a trial before the court without the intervention of a jury, and the court sitting without a jury, shall hear the case *de novo*, and shall ascertain and decide on the proper assessment or classification of the property for the year involved in the appeal; and neither the action, nor the record of the proceedings of the judges of the appeal tax court in the premises shall be held to be or declared void for any reason whatsoever; provided due notice of the proceedings shall have been given to the parties entitled by said judges of the appeal tax court; and the said Baltimore city court shall assess anew, or classify anew, as the case may be, the property forming the subject of the appeal; provided however that in the absence of any affirmative evidence to the contrary, the assessment or classification appealed from shall be affirmed.

Chapter 167 of 1908 is a remedial statute designed to effect a complete system for the correction of all errors in assessing and classifying property in Baltimore city, and to accomplish this with the least possible delay and expense both to the city and to the taxpayer, and it should be liberally construed to effect the purpose of its enactment. This purpose can plainly be best attained by conferring upon a single tribunal jurisdiction over the whole field covered by the text of section 170. Under the original section, only a court of equity could declare an assessment or classification to be null and void (no power being conferred upon the Baltimore city court to that end), and, when so declared by a court of equity, it was necessary to go back again to the appeal tax court, and there have another assessment or classification made. Under the amended section 170, the Baltimore city court on appeal is required to try the case *de novo*, and by the clearest and strongest implication is authorized and required to declare assessments and classifications to be null and void *when made without previous due notice to the owners or persons entitled thereto*. No other rational construction can be placed upon the language of the amended section, which forbids that "neither the action or the record of the proceedings of the judges of the appeal tax court shall be held to be, or declared, void for any reason whatever; *provided due notice of the proceedings shall have been given to the parties entitled,*" than that such record may and

shall be declared void, *when due notice has not been given*. Unless such construction is given to that language, the Baltimore city court could not proceed, as directed in the next sentence, "to assess or classify anew" the property in question. A new assessment or classification can only be made when the old one has been superseded as void. The only object of a bill in equity in such a case as that before us is to have the assessment or classification declared to be null and void, and, if the Baltimore city court is authorized so to declare upon the same state of facts as has heretofore been required in a court of equity, there can be no occasion to resort to a court of equity. The same language which in giving complete jurisdiction to a court of law created a clear legal remedy took away the right to resort to equity. Our conclusion, therefore, is that upon the ground just considered the decree of the circuit court should be affirmed.

Chapter 167 of 1908 was before us in the case of Mayor and City Council of Baltimore v. Hurlock, 113 Md. 674, 78 Atl. 558, decided November 16, 1910, and published in the Daily Record of November 23, 1910. The only contention there made was that the assessment was unequal as compared with other property of the same kind in the same neighborhood, and that the property was overvalued; the appeal in that case being from rulings of the Baltimore city court. In the course of the opinion in that case, referring to the same language of section 170 as amended which is transcribed herein, it was said: "No assessment can be declared void, but the city court must assess the property in question anew." This obviously meant that *no merely irregular or erroneous assessment such as was there complained of* could be declared void; the qualification contained in the amended section, "provided due notice of the proceedings shall have been given to the parties entitled by said judges of the appeal tax court," being inadvertently omitted, as not involved in that case. This will appear from a later passage in the same opinion where it was said that the object of the section as amended was to "avoid a total failure of any assessment such as occurred in Consolidated Gas Co. v. Baltimore, 101 Md. 559 [61 Atl. 532, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584], and would occur under the original section 170 whenever it became necessary to set aside an assessment appealed from."

[2] It does not appear from the opinion of the learned judge below what view he took of the ground upon which we have placed our affirmance of his decree, as he decided the case upon other grounds, holding that "due notice" does not necessarily mean that notice should be personally served in the process of taxation, and that the notices which in this case were left at each house, which was the subject of taxation constituted due notice, and that, therefore, the plain-

tiffs' remedy was by appeal to the city court. With this view we fully agree, and should be quite content to affirm upon that ground alone, but, with a view to settling the practice, we have deemed it best to decide now the question thus renewed under the amended section 170 by the city's solicitors.

Decree affirmed, with costs to the appellees.

MURRAY et al. v. KERNEY.

(Court of Appeals of Maryland. April 26, 1911.)

DEEDS (§ 24*)—NATURE—COVENANT TO STAND SEISED TO USES.

An agreement executed with due formality by four sisters, joint owners of land, reciting that, in case of death of one, the other three "are owners, and if two are taken by death, then the two remaining sisters are the owners, and if one of the two are taken by death, then the last surviving sister is the owner," if inoperative as a common-law deed to vest title in the surviving sister, was effective as a covenant to stand seized to uses under the statute of uses.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 45-48; Dec. Dig. § 24.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by John A. Kerney against James E. Murray and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and PEARCE, THOMAS, PATTISON, and URNER, JJ.

Charles S. Hayden, for appellants. C. Alex. Fairbank, Jr., for appellee.

PATTISON, J. In this case the appellee, plaintiff below, filed his bill alleging that he was the owner, in fee simple, of a lot of land in Baltimore city, situated at the corner formed by the intersection of the west side of Central avenue and the southeast side of Gay street that he had acquired from one Jane J. Murray by deed dated September 13, 1905.

The bill alleges that Jane J. Murray acquired title to this property by written agreement executed on the 2d day of December, 1885, by the said Jane J. Murray and her three sisters, who were at the time owners of said lands as tenants in common. The agreement was executed and acknowledged by them with all the formalities required in the execution and acknowledgment of deeds, and was duly recorded, and is as follows: "We, the undersigned, daughters of the late Peter and Elizabeth Murray, named and subscribed to this instrument of writing, do enter into an agreement that for the benefit of each and all of them named and subscribed to this agreement and are now living in and owners jointly the property being their joint interest left them, Lucy A. Murray,

Ann Murray, Sarah A. Crawford and Jane J. Murray, as heirs of the above Peter and Elizabeth Murray, property situated on the southwest corner of Gay and Canal streets (now Central avenue) the object of this is that in case that if by death should take one of the parties, the other three sisters are the owners, and if two are taken by death, then the two remaining sisters are the owners, and if by death one of the two sisters is taken then the last surviving sister is the owner, and in order to carry faithfully this agreement, we hereunto set our hands and seals and subscribe our names this second day of December, in the year eighteen hundred and eighty five." The bill further alleges that the three sisters all died in the lifetime of Jane J. Murray, leaving her surviving them, the owner, as it alleges, of said property under and by virtue of said agreement, and that she died on the 26th of January, 1908. The bill also alleges that said property for a long time prior to the acquisition of it by the plaintiff was occupied by him and was in his possession at the time of the filing of the bill; that at the time of the death of the said Jane J. Murray she was seized of the property adjoining the property so acquired by him, which was also embraced in the property mentioned and described in the agreement above mentioned, signed by the said Jane J. Murray and her sisters aforesaid, and which her heirs, after her death, agreed to sell to the North Gay Street Permanent Building & Loan Association of Baltimore City, but, upon examination, the purchaser was not satisfied with the title of Jane J. Murray thereto, its objection being based upon the sufficiency of the agreement above given to pass title to her in said lands, and proceedings were instituted in the circuit court for Baltimore city "for the sale of said property and the ratification of the contract of sale to the said corporation, which proceedings have long since been completed and the title of said adjoining property conveyed to the said corporation."

As the legal sufficiency of the title of Jane J. Murray in and to the lands sold as aforesaid had been questioned, the plaintiff thought it best, as he alleges, to have executed to him by the heirs of Jane J. Murray a confirmatory deed for the property so conveyed unto him by her as aforesaid. To this end he called upon the heirs to execute the confirmatory deed, and all of them executed the same except the defendants, who refused to do so. It was then that he determined to file the bill asking the court, as he did, to construe said agreement, and by its decree "remove any cloud which might exist or be supposed to exist" upon his title to said lands. The defendants Mary J. Murray and William A. Murray answered, stat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing that as to the construction of the paper writing or agreement mentioned in the bill, and as to the relief prayed therein, they consented to and desired that the court should pass such decree as to it might seem just and proper in the premises. The other defendants, James E. Murray and Thomas F. Murray, also answered, neither admitting nor denying the things alleged in the bill, but requiring proof thereof. To these answers the general replication was filed, and the testimony of the plaintiff alone was thereafter taken, which substantially sustains the allegations of the bill.

The question presented by this appeal is, Did Jane J. Murray, the survivor of the sisters, who were, as it is conceded, at the time of the execution of the paper writing above set forth the owners of said land involved in these proceedings as tenants in common, acquire their interest therein under and by virtue of such written agreement? It is not difficult to ascertain the meaning of said paper writing. It was evidently the purpose and intention of the sisters that they should continue to own said property so long as all of them should live, and upon the death of any one of them the three surviving sisters should be the owners of said property, and upon the death of the second sister the two surviving sisters should be the owners thereof, and, upon the death of the third sister, the surviving sister was to become the owner of the entire interest formerly held by the four sisters, or the owner of the property. But is this instrument of writing legally sufficient to effect the purpose and meaning aforesaid? "Where the intent of the grantor to pass the land is apparent, if for any reason the deed or instrument by which the transfer of title was intended to be effected cannot operate in the way contemplated by the parties, the court, if possible, will give it effect in some other way, and judges have been very astute in such cases in their endeavors to make the conveyance operative one way or the other to carry into effect the intention of the grantor or donor." *Bank of U. S. v. Housman*, 6 Paige (N. Y.) 534.

If for any of the reasons assigned by the appellant the instrument of writing mentioned in this case should be inoperative as a common-law deed, we think that it is effective as a covenant to stand seised to uses under the statute of uses. Blackstone defines a covenant to stand seised to uses as "a species of conveyance by which a man seised of lands, covenants in consideration of blood and marriage that he will stand seised of the same to the use of his child, wife or kinsman, for life, in tail, or in fee. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood and marriage." Book 2, 338. "No particular word or form

of words is necessary to constitute a 'covenant to stand seised.' The consideration is the chief requisite to characterize it and to support it as such a conveyance. This consideration is blood and marriage. If the consideration appears in a deed, though there be no express words of consideration, yet it is sufficient to raise a use by way of conveyance." *Barry v. Shelby*, 5 Tenn. 229, 231. Lord Coke, in treating the Statute of Uses, says: "The intention of the parties is the principal foundation of the creation of uses." And in *Slay v. Mehan*, 1 Lewt. 782, the court says: "There is no covenant that admits of such a variety of words as that of a covenant to stand seised." *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 263. "The covenant must, of course, be by deed in order to constitute it a covenant; and the usual term employed in creating it is 'covenant,' though any other words may be adopted which are tantamount thereto." 2 Washburn on Real Property, § 1379. The deed or instrument of writing that was before the court in the case of *Fisher v. Strickler*, 10 Pa. 348, 51 Am. Dec. 488, was as follows: "Now, know ye, that we the said Jacob Strickler and Christian Strickler, have this day agreed with each other, that in case if one of them shall happen to die unmarried, or intermarried and without lawful issue or issues that should arrive to the age of twenty one years, that then and in that case the survivor of them shall be the sole heir of the deceased one both to the real and personal estate of the deceased, without any further deed or conveyance; to hold the real estate as well as the personal estate of the deceased unto the survivor and to his heirs and assigns forever." The court in adopting the opinion of the lower court said: "The instrument of writing set forth in this case is what is technically called a 'covenant to stand seised to uses.' The words are sufficient to create the covenant, the intention being apparent on the face of the deed that each party should stand seised to the use of the other surviving him under the circumstances stated. And the consideration of natural love, though not expressed, is manifest from the relation of the parties. *Milbourn v. Salkeld*, Willes, 673; *Bedell's Case*, 7 Rep. 40; *Crossing v. Scudamore*, 1 Ventr. 137; 8 Cruise's Dig. Part IV. 186-190."

In this case, as it is conceded, the four sisters were seised in fee, as tenants in common, of the lands in question, and, being so seised, executed the deed or agreement above set forth. Each was seised of a one-fourth undivided interest in said land, and by this deed or instrument of writing each covenanted to stand seised of her interest therein to her use during her life, and upon her death to the use of such of her sisters as survived her, successively to and including the last survivor, who became seised thereby in fee of the interest of all the sisters in said lands.

From what we have said we do not think the court below erred in its ruling, and will therefore affirm its decree.

Decree affirmed, with costs to the appellee.

CARR v. MAYOR, ETC., OF HYATTSVILLE.

(Court of Appeals of Maryland. April 19, 1911.)

MUNICIPAL CORPORATIONS (§ 46*)—AMENDMENT OF CHARTER—ADOPTION—ELECTIONS—BALLOTS.

Acts 1910, c. 305, amended the charter of Hyattsville (Acts 1908, c. 79, § 21) with reference to street improvements, but section 2 declared that it should not be in force unless approved by a majority of the votes cast at a special election to be held in the town, for which special ballots should be prepared having printed on them "for the act to improve streets," and "against the act to improve streets." *Held*, that the provision with reference to the contents of such ballots was directory and not mandatory, and hence it was not a fatal objection to the adoption of the act that the ballots cast at the election, the majority of which were in favor of the act, were marked "for the road bill" and "against the road bill"; the variance being regarded as a mere innocuous mistake.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 46.*]

Appeal from Circuit Court, Prince George's County; Fillmore Beall, Judge.

Action by C. Franklin Carr against the Mayor and Common Council of Hyattsville. From a judgment dismissing the bill on demurrer, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON, and URNER, JJ.

Jackson H. Ralston, Frederick L. Siddons, and William E. Richardson, for appellant. Vincent A. Sheehy, for appellees.

BURKE, J. By Acts 1910, c. 305, section 21 of the act of 1908, chapter 79 of the Public Local Laws of Prince George's county, was repealed and re-enacted as sections 21a, 21b, and 21c. These sections, which were intended to be amendments to the charter of Hyattsville in Prince George's county, provided for the construction of sidewalks, curbs, gutters, and roadbeds, and certain definite and quite full provisions were made by the act for street improvement, for raising money for that purpose, and for the assessment of the cost of the work upon the abutting land. By section 2 it was declared that the act should have no force or effect "unless the same shall be approved by a majority of the votes cast at a special election to be held in the said town of Hyattsville, and that the said special election shall be held at the same time and place as the election to be held in the said town on the first Monday in May, 1910, for mayor and common council for said town, for which

said special election ballots shall be prepared having printed on them 'For the Act to Improve the Streets,' and 'Against the Act to Improve the Streets.' If at said election the majority of the votes cast shall be 'For the Act to Improve the Streets,' then and in that event the act shall have full force and effect, or if, on the contrary, the majority of the votes cast shall be 'Against the Act to Improve the Streets' then this act shall be null and void." The act was submitted as provided to the voters of the town of Hyattsville at the election held therein on the first Monday in May, 1910; but the ballots voted at that election had printed on them the words "For the Road Bill," and "Against the Road Bill," instead of the words, "For the Act to Improve the Streets," and "Against the Act to Improve the Streets," as directed by the act. The majority of the ballots cast at the election were marked "For the Road Bill," and, after canvassing the vote, the mayor and common council declared the act to be in full force and effect. Acting under the power conferred by the act, the mayor and common council passed an ordinance for the improvement of the road bed of Spencer street, one of the streets of the municipal corporation, and also providing for notice to the owners of abutting property, and for the assessment for the cost of improvement against such property.

The appellant is the owner of fee-simple lots abutting on the south side of Spencer street in the town of Hyattsville. He filed his bill of complaint in the circuit court for Prince George's county for an injunction to restrain the mayor and common council from making any assessment against his property for the improvement of the roadbed of Spencer street, and from enforcing any assessment against his property for that improvement, and for other and further relief.

After reciting the facts we have stated, the bill charges that the mayor and common council of Hyattsville, against the objections of the appellant, "directed that Spencer street be forthwith macadamized, and that a notice of the intention of the mayor and common council so to do be published in the two local papers, which action was taken, all of which will more fully appear by reference to exhibit C hereto attached, and made a part hereof; that the said mayor and common council are now proceeding to macadamize said Spencer street, and are threatening to levy an assessment for the cost thereof against the property abutting on said street, of which the plaintiff is the owner of three lots, as hereinbefore set forth; that they are further threatening that in the event that said assessment shall not be duly paid to cause the property of

this petitioner to be sold in the same manner as taxes due the town of Hyattsville are enforced under the provisions of chapter 79 of the Acts of the General Assembly of 1908, and that meanwhile such assessment constitutes an apparent lien and cloud upon the title of the plaintiff, and interferes with the beneficial enjoyment of his property." The ground upon which the relief prayed for is asked is that the act under which the municipality is acting in improving the street has never become effective and operative, because the ballots cast at the election were not prepared in strict conformity to the requirements of its provisions. The defendant demurred to the whole bill. The lower court sustained the demurrer and dismissed the bill, and from this ruling the plaintiff has brought this appeal.

It is not alleged that the voters were deceived, misled, or confused by the form of the ballot as actually prepared. Nor is there any charge of fraud against the voters or election officers. Nor is it claimed that the result of the election as declared by the mayor and common council was not correct. Indeed, it may be taken as conceded that a majority of the votes cast at the election were marked "For the Road Bill," and that the election in all respects was fair. The simple and sole question in the case is this: Did the preparation and voting of the ballots in the manner in which they were prepared and voted prevent the act from becoming a valid and effective law? If so, it can only be because the provisions of the act relating to the form of the ballot are mandatory, and to be strictly observed. We do not think that the form of the ballot as prepared was an essential departure from the requirements of the act, and it would seem to be reasonably certain that the voters understood that they were voting for or against the approval of this particular act, and did approve it by a majority vote. The court ought not to set aside their clearly expressed will, unless required to do so by some imperative rule of law. Mr. McCrary in his work on Elections (section 190) says: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all consideration touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actu-

al merits of the election." The rule is thus stated in Paine on Elections, § 498: "In general, those statutory provisions which fix the day and the place of the election and the qualification of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and return of the results, are formal and directory. Statutory provisions relating to elections are not mandatory as to the people by the circumstance that the officers of the election are subjected to a criminal liability for their violation. The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Generally such rules are directory, and not mandatory, and a departure from the mode prescribed will not vitiate an election, if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast an uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them." The rule stated by these authors appears to be adopted by the great majority of the courts in this country, and in the light of these principles we are of opinion that the provisions as to the form of the ballot to be used at the special election were merely directory, and that the failure to follow strictly the form prescribed did not affect the validity of the election. Whether the failure to follow strictly directions of this nature would render an election null and void must depend in all cases upon the intention of the Legislature. This intention may be manifested either by express declaration, or by a consideration of the general scope and policy of the act. Where it appears that it was the intention of the Legislature that a strict compliance with the provisions of the act should be a prerequisite or condition precedent to the validity of the election, a failure to observe them will avoid the election.

The plain purpose of the Legislature was that this act should become effective, if approved by a majority of the voters of the special election, and the object of providing the form of ballot was to ascertain the will of the majority of the voters upon the question of its approval, and since that majority did approve the act under the form of ballot used, which was substantially, but not strictly, in the words provided in the act, the will of the majority should not be set aside for any of the reasons stated in the bill. The voters undoubtedly knew they were voting upon the question of the approval or disapproval of the act, and, having settled that question at a fair election, the object which the Legislature had in view has been gratified, and the act should be held to be in full force and effect. This

conclusion is supported by what appears to be the great weight of authority in the American courts. The following are a few of the cases in which the principles stated have been recognized and applied: *Gass v. State*, 34 Ind. 425; *Barnes v. Pike County*, 51 Miss. 305; *Fry v. Booth*, 19 Ohio St. 25; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *Du Berry v. Nicholson*, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767; *Waggoner v. Russell*, 34 Neb. 116, 51 N. W. 465; *People v. Cooke*, 34 Barb. (N. Y.) 259; *Jones v. State*, 1 Kan. 274; *State ex rel. Mize v. McElroy*, 44 La. Ann. 796, 11 South. 133, 16 L. R. A. 278, 32 Am. St. Rep. 355. The Legislature did not expressly declare that the use of the prescribed form of ballot was essential to the validity of the election, nor does it appear from any facts stated in the bill that the omission to use that form of ballot in any way affected the actual merits of the election. The whole case made by the bill rests upon the mere mistake, or error in the preparation of the ballot, and for the reasons stated and upon the authorities cited the order appealed from will be affirmed.

Order affirmed, with costs.

STATE v. GAMBRILL.

(Court of Appeals of Maryland. April 19, 1911.)

1. STATUTES (§ 161*)—REPEAL—REPUGNANT PROVISIONS.

If two provisions of a statute on the same subject are repugnant, in that they cannot both stand together and be executed at the same time, the later statute impliedly repeals the earlier one to the extent of the repugnancy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

2. STATUTES (§ 167*)—REPEAL—IMPLIED REPEAL.

A subsequent statute revising the whole subject-matter of a former statute and intended as a substitute therefor repeals it, though the subsequent statute contains no express repeal.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 242, 243; Dec. Dig. § 167.*]

3. STATUTES (§ 161*)—REPEAL—IMPLIED REPEAL—REPUGNANT PROVISIONS.

Act 1876, c. 262, § 6, was substantially inserted in Code Pub. Gen. Laws 1904, under the title "Bills of Lading, Storage and Elevator Receipts," as article 14, § 10, and under the title "Crimes and Punishments" as article 27, § 194, the last section providing that no warehouseman or person having issued any receipt for goods as on deposit with him shall issue any other receipt for the same goods until the first is canceled, and shall not part with the goods covered by the outstanding receipt except to the holder without canceling such receipt, and makes any corporation or agent thereof who willfully violates the section guilty of a misdemeanor, and punishable by fine of not less than \$100 or more than \$5,000, and imprisonment for not less than one nor more than three years. The uniform bills of lading act (Acts 1910, c. 336) is entitled "An act to re-

peal article 14 of the Code of Public General Laws of 1904 * * * and to re-enact said article 14 with amendments under the title 'Bills of Lading.' The uniform warehouse receipts act (Acts 1910, c. 406) is entitled, "An act to add a new and additional article to the Code of Public General Laws of 1904, to follow immediately after article 14, said new article to be designated as article 14a under the title of 'Warehouse Receipts.'" And section 57 requires it to be interpreted to effectuate its general purposes to make uniform laws on the subject, and section 52 makes any warehouseman or his agent who issues a duplicate receipt knowing that a former receipt for the same goods is uncanceled, without marking it "duplicate," except in case of a lost or destroyed receipt, after proceedings as provided in the act, guilty of a crime, and punishable by imprisonment not exceeding five years or by fine not exceeding \$5,000, or both. Neither chapter 336 nor chapter 406 expressly repealed section 194 of the Code of 1904. *Held*, that section 194 was impliedly repealed by Acts 1910, c. 406, § 52; the penalties imposed by the two sections being repugnant, so that they could not stand together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

Appeal from the Criminal Court of Baltimore City.

George T. Gambrill was indicted for unlawfully issuing a warehouse receipt without destroying an outstanding receipt. From a judgment sustaining a demurrer to the indictment, the State appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

Emory L. Stinchcomb and Isaac Lobe Straus, Atty. Gen., for the State. Clifton S. Brown and George Whitelock, for appellee.

BRISCOE, J. The appellee was indicted on the 5th day of May, 1910, in the criminal court of Baltimore city for the alleged violation of section 194 of article 27 of the Code of Public General Laws of 1904, entitled, "Crimes and Punishments." The indictment, in substance, alleges that the traverser on the 27th day of August, in the year 1908, being an agent and officer of the Roxbury Distilling Company, a corporation, unlawfully did willfully issue a certain receipt of the said corporation, dated the 27th day of August, 1908, numbered 335, to a certain person unknown, for 125 barrels of rye whisky, being on deposit, and under the control of the said corporation, without, before the issuance of the receipt, having canceled and destroyed a certain other receipt, then outstanding, for the same number of barrels of whisky previously issued on the 17th day of June, in the year 1907, to the order of the Citizens' National Bank of Baltimore, contrary to the form of the act of assembly in such case made and provided, etc.

The material part of the section of the Code upon which the indictment rests is as follows: "No warehouseman or corporation or person whatsoever having issued or caus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed to be issued or having outstanding and issued by an agent or officer of such person or corporation as aforesaid any receipt, acceptance of order or other voucher for goods, chattels or commodities as on deposit or the control of such person or corporation shall issue any other receipt, acceptance of order or other voucher whatsoever for the same, or any part thereof, until the said first issued instrument shall have been returned and canceled or destroyed; and no person or corporation whatsoever having issued or having outstanding, as aforesaid, any such receipt, acceptance of order or other voucher aforesaid, and no agent or officer of any such person or corporation shall part with, deliver or remove or permit to be delivered or removed the goods, chattels or commodities in such instrument named or described, or any part thereof, except only to or by the holder of said instrument, or upon his order, and upon the presentation of said instrument with his indorsement in every case, or without canceling or destroying said instrument in case of complete delivery or removal or indorsing thereon the quantity and description of the goods, chattels and commodities, delivered or removed, and the names of the persons to whom delivered, or by whom removed in case such delivery or removal shall be partial only; and any principal person or corporation or agent or officer of any person or corporation willfully violating this section or any of the provisions thereof shall be guilty of misdemeanor, punishable by a fine of not less than one thousand nor more than five thousand dollars, and imprisonment in the penitentiary for a period of not less than one year, nor more than three years in the discretion of the court."

A demurrer to the indictment was sustained by the court below and a judgment entered thereon for the traverser. From the judgment thus entered, the state has taken this appeal.

It is contended upon the part of the traverser, first, that section 194 of article 27 of the Code has been repealed by chapters 336 and 406 of the Acts of 1910, and, there being no saving clause in the repealing statutes, the indictment must fall; secondly, that even if section 194 of article 27 is still in force, and unrepealed, "the receipt" set forth in the indictment is not a receipt or order within the meaning and the terms of the act, and the indictment therefore charged no offense within the statute. It is obvious we think that, if either one of the grounds here relied upon by the traverser is sound, the demurrer was well sustained in the court below, and its judgment will have to be affirmed. The question involved in the first proposition, as to whether the legislation of 1910 (chapter 406) operates as a repeal of section 194 of article 27 of the Code, is not free from difficulty, and this difficulty arises from a double codification of section 6 of the

act of 1876 in the Code of 1888, and inserted therein in its original form, in two separate and distinct articles, to wit, in article 14, section 6, tit. "Bills of Lading, Storage and Elevator Receipts," and in article 27, § 119, tit. "Crimes and Punishments." And in the present Code (1904) the two penal sections, as previously codified, were recodified as section 10 of article 14, and as section 194 of article 27, the section here in dispute.

It is conceded that the two sections are identical, and, except for some unimportant changes, are as originally enacted by the act of 1876, and, as codified, in the Code of 1888. In this state of the law, as then applicable to the offense here charged against the appellee, the Legislature, during its session of 1910, passed and adopted two acts of assembly, one relating to bills of lading, and known as the "Uniform Bills of Lading Act," (chapter 336, Acts 1910), and the other, relating to "Warehouse Receipts" and to be cited, as the uniform warehouse receipts acts (chapter 406, Acts 1910). The title of the bills of lading act is "An act to repeal article 14, of the Code of Public General Laws of 1904, title 'Bills of Lading, Storage and Elevator Receipts' and to re-enact said article 14, with amendments under the title 'Bills of Lading.'" Now it is admitted by the state that article 14, including section 10 (the duplicate section), was repealed in toto by Acts 1910, c. 336, and an entirely new scheme of legislation relating to bills of lading was adopted and substituted therefor, but that article 27, § 194, was not repealed by either act. The title of the uniform warehouse receipts act is an act to add a new and additional article to the Code of Public General Laws of 1904 to follow immediately after article 14, said new and additional article to be designated as article 14A, under the title "Warehouse Receipts." By section 57 of this act it is expressly provided that this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and, as stated by the appellee in his brief, it is now the new uniform warehouse receipts act, adopted by 19 states and territories of the United States.

The various penalties for the violation of the provisions of this act, including the offense here charged, are fully set out in the act. By section 52 it is provided: "A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word 'duplicate,' except in the case of a lost or destroyed receipt after proceedings as provided for in section 14, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not

exceeding five years, or by a fine not exceeding five thousand dollars, or by both."

While it is conceded that neither of the last-named statutes (1910) contain an express saving clause or an exception of pending or existing offenses from its operation, it is earnestly urged by the state that because there was no reference made in either act to section 194 of article 27, the penal section, there was no intention on the part of the Legislature to repeal it by the substituted legislation, and the previous law must be continued in full force and effect. The manifest effect of this contention, if sustained, would be to continue in force two absolutely different punishments for the same offense, and in this regard it will be seen there is a palpable conflict, and an irreconcilable repugnancy between the two provisions of the law relating to the penalty to be imposed. The punishment provided by article 27, § 194, for the offense here alleged, in the case of an individual, is a fine of not less than \$100 nor more than \$5,000 and imprisonment in the penitentiary for a period of not less than one year, nor more than three years in the discretion of the court. By section 52 of the act of 1910, above quoted, the penalty provided for each offense is imprisonment not exceeding five years or by a fine not exceeding \$5,000, or by both. The correct rule of construction in such cases is well settled by the decisions of this court, and by the Supreme Courts of other jurisdictions. The general rule of implied repeal, where there is no express repeal in terms, is stated in *State v. Yewell*, 63 Md. 121, to be when there are two acts on the same subject the rule is to give effect to both, if possible.

[1] But, if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. The test, whether repugnancy or conflict exists, is, Can the two laws stand together, and be executed at one and the same time? *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331; *United States v. Tynen*, 11 Wall. 92, 20 L. Ed. 153. In *Gorman v. Hammond*, 28 Ga. 85, the Supreme Court of Georgia held, in speaking of laws imposing penalties, when two statutes impose a penalty for the same offense and the punishment imposed by one is not that imposed by the other, the latter statute repeals the earlier, for the intention to inflict two punishments for the same offense is not to be imputed to the Legislature.

[2] There is another rule of statutory construction, supported by authority, which we think could be invoked in aid of this class of legislation, and it is thus stated by the Supreme Court of Massachusetts in *Bartlett v. King*, 12 Mass. 545, 7 Am. Dec. 99: "A subsequent statute revising the whole subject-matter of a former one and evidently in-

tended as a substitute for it, although it contains no express words to that effect must on principles of law as well as in reason and common sense, operate to repeal the former." This doctrine and rule of construction is approved and applied by this court in *Montell v. Consolidated Coal Co.*, 39 Md. 164, *State v. Falkenham*, 73 Md. 463, 21 Atl. 370, *Leitch v. Leitch*, 114 Md. 336, 79 Atl. 600, and cases there cited, *U. S. v. Claflin et al.*, 97 U. S. 546, 24 L. Ed. 1082; *State v. Popp*, 45 Md. 437. We rest our conclusion, however, in this case upon the application of the rule of repeal by implication and upon the principles of implied repeal, as that rule is applied and understood, and as herein announced.

[3] We hold, then, that there is a manifest inconsistency and a plain repugnancy between section 52 of the act of 1910, and section 194 of article 27 of the Code, and that the two sections cannot stand together and be executed at one and the same time; that article 14, § 10, of the Code, has been expressly repealed, and that article 27, § 194, has been repealed by implication, leaving in force the subject-matter and penalties fixed by the acts of 1910, for the violation of those respective statutes. *Dundalk Ry. Co. v. Smith*, 97 Md. 181, 54 Atl. 628. It will be borne in mind we are here dealing with a penal statute, and, as was said by the Supreme Court of Massachusetts, in *Ellis v. Paige*, 1 Pick. 45, "to hold otherwise would be to impute to the Legislature gross carelessness or ignorance, which is altogether inadmissible." *State v. Long*, 94 Md. 637, 51 Atl. 827.

It was also contended that the indictment was defective in substance, and for that reason the demurrer to the indictment was properly sustained. As we have determined that the judgment must be affirmed for the reasons already stated, it becomes unnecessary to pass upon this question.

We think the demurrer in this case was properly sustained, and, as it is well settled that after the repeal of a law no penalty can be enforced nor punishment imposed for its violation when in force, without a saving clause in the repealing statute, the indictment must fail. *Keller v. State*, 12 Md. 322, 71 Am. Dec. 596; *Beard v. State*, 74 Md. 134, 21 Atl. 700.

Judgment affirmed.

McOARTHY et al. v. CLARKE.

(Court of Appeals of Maryland. April 5, 1911.)

1. MUNICIPAL CORPORATIONS (§ 750*)—TORTS—DEFECTIVE SIDEWALKS—LIABILITY OF CITY.

Though a city might not be liable for injuries by obstructions on a sidewalk placed there by other than the city's agencies because the board of police commissioners had sole au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thority to abate such nuisances, the rule would not apply where the obstruction was placed in the street by the city's contractors over which it had control.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1579; Dec. Dig. § 750.*]

2. MUNICIPAL CORPORATIONS (§ 751*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTORS—RELATIONSHIP.

Where the agreement between a city and contractors putting in a sewer required the work to be done under the supervision of the city engineer, with whose directions the contractors were required to comply, the contractors were not independent contractors, so as to relieve the city from liability for injuries to a pedestrian by falling over a manhole frame temporarily placed by the contractors on the sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

3. TRIAL (§ 253*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where, in an action against a city and sewer contractors for injuries by falling over a manhole frame temporarily placed on a sidewalk by the contractors, the pleadings and evidence raised the question of negligence in placing the frame on the sidewalk as well as in not having it lighted, a requested prayer was properly refused that, if the contractors had a light placed on the manhole frame which was removed without their knowledge, they were not negligent; such prayer ignoring the other questions of negligence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

4. MUNICIPAL CORPORATIONS (§ 809*)—STREETS—OBSTRUCTIONS.

It was the duty of sewer contractors to deposit material to be used in a reasonable place on the street, and to place guards or give reasonable warning to the public of its location.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

5. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—INJURIES—NEGLIGENCE—JURY QUESTION.

In an action against a city and sewer contractors for injuries by falling over a manhole frame temporarily placed by the contractors on a sidewalk, where there was evidence that the frame was left there without reasonable necessity, it did not show, as a matter of law, that defendants were not negligent in placing the frame on the sidewalk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

6. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTIONS.

To make plaintiff guilty of contributory negligence as a matter of law, his conduct must have been so reckless as to preclude a difference of opinion as to its character in the minds of ordinarily prudent men.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 296; Dec. Dig. § 136.*]

7. MUNICIPAL CORPORATIONS (§ 821*)—INJURIES ON STREETS—CONTRIBUTORY NEGLIGENCE.

Since a pedestrian may assume that a sidewalk is safe to walk upon, plaintiff, who was injured by falling over an iron manhole frame three feet two inches in diameter at the bottom, two feet at the top and nine inches high, temporarily placed on a sidewalk, while walking in an ordinary manner with a child in her arm,

was not guilty of contributory negligence as a matter of law because she did not see the frame in the darkness, though she testified that she could see it after she rose from the ground, and also as she sat on a doorstep in front of which it was.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.*]

8. MUNICIPAL CORPORATIONS (§ 818*)—STREETS—INJURIES—ADMISSION OF EVIDENCE.

In an action against a city and sewer contractors for personal injuries by falling over a manhole frame temporarily placed on a sidewalk, an ordinance applicable to municipal agents requiring building material left in streets at night to be shown by a lighted lamp was admissible to show defendant's duty to light the obstruction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1736; Dec. Dig. § 818.*]

9. MUNICIPAL CORPORATIONS (§ 818*)—STREETS—INJURIES—ADMISSION OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

The ordinance was also admissible to show plaintiff's right, with her presumptive knowledge thereof, to assume that the sidewalk was safe, in absence of the danger signal required by the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1736; Dec. Dig. § 818.*]

10. DAMAGES (§ 158*)—PLEADING—PROOF—SPECIFIC INJURIES.

Where the declaration in an action for negligent injuries alleged that plaintiff's right leg was injured, and that her head was badly bruised, and her system generally shocked, and that she sustained other permanent injuries, plaintiff could show injury to her hearing as an element of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441-446; Dec. Dig. § 158.*]

11. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in excluding a question to plaintiff on cross-examination was harmless, where the same question was repeated in another form and answered without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

12. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—INJURIES—ADMISSION OF EVIDENCE.

In an action against a city and sewer contractors for personal injuries by falling over a manhole frame temporarily placed on a sidewalk, in which the negligence charged was in placing the frame there, and the evidence showed the location of street lamps in that neighborhood, and that they were lighted at the time of the accident, evidence as to whether the block in which the accident occurred was well lighted, as compared with other parts of the city, was properly excluded as irrelevant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1734; Dec. Dig. § 818.*]

13. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTIVE STREETS—INJURIES—ADMISSION OF EVIDENCE—NEGLIGENCE.

In an action against a city and sewer contractors for personal injuries by falling over a manhole frame temporarily placed on a sidewalk by the contractors, they could show that their employé had placed a lighted lamp upon

the obstruction each night until it was removed, as bearing on the question of negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1732; Dec. Dig. § 818.*]

14. TRIAL (§ 62*)—EVIDENCE—REBUTTAL EVIDENCE.

Evidence is admissible for plaintiff to contradict relevant evidence introduced by defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

Appeal from Baltimore Court of Common Pleas; Chas. W. Heulsler, Judge.

Action by Olivia F. Clarke against William M. McCarthy and another, trading as McCarthy & Co., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and URNER, JJ.

W. H. De C. Wright, for appellants Mayor and City Council of Baltimore. Vernon Cook, for appellants McCarthy & Co. J. Cookman Boyd, for appellee.

URNER, J. The appellee was seriously injured by stumbling and falling at night over an iron manhole frame temporarily deposited on a sidewalk in Baltimore city, and intended for use in connection with a system of sewers then in course of construction. The suit was against the municipality and McCarthy & Co., the contractors engaged in the work under employment by the city, and the declaration alleges negligence on the part of the defendants in placing the frame upon the pavement, and in permitting it to remain there for a long space of time without light or signal of any kind to warn the plaintiff of its location. A judgment upon verdict was recovered by the plaintiff, and the defendants have appealed. The record contains 15 bills of exception, of which 14 relate to rulings of the court below on the admissibility of evidence, and one to its action on the prayers. There are certain general questions of liability involved in the exceptions, and these will be first considered.

Independently of the theories common to both defendants, the city claims exemption from responsibility for the accident upon the ground that the sewer construction was in charge of independent contractors, and that the frame which injured the plaintiff was deposited by them, without the knowledge of the city officials, at a point remote from the line of the work, and where the representatives of the municipality could not have anticipated that it would be placed, and that, therefore, the rule of respondeat superior does not apply.

[1] It is further insisted that the city is not liable merely on account of its omission to remove or guard the obstruction, because, as it is asserted, the exclusive au-

thority for such purposes is vested in a police department over which the municipality has no control, and its own duty has been performed and its power exhausted by the passage of prohibitive and punitive ordinances on the subject. In support of the proposition last stated, the cases of *Altwater v. Baltimore*, 31 Md. 462, and *Sinclair v. Baltimore*, 59 Md. 592, were cited. It was held in these cases that the city of Baltimore was not liable to persons injured by nuisances on the public streets caused by agencies other than those of the municipality, for the reason that under the laws then in force the sole power of abating such nuisances was conferred by the law upon the board of police commissioners of the city. Whether this principle would be applicable under the existing provisions of the city charter and the decisions of this court in *Baltimore City v. Beck*, 96 Md. 191, 53 Atl. 976, and *Baltimore City v. Walker*, 98 Md. 637, 57 Atl. 4, it is not necessary for us to determine, because it is obvious that such a doctrine could not be applied to a case in which the municipality was itself instrumental in creating the occasion for the obstruction, and because upon the facts now before us we are of the opinion that the city must be held to sustain such a relation to the cause of the accident.

[2] It is not entitled to be exonerated on the ground that the particular acts alleged to constitute negligence were done by independent contractors beyond the scope and intent of the work committed to their charge. The plans for the work in connection with which the manhole frame was to be used indicated a line of sewer along the east side of Broadway, a wide avenue with a central parkway. The point at which the frame was deposited and the accident occurred was on the west side of the avenue, and about 75 feet south of Preston street. The sewer was not actually constructed through this block according to the location contemplated by the original plan; another course parallel to Broadway in this locality having been subsequently adopted. It was testified by the employé who delivered the frame that it was placed on the west side of the avenue because this was a more convenient point on account of the pavement on the east side being to some extent blocked with pipes. The agreement between the city and the contractors provided that the work should be done under the general supervision of the city engineer, who was authorized to direct the order in which and the points at which it should be prosecuted. It was stipulated that the contractors should immediately comply with all the instructions given by the engineer.

It appears, therefore, that the placing of the frame at the point of the accident was in connection with construction work in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

which the city was interested, and over which it reserved control. In view of such conditions, we are unable to hold the city exempt from liability as a matter of law upon the grounds suggested. The principles which govern the case before us are settled by the decisions of this court in *Thillman v. Baltimore City*, 111 Md. 131, 73 Atl. 722, and *Baltimore City v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395. In the former case an independent contracting company, employed by the city to grade, pave, and curb a street, changed the condition of an alley opening into the street, as a result of which surplus water flowing in the alley, instead of passing off into a sewer as it had previously done, flooded the cellar of plaintiff's house. It was provided in the contract between the contractors and the municipality that the work should be done under the inspection of the city engineer. The evidence was held legally sufficient to show that the change in the alley was made by the contracting company in connection with the performance of its contract to pave the street, and it was decided that the city, as well as the company, was liable for the resulting injury. In *O'Donnell's Case* an agent of a contractor employed by the city to repave a street caused a rope to be suspended to prevent travel on it while the work was in progress. A lamp was attached to the rope as a warning, but it was immediately broken and extinguished by stones thrown by boys. The employé in charge took the lamp to his home to repair it, but did not replace it the same night. While he was absent, the plaintiff, in attempting to drive his hack up the street, was injured by coming in contact with the rope. None of the city officials knew that the rope had been stretched across the street. The city nevertheless was held to be liable. In each of the cases cited it was decided to be the duty of the city to have its work done in such manner as to avoid injuries to the public, and that it could not be relieved of this obligation by committing the work to an independent contractor. In the *Thillman Case*, as in the present, there was the additional consideration that the city had stipulated for the supervision and control of the work by its own engineer, and it was stated as a general rule, which we find clearly applicable here, that, where an employer retains control of the work, he is not relieved of liability by reason of the fact that he is operating through the agency of a contractor. In this case the city sought to have the jury instructed to find a verdict in its favor upon the theory of nonliability which we have discussed, but its prayer to that effect was rejected by the court below, and for the reasons stated we must concur in the ruling.

[3] The proposition upon which the contractor defendants placed most reliance was presented in the third prayer, offered separately on their behalf, in which the court

was asked to instruct the jury that if they found from the evidence that these defendants caused a light to be placed on the manhole frame in question on the evening of the accident and prior to its occurrence, and that subsequently the light was stolen or removed by some person unknown, and that the defendants did not know of its removal, and that they made reasonable efforts to maintain a light on the frame on the evening of the accident, then they were not legally guilty of any negligence, and the verdict must be in their favor. There was evidence tending to show that the contractors had caused a lamp to be placed on the frame about half past 5 o'clock on the evening of the accident. Their employé passed that way about a quarter of 7 and found the lamp still lighted and in position. His next visit to this point was at a quarter past 8, and the lamp was then gone. The accident occurred about 7 o'clock. It was contended that this evidence was legally sufficient to support the theory of the prayer, and that its rejection by the court below constituted reversible error. If the only negligence charged in this case related to the maintenance of a light on the manhole frame during the hours of darkness, we might accept as sound and just the principle which the prayer under consideration invoked. The difficulty, however, in the way of granting such an instruction under the pleadings and evidence in the present record, is that there is a distinct issue as to whether in placing and keeping the frame on the sidewalk at the point and in the position indicated by some of the witnesses the defendants were guilty of negligence. The prayer proposed to instruct the jury that, if the defendants were not negligent in their efforts to keep the lamp in place and lighted, they could not be found to have been negligent in any respect. Such an instruction could not have been granted without disregarding the preliminary question of negligence to which we have referred. If the defendants did not observe due and reasonable care in the selection of the place and position for the deposit of the frame during the prosecution of the work, if, in fact, it was so located as to be needlessly dangerous to pedestrians, then the liability of the defendants could not justly be said to be commensurate merely with an obligation to make diligent efforts to avoid the consequences naturally to be anticipated from such negligence. Their responsibility could not be discharged simply by the use of due care to maintain the light, if there was no reasonable necessity to have the obstruction at all in the position in which it was placed.

[4] Their duty was to "deposit the material in a reasonable place," as well as to "place guards or give reasonable precautionary signals to warn the public." *Sinclair v. Baltimore City*, supra.

The record here shows, as already stated, that the manhole frame over which the ap-

pellee fell was deposited on the west side of the street, opposite the intended course of the sewer. It was testified by the contractors' materialman that the frame was delivered at the point of the accident about October 18th by the supply company from which the contractors were obtaining this class of material for the work. He stated that the frame belonged on the east side of the street, and that nobody told the supply company to put it on the west side. He learned on the following day of the location of the frame and placed a light on it every night from October 24th to the last week in November. The manager of the sales department of the supply company testified that the frame was supposed to go on the east side of Broadway and might possibly have been placed there, but, as the pavement there was partially blocked with sections of terra cotta pipe, it was more convenient to place it on the other side. He described the frame as being three feet two inches in diameter over all at the bottom, two feet at the top, and nine inches high. It had a flange around the bottom about six inches wide and three-eighths of an inch thick. The flange represented practically the difference between the upper and lower diameters just mentioned. There was a cover adjustable to the top of the frame, and both parts were painted black. The total weight was 425 pounds. There was evidence adduced by the plaintiff tending to show that the frame lay on the pavement about a foot inside of the curb with the flange uppermost. It was with the flange that the plaintiff testified she came in contact as she was passing along the sidewalk. On behalf of the defendants, there was testimony to the effect that the frame was in proper position with the flange down, and that it extended over the curb. It is obvious that the two positions thus indicated represented a material difference in the extent of the interference liable to be caused by the frame to public travel on the pavement. In the latter position the flange would form no part of the obstruction, and, with the frame extending over the curb, there would be very slight probability of its constituting any impediment whatever to the free use of the sidewalk. In the former position, however, it would form an obstruction three feet wide extending to a point on the pavement four feet from the curb, and would be a serious menace to the safety of pedestrians.

[5] As there was evidence from which the jury might find that the defendants without reasonable necessity kept this large and heavy frame on a public pavement and in the position last indicated, the court would not be justified in ruling as a matter of law that such a course of conduct involved no element of negligence. It is because the third prayer offered on behalf of the contractors would have excluded this issue entirely from the consideration of the jury that we must hold it to have been properly

rejected. In the cases cited to support the theory of this prayer, the impediments to travel against which the public was to be guarded were necessary incidents of the work in connection with which they existed. They consisted of excavations or structures immediately involved in the prosecution of the work. The question of negligence in the deposit in an unsuitable place and in an improper position on a public thoroughfare of materials designed for subsequent use at another point was not involved. The second prayer of the same defendants sought to have the case withdrawn from the jury on the ground of contributory negligence. It was urged that the obstruction in question was of such size that the plaintiff would have noticed it if she had paid due attention to the condition of the pavement on which she was walking; and it was argued that, while she had the right to assume that the sidewalk was safe in a general way, yet she was bound to exercise some precaution to avoid obstacles. The testimony of the plaintiff upon this point was to the effect that, when the accident occurred, she was on her way home from a walk with her two little grandchildren, one of whom she was carrying in her arms. She was going straight along the pavement in her usual way, looking ahead and downward, but did not see the manhole frame until she had stumbled and fallen over the flange. She testified that she did not know that there was such an obstruction on the pavement, that there was no light on it, and that, while there were some street lamps in the square at a distance, it was dark at the place she was injured. As she rose from the ground after her fall, she could see the frame, and it was also visible as she afterwards sat on the doorstep in front of which it lay. She stated that, after falling over it and having "a forcible feeling of it," she could see it from the positions just mentioned, but that she did not notice it in the first instance on account of the darkness, and because she had no reason to suppose there was any obstruction on the sidewalk. In the face of this testimony the court below was clearly right in refusing to rule that the conduct of the plaintiff amounted in law to contributory negligence.

[6] To warrant such a ruling, there would have to be "some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men" (*B. & O. R. R. Co. v. State, Use of Wiley*, 72 Md. 40, 18 Atl. 1108, 6 L. R. A. 706, 20 Am. St. Rep. 454), or "some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ" (*Baker v. Maryland Coal Co.*, 84 Md. 27, 35 Atl. 10). In *Mayor, etc., v. Baltimore v. Holmes*, 39 Md. 249, where the injury sued for resulted from the attempt of the plaintiff to lead his horses over a ridge of stones in a public street, it was said: "Neg-

ligence is the want of such care as men of ordinary prudence would use under similar circumstances; and the question as to whether the act of the plaintiff amounted in law to negligence depended upon the danger which might reasonably be expected to result therefrom. If the danger was so great that no sensible man would have incurred it, the plaintiff was not entitled to recover, but this, of course, raised a question of fact, which we think was properly submitted to the jury."

[7] In the present case there is absolutely nothing to indicate a want of due care upon the part of the plaintiff. She had the right to assume that the sidewalk was safe for pedestrians, and we would not be justified in declaring her guilty of contributory negligence merely because she did not observe in the obscurity to which she testified the low dark object over which she stumbled.

The only Maryland case cited by the defendants in this connection is *Knight v. Baltimore City*, 97 Md. 654, 55 Atl. 388. In that case the accident occurred in daylight, and contributory negligence was imputed to the plaintiff because by his own admission the hole into which the wheel of his wagon ran was visible at a distance of half a square, and he did not see it because he was talking to a companion, and was not looking. It was stated in the opinion by Judge Pearce that "greater watchfulness is required of the driver of a team upon a city street than of a pedestrian upon the sidewalk, and what would be negligence in law in the former case might not be in the latter." The cases from other jurisdictions to which our attention has been called upon the question of contributory negligence involved causes of injury which the evidence conclusively showed might have been avoided by the exercise of due care. In the present case such a condition of proof does not exist.

By the fourth prayer offered on behalf of the contractors, the proposition was submitted, in substance, that, if both the defendants and the plaintiff were negligent and the negligence of each contributed to the accident, then the verdict must be for the defendants, even though the jury should find the negligence of the defendants to have been greater than that of the plaintiff. It is not necessary to discuss this prayer further than to say that we do not find its theory supported by any legally sufficient evidence of the plaintiff's negligence. There was evidence offered by the defendants as to the location of street lamps in the parkway of the avenue in which the accident occurred, and as to their being lighted at the time, but there was nothing affirmative to show that there was sufficient light at the place at which the frame was located to reveal it to a person exercising ordinary care. In order to grant this instruction, it would be necessary to hold that the jury might infer negligence on the part of the plaintiff from the mere fact that

she failed while walking at night with a child in her arms to see a dark obstruction nine inches high lying on the sidewalk at a place where its presence was not to be suspected. A finding of contributory negligence under such circumstances could only be the result of conjecture. The rejection of the prayer was proper.

The city and the contractors offered prayers for the withdrawal of the case from the jury upon the theory that there was no legally sufficient evidence of negligence on the part of the respective defendants. These prayers were rejected by the court below. The testimony was in conflict as to whether there was a light on the obstruction at any time prior to the accident and also, as already stated, as to whether the frame was negligently placed and kept on the sidewalk; and the refusal of the proposed instructions was clearly correct. There were other prayers offered by the defendants which the court below declined to grant, but no reference was made to them in the argument on behalf of the defendants, and we will not discuss them separately, but will simply state that they were all at variance with the principles we have discussed and applied to the case, and that we find no error in their rejection.

The two prayers submitted by the plaintiff correctly presented the issues of fact to the jury and defined the measure of damages, and the special exception to them on the ground that they were not supported by legally sufficient evidence of the delivery of the frame to the defendants prior to the accident, or of the plaintiff's due care, or of the defendants' negligence, was properly overruled.

In the first bill of exceptions the defendants noted their objection to the admission in evidence of an ordinance of the city of Baltimore applicable by its terms to municipal agents and employees as well as to all other persons, providing that building material left in any of the streets, lanes, or alleys of the city should during the night "be designated by displaying a lighted lamp or lantern at such part of the same as to be easily observed by persons passing along the streets."

[8,9] This evidence was competent, not only as reflecting upon the duty of the defendants in the premises, but also as emphasizing the right of the plaintiff, with her presumptive knowledge of the ordinance, to assume that, in the absence of such a signal of danger, the street was safe for her passage. In the case of *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603, cited in support of this exception, there was no question as to the admissibility of evidence, and the point of the decision was that the failure of an abutting owner to comply with an ordinance requiring under a prescribed penalty the removal of snow from the sidewalks in Baltimore city did not make him

liable to a person injured by a fall occasioned by an accumulation of snow and ice in front of the defendant's dwelling.

The second, fifth, sixth, ninth, and tenth exceptions were not pressed. There is no reversible error in any of the rulings to which they relate.

[10] In the third bill of exceptions the defendants complain of the admission of a statement by the plaintiff in describing her injuries, to the effect that her hearing was affected by the injury she had sustained to the right side of her head when she fell over the frame. This was claimed to be objectionable on the ground that the declaration did not mention loss of hearing as one of the consequences of the accident. It was urged that, where a plaintiff proposes to claim for injury to one of the special senses, the defendant should be given notice of such a claim in the declaration, as otherwise he may be subjected to surprise at the trial. In the present declaration it is averred that the plaintiff's right leg was severely and permanently injured, that her head was badly bruised and her system generally shocked, and that she sustained other permanent injuries. The defendants were thus apprised that the plaintiff's claim was intended to cover, not only the wounds specifically mentioned, but also other injurious effects of the fall, and in our opinion the impairment of her hearing as a consequence of the injury to her head was competent to be proved as an element of damage.

[11] The fourth exception is unimportant. A question propounded to the plaintiff on cross-examination was ruled improper, apparently because it assumed conduct on her part to which she had not testified; but it was at once repeated in another form and answered without objection.

[12] It appears from the seventh bill of exception that the court below refused to permit a witness to answer a question as to whether Broadway was a well-lighted block as compared with other parts of the city. There was no issue of negligence in relation to the ordinary lighting of the street, and there was full proof as to the location of the lamps in that vicinity, and the fact that they were lighted at the time of the accident. The inquiry as to whether the block was well lighted as a matter of comparison was therefore irrelevant. The eighth exception presents the same question, and the evidence to which it refers was properly excluded.

[13] The eleventh, twelfth, thirteenth, and fourteenth bills of exception refer to testimony admitted in rebuttal to the effect that on various nights between November 2d, the date of the accident, and the latter part of the same month, there was no light on the frame. This was in contradiction of the tes-

timony given by the contractors' materialman, previously noted, that beginning with October 24th he had himself placed a lighted lamp on the obstruction every night, and had taken it away every morning, until the removal of the frame about the last week in November. It is objected that this evidence on both sides was irrelevant, except in so far as it related to the presence or absence of the light on the night of the accident, but that the testimony of the defendants' witness on the subject, having been admitted without objection, could not be made the occasion for the introduction of immaterial evidence in rebuttal by way of contradiction. This objection incorrectly assumes the irrelevancy of the evidence sought to be rebutted. As indicating care and diligence in the maintenance of the light, it was competent for the defendants to prove by the employé to whom they had committed the duty that he had given the matter his personal attention every night without intermission until the obstruction was removed.

[14] This testimony was pertinent to the issue of negligence, and the contradictory evidence offered in rebuttal was equally competent.

We find no reversible error in any of the rulings presented for review, and the judgment will be affirmed.

Judgment affirmed, with costs.

HENDRICK v. STATE.

(Court of Appeals of Maryland. April 5, 1911.)

1. CRIMINAL LAW (§ 1011*)—EXISTENCE OF OTHER REMEDY.

Laws 1910, c. 207, regulating motor vehicles, provides, in section 140p, that magistrates shall have jurisdiction of offenses thereunder, and gives an appeal only to the circuit court. *Held*, that a writ of certiorari should not be issued to test the jurisdiction of the circuit or justice court, for the Court of Appeals will, in suits such as this, entertain an appeal or writ of error, though not provided for, to test the jurisdiction of the inferior tribunals.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1011.*]

2. COURTS (§ 207*)—COURT OF APPEALS—CERTIORARI.

The Court of Appeals has appellate jurisdiction only, and may not issue writs of certiorari in original proceedings.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

3. CRIMINAL LAW (§ 1011*)—GROUNDS—JURISDICTION—LACK OF.

Laws 1910, c. 207, § 140p, which is part of the law regulating motor vehicles, provides that any person accused of an infraction may be tried by the nearest justice of the peace, and, if convicted, may have an appeal to the circuit court. One accused of a violation was convicted in the justice court, and appealed to the circuit court. *Held*, that the circuit court had jurisdiction to determine the constitutionality of the law, and certiorari should not issue on the ground that the circuit court was without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

jurisdiction, though its determination was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1011.*]

4. CRIMINAL LAW (§ 1011*)—REVIEW.

Under Laws 1910, c. 207, regulating motor vehicles, and providing in section 140p that the nearest justice shall have authority to try offenders who may appeal to the circuit court, one wishing to attack the constitutionality of the law and obtain review of the decision of the circuit court by the Court of Appeals should sue out of the circuit court a writ of certiorari directed to the justice, and take an appeal from the determination of the writ, for that determination is an exercise of the circuit court's common-law functions from which appeal will lie.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1011.*]

John T. Hendrick was convicted in a justice court of operating his automobile without having paid the registration fee, and he appealed to the circuit court, where the judgment was affirmed. On application for certiorari to the circuit court. Application denied.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

Ralston, Siddons & Richardson, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BOYD, C. J. John T. Hendrick filed a petition in this court for a writ of certiorari directed to the circuit court for Prince George's county, to the end that the case against him referred to in the petition may be reviewed, and that the judgment of the circuit court may be quashed. The petitioner was arrested for operating his automobile without having paid the registration fee required by section 133 of the motor vehicle law of Maryland passed in 1910 (chapter 207), and was taken before a justice of the peace for Prince George's county. He filed a motion to quash the warrant on the ground that the act was unconstitutional, which was overruled by the justice, and he was then tried, found guilty, and fined the sum of \$15. He then entered an appeal to the circuit court for that county, and, the record of the proceedings before the justice having been transmitted to that court, the petitioner was there tried, and the judgment of the justice was affirmed. Section 140p of the act of 1910 gives any person convicted by a justice of any offense under the subtitle of the act the right to appeal to the court of criminal jurisdiction of the county in which he may be convicted, which is the circuit court. The petitioner availed himself of that right, but contends that he is entitled to the writ of certiorari on the ground that the act is unconstitutional, and that for that reason the court was acting outside of the jurisdiction

conferred upon it by law, the contention of the petitioner being that the circuit court was in error in assuming jurisdiction of the case when it had before it an agreed statement of facts showing that he was a citizen of the United States, a resident of the city of Washington, in the District of Columbia, and conducted and operated his automobile from the city of Washington into Prince George's county, and while temporarily operating the same as aforesaid was arrested in Hyattsville, in said county, on the charge of operating his said automobile on the highways in the state of Maryland without having procured the certificate of registration required by section 133 of the motor vehicle law of said state.

So far as we are aware, this is the first time an application has been made to this court to grant the writ of certiorari to the circuit court (or any court having like jurisdiction) on the ground that the latter, when sitting in its appellate capacity, hearing an appeal from a justice of the peace or other tribunal which was authorized by law to be taken to it, had exceeded its jurisdiction. That fact alone should cause us to be extremely cautious in entertaining such an application, for our reports contain many decisions in which the jurisdiction of the circuit court (we need not mention other courts exercising like jurisdiction) has been attacked on the ground that the justice of the peace or other tribunal appealed from did not have jurisdiction, and hence the lower court did not have it. If it had been supposed by the profession that there was a remedy by the writ of certiorari, it would surely have heretofore been resorted to by some of the attorneys engaged in such cases.

[1] We have frequently decided that, although when a statute gives the right of appeal to the lower court and no appeal is expressly given to this court, ordinarily we have no jurisdiction to entertain an appeal from the judgment of the lower court. If the lower court and the justice or other tribunal appealed from did not have jurisdiction, we would entertain an appeal or writ of error on that ground. As that is thoroughly established in this state, it would of itself be sufficient reason for refusing to grant a writ of certiorari to test the question of jurisdiction, as appeals or writs of error are the usual methods of bringing cases before this court for review, and nothing could be accomplished in such cases by writs of certiorari, which could not be by one of those methods. It is true it was said in *Gaither v. Watkins*, 66 Md. 576, 8 Atl. 464, that we were not prepared to go to the extent of saying that "a writ of certiorari ought not to issue in any case where a party has a remedy by appeal or by writ of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

error," but it was also there said that "the writ ought not to be granted in any case where the party has a right of appeal, except for the purpose of testing the jurisdiction of the tribunal below." That had reference to an application to such a court as the circuit court for the writ of certiorari, to be issued to an inferior tribunal, and the reason why that court should allow the writ to test the jurisdiction is given in that opinion, and is not in any way applicable to this court. The reason there assigned was that an appeal to the circuit court from an inferior tribunal "brings up the case generally on its merits, and this would in a case like the one before us, involving the question whether the public convenience required the road to be open, subject the parties to an expensive and protracted litigation; whereas, by certiorari, to test merely the jurisdiction of the commissioners, the question is one to be decided on the face of the proceedings themselves. In such cases it is a more efficient remedy than by appeal." In this court we could not consider the merits of the case, but could only entertain the question of jurisdiction, which could be done as fully and as thoroughly by appeal or writ of error as by certiorari. There is therefore no valid reason for granting the latter.

[2] It would certainly be contrary to all precedents, and not in accordance with the purposes for which this court was constituted, to issue the writ of certiorari in such a case as this. In many of the states there are constitutional or statutory provisions authorizing their highest appellate courts to issue this writ, as will be seen by a reference to 4 Ency. of Pl. & Pr. 15, et seq. But this court is one of appellate jurisdiction only. In *Sevinsky v. Wagus*, 76 Md. 335, 25 Atl. 468, we held that a statute which provided that "the Court of Appeals, and the chief judge thereof, shall have the power to grant the writ of habeas corpus, and to exercise jurisdiction in all matters relating thereto throughout the state," was unconstitutional and void, as the Legislature had no power to confer upon the appellate court such original jurisdiction. In passing on the question Chief Judge Alvey said: "The Constitution (article 4, § 14), in defining the jurisdiction of this court, declares that 'the jurisdiction of said Court of Appeals shall be coextensive with the limits of the state, and such as now is or may hereafter be prescribed by law'; that is to say, such appellate jurisdiction as the court then had or might thereafter have conferred upon it. The court at the time of the adoption of the present Constitution had, under former Constitutions, appellate jurisdiction only; and the terms by which the jurisdiction is defined in the present Constitution are substantially the same in meaning as those employed in the Constitutions of 1851 and 1864. It would therefore seem to be clear that the jurisdiction of this court

is appellate only; for, if not so, and the Legislature could confer original jurisdiction upon it in cases of habeas corpus, it could also confer such jurisdiction in cases of mandamus, or in cases of any other subject-matter of original jurisdiction. This manifestly was never contemplated by the framers of the Constitution; and therefore the attempt by the Legislature to confer such jurisdiction is simply nugatory and void. *Ex parte O'Neill*, 8 Md. 227; *State v. Shields*, 49 Md. 301; *State v. Glenn*, 54 Md. 591." It will be observed that the Legislature had attempted to confer the power sought to be enforced in that case.

[3, 4] Of course, it was not intended by that decision to say that this court could not grant a mandamus, certiorari, or other appropriate writ in aid of its appellate jurisdiction, but there is no power granted to it by the Constitution to issue writs of mandamus, certiorari, or writs in cases of any other subject-matter of original jurisdiction, and the Legislature has not attempted to do so, if it be supposed that it could constitutionally confer such power, notwithstanding what has already been said on that subject in the former decisions of this court. Under our system it would be of little, if any, use, if it had the power, for, as we have already said, the question of jurisdiction of the circuit court and of the justices of the peace or other inferior tribunal can be tested by appeal from or writ of error to the circuit court, and, in addition to that, where the writ of certiorari is sued out of the circuit court to test the power and jurisdiction of the inferior tribunal to act at all in the matter, the circuit court acts in its ordinary common-law capacity, and an appeal will lie to this court from its judgment (*B. & H. Turnpike Co. v. N. C. R. R. Co.*, 15 Md. 193); and that, too, notwithstanding an appeal is given by the statute from the justice of the peace or other inferior tribunal to the circuit court (*Rayner v. State*, 52 Md. 368; 2 Poe on Pl. & Pr. § 723A). But even if we had original jurisdiction, and were called upon to issue a writ of certiorari in such case as this, there would still be conclusive reasons why we should not do so. As under our decisions it is settled beyond all question that, when there is an appeal, the writ can only properly issue to inquire into the jurisdiction of the lower court, and prevent it from transcending the powers validly conferred upon it, we would be met at the very threshold of this case by the fact that there is nothing to show that the lower court did exceed its jurisdiction. The learned counsel for the petitioner overlook the distinction so often made by this court between cases in which there is the right to decide and those in which the question is simply whether they were rightly decided, or, as Chief Judge McSherry, in his concise and forcible way of stating propositions, said in *N. Y. Mining Co. v. Midland Co.*, 99 Md. 512, 58 Atl. 217: "The

inquiry here is, not whether the trial court rightly decided, but whether it had the right to decide what it did decide." If the lower court had the right to decide what it did decide, then no question can be made in this court on the ground of want of jurisdiction, and whether it rightly decided what it did decide can only be reviewed by this court when the right of review is given it. If that court had no right to decide the constitutionality of the statute, when raised on the appeal to it, what was to become of the case? No other tribunal was given authority to determine it. Surely it cannot be the law in this or any other state that, because the constitutionality of a statute is attacked, the court must then and there stop all proceedings and further consideration of it, and require the case to remain undetermined. But that is precisely what the contention of the petitioner, if sustained, would lead to. If the court had no jurisdiction to decide that the law was constitutional, where did it get the jurisdiction to do what the petitioner asked it to do—decide that it was not constitutional? When the petitioner took the appeal and the papers were transmitted to it, it not only had the jurisdiction to decide the case, but it was its manifest duty to do so, unless the parties made some other authorized disposition of it. The statute in terms says that "any person so convicted of any offense under this subtitle shall have the right of appeal from the judgment of such justice of the peace, * * * and such court on such appeal shall hear the case *de novo*." No appeal to this court is given, but, as we have seen, an appeal will lie to test the jurisdiction. The judgment of the court to which the appeal is taken under the statute is therefore as final and binding on the parties as a judgment of this court would be in any case in which its judgment is final, provided the court had jurisdiction, and, if it did not have, ample remedy is afforded the accused by appeal or writ of error.

It is not unusual for state courts to have questions before them involving provisions of the federal Constitution, and it cannot be said that they have not the jurisdiction to determine such questions, unless there be some case in which the federal courts have exclusive jurisdiction. When the state court determines the question, it is final and binding on the parties, unless reviewed by the tribunal authorized to review it, and it cannot be said that such court had no jurisdiction over the case merely because a federal question was involved. In this court we frequently have such questions presented, but it has never been suggested that our decisions were not final and conclusive on the parties, if not taken to the Supreme Court of the United States. In *Rayner v. State*, 52 Md. 368, it was contended that the statute under which the traverser had been convicted before the justice of the peace, which conviction was affirmed by the circuit court

on appeal, was unconstitutional. Judge Alvey, in speaking for the court, said: "But whatever may be thought of the particular provisions of the statute supposed to be obnoxious to constitutional objections, and if the objections were conceded to be well taken, it does not follow that the right of appeal was not well and validly given, and that the circuit court would not have power and jurisdiction to hear and decide the case." After saying that it was true that the circuit court was not in the exercise of its ordinary common-law jurisdiction, but was acting as a court of special limited jurisdiction, he continued: "Its judgment, however, rendered within the limits of the special jurisdiction conferred, is not only binding, but is final. This court has no power to review it, and consequently the assignment of errors must be dismissed." The court went on to say that: "If, instead of the appeal under the statute, the party had applied for the writ of certiorari, upon the specific ground of the unconstitutionality of the statute, and the consequent want of power and jurisdiction of the magistrate to proceed under it, the circuit court then would have been in the exercise, not of the special limited jurisdiction, but of its ordinary common-law jurisdiction; and from its judgment in the premises a writ of error or an appeal could have been prosecuted to this court." In the case of *Judefind v. State*, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721, the Sunday law was attacked on the grounds, amongst others, that it was contrary to the first paragraph of the fourteenth article of the Constitution of the United States and the Bill of Rights of Maryland. This court, after repeating what in substance had been said in *Rayner v. State*, in speaking of the circuit court, said: "That court had the power and authority to entertain the appeal from the judgment of the justice on the question of jurisdiction, as well as on other grounds, and, the plaintiff in error having invoked and submitted himself to its jurisdiction, its judgment is final and conclusive." See, also, *Messick v. State*, 82 Md. 583, 34 Atl. 537; *Roth v. State*, 89 Md. 524, 43 Atl. 769; *Arnsberger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497; *Josselson v. Sonneborn*, 110 Md. 546, 73 Atl. 650; *Smith Premier Co. v. Westcott*, 112 Md. 146, 75 Atl. 1052; 2 Poe on Pl. & Pr. § 723A.

It will be seen from the cases cited and others which might be referred to that if it is desired to test in this court the constitutionality of a law, which it is alleged is unconstitutional and void, and hence that the justice cannot lawfully act under it, application for a writ of certiorari can be made to the circuit court, and from the judgment of that court an appeal can be taken to this court, but if, instead of doing that, there is an appeal to the circuit court, under the authority of the statute giving such appeal, its judgment on the constitutionality of the

statute as well as upon other grounds is final and conclusive. Of course, if the justice and the court on appeal had no jurisdiction of the subject-matter, or of the parties, by reason of the defendant not being summoned or something of that kind, then there is still an appeal to this court, but, if the circuit court had jurisdiction over the subject-matter and the parties, its decision is final. But in none of those cases or in any others in this state has it ever before been said or suggested that an application can be made to this court for a writ of certiorari directed to the circuit court, when the latter had decided the case on an appeal authorized by the statute. That would simply be an unauthorized method of having this court review a decision of the circuit court, which is made by the statute the appellate court, without further appeal to this court.

The petitioner in his notes relied on *Williamson v. Carnan*, 1 Gill & J. 196, and *Swann v. Cumberland*, 8 Gill, 150, as well as some authorities outside of this state, but there is nothing in them which requires us to further prolong this opinion by a discussion of them. In a number of the other states, as we have seen, it has been held that under their Constitutions and statutes their highest appellate courts have jurisdiction to issue this writ, but, of course, we must be governed by our own Constitution, statutes, and decisions, and there is nothing in the two Maryland cases mentioned which conflicts with what we have said, especially when considered in connection with later decisions, where such questions as we have been considering have been more directly presented. It follows that the application for the writ of certiorari must be denied.

Application for writ of certiorari denied and the petition dismissed, the petitioner to pay the costs.

HENDRICK v. STATE.

(Court of Appeals of Maryland. April 5, 1911.)

Appeal from Circuit Court, Prince George's County.

John T. Hendrick was in a justice's court convicted of operating his automobile without having paid the registration fee, and he appealed to the circuit court, where the judgment was affirmed. On application for certiorari to the circuit court. Application denied.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

Ralston, Siddons & Richardson, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BOYD, C. J. For the reasons given in the case of *John T. Hendrick v. State*, 81 Atl. 18, being No. 73 on the docket of the January term, 1911, of this court, the application for the writ of certiorari will be denied.

Application for writ of certiorari denied and petition dismissed, the petitioner to pay the costs.

ZIELIAN v. BALTIMORE PLATE ICE CO. (four cases).

(Court of Appeals of Maryland. April 19, 1911.)

1. DEPOSITS IN COURT (§ 2*)—DISPOSITION UNDER ORDER OF COURT—JURISDICTION.

An order requiring money to be brought into court for disposition is in the nature of a final judgment and should only be passed upon evidence conclusively showing the present liability of the person directed to deposit it.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. RECEIVERS (§ 163*)—DISTRIBUTION OF ASSETS—RECEIVER'S NOTES—PREFERENCES.

An order in receivership proceedings, requiring the receiver to bring a certain sum into court to discharge unauthorized receiver's notes held by a certain creditor, constituted a preference over other creditors holding similar notes.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 163.*]

3. RECEIVERS (§ 192*)—CHARGES—DUPLICATE CHARGES.

If money, appropriated by a receiver from the assets of a corporation, was charged to his personal account, it was error on an accounting to again charge him with such money.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 192.*]

4. BILLS AND NOTES (§ 340*)—BONA FIDE PURCHASERS—NOTICE.

The purchaser of notes of the receiver of a corporation signed, "Z., Receiver," and indorsed by him personally, took them with constructive notice of the receiver's want of authority to issue them, so that the corporation was not liable thereon.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 842; Dec. Dig. § 340.*]

5. RECEIVERS (§ 193*)—ACCOUNTING—CREDITS.

A receiver was entitled to a credit for money raised by notes executed by him without authority, which went into the corporation's business.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 193.*]

Appeals from Circuit Court No. 2 of Baltimore City; Alfred S. Niles, Judge.

In the matter of the receivership of the Baltimore Plate Ice Company, for which Edgar Zielian was appointed receiver. From orders requiring the receiver to bring certain funds into court and removing him as receiver, he appeals by four separate appeals. Certain decrees reversed and others affirmed in part and reversed in part and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, THOMAS, PATTISON, and URNER, JJ.

George P. Bagby and Edwin G. Baetjer, for appellant. W. Burns Trundle and Leigh Bonsal, for appellee.

BRISCOE, J. There are four appeals in the record before us, and they are from separate decrees of circuit court No. 2 of Baltimore City, in equity. The controversy grows out of the liquidation of the affairs of the Baltimore Plate Ice Company, a New Jersey

corporation, with its place of business in Baltimore City and now in the hands of receivers. While there are four appeals taken from separate decrees or orders of the court below, it is conceded that they practically present but two controversies, and these will be considered as on two appeals. The appeals were entered upon the same day, but the first in number appearing upon the record is an appeal from the decree of July 20, 1910, overruling the exceptions of the appellant to and ratifying the auditor's account stated passed on the petition of the Fairbanks Company, a corporation of the state of New Jersey, requiring the appellant, receiver, to bring into court, within 15 days, the sum of \$7,650 with interest, being the amount of certain notes issued by him, as such receiver, to the Fairbanks Company, in excess of his authority, and in default thereof authorizing and permitting the bonds of the receiver to be put in suit for the recovery of the amount of the notes. The second appeal is from a decree, passed on the 5th day of August, 1910, making final the decree of the 20th day of July, 1910, and directing the bonds of the receiver to be put in suit. The two remaining appeals are from decrees of the court below, passed on the 20th day of July, 1910, and on the 5th day of August, 1910, overruling the appellant's exceptions to and ratifying the auditor's account requiring the receiver to bring into court the sum of \$3,942.52 with interest, within 15 days, the amount being alleged funds of the Plate Ice Company, stated to have been wrongfully converted by him to his own use, also removing him as such receiver, depriving him of commissions, and directing, in default, the bonds to be put in suit. The decree of August 5, 1910, made final the order of July 20, 1910, also removed the appellant, as receiver, denied him all commissions and compensation, and directed the co-receivers to put the bonds in suit.

The facts as they appear from the record relate to both appeals and will be now briefly stated, for a proper understanding of the questions involved on the appeals, and will be disposed of separately.

On the 25th day of March, 1908, the appellant upon application of certain creditors was appointed sole receiver of the Baltimore Plate Ice Company and duly qualified as such. The decree did not provide for a dissolution of the corporation nor for the sale of its property, but the power of the receiver seems to have been limited to the preservation of the property of the corporation and to making it a productive and profitable business plant.

The assets of the corporation consisted of a leasehold interest in certain property known as Nos. 7, 9, 11, and 13, Frederick street, Baltimore, upon which had been erected an ice factory and a machine building for the manufacture of ice, at a cost of \$35,000. There was outstanding and issued at this

date \$24,000 of bonds, and its unsecured debts amounted to about \$9,450.

On July 16, 1908, the receiver was authorized by an order of court (all of the bondholders and creditors consenting) to issue receiver's certificates and notes to complete the ice plant. In pursuance of this order receiver's certificates to the amount of \$30,000 were issued and sold to complete the building and make the first payment on machinery, and these were made a first lien on the assets of the company. Receiver's notes to the amount of \$26,300 were also issued to the manufacturers in payment for machinery, and these notes were made a second lien on the assets. There was also issued by the receiver, in excess of his authority and not covered by the court's order, receiver's notes (to be hereafter designated receiver's notes, not authorized) to the amount of \$17,406.66. The notes held by the Fairbanks Company and here in dispute are admitted to be a part of the notes, so issued, in excess.

On the 2d day of September, 1909, upon the petition of certain creditors of the ice company, Messrs. John P. O'Ferrall, W. Burns Trundle, and Leigh Bonsal, members of the Baltimore bar, were appointed co-receivers, with the appellant.

On the 31st of July, 1909, the appellant receiver filed the following report, showing the status of the affairs of the company and his administration of the office:

Outstanding Obligations.	
1. Receiver's certificates	\$ 30,000 00
2. Receiver's notes	26,341 13
3. Bills payable	18,445 53
4. Edgar Zielian	14,028 69
5. Accts. payable	9,442 65
Ice account	\$ 97,257 90
Cash	\$ 3,686 59
	\$101,274 66
Disbursements.	
Plant, machinery, buildings, etc.....	\$ 86,698 43
Furniture	486 05
Tools and fixtures.....	86 61
Pay roll, telephone, rents, expenses, etc...	7,885 07
Interest and exchange.....	579 90
Commission for sale of Rec. Cert., etc....	1,345 00
Coal	970 08
Oils	298 97
Insurance	604 00
Ground rent	1,125 00
	\$100,079 11
Accounts receivable	1,195 55
	\$101,274 66

It also appears that on the 12th of November, 1909, the receivers sold all the property of the company for \$34,500, and there remained for distribution the sum of \$21,504, to be paid on account of the authorized receiver's certificates, being the first lien upon the company's assets.

On the 15th of November, 1909, on petition of the Fairbanks Company, a creditor of the ice company, and holding \$7,650 of the unauthorized and overissued receiver's notes, the court below directed the receiver to bring

into court the sum of \$7,650, to be paid the petitioner, and that the receiver bonds be put in suit.

This brings us to a consideration of the questions raised on the appeals, from the decrees of the 20th of July and August 5, 1910, relating to the Fairbanks Company's claim, being the amount of the notes held by them and which the auditor found were included in the unauthorized overissue of notes.

Practically, the only question before the auditor was the fact whether the notes formed a part of the unauthorized issue. By the order of the 3d day of December, 1909, the papers were referred to the auditor "to state an account of all notes issued by the receiver in excess of the authority conferred by the orders of court, and showing whether or not the receiver's notes held by the Fairbanks Company were included in the unauthorized overissue. The report of the auditor, on May 2, 1910, shows that he was unable to ascertain the total overissue, but that the Fairbanks notes were a part of them. The court in its decrees here appealed against not only ratified the auditor's report as to the finding of the overissue, but it made this report a basis for the order, directing the receiver to bring the amount of the Fairbanks notes into court to be paid to that company and directed the bonds of the receiver to be put in suit. In other words, the court held that, because the auditor found that these notes were overissues, the finding of this fact was a sufficient reason and ground for directing the money to be brought into court, and to be paid to the holder of these notes.

[1] There was error, we think, in all three of the directions of this decree, because, it is well settled, that an order of this character is in the nature of a final judgment and decree, and it will not be passed except upon such proofs and findings as will conclusively establish the party's liability and that the money is due and payable by the party directed to bring it into court.

In *Dillon v. Connecticut Ins. Co.*, 44 Md. 386, it is said, though the practice of ordering money into court has become one of the most ordinary methods by which the court enforces its jurisdiction of preserving property in dispute pending a litigation, there are certain well-defined restrictions and limitations upon it which courts of equity should always be careful to observe. These limitations are well stated in the cases in our own state. *Daniell*, Ch. Pr. c. 41, § 1; *Contee v. Dawson*, 2 Bland, 270.

In *Hopkins v. McEldery*, 4 Md. Ch. 23, the chancellor said the facts upon which the party relies must be found in the case, either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings, and in concluding the opinion held that, at all events, it is certainly not now in the power

of the court to say that the fact that the defendant owes this precise sum is so conclusively established as to be open to no further controversy at any stage of the controversy.

In *McKim v. Thompson*, 1 Bland, 155, the chancellor, there, in dealing with this subject, said: "It is held to be a fundamental axiom that the judgment of a court must be the conclusion of law arising from the facts presented to it. And in the application of this maxim there is nothing peculiar in the character of the court, or in the mode of judicial proceeding, by which it can be at all affected or varied. It is a fundamental principle applicable to all courts, and from which none are allowed to depart. The judgment of a court of law is the legal result of the facts admitted by the parties, or found by the jury; and so, too the decree of a court of chancery is the result, according to principles of equity, arising from the facts found in the bill, answer, proceedings and proofs. Such is the acknowledged foundation of all final and general judgments or decrees. But interlocutory orders and decrees affecting rights must, so far as they go, have a similar basis, because no court of judicature can arbitrarily make a partial, any more than a total, disposition of the rights of things or persons, without such a foundation. The judge can go no further than to apply the rule to the case, or to pronounce the law upon the facts, either partially or wholly. It is of the very nature of judicial power to be so limited. It is, however, of no importance, as regards this principle, how the facts are made to appear, or in what shape they are presented to the tribunal; whether by confession, by arithmetical calculation, by necessary deduction, or by positive and direct proof. It is enough that the facts are so placed before the tribunal as to preclude all further denial of them. The court may then be called on, in cases like this, to pass an order, or, in other words, to pronounce the equity resulting from the facts."

We shall not undertake to recapitulate the facts, nor to answer the various contentions of the parties to the record, in this case, because we are clearly of the opinion that the decrees, upon this state of the record, were not properly passed.

There was no proper foundation to justify the final decree, directing the money to be paid to the Fairbanks Company, or to warrant the conclusion of the liability of the receiver to this company. The fact that these notes were unauthorized did not justify a decree or judgment for the amount of the notes, in favor of the Fairbanks Company, under the facts of the case. It was not conclusive as to his liability without further proceedings, and without an opportunity to defend, and this liability was clearly denied by the answer. The claim was not an

asset of the trust estate for distribution by the receivers, but a claim to be asserted in an action at law, by the Fairbanks Company, if such right existed.

The record shows the assets of the company for distribution to claimants amounted to about \$21,504, while the receiver's certificates outstanding which constitute a first lien amount to \$30,000.

[2] Besides this, there are other holders of unauthorized notes in the same position as the Fairbanks Company, and the order of court constituted a preference over the other creditors in the identical situation.

The question of the measure of damages and the liability of a person acting in a representative capacity, for an unauthorized act, is settled in this state, and elsewhere. *Broumel v. Rayner*, 68 Md. 47, 11 Atl. 833; *Lane, Adm'r, v. Lantz*, 27 Md. 212; *Fairbanks v. Humphries*, 18 Q. B. Div. 54; *Simmons v. Patchett*, 7 El. & Bl. 570; *Cyc.* vol. 34, p. 303.

The next inquiry relates to the appeals from the decrees directing the receiver to bring into court the sum of \$3,942.52, alleged to be the funds of the receivership misappropriated by him. It is admitted there is a balance, an overdraft of about \$800, due by the receiver to the trust estate, for funds unaccounted for; but it is insisted that the principle adopted and the method by which the liability of the receiver was ascertained in the case was improper and erroneous.

It will be seen that the books and accounts of the receiver were kept by an accountant appointed by the court, and they appear to be in proper balance. The record shows that the account contains an entry of all amounts advanced by the receiver to the trust estate, and the repayment of those amounts by him. A separate account was kept on the books, marked "Edgar Ziellian," and it shows the transactions of the receiver with the company in this regard.

The basis of the co-receivers' claim is that the receiver has overdrawn this personal account, and the auditor so found to the extent of the amount stated in the decree, and it was directed to be brought into court.

[3] The first question presented here is whether the receiver shall be held accountable for certain checks drawn by him as such receiver and payable to his own order or to the order of his individual creditors. While his liability in this respect is not denied, it appears that these checks were charged in the ledger to his personal account, and the effect of the auditor's again charging them was to charge him twice with the same payments. The record shows that the money was charged to his personal account, and, this having been done, it was

error in the auditor to have charged them a second time.

As to the error of a cash balance of \$330.17 charged against the receiver, there seems to be but little doubt. The ledger shows that this was an overdraft, and not a cash balance on hand, and was charged as a liability of the receiver with bills payable, etc.

[4] The remaining question is whether the \$14,800 loaned by Hopper and others to the receiver constituted a proper credit to the receiver's personal account, and this depends largely upon whether the money belonged to the company, or was raised upon obligations for which the company is liable. It is not claimed that the money was taken from the funds of the company, and it is difficult to see, under the facts of this case, upon what ground the company can be held liable, upon the unauthorized notes that were issued by the receiver upon which the money was raised. The notes were signed, "Edgar Ziellian, Receiver," and were indorsed by him personally. The purchaser of these receiver's notes took them with constructive notice of the receiver's want of authority to issue them, and the company is not liable on the notes.

[5] The money went into the company's treasury and plant, and the receiver has a right to a credit therefor. *Nat. Bank v. Lange*, 51 Md. 144, 34 Am. Rep. 304; *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; *Gable v. Cheston*, 51 Md. 352.

We find no error in that part of the order removing the appellant as receiver and denying him commissions, and it will be affirmed in this respect.

It follows, for the reasons stated, that the decrees of the 20th of July, 1910, and of the 5th of August, 1910, in re the Fairbanks Company will be reversed. The decrees of the 20th of July, 1910, and of August 5, 1910, in re the petition of the co-receivers, will be affirmed in part and reversed in part, and the cause remanded for a new accounting, with costs. Decrees of the 20th of July, 1910, and of August 5, 1910, in re Fairbanks Company's claim reversed. The decrees in re co-receivers claim, affirmed in part and reversed in part, and cause remanded for new accounting, with costs to the appellant, on all four appeals.

IN RE BRISTOR'S ESTATE.

(Court of Appeals of Maryland. April 19, 1911.)

1. INSANE PERSONS (§ 27*) — INQUISITION — RIGHT TO REVIEW.

Under Code Pub. Gen. Laws 1904, art. 18, § 107, giving the chancery court authority to direct the affairs of insane persons, and under Code Pub. Gen. Laws 1904, art. 5, § 28, per-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mitting appeals from orders in the nature of a final decree passed by a court of equity, appeal would lie from an order confirming a finding on an inquisition of lunacy.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 37, 38; Dec. Dig. § 27.*]

2. INSANE PERSONS (§ 19*)—INQUISITION—AUTHORITY OF DEPUTY SHERIFF.

An inquisition as to insanity may be conducted by a sheriff's deputy.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 19.*]

3. INSANE PERSONS (§ 27*)—INQUISITION—REVIEW.

The finding of the jury in an inquisition as to insanity is not conclusive on appeal, though they had opportunity to observe the appearance and demeanor of the alleged insane during a protracted hearing and while she was testifying.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 27.*]

4. INSANE PERSONS (§ 2*)—INQUISITION—EVIDENCE.

Evidence held insufficient to sustain a finding of insanity on inquisition.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 2.*]

Appeal from Circuit Court No. 2 of Baltimore City; George M. Sharp, Judge.

In the matter of the estate of Jane B. Moore Bristor. From an order confirming the finding of the jury on an inquisition as to insanity of the said Bristor, she appeals. Reversed, and inquisition quashed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

H. N. Abercrombie and William L. Marbury (Francis A. Buschman, on the brief), for appellant. George Moore Brady and William Milnes Maloy, for Charles M. Bristor.

URNER, J. The appellant, Jane B. Moore Bristor, on September 16, 1910, wrote to a representative of the Board of Foreign Missions of the Presbyterian Church a letter in part as follows: "As I have entered my seventieth year and am an invalid from exposure and wounds received upon battle fields of the Rebellion where with my mother I worked to relieve the wounded, I am putting my affairs in order to be ready for the great summons. Lately I have given my pictures and books largely to Lincoln University and Ashville Industrial School, N. C., and as I read again in *The Land of the Vedas* of the awful condition of women in India I long to do something for their relief. If I had known that special work would be allowed, then several deeds that have been made to the American Board would have been in favor of my beloved church. * * * I intend to prepare, that is my lawyers will, two deeds, one of which will give to my son, my only living child, about forty years old, and single, nearly one thousand dollars per year in ground rents and in which he is to have a life interest only. * * * I have always

supported my son. He is not a strong man, and at one time early in life he had an attack of melancholia and wandered from home hoping to get a position. He is a member of the Presbyterian Church, perfectly moral in his habits, but in my opinion persons who have had mental trouble should not marry, and Charles would be a prey if I left him all I have made or even all I have inherited. I provide for him amply, but at his death these rents in which he has a life interest go to the Presbyterian Board for special work among destitute girls in India, China and Africa. The other deed will convey a number of ground rents to you for the same work." (It was stated elsewhere in the letter that these rents would amount to about \$1,000 per year.) "What I have reserved for myself, my son's and my own use, will probably be deeded to you later on, or at least some to home and some to foreign. My tastes are all literary and I greatly wished to do some good work in that line before I go, but more was to be made by attending to investments, and I have made in twenty years more than three times what was left me by my mother, besides giving away about thirty thousand dollars. * * * I want to deed now lest I should be called away suddenly. * * * My mother was very much impressed many years ago by the statement in the life of Wesley that he attended so faithfully to all his affairs that he left directions what should be done with any loose change that might be found in his pockets at the time of his death."

This letter, sealed in an envelope, was handed by Mrs. Bristor to her son Charles to be mailed. He performed this duty after he had opened and read the letter and had it copied by his attorneys. Soon afterwards he filed a petition in circuit court No. 2 of Baltimore City for an inquisition as to his mother's sanity. He alleges in substance in the petition that his mother has been for more than 10 years past "of that degree of unsoundness of mind that unfits her to be in possession of her property and to be clothed with the power of alienating any part of her estate"; that she has been "a woman of strong personality and active mentality; that she was a nurse on battlefields in the Civil War, and during her subsequent years has suffered from the exposure and hardship to which she was subject in that honorable service"; that her husband, from whom she was divorced, is deceased; that she has been for many years interested in the temperance cause, but more recently has devoted all her time, thought, and energy to the woman's suffrage cause and the work of foreign missions; that to such an extent has she thought and written upon these movements and so largely has she contributed to their advancement, especially in the case of mission work in foreign fields, that her mind, enfeebled by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

advancing years, is now controlled by delusions on the subjects indicated, and especially that of foreign missions; and that she is deprived of reason and judgment and is impelled to give nearly all of her property to foreign mission work to the exclusion of her relatives, who have had every reason to expect to be the natural objects of her bounty.

This application was supported by the petitioner's affidavit, and a writ was issued by order of the court directing the sheriff of Baltimore city to inquire by a jury "whether the said Jane B. Moore Bristor be so far deprived of her understanding that she is altogether unfit and unable to govern herself or to manage her affairs." A jury of 14 members was impaneled, and, after a prolonged and contested hearing, 12 of the jurors, being a sufficient number under the law (Alexander's Chancery Practice, 224), joined in a finding that Mrs. Bristor was of unsound mind and incapable of the government of herself or the management of her property. After the return of the inquisition to the circuit court, a motion to quash was filed by Mrs. Bristor upon various grounds, of which the only ones necessary to be considered were that the inquisition was tried and heard by the sheriff's deputy and not by the sheriff in person, and that the finding was against the evidence and the weight of the evidence adduced before the jury. A complete stenographic record was kept of all the testimony taken at the inquisition and was filed in the court below as part of the proceedings. Upon the evidence thus presented the court sustained the finding of the jury, confirmed the inquisition, and appointed a committee to assume control of Mrs. Bristor's person and estate. In the oral opinion of the learned judge who passed the decree his conclusion was stated, as to the two specific objections we have mentioned, that the verdict of the jury was correct on the evidence, and that no satisfactory authority had been shown for invalidating the inquisition, on the ground that the sheriff did not personally preside, in view of the long-established practice in Baltimore city for the chief deputy to conduct proceedings of this nature.

[1] The first question we have to determine is whether the decree confirming the inquisition can be reviewed by this court; a motion to dismiss the appeal having been filed on the theory that the action of the court below is final.

Section 107 of the Chancery article (16) of the Code provides: "The court shall have full power and authority, in all cases, to superintend and direct the affairs of persons non compos mentis, both as to the care of their persons and the management of their estates, and may appoint a committee, or a trustee or trustees, for such persons, and may make such orders and decrees respecting their persons and estates as to the court may seem proper."

It is provided by article 5, § 26, of the Code, that: "An appeal shall be allowed from any final decree, or order in the nature of a final decree, passed by a court of equity, by any one or more persons parties to the suit. * * *"

While we have found no instance of an appeal to this court from a decree ratifying an inquisition of lunacy, there are cases in which appeals from orders refusing to supersede inquisitions, where restoration to sanity was claimed, or to rescind the decree of confirmation for alleged irregularity in the proceedings, have been entertained. *Johnson v. Safe Deposit Co.*, 104 Md. 460, 65 Atl. 333; *Greenwade v. Greenwade*, 43 Md. 313; *Royal Arcanum v. Nicholson*, 104 Md. 472, 65 Atl. 320. The only statutory authority under which the right to prosecute such appeals could have existed is that contained in the section last cited. In *Tome v. Stump*, 89 Md. 264, 42 Atl. 902, the right of appeal, under this section, from an order appointing a committee for an habitual drunkard, was distinctly recognized. The power to supersede the inquisition is derived from the same statutory source as the power to set it aside originally. In every such instance the judicial authority described in the section quoted is as "comprehensive as language can make it." *Estate of Dorney*, 59 Md. 69. The court may refuse to issue a commission, even in a case of undoubted insanity, if such refusal appears to be for the best interests of the person affected. *Rebecca Owings Case*, 1 Bland, 293. And the inquisition may be set aside or superseded if the party has been improperly found to be a lunatic. *Alexander's Chancery Practice*, 227, 238. The judgment of the court may be based upon depositions, or the respondent may be discharged after a personal examination. If the court is convinced of the party's sanity, it should not hesitate to supersede or set aside the inquisition. This procedure is independent of the right of the alleged lunatic to traverse the finding and to have the issue as to his sanity determined by a jury of the county upon a trial before the court. *Id.* The controlling question to be determined by the court, upon motion either to quash or to supersede, is whether the person alleged to be of unsound mind is in fact incapable of managing his person or estate. A finding of insanity by the jury is advisory, and is a prerequisite to an adjudication by the court to that effect; but it is not conclusive as against the objection of the party protesting his competency and invoking the court's own judgment upon this vitally important question. We see no reason to doubt that a decree passed in the exercise of such a general authority and jurisdiction is a proper subject of review under the terms of the statute giving the right to any of the parties to a suit to appeal to this court from any final decree of a court of equity.

It is to be observed that the Code, while conferring upon courts of equity general jurisdiction with respect to persons non compos mentis, does not prescribe the method by which the incapacity shall be ascertained. The course of procedure leading up to an adjudication of mental unsoundness remains as it existed, independently of statute, under the English practice, whose origin and theory are fully and clearly discussed in *Hamilton v. Traber*, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258. The decree confirming the inquisition in this case was therefore not passed in pursuance of a special and limited jurisdiction created by statute, and the present question is not affected by the rule that in such proceedings a right of appeal does not exist unless it is specially conferred. *Jackson v. Bennett*, 80 Md. 76, 30 Atl. 612; *Textor v. B. & O. R. R. Co.*, 107 Md. 223, 68 Atl. 493.

The cases in other jurisdictions cited to support the motion to dismiss the appeal were mainly concerned with prescribed statutory procedures which were found not to contemplate any appellate review.

[2] Another preliminary question to be determined is that relating to the conduct of the inquisition by the deputy sheriff. It is conceded that the deputy who presided has held his office for many years and is customarily assigned to duties of this nature under all writs of inquiry. There is nothing in the record to indicate that any objection to his serving in this capacity was made at any time during the progress of the inquisition. For this reason, and in view of the long-established practice in Baltimore city, and in at least one of the counties, as we are informed, to have the sheriff's deputy preside on such occasions, we should be very strongly disposed, even in the absence of authority, to affirm the action of the court below in overruling the objection now under consideration. But we are satisfied upon precedent and principle that the regularity of the proceedings was not affected by the fact that they were conducted by the deputy sheriff. In *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63, an elaborate opinion by Chief Justice Kent discussed the question now presented. In that case a motion was filed to set aside an inquisition on the ground of its execution by the sheriff's deputy. "This," said the learned jurist, "appeared to me upon the argument to be a novel objection; for it has been usual to execute writs of inquiry before the deputy with as little hesitation as before the sheriff. * * * The deputy is an officer coeval in point of antiquity with the sheriff and is recognized in the most ancient statutes. * * * The creation of deputies arose from an impossibility of the sheriff's performing all the duties of his office in person. The powers of the deputy have consequently been ascertained at an early date. The general criterion by which

to test his authority is declared in the case of *Levett v. Farrar*, Cro. Eliz. 294, in which the court said that if a writ is directed to the sheriff by the name of his office, and not by a particular name, and doth not expressly command him to execute it in person, the undersheriff may execute it. * * * There are numerous cases within the circle of the sheriff's duties in which these inquests of office are requisite, and in which no doubt has been entertained that a deputy was competent to summon a jury and take the inquest, although the objection would equally go to every inquest in every possible case. * * * The cases in which the sheriff must personally preside at the inquisition are all special cases in which the writ requires the personal attendance of the sheriff." The writs relating to inquiry of waste and rediseisin are mentioned as instances in which the attendance of the sheriff is commanded in propria persona, and the conclusion is stated that, except in cases where the statute or the writ itself directs the sheriff to attend in person, "there is no case in which a writ of inquiry may not be executed by a deputy." In the present case there is no direction for the execution of the writ by the sheriff personally.

In *Turner v. Holtzman*, 54 Md. 159, 39 Am. Rep. 361, it was held that a deputy sheriff duly appointed possesses such authority as the sheriff himself may exercise.

It is argued that the duty of presiding at an inquisition involves the performance of judicial functions, such as the determination of questions as to the admissibility of evidence, and that such authority cannot be delegated by the sheriff to a subordinate officer. In *Tillotson v. Cheetham*, supra, it was complained that the deputy sheriff who officiated had improperly excluded the testimony of certain witnesses; but the court nevertheless sustained the regularity of the proceedings. It was held that the duties were ministerial, as they required no judicial decision upon the law concluding to a judgment. This principle was referred to with approval in *Obart v. Letson*, 17 N. J. Law, 78, 34 Am. Dec. 182. In *Wroe v. Harris*, 2 Wash. (Va.) 129, where a writ of inquiry was held to have been properly executed by a deputy, it was said: "The inquisition is the finding of the jury, not the judgment of the sheriff. It is returned to the court from whence the writ emanated, and it is there finally decided upon." In the execution of such a writ the practice is for the presiding officer to rule upon objections to the admissibility of evidence. This doubtless involves the exercise of judgment and discrimination, but neither the action of the officer nor the finding of the jury constitutes a final adjudication. The effective disposition of the question of sanity with which the inquiry is concerned is committed to the decree of the court out of which the writ issued, and no one can be deprived of the control of his

person or property upon a charge of lunacy unless the court, after consideration of all objections to the course and result of the investigation, is satisfied that no injustice has been done and that the party is in fact of unsound mind. All the rights of the person whose mental condition is under examination are thus afforded ample protection as against any errors of the officer in charge of the inquisition.

The objection to the proceedings on the ground that the writ was executed by the deputy sheriff was properly overruled.

[3, 4] The evidence upon which the jury reached its conclusion that the appellant was insane must now be considered. In discussing this feature of the case we fully appreciate the fact that the jury had the opportunity to observe the appearance and demeanor of Mrs. Bristol during the protracted hearing and while she was being interrogated as a witness. In many instances this might be an important consideration with a court of review in reaching a conclusion as to whether the jury's finding should be confirmed, but we are not at liberty to give it controlling weight in the case before us because of the presence here of what appears to us to be conclusive evidence of the appellant's competency to care for her person and estate. It is evident from the record that Mrs. Bristol is a woman of exceptional business ability, and it is conceded that there is no occasion to interfere with her personal liberty. The specific charge is that she is afflicted with a mania on the subject of Christian missions, and the present proceeding was induced by her proposal to contribute a portion of her property to that cause. Her estate consists principally of ground rents and produces an annual income estimated to be at least \$4,700. In the letter from which we have quoted she proposed to convey \$1,000 of the rents to the Board of Foreign Missions of the Presbyterian Church and about an equal amount to her son for life with remainder to the same board, and indicated also her intention to make a later disposition of the residue of her estate in favor of home and foreign missions. Deeds were subsequently executed conveying to the church boards representing both missions ground rents having an aggregate annual value of about \$3,000. These conveyances have not been recorded, but are held by the grantees to abide the result of the present litigation. While they dispose of a considerable part of the appellant's property, it is clear that they were not prompted by any insane impulse or delusion, but were executed by her in the gratification of an earnest, intelligent, and generous interest which she has manifested for years in the beneficent objects for which she now desires, as she approaches the close of her life, to make a final provision out of her estate. In determining upon this disposition the record

shows that she has given careful consideration to her own welfare and to that of her son. There is no reason to doubt the correctness of her estimate that the estate she has reserved is ample for their continued support in the manner in which they have been accustomed to live, and the reasons she assigns for not giving her son more than a life interest cannot under the evidence be regarded as irrational.

The testimony is so voluminous that it would be impracticable, even if it were desirable, to discuss it in detail; but a reference to the hypothetical question propounded to Dr. Robert M. Bruns, the only alienist produced by the petitioner for the writ, will afford an illustration of the grounds upon which the theory of insanity was based.

The question begins by describing the subject of the inquiry as a widow of about 70 years of age who has suffered considerable hardship by reason of exposure in her earlier years. It then states that when excited she quotes Scripture. There is nothing in the record to suggest that this recital has any material significance. The next statement is that the person referred to "declares that the newspapers in their efforts to frown down everything of the kind have regarded missions in the same light as if a red flag were waved at a mad dog." The only declaration to this effect which Mrs. Bristol appears to have made occurred in the course of her examination by her son's counsel as a witness before the jury. When describing the purpose of the disposition she had made to the Home Missionary Society as being "for the benefit of friendless orphan children in order that they may get an education in industrial schools," she made use of some such expression as that quoted. There was no inquiry as to whether she had not in fact read in one or more newspapers articles in opposition to the cause in which she was interested, but the expert to whom the question was addressed was expected to assume the contrary and to attribute the statement to an insane delusion. The hypothesis then continues: "She believes without reasonable foundation that since she has attempted to get rid of all or a majority of her property she has been tortured and tormented as if she were a fierce animal." In her impatience and resentment on account of the persecution to which she claimed that she was being subjected in having her sanity questioned and her private affairs made public, the appellant exclaimed in the course of her examination as a witness: "I have been tortured and tormented as if I were a fierce animal." The next assumption is that "she has the delusion, without foundation, that a proceeding to test her mental condition has been instituted and carried on unjustly because one of the counsel for the petitioner is not a Protestant." The appellant had

complained of what she regarded as an unnecessary repetition of questions propounded to her by the counsel for the petitioner, and in the nervous stress of her examination she declared: "There is prejudice at the bottom of this, and that prejudice is clearly shown." Upon being asked for an explanation she referred to the fact that the examining counsel was not a Protestant, and in reply to a further question she stated her belief that she was "having all this" because he was prejudiced. That this statement was due merely to momentary irritation, and did not represent a spirit of unreasoning bigotry, is shown by her later assertion, to which, however, the hypothetical question does not refer, that: "Catholics believe in them (foreign missions) just as much as Protestants, and the noblest specimens of foreign missionaries have been the Jesuits who have opened the veins of their arms and have taken the blood and written their willingness to go to the most forlorn and desolate places on earth, and greatly to their credit." The question next describes the person under consideration as one who "declares that an orderly court proceeding, conducted with proper decorum, is an inquisition of the vilest kind, declares in a court proceeding that she thinks she is in a heathen country, swears without foundation in a court proceeding properly conducted that she has never known one accused of stealing or murder to be treated as she has been." These recitals were intended to refer to the following passages in the appellant's testimony: When pressed as to her disposition of her property, she inquired: "Am I under an inquisition?" And, upon being told by her counsel that it was so called legally, she said: "It is an inquisition of the vilest kind." When it first developed that a copy of her letter from which we have quoted had been somehow obtained by the other side without her knowledge, she exclaimed: "I should think I was in a heathen country!" Later, in complaining of the repetition of a question, she said: "But I have no reason to be asked so many times. I have been in court many times, and I have never known a person, even one brought up for stealing or murder, to be treated as I am." All this shows a high degree of indignation on the part of a nervous woman undergoing the ordeal of an examination which she understood to be predicated upon a charge that she was insane; but such expressions as those just mentioned are entirely too inconsequential to support the inference to which they were directed in the hypothetical statement. The next assumptions in the question are: "She declares that she does not know whether she has made a will or not, and if she has made a will she does not know whether it has been destroyed or not, thinks that her son was murdered when she knows that he died of disease." The appellant's testimony was that she did not know wheth-

er she ever made a will, although she may have made one some time ago, and that, if she did, it was probably destroyed. The reference in the question to the death of another son of the appellant involves a misconception of her testimony. This son, William, died away from home, and his mother insisted that she had been kept in ignorance of his illness, as the result of which she thought that he did not have the care he required. In using the term mentioned in connection with his death, she explained: "When a person is ill and you know they have not absolute necessities and if they keep help from him I call it murder, or very near kin to it." The hypothetical question then concludes: "She swears that her son, of about 40 years of age, is a prey in the hands of a bad woman and a bad man, and cannot say who such persons are, declares, in answer to a question, that her son would do anything at all that was contrary to what she wants, and in her communication written a short time before stated that he was a perfect man, a dutiful son, has considerable means, and lives in a parsimonious style and in a condition much below the average condition in which persons of her means live, seldom goes out alone and then only for a short distance and for a brief period of time, apparently fearing that some harm will happen to her; what would you say was the mental condition of a woman such as I have described?"

There is no attempt in the question to dispute the correctness of the appellant's belief that her son is being imposed upon by designing persons, notwithstanding her inability to identify them, and it does not mention the fact that the criticism of her son to which it refers was made after he had opened her letter to the Missionary Society and had brought his mother into court under an inquisition as to her sanity. The suggestion that she avoids going out because of fear that she may be harmed has no proper support in the evidence. The testimony showed that she lived simply but comfortably, and that she was generous in her donations to relatives. The hypothesis in general is erroneous in presenting out of their proper relation the circumstances supposed to indicate mental incapacity. The *Berry Will Case*, 93 Md. 560, 49 Atl. 401. In reply to the question the alienist said: "She is of unsound mind." His attention was then directed to certain facts mentioned in the testimony of other witnesses, but in our judgment they have not sufficient probative force to require separate discussion. The opinion of the witness as to the appellant's insanity was then reiterated, and its form was described as religious paranoia. He stated that he could not testify merely from his observation of Mrs. Bristor, during the whole of the hearing, that she was deranged, without further examination.

A number of nonexpert witnesses were produced by the petitioner. Some of these expressed the opinion that Mrs. Bristor was not of sound mind. It is not necessary to set forth the results of our investigation as to the sufficiency of the grounds for these expressions because the testimony of other witnesses, who, in our judgment, were in a much better position to form an accurate opinion as to her sanity, has satisfied us that she possesses the requisite capacity to manage her affairs. The real estate brokers with whom she has conducted important and frequent negotiations for a number of years, the bank officials who have come in contact with her weekly for a long period in connection with her financial matters and who have loaned her money on her own name, the lawyer who has attended to her legal business, and the justice of the peace before whom she has brought suits for rents in arrear, all stated unequivocally that she is entirely rational and capable. Their testimony was supplemented by other convincing evidence to the same effect, including that of Dr. J. C. Clarke, superintendent of the Springfield Hospital for the Insane, who made a special and thorough examination of Mrs. Bristor, while the inquisition was pending, to ascertain her mental condition, and whose opinion is positive in favor of her competency. She told Dr. Clarke that she intended to provide for her son, as she would not disinherit her "own flesh and blood," but said that she was carrying out her mother's wish in making the deeds to the missionary societies and that this had been her "life object."

There are other features of the testimony on both sides which were considered of importance by the counsel for the respective parties, but to which we cannot particularly refer without unduly extending this opinion. Upon the evidence as a whole we find no just occasion to deprive the appellant of the control of her estate and thus deny her the privilege of making any provision whatever in support of the great religious and philanthropic enterprises to which she has been so long and consistently devoted.

Decree reversed, with costs, and inquisition quashed.

STATE, to Use of BOUNDS, v. GRAHAM
et al.

(Court of Appeals of Maryland. April 19, 1911.)

1. TRUSTS (§ 387*)—ACTION ON TRUSTEE'S BOND—ALLEGATIONS OF DECLARATION—NATURE OF ACTION.

In a suit by the state, "at the instance and for the use of B.," who was an administrator, on the bond of the trustee of the estate, to recover an overpayment made to the trustee by the administrator in the settlement of his ac-

count, the declaration alleged that the trustee's audit of distribution allowed plaintiff a certain sum, which was "the amount overpaid by the said B. as administrator; * * * that is to say, paid by him as such administrator beyond and above the assets which came into his hands as such administrator," and that the trustee had due notice of the original ratification of the audit, and demand was made before the institution of this suit for payment of the sum "so ordered to be paid to the said B." *Held*, that the equitable plaintiff did not sue as administrator, but as an individual, for the sum audited to him as such by the trustee.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 387.*]

2. JUDGMENT (§ 479*)—COLLATERAL ATTACK—DECRETAL ORDER.

An order ratifying a final audit of a trustee and requiring him to pay a sum to one as an individual, and not as an administrator, is a decretal order, and cannot be collaterally attacked in an action on the trustee's bond to recover such sum, by showing that the sum was ordered to be paid to him as administrator.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 479.*]

3. EXECUTORS AND ADMINISTRATORS (§ 513*)—ACCOUNTING—OVERPAYMENT—RIGHTS OF ADMINISTRATOR.

An administrator may recover as an individual from the realty of an estate an amount overpaid by him in his accounting as administrator, if the payments were properly chargeable against the estate, being subrogated to the rights of the creditors whose claims he has paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2267-2291; Dec. Dig. § 513.*]

Appeal from Circuit Court, Wicomico County.

Action by the State of Maryland, to the use of J. Windsor Bounds, against Robert P. Graham and others. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed, and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTERSON, and URNER, JJ.

Ellegood, Freney & Wailes, for appellant. George W. Bell and Robert P. Graham, for appellees.

BOYD, C. J. A demurrer to the amended declaration filed in this case was sustained by the lower court, and judgment was entered for the defendants for costs. From that judgment this appeal was taken.

The suit was brought in the name of the state, "at the instance and for the use of J. Windsor Bounds," by his attorneys, on a trustee's bond executed by the appellee. The declaration alleges that Mr. Graham was appointed trustee and gave the bond, which is set out in full, and is subject to the usual conditions in bonds of that character; that the trustee became possessed of a large amount of the assets of the trust estate, and distributed the funds among the parties entitled thereto by an audit, which was duly

and finally ratified on the 21st of June, 1906; that by said audit the sum of \$168.69 was audited and allowed to the plaintiff, to be paid by the trustee, and the trustee was ordered by the court to pay said sum, "with the due proportion of interest." It then alleges that said sum was "the amount overpaid by the said J. Windsor Bounds as administrator of Train A. Bounds; that is to say, paid by him as such administrator beyond and above the assets which came to his hands as such administrator;" that the trustee had due and legal notice of the final ratification of the said audit, and demand was made before the bringing of this suit upon him for the payment of said sum "so ordered to be paid to the said J. Windsor Bounds," but the trustee has not paid the same, etc.

We confess that it would be difficult for us to understand upon what ground the demurrer was sustained, but for the brief of the appellees, which, we suppose, states the ground relied on below, as no other is given. It says that the real plaintiff, J. Windsor Bounds, claims that there is audited to him individually the sum of \$168.69, and then claims the same sum as due him as administrator. It is then contended that "the two claims are repugnant and cannot be the same cause of action in the same suit," and it is argued that if Bounds overpaid said sum as administrator he could not recover individually for the overpayment, or proceed against the real estate for the payment of his debt, but it would be a debt owing to him as administrator.

[1, 2] There are two conclusive answers to the contention of the appellees. In the first place, the equitable plaintiff does not claim the sum as administrator, but he sues individually, and alleges that the amount was distributed to him. It was unnecessary to state how the sum became due to the plaintiff, but if it be assumed that Bounds was not entitled to have the money distributed to him individually, because he had made the overpayment as administrator, that would not be an answer to this suit. The narr. distinctly and in terms alleges that it was audited to the plaintiff, who is J. Windsor Bounds, the individual, and not the administrator, that the audit was ratified, and the trustee was ordered by the court to pay the sum to the plaintiff. It was a decretal order of the court, and it is wholly immaterial in this suit on the bond whether or not the circuit court properly allowed it to him individually. It is well settled that that can-

not be questioned in a suit on the bond. The late case of *Ward v. Schlosser*, 111 Md. 528, 75 Atl. 116, distinctly determines that such a decretal order is not open to collateral attack, in a suit on the bond; that the distribution made by such a decretal order is res adjudicata. Judge Burke quoted from *Taylor v. State*, Use of Miller, 73 Md. 221, 20 Atl. 915, 11 L. R. A. 852, where it is said: "When an audit disposing of trust money has been ratified and the trustee has been ordered to pay out the funds as audited, the order as to him and his sureties has the force and effect of an adjudication in rem, and, if he fails to make payment and his bond be put in suit, there are but two questions open for the jury, and these are: Has such an order been passed? Has the money been paid? The court's order ratifying the audit is absolutely binding on the trustee and his sureties, unless reversed on appeal to this court, or revoked on proper proceedings in the court by which it was passed." As the narr. contained the allegations of notice by the trustee of the final ratification of the audit and demand on him, there would seem to be no question about the sufficiency of the narr., under the case of *Ward v. Schlosser* and those cited in it. It would seem to be clear, therefore, that it was immaterial whether the plaintiff could have recovered in his own right the amount overpaid by him as administrator, as the court in which that question should have been raised was the court of equity where the money was distributed.

[3] But there is no doubt about the right of an administrator to recover from the real estate an amount overpaid by him as such administrator, provided, of course, the payments made by him were properly chargeable against the estate of the decedent. The cases of *Gist v. Cockey*, 7 Har. & J. 134, *Collinson v. Owens*, 6 Gill & J. 4, and *Billingslea v. Henry*, 20 Md. 282, fully recognize such right. He is subrogated to the rights of the creditors whose claims he has paid, and it cannot be said that he receives the money as administrator, for if he did he would have to account for it as such. He may be entitled to it because he was administrator, and, as such, in the distribution of the personal estate, paid out more than that estate amounted to, but he is entitled to recover it individually, if the audit shows it was distributed to him by reason of such overpayment. It follows that the judgment must be reversed.

Judgment reversed and new trial awarded, the appellees to pay the costs.

STOVER v. STEFFEY et al.

(Court of Appeals of Maryland. June 22, 1911.)

1. DEDICATION (§§ 15, 44*)—EVIDENCE—INTENT OF PARTIES.

The question of a dedication to the public use depends upon the intention of the parties, irrespective of how it is claimed to be made, and must be shown by clear evidence.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 13, 85-87; Dec. Dig. §§ 15, 44.*]

2. DEDICATION (§ 19*)—PUBLIC PARK—SALE WITH REFERENCE TO PLAT.

The doctrine of implied covenant to dedicate a street, with reference to which platted lots are sold, creates a way only over such land as is contiguous to the lots sold, and until the platted street reaches some other existing street or public way, and the same rule applies to the dedication of land platted as a public park, so that where the platted lots sold with reference to the plat were not adjacent to another lot of the grantor shown on the plat as a "park," but were separated therefrom by other lots and by a street, being over 400 feet from the "park" lot at the nearest point, there was no presumptive dedication of the latter lot as a public park.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 44*)—SUFFICIENCY OF EVIDENCE—PARK.

Evidence held not to show the dedication, as a public park, of a lot shown on a plat, with reference to which lots were sold, as a park.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 44.*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Suit by H. Winter Stover against Elizabeth A. Steffey and another. From a decree in part for complainant, he appeals affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

Charles D. Wagaman, for appellant. C. A. Little, for appellees.

PATTISON, J. Samuel Cost and wife, on the 28th day of October, 1890, conveyed to J. Clarence Lane a tract of land containing 30 acres, more or less, known as the Cost farm, situated immediately outside of and adjacent to the corporate limits of Hagerstown, Washington county, Md., and upon the east side of the turnpike road leading from Hagerstown to Leitersburg. J. Clarence Lane was the only grantee mentioned in said conveyance, but the record discloses that other persons, including James Findlay, one of the appellees, and one Edward P. Steffey, who devised his interest therein to Elizabeth A. Steffey, the other appellee, were interested in said lands and part owners thereof. This land so conveyed unto J. Clarence Lane was thereafter laid out in lots, streets, and alleys, and a plat showing such lots, streets, and alleys, as well as the building line and a portion thereof marked

"Park," was made and placed on the plat record in the office of the clerk of the circuit court for Washington county, although not marked "Filed." Upon the plat was written the following: "Plat No. 1. 'East Park,' Addition to Hagerstown, Md."

On the 15th day of August, 1896, J. Clarence Lane sold and conveyed unto the appellant, H. Winter Stover, plaintiff below, two of said lots fronting on Leitersburg pike, otherwise known as Potomac street. In the deed therefor the lots of land thereby conveyed are referred to as "lots number nine (9) and ten (10) on East Park addition to Hagerstown, as designated on plat of said addition," and in said deed it is provided that "any building erected on said lots or either of them to conform to the building line as shown on said plat and not to be located less than twenty feet from said marginal line."

On the 27th day of July, 1898, J. Clarence Lane conveyed unto James Findlay, one of the defendants in this cause, and to Edward P. Steffey, as tenants in common, by deed dated and recorded as of the last-named date, all that portion of the aforesaid tract or parcel of land which is designated on the said plat as "Park," and also lot No. 17, as designated on said plat. These lots were conveyed subject to the restrictions of the building line appearing upon the plat, which restrictions are set forth in the deed in the words following, to wit: "Provided, however, and this conveyance is upon the condition that no building shall be erected upon the parcel hereby conveyed nearer than twenty five (25) feet to the east marginal line of said North Potomac street or the Leitersburg pike."

The lot of ground designated on the plat as "Park" is adjacent to the line of the Western Maryland Railroad, and situate, lying and being in the northeast corner formed by the intersection of the said railroad and the Leitersburg pike, with the frontage of 227 feet on North Potomac street, and running back with the southward side of Park avenue 370 feet to the west side of Dewey street, 57 feet from the railroad property; thence with the westward side of Dewey street extended to said railroad property; thence with the line of the railroad to the place of beginning. By reason of its location, it is said to be well suited for manufacturing or business purposes.

On the 1st day of July, 1899, J. Clarence Lane filed with the clerk of the circuit court for Washington county another plat of the same land. On this second plat other streets and alleys were laid out, and the bed of Dewey street was thereby changed, it being located on this plat 50 feet nearer Potomac street than upon the original plat; that is to say, the depth of the lots fronting on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dewey street and running back to the alley separating them from the lots fronting on Potomac street was lessened to the extent of 50 feet, and Park avenue was changed to Manilla avenue, and the designation "Park" upon the lot of land lying to the southward of Park or Manilla avenue was removed; the same not appearing upon the second plat. Upon this plat was written the following: "It is not intended by anything herein contained to dedicate any of the streets or alleys mentioned or designated in the plat, or the beds of the same or any part thereof, the streets and alleys being mentioned and designated for the purpose of location and description merely and not for the purpose of dedication, and the fee therein is hereby reserved." While this plat was not filed until July, 1899, the record does not disclose when it was made, but it is shown by the deed from J. Clarence Lane to Findlay and Steffey, dated the 27th day of July, 1898, that Park avenue was at that time known as Manilla avenue, or at least it was so referred to in said deed, and that Dewey street had been changed and relocated on the plat 50 feet nearer Potomac street, thus reducing the depth of this lot conveyed unto Findlay and Steffey, the dimensions of which are given above, from 420 feet, as appearing upon the first plat, to 370, upon the second plat.

In going north from Hagerstown upon the Leitersburg pike or Potomac street, the first lot reached after crossing the railroad is the designated "Park" lot, conveyed as aforesaid to Findlay and Steffey. Then comes Park or Manilla avenue, beyond which are the other designated lots upon Potomac street, commencing with lot No. 17 and ending with lot No. 1, including the lots of the appellee, numbered 9 and 10. It will thus be seen that the designated "Park" lot lies entirely to itself, not adjacent to any of the other lots, and separated from the appellant's lots by Park or Manilla avenue and the seven intervening lots numbering from 11 to 17, both inclusive. Some of these lots were sold and conveyed in the interim between the placing of the plat No. 1 upon the plat record and the filing of the second plat in the office of the clerk of the circuit court for Washington county, while other lots were sold and conveyed after the filing of the second plat, but all were conveyed subject to the building line restrictions alike laid down upon both of said plats. The record discloses that dwelling houses have been erected upon most of the lots so sold, but not upon the appellant's lots, at considerable costs to those erecting the same, and that the location, as a residential section, is now regarded as one of the most desirable in the suburbs of Hagerstown.

At the time of the purchase by Findlay and Steffey of the designated "Park" lot, it was partially inclosed by a part of the fence

that originally inclosed the entire tract of land when a farm; that is to say, the old farm fence still stood upon the front of the lot bordering upon Potomac street, and also on the side thereof binding with the railroad property. This lot of land, since its purchase by J. Clarence Lane, had at times been cultivated, but at the time of its conveyance to the grantees aforesaid it was, as described by one of the witnesses, a weed patch; the weeds thereon being from four to five feet high. On it were also shade trees, at that time 10 or 12 feet tall, which had been planted thereon by J. Clarence Lane, the former owner. Some of these trees were thereafter cut down and displaced by the appellees in the erection of the buildings on said lot. Not long after its purchase, Findlay and Steffey first built on this lot a lumber shed, later a stable, and then followed the erection of other buildings, including an office, built by the appellees about three years before the institution of these proceedings, which was thereafter occupied by them, and at which place they henceforth conducted the lumber, wood, coal, lime, and cement business, and whereat the said business is still conducted.

In the erection of one or more of said buildings, the restrictions as to the building line were disregarded by the appellees; the same being built upon the line of the street and not 25 feet therefrom, as designated by the plat and as required by the deed conveying said lot to the grantees aforesaid. It was because of the violation of said restrictions in the erection of said buildings and because of the use made of said lot by the appellees, whereby its use as a public park was prevented, that the appellant filed his bill in this case, alleging that said lot had been dedicated for park purposes, and that he was entitled to have the same used exclusively for such purposes, and further alleging that the erection of said buildings thereon nearer than 25 feet of the east marginal line of Potomac street or Leitersburg pike and the destruction of the shade trees on said lot and the use and occupation of said lot as above set forth was unwarranted and unlawful under the circumstances stated, and in violation of his rights and asking the court, first, to enjoin the appellees from building on said lot nearer than 20 feet to the east marginal line of Potomac street, and that they be required and directed to remove from the prohibited area any and all buildings standing thereon; second, that they be also enjoined and prohibited from using and occupying said lot of ground for other than park purposes, and that they be required to remove from said lot any and all buildings, lumber, and merchandise of every description thereon.

The learned court below passed an order requiring the defendants to show cause why the injunction should not pass as prayed,

whereupon the defendants answered, to which the plaintiff filed his replication, and the court, after hearing testimony upon the issues thus joined, granted an injunction restraining the defendants from erecting upon the parcel or parcels of land so conveyed unto James Findlay and Edward P. Steffey by the deed of J. Clarence Lane, dated July 27, 1896, any building nearer than 25 feet to the east marginal line of Potomac street, and requiring and directing the said defendants to remove from the said area or space of 25 feet, within 30 days from the service of the injunction, any or all buildings standing thereon. The court, however, denied the relief sought in the prayer of the bill, asking that the defendants be restrained from using or occupying the said designated park lot for other than park purposes, and it is from this order refusing to grant the injunction restraining the defendants from using the designated park lot as it is now being used, or for other than park purposes, that this appeal is taken.

[1] "It has always been held in this state and elsewhere that whether a dedication to the public has been made depends in every case upon the intention of the parties, and this, whether dedication is claimed by acts in pais, by solemn conveyances of record, or by judicial proceedings. And it is also as well settled that such intention to dedicate must be established by clear, satisfactory, and unequivocal testimony." *Harbor Co. v. Smith*, 85 Md. 541, 37 Atl. 27. "The principle of dedication rests largely upon the doctrine of estoppel in pais, and, while there are general rules applicable to certain lines of conduct on the part of the owner of the land, each individual case must, after all, be decided upon its own facts and circumstances." *Baltimore v. Frick*, 82 Md. 83, 33 Atl. 435; *Canton Co. v. Baltimore*, 106 Md. 83, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129.

This court, in the case of *Hawley v. Baltimore*, 33 Md. 270, said: "The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets he thereby dedicates the streets so laid out to public use. The rule is founded on the doctrine of implied covenants, and the dedication will be held to be coextensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he had acquired by virtue of his grant. The doctrine of implied covenants will not be held to create a right of way over all of the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet

opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further."

[2] The question involved in this appeal is not the dedication to public use of the bed of a street, but here we are to ascertain if the designated park lot was dedicated by J. Clarence Lane to the public, to be used by it as a park, through an implied covenant with the grantee, Stover, for it is only upon the theory of an implied covenant for its use as a park, arising from the reference to the plat in the deed, that the grantee, Stover, can claim any interest or privilege in the park. As was said in the case of *Canton Company v. Baltimore*, 106 Md. 86, 66 Atl. 681, 67 Atl. 274, 11 L. R. A. (N. S.) 129: "Although the law relating to the dedication for public use of streets has been settled by numerous decisions of this court, we have seldom been called upon to consider the nature and extent of a dedication of a park to such use when it is so dedicated on a plat of the grantor's land, and reference is made to the plat in deeds conveying portions of the land." In some jurisdictions it is held that the streets mentioned in the deed or laid out on the plat are embraced in the dedication to the full extent that they are owned by the grantor, but, as above stated, this is not the law of this state, and in such jurisdictions they have held that the principle controls with equal force the dedication of parks and other places designated on such plats. This, however, is not held to be the law in other jurisdictions.

In the case of *Light v. Goddard*, 11 Allen (Mass.) 5, which was quoted by this court in the case of *Canton Co. v. Baltimore City*, supra, that court, through Bigelow, C. J., said: "An attempt is made in the present case to extend this rule of interpretation much further than is warranted by any of the adjudicated cases. The plaintiff claims under a deed in which he described the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is designated on the plan as 'Ornamental Grounds' and as 'Play Ground.' The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent thereto, the land granted amounts to a covenant that those

grounds shall forever continue to be appropriated and used for the uses and purposes so designated. We are by no means prepared to adopt as a sound rule of exposition the general proposition on which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent thereto, but lying in the vicinity of that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same, so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant."

[3] The appellant's land, consisting of lots Nos. 9 and 10, as well as the designated park lot, is located on the east side of North Potomac street, but the said land of the appellant is not adjacent or contiguous to the park lot, but is separated therefrom by lots Nos. 11 to 17 both inclusive, and Park avenue or Dewey street. The lots of the appellant at the nearest point are over 400 feet from the park lot. If, therefore, the reasoning of the restrictive principle or rule of law in force in this state, "that the sale of a lot of land calling to bind on an unopened street works a dedication to public use of the street, if it is of the land of the grantor, only until it reaches the next opened or unopened street," were applied, as we think it should be, in cases of this sort where the alleged dedication is for park purposes, we do not think from the facts of this case a dedication of this lot to the public for use as a park should be presumed. The land in this case was never used as a park by the public or by any person, nor was anything done to beautify it or render it suitable or attractive for park purposes, more than to plant a few trees thereon. The original fences were not removed, and at the time of its conveyance to Findlay and Steffey it was in weeds and altogether unattractive and unsuitable for park purposes. The facts in this case, in our opinion, do not establish a dedication by J. Clarence Lane of the lot to public use as a park. A plat showing the lots, streets, and alleys as laid out by Lane, the owner, was made and placed in the office of the clerk of the circuit court, though not marked "Filed." Upon this plat the lot in question was designated "Park." Afterwards, in August, 1896, lots Nos. 9 and 10 were conveyed to the appellants, and in 1898 this designated park lot was conveyed to Findlay and Steffey, and about this time a second plat was made out and in 1899 filed with the clerk of the circuit court. On this plat the park lot was no longer so designated, and upon it is written the announcement by Lane that it was not intended by anything therein contained to

dedicate the streets or alleys designated thereon, and that they were mentioned and designated for the purpose of location and description merely, and that the fee was reserved by him. After this a number of other lots were sold. None of the deeds offered in evidence profess to convey to the grantees any title to, interest in, or use of, said park lot, nor do any of the lots conveyed in said deeds touch or bind on the lot itself. The plat is referred to in the deed, and the fact of the park to be located on the lot was mentioned to the appellant by the agent of Lane at the time of the sale. These facts, it is claimed by the appellant, somewhat influenced him in the purchase of said lots. They, however, when considered with the other facts of the case, controlled and governed by the principal or rule of law that we have quoted, are not, in our opinion, sufficient to establish the dedication of this lot to the public use as a park. Therefore we find no error in the ruling of the court below.

Decree affirmed, with costs to the appellees.

CRICHTON v. STATE.

(Court of Appeals of Maryland. April 5, 1911.)

1. CRIMINAL LAW (§ 1069*)—CERTIORARI—TIME OF TAKING.

Certiorari may be issued before final judgment, for the object of the writ is to stay the exercise of authority by an inferior tribunal until its jurisdiction can be determined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

2. JURY (§ 31*)—RIGHT TO TRIAL BY JURY—JUSTICES OF THE PEACE.

Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, is not invalid because authorizing justices of the peace to try and convict offenders without the intervention of a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

3. JURY (§ 22*)—REGULATION—MOTOR VEHICLES—CRIMES—JUSTICES OF THE PEACE.

Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, provides in section 140p that, if any person shall violate the act, the nearest magistrate or police justice shall have jurisdiction to hear the complaint and impose fine or sentence, but one convicted may appeal to the court having criminal jurisdiction, which shall hear the case de novo. Laws 1906, c. 475, amending Code, art. 52, § 12, provides that justices of the peace, save in the city of Baltimore and three named counties, shall have jurisdiction to determine crimes not punishable by confinement in the penitentiary, and that, if either the state or the accused elects, a jury trial might be had on transfer to the circuit court. Laws 1910 repealed all acts in conflict therewith. *Held*, that Laws 1906 did not govern the trial of offenders prosecuted under Laws 1910, and a party might be summarily tried by the justice.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 22.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. CRIMINAL LAW (§ 1011*)—CERTIORARI— GROUNDS—IRREGULARITIES.

Under Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles and providing for the trial of offenders before justices of the peace, an irregularity in the warrant will not deprive a justice of jurisdiction, and under Code, art. 52, § 12b, as added by Laws 1908, c. 444, warrants may be cured by amendment, and hence a writ of certiorari will not issue for an irregularity in the warrant, as its function is to test the jurisdiction of an inferior court, and not to correct error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. § 1011.*]

5. HIGHWAYS (§ 186*)—REGULATION—MOTOR VEHICLES.

Under Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, the provision in section 140p that offenders shall be tried before the nearest justice of the peace, the difference of only a short distance will not oust the justice first taking jurisdiction, and a warrant issued by a justice need not affirmatively show on its face that he was the nearest in point of actual distance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

6. HIGHWAYS (§ 186*)—REGULATION—MOTOR VEHICLES—WARRANTS.

In a prosecution under Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, and providing in section 140p that the nearest justice shall have jurisdiction, and that, if the party be convicted, he shall indorse on the license certificate the date and particulars of the conviction, which must under section 139 be sent to the commissioner of motor vehicles, who may revoke the operator's license, a warrant merely charging the reckless operation of a car, or that the accused failed to stop when met by C., who gave the lawful signal, should be more specific.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

7. CRIMINAL LAW (§ 1011*)—CERTIORARI— PROCEEDINGS.

Where a criminal prosecution was pending before a justice of the peace, certiorari should not be issued on an ex parte proceeding because of the alleged prejudice or bias of the justice, as, under the Constitution, justices are judicial officers and are presumed to act fairly, and the removal of the case might both be unfair to the justice and bring the administration of the law into disrepute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. § 1011.*]

Appeal from Circuit Court, Charles County; Fillmore Beall, Judge.

Macpherson Crichton was charged in justice court with a violation of the motor vehicles law, and sued out a writ of certiorari from the circuit court. From a judgment quashing the writ of certiorari, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

L. Allison Wilmer, for appellant. Walter D. Eiseman, and Isaac Lobe Straus, Atty. Gen., for the State.

BOYD, C. J. This is an appeal from the action of the lower court in quashing a writ

of certiorari previously issued by its order at the instance of the appellant. The writ was directed to Henry G. Robertson, a justice of the peace for Charles county, who had issued three warrants against the appellant under which he had been apprehended and taken before said justice. Two of the warrants were intended to charge violations of section 140b of article 56 of the Code, title "Licenses," subtitle "Motor Vehicles," as amended by chapter 207, Acts 1910, and the third was for an alleged violation of section 140c of that article, as so amended. The appellant through his attorney demanded a trial by jury, which was denied by the justice, on the ground that justices of the peace had summary jurisdiction to try such cases, and the accused only had the right of trial by jury on appeal from the judgment of the justice in case of conviction. He gave bail for his appearance before the justice on September 14, 1910, for which time the cases were set for trial, but on September 13th the writ of certiorari was ordered and issued.

The grounds relied on by the appellant in this court are that the said justice of the peace was without jurisdiction to hear and determine the cases upon the three warrants for the following reasons, as set out in his brief: "(1) Because of the prayer for a jury trial in each and every case, and on account of the nature of the offenses attempted to be charged in said warrants, coupled with attendant circumstances. (2) Because of the interest of the said justice of the peace as prosecutor, and of his bias against the appellant, as narrated in the petition. (3) Because in none of the three warrants is any offense charged upon which the appellant may be held or for which he can be tried. (4) Because the jurisdiction of the justice of the peace 'as the nearest justice of the peace' does not affirmatively appear from the face of the proceedings, if section 140p of chapter 207 of the Acts of 1910 be held to apply in the cases upon the three warrants."

[1] 1. Before proceeding with the discussion of those reasons, it is proper to say that the motion of the state's attorney for Charles county to dismiss the petition for the writ of certiorari on the ground that there had been no final adjudication of the matters depending before the justice of the peace was properly denied. "Ordinarily, where the writ will lie at all, it should be applied for and be issued before the proceedings have culminated in a judgment, for the chief object of the writ is to stay the exercise of authority by the inferior tribunal until its jurisdiction in the premises can be determined by the superior court," although it will also lie after judgment and even after judgment executed under some circumstances. 2 Poe on Pl. & Pr. § 725.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] 2. It may also be well to remark before considering the particular grounds relied on by the appellant that in the brief filed on his behalf it is said: "It is undisputed, upon the authority of leading Maryland cases, to go no further, that the Legislature may constitutionally 'confer summary jurisdiction upon a justice of the peace to try and convict a party for an offense' of a certain 'minor character'"—citing *State v. Glenn*, 54 Md. 572; *Kane v. State*, 70 Md. 546, 17 Atl. 557; *Danner v. State*, 89 Md. 220, 42 Atl. 965; *Lancaster v. State*, 90 Md. 211, 44 Atl. 1039; *State v. Ward*, 95 Md. 118, 51 Atl. 848. As those decisions and others which might be cited conclusively establish the power of the Legislature of this state to confer jurisdiction upon justices of the peace to hear and determine cases similar to these, especially when the right of appeal is given to courts where jury trials can be had, as is done by this statute, and as that power is not denied, it will be unnecessary for us to further discuss the constitutionality of such a law.

[3] 3. The real question in this connection, which was urged by the appellant, is whether the act of 1910 limited him to an appeal from the judgment of the justice of the peace, if against him, or whether he was not entitled to at once demand a jury trial under the provisions of section 12 of article 52 of the Code, as amended by Acts 1906, c. 475. The language of that section, as amended, is undoubtedly very broad, and, if it stood alone, would have given the appellant the right to at once demand a jury trial, without first having a trial before the justice of the peace. But it must not be forgotten that that section expressly excepts from its operation the justices of the peace in the city of Baltimore and in four of the counties of the state, while the act of 1910 is intended to be, and is, applicable to the whole state. The latter in terms includes Baltimore city, providing that, if any one is taken in custody for violation of any of the provisions of the subtitle of the act in that city, he shall be taken "before the nearest police justice," and then authorizing an appeal to the criminal court of Baltimore in case of conviction. It would seem to be clear that the Legislature did not intend by the act of 1910 that any one arrested in Baltimore city, or in either of the four counties excepted from the operation of section 12 of article 52, should be required to be tried before a justice of the peace, but that any one arrested in any of the other counties could at once demand a jury trial, and thereby avoid a trial before the justice. If it had so intended, it would have been much simpler to have provided that any person arrested in Baltimore city, or in either of the four counties, should be tried as therein provided, and that any one arrested in one of the counties to which section 12 of article 52 is applicable should be tried in accordance with the provisions of that section.

But, in addition to that, section 140p of the act of 1910 provides that, "in case any person shall be taken into custody because of a violation of any of the provisions of this subtitle, he shall forthwith be taken in the counties of this state before the nearest justice of the peace, committing magistrate or police justice, or, if in Baltimore city, before the nearest police justice, and be entitled to an immediate hearing"; and then, after providing for bail in case such hearing cannot then be had, the section continues: "In all complaints of the violation of any of the provisions of this subtitle the justice of the peace, committing magistrate or police justice before whom the alleged offender is taken as aforesaid shall have jurisdiction to hear and determine such complaint and impose the fine or sentence herein provided; but any person so convicted of any offense under this subtitle shall have the right to appeal from the judgment of such justice of the peace, committing magistrate or police justice to the criminal court of Baltimore, if convicted in Baltimore city, or court of criminal jurisdiction of any county in which he may be so convicted, and such court on such appeal shall hear the case de novo." That section only gives the person convicted the right of appeal, while section 12 of article 52 gives either party such right, and also the right to demand a jury trial. There are other provisions which we might refer to, but those already mentioned, together with section 2 of this act of 1910, which says, "That all acts and parts of acts and laws and parts of laws inconsistent herewith or contrary hereto, be and the same are hereby repealed to the extent of such inconsistency," seem to us to show conclusively that it was intended by the Legislature that the provisions of section 140p should be applicable to the entire state, and a person accused of violating the provisions of that act has no right to demand a jury trial, excepting upon appeal from the judgment of the justice. It is difficult to see how the Legislature could have been more explicit in declaring its intention, unless, perhaps, it had said in so many words that section 12 of article 52 should not be deemed applicable to prosecutions for violations of these provisions, which would not only have been unusual, but, as it seems to us, useless. The act of 1910 is the latest expression of the Legislature on the subject, and it is manifest that it intended to embody the entire statutory law on the subject of motor vehicles in that act. When it devoted a section, which covers a page of the printed volume of the laws passed at that session, to the arrest, bail, trial, and appeal of violators of its provisions, the Legislature must be presumed to have intended what we think is sufficiently expressed—that the procedure for the violation of these provisions should be in accordance with what it there specially enacted, and not under a statute which was not in force in Baltimore

and four counties. The appellant was therefore not entitled to the writ of certiorari by reason of the refusal of the justice to grant his demand for a jury trial.

[4] 4. We will next consider the third and fourth reasons given by the appellant, quoted above. It is contended that the warrants do not sufficiently describe the offenses intended to be charged, but if it be conceded that they are not very accurately charged, or even not technically correct, that would not necessarily deprive the justice of jurisdiction, so as to require the court to grant a writ of certiorari. That is not a writ of right. In *Gaither v. Watkins*, 68 Md. 576, 8 Atl. 464, this court through Judge Robinson said: "Now, it was argued that a certiorari ought not to issue in any case where a party has a remedy by appeal or by writ of error. We are not prepared to go to this extent. This much, however, we may say, that, as it is a matter resting in the legal discretion of the court, the writ ought not to be granted in any case where the party has a right of appeal, except for the purpose of testing the jurisdiction of the tribunal below." And in that case, in which it was claimed that the proceedings by the county commissioners were not in accordance with the provisions of the law, after pointing out that the record did not sustain the objections which went to the jurisdiction of the commissioners, the court said: "The county commissioners had then, in our opinion, jurisdiction in regard to the subject-matter, and having jurisdiction, subsequent irregularities in their proceedings, or irregularities on the part of the examiners, were matters to be taken advantage of by way of appeal to the circuit court. Such irregularities in no manner affected their jurisdiction over the subject-matter." In *Weed v. Lewis*, 80 Md. 126, 30 Atl. 610, Judge McSherry, in speaking of a justice of the peace, said: "If having jurisdiction of the subject-matter he subsequently proceeded irregularly or erroneously, this in no manner affected his jurisdiction, and the appropriate and only remedy was by an appeal from his judgment to the circuit court, for which appeal the law makes ample provision"; and concluded his opinion by saying, "as the writ of certiorari will only be issued where it is alleged and appears at least in a prima facie manner that the inferior tribunal is without jurisdiction, the circuit court was right in refusing the writ, and its order will be affirmed." See, also, *Kane v. State*, supra, *Lancaster v. State*, supra, and *Baum v. Warden of Jail*, 110 Md. 583, 73 Atl. 294.

[5] One of the objections urged is that the jurisdiction of the justice of the peace, as the "nearest justice of the peace," does not affirmatively appear upon the face of the proceedings. It is not alleged in the petition, or in any of the proceedings, that Henry G. Robertson was not in point of fact the near-

est justice of the peace, but, as we understand the position of the appellant, he contends that the justice was without jurisdiction because it did not affirmatively appear on the face of the warrants that he was the nearest justice. We cannot assent to such a construction of this statute. In the first place, it evidently contemplates that offenders of the law may be taken into custody without a warrant—indeed, in many cases the law would be useless if that were not so, as the offenders could get out of the state before warrants could be obtained, and, as said in *Kane v. State*, 70 Md. 551, 17 Atl. 558: "Without the power to arrest on view without warrant, it would, in the nature of things, be quite impossible to execute the law with any degree of efficiency." It was intended that, when any one is taken into custody for a violation of the law, he should be taken before a justice who is near where the offense was committed and be entitled to an immediate hearing, as otherwise he might be unnecessarily delayed by being taken before some remote justice. But while the accused is entitled to be taken before and tried by some one who will answer the description of "the nearest justice" within the meaning of the statute, it does not necessarily follow that some other justice cannot issue a warrant for him. It may often happen that it is not known which justice is in point of fact the nearest. The offense may have occurred within a few miles of a number of justices, and some investigation would have to be made as to which was the nearest before a warrant could be issued, if such a strict construction must be placed on the statute as the appellant contends for. The law certainly did not mean that the services of the county or other surveyor were to be called into use, and then the offender was to be arrested on a warrant issued by the one found by him to be nearest, but the object of the law was to have a speedy hearing, and not unnecessarily inconvenience the accused. The provision with reference to "the nearest justice" must have a reasonable interpretation, and not such an unreasonable one as would jeopardize, if not destroy, the value of the statute itself. The object of the provision must be considered, and if some other justice was in point of fact nearer by a few feet, or some small distance which would be immaterial to the accused, it should not oust the jurisdiction of the justice who had issued the warrant.

There can be no reason, so far as the protection of the accused is concerned, for requiring the warrant to state that it was issued by the nearest justice, and, as we have already indicated, we do not deem that necessary. There was a time in this state when warrants issued by justices of the peace were so defective that prosecutions frequently failed by reason thereof, either before the justices or on appeal to the

courts. But by chapter 444, § 12b, Acts 1906, it was provided that "in all criminal cases before justices of the peace, the justice, of his own motion, or on the motion of the state's attorney, may at any time during trial before final judgment amend the information, warrant, his docket entries, names of the offenders or other proceedings in any such cases pending before him," and ample authority is also given to circuit courts to which cases have been removed on applications for jury trials, or, on appeals, to allow such amendments. That statute was recently sustained in *Green v. State*, 113 Md. 451, 77 Atl. 677. It is clear that if any of the objections urged here against these warrants had been made before the justice of the peace, or before the court on appeal, if the case had been tried before the justice and an appeal had been taken, amendments could have been made, if the objections had been deemed well taken, and the prosecutions proceeded with. In saying that, we assume that Mr. Robertson was "the nearest justice" within the meaning of the statute, as it is not claimed in the petition for the certiorari that he was not, but, if he was not, the appellant could have been taken to the one who was, if he so demanded. The justice, in so far as appears from the record, had jurisdiction over the subject-matter and over the appellant, and hence the cases are within the rulings of this court referred to above. Even if it be conceded that there were such defects in the warrants as on their face affected the question of jurisdiction, inasmuch as they could have been corrected by amendment, we are not willing to extend the use of the writ of certiorari so as to permit an accused person, instead of raising the question before the justice or the court on appeal, and, giving an opportunity to have the warrants amended, apply for that writ on the ground that the warrants were defective. Of course, if warrants utterly fail to show any violation of the law, or place a construction on a law which is not justified, there may be ground for the issuing of a writ of certiorari, but when, at most, they only disclose some technical defect in the charge, although it can readily be seen what is intended, and especially when there is an appeal provided, the objection should be made before the justice, or the court on appeal where an amendment can be made, and the writ of certiorari should not be granted merely by reason of such technical defects in the warrants.

[6] It will not be out of place to say that we are of the opinion that, although the lower court was right in quashing the writ of certiorari, the warrants ought to have been more specific than they were. It is true that those in the first two cases follow very closely the language of the statute, and

that even in an indictment for an offense created by statute it is generally sufficient to describe it in the language of the statute (*Stevens v. State*, 89 Md. 689, 43 Atl. 929, and earlier cases there cited), but this is a peculiar statute. By section 140p the justice of the peace or the court, if an appeal is taken, is required to indorse upon or attach to the license certificate the date and particulars of the conviction, if the party is convicted, and by section 139 full records are required to be kept and copies to be sent to the commissioner of motor vehicles, who may, and must under some circumstances, revoke the operator's license. There ought, therefore, to be reasonable certainty as to the grounds for conviction, and the mere charge of operating a motor vehicle "recklessly," without stating in what respect it was reckless, not only gives the accused very little information as to what the precise charge is, but might do him an injustice in the record sent to the commissioner. In a warrant under section 140c, such as that in the third case, it would be better to more closely follow the statute, instead of saying, as that warrant did, "when met by the said William B. S. Chapman," and that the said "Chapman, having given the lawful signal," etc. The statute says that it shall be given "upon approaching," etc., and not when they "met," which might be too late for the operator to stop the automobile, and the statute says what signal shall be given.

[7] 5. The only remaining question to be considered is presented by paragraph 13 of the petition. It alleges "that the said justice of the peace, in the discharge of what it is to be assumed, in fairness to him, he must conceive to be his official duty as an examining magistrate, has been exercising the functions of a prosecuting officer by seeking evidence to aid in the prosecution of your petitioner upon the charge of manslaughter aforesaid; and, as hearing upon that prosecution, he has sought out persons to bring such charges against your petitioner as are made in the three warrants; and, further, he has interested himself, even if he have not taken the initiative, in procuring counsel to assist the state's attorney for Charles county in the prosecution of your petitioner upon the charge of manslaughter aforesaid." The petition shows that the petitioner had been arrested for manslaughter for a death which occurred the same day as that named in these warrants as the result of the deceased being struck by the appellant's automobile. Without deeming it necessary to pass on the sufficiency of those allegations as affecting the jurisdiction of the justice, we are of the opinion that the circuit court properly quashed the writ, as it was improvidently issued, if those allegations were relied on as a ground for its issuance. Jus-

tices of the peace are by our Constitution made part of the judiciary in whom the judicial power of the state is vested (McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465), and, while they are not by that instrument required to be learned in the law and their jurisdiction is limited, they are presumed to act fairly and honestly. If then an application for a certiorari be made on such grounds as those stated above, and no such objection had been made before the justice, he should at least have an opportunity to answer them, and, if he desires, explain them before the case is taken from his control. Although we have said that the writ of certiorari can be granted before judgment, it might do a justice of the peace, or other inferior court, great injustice, and have a tendency to bring the administration of the law into disrepute, to grant that writ on an ex parte proceeding, if it be based on the alleged personal conduct or misconduct of the justice or other inferior court, alleging matters which he had no opportunity to explain or act upon. Of course, if such questions are brought to his attention, made part of the record, and acted on by him, the court to which the application for the writ is made may then be sufficiently informed to enable it to act, and determine whether the matters are such as would be a disqualification or should prevent the inferior court from proceeding further, but where, as in this case, no such question was raised before the justice, and hence was not acted upon by him, he should at least have an opportunity to answer the application for the writ, and an order to show cause should first be passed. So without passing on the sufficiency of those allegations, or intimating our views on the subject, we are of the opinion that, if they could be made the ground for a writ of certiorari, such course as we have indicated should first be adopted, and hence, if the granting of the writ was based on those allegations, it was improvidently issued, and the court properly quashed it. Of course, we do not know that it was issued for such reasons, as other grounds were alleged in the petition, but, having disposed of those other grounds, we only mean to here say that it could not properly have been issued for matters involved in the charges as to the personal conduct of the justice on an ex parte application.

It follows from what we have said that the order quashing the writ of certiorari must be affirmed, and the lower court should remand the cases to the justice of the peace, if the state so requests.

Order affirmed, the appellant to pay the costs.

TYSON et al. v. GEORGE'S CREEK COAL & IRON CO.

(Court of Appeals of Maryland. April 26, 1911.)

1. PRINCIPAL AND AGENT (§ 46*)—REVOCA-TION OF AGENCY—DEATH.

If decedent held property as agent of another, the agency was revoked upon his death; and hence the property would not pass to his administrator.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 74, 75; Dec. Dig. § 46.*]

2. CORPORATIONS (§ 95*)—STOCK CERTIFI-CATES—OWNERSHIP—"AGENT."

Stock certificates issued to "M., Agent," were presumed held by him as agent for another; the word "agent" prima facie not being descriptive personæ.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 95.*]

For other definitions, see Words and Phrases, vol. 1, pp. 262-270; vol. 8, p. 7509.]

3. CORPORATIONS (§ 109*)—STOCK CERTIFI-CATES—LOSS OF CERTIFICATES—EVIDENCE OF OWNERSHIP.

In an action by an administrator to have lost stock certificates, originally issued to decedent as "agent," reissued to the administrator, evidence held not to overcome the presumption arising from the form of the certificate that decedent held the stock for another.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 109.*]

4. CORPORATIONS (§ 109*)—STOCK CERTIFI-CATES—LOSS—BURDEN OF PROOF.

In a proceeding by an administrator to have lost stock certificates, originally issued to decedent as "agent," reissued to the administrator, the corporation was not required to show the name of the principal, whose agent M. was; plaintiff having the burden of showing that decedent owned them in his own right.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 109.*]

5. LIMITATION OF ACTIONS (§ 36*)—TRUSTS—ENFORCEMENT — LIMITATIONS — APPLICATION.

Stock certificates were issued in 1838 to decedent as "agent," without naming the principal, thus raising the presumption of ownership in another, and the stock was so registered on the corporation's books, and remained so. No dividends were ever collected by decedent, and he never did anything to repudiate any trust under which he held the stock. Held, whether the enforcement of a trust is subject to the statute of limitations depends largely upon the character and terms of the trust, and that, in absence of the trust agreement and of any evidence as to the principal and of the facts on which the trust was created, it could not be said that limitations would run against the enforcement of the trust against decedent by the legal owner of the stock.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 36.*]

Appeal from Circuit Court No. 2 of Baltimore City; Henry Stockbridge, Judge.

Suit by Malcolm V. Tyson, administrator of Morris Robinson, deceased, and others, against George's Creek Coal & Iron Company. From a decree in part for the administrator, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

Charles T. Reifsnider and Rufus W. Applegate, for appellants. Bernard Carter, for appellee:

PATTISON, J. The stock ledger of the appellee, the George's Creek Coal & Iron Company, contains, among others, two accounts, one with "Morris Robinson, New York," and one with "Morris Robinson, Agent." The former account discloses that there were issued to him in his individual capacity 354 shares of the stock of the appellee company. Of this number 331 were disposed of by Robinson and reissued to those to whom they had been assigned by him, leaving 23 shares outstanding in his name. These were issued, as shown by the account, 11 shares on October 12, 1837, and 12 shares on June 1, 1838; the certificates therefor being numbered 27 and 88, respectively. The latter account discloses that there were issued to him as *agent* 350 shares of stock. Of these shares 250 were acquired by him from John H. Alexander, at that time the president of the appellee company, and issued to him December 26, 1837, and 100 shares from John Duer, vice president of the American Life Insurance & Trust Company, issued to him September 8, 1838. The account then discloses that 250 shares, the number that he had acquired from John H. Alexander, were, on September 14, 1838, reissued to John H. Alexander, leaving Robinson holding, as agent, only the 100 shares that he had acquired from John Duer; the certificate for the same being numbered 616.

The record discloses that at the time of the issuance of this stock Morris Robinson was cashier of the New York branch of the Bank of the United States, which position it seems he held for a number of years. He later became the first president of the Mutual Life Insurance Company of New York, and died in 1849. Letters of administration upon his estate were granted in New York and an inventory of his property filed, but in it no mention is made of his ownership of the stock of the appellee company above referred to.

No dividends were declared by the company upon its stock before the death of Morris Robinson; in fact, no dividends were declared thereon earlier than 1864, or thereabouts. From that time on dividends were declared at regular intervals until 1903, when they issued a stock dividend of 100 per cent. As the books of the company then showed that the 12 and 11 shares issued to Morris Robinson were still standing in his name, the 23 additional shares issued as a stock dividend upon said 12 and 11 shares were accordingly issued to him in his individual capacity; the certificate therefor (No. 3,628) being withheld by the company. And, as the 100 shares issued to Robinson as agent were still outstanding to him in that capacity, the 100 additional shares issued as a stock dividend thereon were likewise is-

sued to him as agent, the certificate therefor being numbered 3,629, which was also withheld by the company. After the issuance of the stock dividend of 100 per cent., the company thereafter declared dividends, not only upon the original stock issued to Robinson as individual and as agent, but also upon the additional stock issued as stock dividends, and as there was no claimant for such dividends they were retained by the company, and consequently are still unpaid.

In 1909 letters of administration upon the personal estate of Morris Robinson, in Maryland, were granted to Malcolm V. Tyson, the appellant, who, as he testified, made diligent search for the three certificates, Nos. 27, 88, and 616, representing the stock issued to Morris Robinson in his individual capacity and as agent, and failing to find them he caused a notice to be inserted in the Baltimore Sun, giving notice of the loss or destruction of said certificates, and stating that application had been made to the company for the issuance of new certificates of stock in lieu thereof. This advertisement, it seems, brought no information as to the whereabouts of the certificates, whereupon the appellant, as administrator, made written request of the company to issue to him, as administrator of Morris Robinson, deceased, new stock certificates in the place of those which were supposed to be lost or destroyed, and filed with the president of the company a statement of the circumstances of the loss or destruction of said certificates and of his ineffectual efforts to find them. Upon the company declining to issue new certificates in lieu of the old ones, the appellant, as administrator, filed his bill in this case, alleging the facts as we have stated them and asking the court to require the company to issue new certificates of its stock unto him in lieu of those lost or destroyed, and to transfer unto him certificates Nos. 3,628 and 3,629, and to pay over unto him all accrued dividends that may have been earned upon said stock since the death of the said Morris Robinson.

To this bill the appellee answered, admitting the issuance of the stock to Robinson as and in the manner above stated, but requiring proof as to the fact that the decedent, of whom the appellant was administrator, was the Morris Robinson to whom the stock had been issued, as well as other facts therein alleged that were not within its knowledge, and further answering said: "It appears by the stock ledger 'A' of the defendant that there was outstanding, on February 11, 1857, certificate No. 616, for 100 shares of the capital stock of the defendant, dated September 8, 1838, in the name of 'Morris Robinson, Agent,' and there is nothing on the stock ledger to show that said certificate has been transferred from the name of said 'Morris Robinson, Agent.' But the said defendant does not know whether

the said 'Morris Robinson, Agent,' died possessed of or entitled to the said certificate, or any of the shares of stock for which the same was issued, or whether the said certificate still stood in the name of the said 'Morris Robinson, Agent,' at the time of his death; and therefore the defendant does not admit that the said 'Morris Robinson, Agent,' did die so possessed of or entitled to the said shares of stock, or any part thereof, or that, at the time of his death, if he did die, the said certificate of stock stood in his name. That it is advised, and it so avers, that even if the said 'Morris Robinson, Agent,' was still possessed of or entitled, at the time of his death (if he be dead), to the said certificate No. 616, for said 100 shares issued to him on the 8th of September, 1838, and even if the plaintiff was duly appointed by the orphans' court administrator of the personal estate of Morris Robinson, and that the said Morris Robinson is the 'Morris Robinson, New York,' to whom was issued the above-named certificate No. 27 for 11 shares, and certificate No. 88 for 12 shares, of the capital stock of the defendant, nevertheless the plaintiff is not entitled, as such administrator, to any part of the 100 shares for which said certificate No. 616 was issued by this defendant to 'Morris Robinson, Agent,' because said stock did not belong to said Morris Robinson in his individual capacity. Moreover, until the contrary appears, the presumption of law is that the said stock for which said certificate No. 616 was issued did not belong, when it was so issued, to the said Morris Robinson in his individual capacity, but he held it as agent for some owner to whom it did belong, and that such ownership and agency, respectively, continued as long as the said certificate stood in the name of the said 'Morris Robinson, Agent,' and if the said Morris Robinson is dead his agency for the true owner of the said stock terminated at his death."

The answer further alleged that unpaid dividends had accrued to June 27, 1909, upon the shares of stock represented by certificates Nos. 27, 88, and 3,628, issued in the name of Morris Robinson, New York, to the amount of \$7,066.75, and that unpaid dividends had accrued to June 27, 1909, upon the shares of stock represented by certificates Nos. 616 and 3,629, issued in the name of Morris Robinson, agent, to the amount of \$30,725, and that the stock dividends represented by certificates Nos. 3,628 and 3,629 had never been delivered to any person or corporation, and are still in the possession of the defendant company. The answer further alleges that at the time of the filing of the answer, with the exception of said stock ledger, there was in the possession of the defendant no other book of any kind, prior in date to the Baltimore fire, which took place in 1904, relating to the issue or ownership of the above-mentioned capital stock, either that issued to Morris Robinson, New

York, or to Morris Robinson, *agent*; the stock certificate book and other books relating to said stock and its ownership having been destroyed by said fire.

To this answer the general replication was filed, and the learned court below (Judge Stockbridge), after hearing the evidence upon the issues joined and finding thereon that the shares of stock represented by certificates Nos. 27, 88, and 3,628, issued by the appellee company to Morris Robinson, had devolved upon the administrator of the personal estate of Morris Robinson, deceased, and that certificates Nos. 27 and 88 had been lost, decreed: "(1) That the appellee company should issue to the appellant, in his name as administrator of Morris Robinson, deceased, a certificate for 23 shares, to represent the said 11 and 12 shares so lost as aforesaid, and also decreed that the administrator be allowed to transfer unto himself, as administrator, the 23 shares so issued as a stock dividend. (2) And it appearing by the proceedings in this case that none of the dividends heretofore declared by the defendant on, or in respect of, the above-mentioned 11, 12, and 23 shares of said stock have been by said defendant paid to any one, and that the total amount of said dividends declared on said stock up to and including June 27, 1909, being dividends from dividend No. 1 to dividend No. 81, inclusive, is seven thousand and sixty-six and seventy-five hundredths (\$7,066.75) dollars, it is further adjudged, ordered, and decreed that the said plaintiff is entitled to receive from the defendant, and the defendant shall forthwith pay to the plaintiff, the said sum of seven thousand and sixty-six and seventy-five hundredths dollars (\$7,066.75), and the defendant shall pay to the plaintiff all dividends, if any, declared in respect of the above-mentioned shares of stock subsequently to June 27, 1909. (3) And the court being of opinion that there is no sufficient evidence in the case that the 100 shares of the stock of the defendant company, now standing on its books in the name of Morris Robinson, agent, and for which certificate No. 616, dated November 8, 1838, was issued in the name of Morris Robinson, agent, ever belonged to or was the property of the said Morris Robinson in his own right or in his individual capacity, and it appearing from the proceedings that the 100 shares for which the certificate No. 3,629 was made out in the name of Morris Robinson, agent, in the year 1903, was declared as a stock dividend of 100 per cent. on the 100 shares for which certificate No. 616, dated November 8, 1838, was issued in the name of Morris Robinson, agent, and now stands on the books of the company, and the court being of the opinion that the plaintiff has no title to said 200 shares of stock, it is further adjudged, ordered, and decreed that the bill of complaint, so far as the plaintiff seeks thereby to recover said 200 shares of stock and the divi-

dends payable in respect thereof, be and the same is hereby dismissed."

It is from this order or decree dismissing the bill, so far as it seeks to recover the 200 shares of stock issued to Morris Robinson, agent, and the dividends payable in respect thereof, that the administrator has appealed.

By the bill the court is asked: (1) To require the appellee company to issue unto the appellant, as administrator of Morris Robinson, deceased, the 100 shares of stock represented by certificate No. 616 that were issued to Morris Robinson, *agent*; the original certificate having been lost; (2) that certificate No. 3,629, representing the 100 shares issued as a stock dividend upon the 100 shares represented by certificate No. 616, to Morris Robinson, agent, as aforesaid, be transferred to him as administrator of Morris Robinson, deceased; and (3) that the unpaid dividends declared upon all of the said 200 shares of stock be paid over by the appellee company unto him as such administrator.

[1] Should we determine that he, as administrator of Morris Robinson, deceased, is not entitled to have issued to him the 100 shares of stock in lieu of the 100 shares issued to Morris Robinson, agent, represented by the lost certificate No. 616, then it follows that the other relief asked for must be refused him, as his right to such relief is dependent thereon. This demand, made by the administrator, that the stock be issued to him as such administrator in lieu of the stock issued to Morris Robinson, agent, can only be made upon the theory that said stock so issued to Morris Robinson, agent, was his individual property at the time of his death. The inquiry, therefore is, Was this stock the property of Morris Robinson at the time of his death, or was it the property of another for whom he held it as agent? If he held it as agent of another, such agency was revoked by the death of Morris Robinson, and, it not being the property of the decedent, would not pass to his administrator. The stock, when issued, was issued to Robinson as agent, and the books of the company disclose no change in the character of such holding, nor is there any affirmative evidence found in the record that said stock ceased to be held by Robinson in the capacity of agent.

The transactions involving the sale and issuance of this stock occurred more than 70 years ago, and necessarily the evidence in relation thereto is meager. All the parties who participated in such transactions have long since died, and by the great Baltimore fire of 1904 all the books of the company from which we could hope to acquire any information in relation to these transactions, with the exception of the stock ledger, were destroyed. While the stock was issued to him as agent, the record does not disclose the principal for whom he

so held it as agent, nor has any one ever made claim to it as such principal.

[2] It is contended by the appellant that the word "agent," following the name of Morris Robinson, is merely descriptio personæ, and that no presumption arises therefrom that the stock was not his property, or that it was the property of another for whom he was holding it as agent; the appellant contending that the word "agent" might have been added "for some private and undisclosed reason, probably to prevent its being attached under execution, as he may have thought." On the other hand, it is contended by the appellee that as the stock stood in the name of Morris Robinson, agent, the prima facie presumption is that he did not hold the stock in his own right and as his own property, but that he held it on behalf of some principal, and that to entitle his estate to this stock the burden of proof is upon the administrator to show that he (Morris Robinson) did not hold the stock at the time of his death as agent for a principal, but held it as his own individual property.

This court, in the case of Third National Bank of Baltimore v. Lange et al., 51 Md. 144, 34 Am. Rep. 304, in quoting approvingly from the decision of the Supreme Court of Massachusetts, in the case of Shaw v. Spencer and Others, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, in which stock certificates outstanding in the name of E. Carter, trustee, were pledged by the holder as collateral for certain acceptances and indorsed by him, and in which one of the questions presented was whether the word "trustee" was sufficient to put the holders upon inquiry, and thereby affect them with notice of the trust, said: "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this commonwealth." See, also, the cases of Marbury, Trustee, v. Ehlen and Others, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; Swift v. Williams and Moore, Trustees, 68 Md. 255, 11 Atl. 835. Reasoning from the principles laid down in these cases, it would seem clear that the word "agent," added to the name of the party to whom the certificates are issued, is not merely descriptio personæ, but its use raises the presumption that the stock was held by him as agent

for a principal, and not held by him in his own right.

[3] The prima facie presumption that this stock was held by Morris Robinson, not in his own right, but as agent holding it for another, is supported by the facts disclosed by the accounts appearing upon the stock ledger of the appellee company. As has been stated, there are two accounts upon the ledger, one in the name of "Morris Robinson, New York," and the other "Morris Robinson, Agent"; the first appearing upon page 9 and the latter upon page 25. The first account was opened March 4, 1837, as shown by the first item therein contained by which he is credited with one share of stock acquired from Macauley, and on January 29, 1841, he is charged with assigning or disposing of 200 shares to Isaac Lawrence. The account was balanced on January 31, 1857, showing a balance of 23 shares standing in the name of "Morris Robinson, New York." The account of Morris Robinson, *agent*, was opened on December 26, 1837; the first item therein being a credit to him, as such agent, of 250 shares acquired from John H. Alexander. The last item therein is of September 14, 1838, whereby he is charged with the disposition of 250 shares to John H. Alexander. This account, too, was balanced January 31, 1857, showing the number of shares outstanding in the name of Morris Robinson, *agent*, to be 100. It will therefore be seen that these accounts were running along at the same time. The certificates of stock issued to him in his individual capacity were dated October 12, 1837, and June 11, 1838, while it is shown by the ledger that the 250 shares acquired from John H. Alexander and the 100 shares from John Duer, vice president, were issued to Morris Robinson, *agent*, on December 26, 1837, and September 8, 1838, respectively. The order, therefore, of the issuance of such stock to him being: October 12, 1837, 11 shares to Morris Robinson; December 26, 1837, 250 shares to Morris Robinson, *agent*; June 11, 1838, 12 shares to Morris Robinson; September 8, 1838, 100 shares to Morris Robinson, *agent*.

It is shown by a copy of a letter appearing in the record, from Richard Wilson, treasurer of the company, to Morris Robinson, dated September 8, 1838, that the 100 shares of stock acquired from Duer, vice president, were issued to Morris Robinson, *agent*, upon his direction, and so entered on the account of Morris Robinson, *agent*. Why should there have been two accounts, one with Morris Robinson, *New York*, and the other with Morris Robinson, *agent*, if the stock shown thereby to have been issued was to be held by him in the same capacity—that is, was to be held by him in his own right? Why should it have been issued to Morris Robinson, *agent*, upon his own direction, if there was to be no difference in the character of the holding of the stock so is-

sued as agent, and the stock issued to him as Morris Robinson? The only answer thereto is that there was, at that time, a difference in the character of the holdings, and that it was so intended by him. In one case he held it in his own right, and in the other he held it in the right of another, although the principal is not disclosed.

The only other evidence throwing any light upon these transactions is that found in copies of certain letters from John H. Alexander, at that time the president of the appellee company, and Richard Wilson, at that time its treasurer, and one Macauley, a stockholder and agent, employed, as it seems, for the sale of the company's stock, to Morris Robinson, and letters from Morris Robinson to them, written at the time of these transactions and in relation thereto. Some of these copies of letters were made by the president of the appellee company 15 or 16 years ago, from the letters then in his possession, but which have since been destroyed by the fire of 1904, and which copies were placed in the hands of the counsel for the administrator, while other copies were found in the possession of certain of the heirs of Morris Robinson, deceased.

From these letters we are enabled to gather some information concerning the relation existing between Morris Robinson and the appellee company and its officials. This company, incorporated by the General Assembly of Maryland at its session of 1836, was at the time of the issuance of this stock in its infancy, and was in need of money with which to develop its property and operate its mines. Mr. Robinson at this time was the cashier of the New York branch of the great financial institution, the Bank of the United States, and was thereby in a position to render to them great financial assistance. Those interested in the appellee company succeeded in interesting Mr. Robinson in their undertakings in connection therewith. He not only became a stockholder of the company, but, as shown by the correspondence referred to, he largely aided its officials in financing its needs. His advice was also often sought and given in connection with its business management. So early as February, 1838, we find in a letter from Richard Wilson, the treasurer of the company, to him, in which was inclosed a draft for \$9,275, "being the proceeds for certificates for \$10,000," a request that he make "no further negotiations at present with respect to the remaining \$10,000, as we prefer to wait until about the first of May, when I will address you on the subject."

These letters further disclose that upon the sale by Macauley, in Europe, of 4,000 shares of the stock of the company, the money received therefor, amounting to £58,000 in gold, was remitted to this country in two sailing vessels, arriving here at different times. The bills of lading were to the order

of Richard Wilson, treasurer of the George's Creek Coal & Iron Company. Upon the arrival here of the bills of lading, they were indorsed and sent to Morris Robinson, at New York, in letters written by the president and treasurer of said company, in which letters Mr. Robinson was directed to dispose of the gold, and the disposition of the same was left to his good judgment, and in the letter of Mr. Alexander he refers to the fact that Mr. Robinson had mentioned to him that perhaps the United States Bank would take the whole amount. Later more gold was sent from Europe to the company, and this, too, was sent to Mr. Robinson and disposed of by him; the disposition of it being left to his judgment.

The letters also disclose that, in order to make the sale of the 4,000 shares of stock that were sold by Macauley in Europe, it was necessary to have the holders of the stock here surrender 1,300 shares of their holdings. It was therefore agreed by and among them that they contribute this number of shares in proportion to their holdings, and with the understanding that in the surrender thereof they were entitled to have returned to them out of the proceeds of sale thereof the excess over what was agreed upon as needed by the company, but the company refused to pay over any part of such excess to the contributing stockholders until the whole 1,300 shares of stock had been transferred. The transfers were made without any apparent difficulty or trouble, with the exception of those to be made by Patrick Macauley and J. Watson Webb, both of whom lived in New York. It was in relation to these transfers that the services of Morris Robinson were sought and obtained.

The stock of both Macauley and J. Watson Webb had been pledged to the American Life Insurance & Trust Company of New York, and was therefore in its possession at such time and would not be surrendered by them, unless some arrangement was made with the insurance company for its release, and this arrangement and other matters in connection therewith, it seems, were committed to the care and attention of Morris Robinson and Richard Wilson, who were to co-operate in their efforts to accomplish this result. Webb was the owner of 170 shares, all of which had been pledged to the said insurance and trust company to secure an indebtedness of \$1,500, and he was to contribute to the 1,300 shares 27 shares; the same being his proportionate part of such number of shares. It was necessary to obtain the release of at least 27 shares of the number so pledged. The consent of the company was obtained, and certificates Nos. 38 and 39, for 85 shares each, were turned over to Morris Robinson, who, by letter of August 17, 1838, sent them to Wilson, with direction to issue the 143 remaining shares to John Duer, vice president of the said insurance and trust company. The 143 shares were so issued by

the company and the certificates returned to Robinson. Later, on September 8, 1838, Wilson wrote Robinson as follows: "I received your letter of yesterday (September 7th) inclosing certificates for 143 shares G. C. & I. Co. stock in name of Mr. Duer, and I now inclose in place of it, agreeably to your directions, certificates:

No. 616, for 100 shrs. name of Morris Robinson, Agent.

No. 617, for 43 shrs. name of Mr. Duer, vice president A. L. In. & Tr. Co."

The letter of Robinson to Wilson, September 7th, to which Wilson's letter of September 8th is an answer, is not in the record, nor have we any evidence as to its contents, further than can be gathered from the answer of Wilson thereto. From this letter it can be seen that the stock was issued as directed by the letter of Robinson, 100 shares of the same issued to Morris Robinson, *agent*.

We have stated quite fully the contents of these letters for the purpose of showing, as far as can be gathered from them, the relations existing between the company and Robinson; also for the purpose of showing the extent of evidence offered by the plaintiff to rebut the presumption that the stock was held by Robinson as agent for another, and not held by him in his own right. It is shown by these letters that in some of the transactions of the company he was acting for and on its behalf, and in this connection it will be recalled that the account with him as agent, on the stock ledger, discloses that on December 28, 1837, the 250 shares of stock acquired from John H. Alexander, president of the company, were issued to Morris Robinson, *agent*, whether as agent of the company or for whom it is not disclosed, but we find that so early thereafter as September 14, 1838, it was surrendered and reissued to John H. Alexander, president of the company.

[4] The stock ledger further discloses that on January 31, 1857, after the death of Robinson and while John H. Alexander, the president of the company, was still living, and possibly while Wilson was living, although this is not clear from the record, the testimony being that he died in the fifties, the stock was then recognized as outstanding in the name of Robinson, as *agent*. While the testimony may fail to disclose the principal (a burden not placed upon the appellee company), it, nevertheless, utterly fails to overcome the presumption that this stock was held by him as agent for another as principal, or that it was not held by him in his own right.

It is contended, however, on the part of the appellant that the presumption of his not holding the stock in his own right is overcome by the failure of the principal, in the great length of time that has elapsed, to appear and claim it as his own; he contending that by reason of such failure the property should now be recognized and treated as having been the property of the decedent,

Morris Robinson, at the time of his death, and that it, as his property, should pass into the hands of his administrator. We cannot adopt this contention, for we do not think their failure to appear, under all the facts and circumstances of this case, can overcome the presumption of ownership of the stock in another, and, if the property was not the property of Robinson at the time of his death, the principal's failure to appear could not operate so as to vest the same in him.

[5] It is further contended by the appellant that, should the principal, by any appropriate proceeding, assert his or its claim or right, as such, to said stock now outstanding in the name of Morris Robinson, agent, such proceeding would be barred by the statute of limitations, and, although the stock might originally have been held by Morris Robinson as agent of another, that as a result of such bar the stock, so issued to him as agent, became his individual and absolute property. Whether a trust is subject to the statute of limitations is, to say the least, largely dependent upon the character and terms of the trust. In this case we have not before us the agreement or facts upon which the trust or agency was created, showing the exact relations existing between the principal and agent, to aid us in characterizing the trust or agency and in determining whether or not it is subject to the statute of limitations.

In the case of *Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647, cited in the brief of the appellant in support of his contention, Averill, the plaintiff's testator, bought of one Dunham eight shares of the stock of the *Ætna Life Insurance Company*, and to conceal his interest in the stock it remained in the name of Dunham on the books of the company down to the time of his death. The purchase was made in August, 1850. After the refusal of the executors of Dunham to comply with the demands made in March, 1885, by the executors of Averill to issue to them the stock to which they alleged they were entitled under the sale to Averill, the suit was instituted, which resulted in the lower court rendering a judgment against the defendant, ordering them to deliver and transfer to the plaintiffs the stock in controversy, and all dividends thereon received by the defendants or their testator. The Supreme Court of Connecticut, in discussing that case, said: "Here the trust is created by the transactions between the trustee and the cestui que trust. Mr. Dunham owned 21 shares of stock. Of this Mr. Averill purchased 8 shares, which, for reasons of his own, he did not want transferred to himself, but did want them to remain standing in the name of Mr. Dunham and ostensibly his. Hence arose the necessity of the writing of August 14, 1850. The writing was in the nature of a receipt to

furnish evidence, not only of the payment of the \$80 (the cash payment made thereon), but also that, of the 21 shares of the stock standing in Mr. Dunham's name, Mr. Averill was the owner of 8, having paid \$80 therefor and become responsible for the balance of the installments when called in. It contained no agreement as to the future disposition of the stock or the dividends therefrom; that was left where the law left it."

In that case the court held that from the nature or character of the trust it was subject to the statute of limitations, and that from the facts disclosed therein the plaintiff's claim was barred by the statute. That case, however, is very unlike the case before us in many respects. In this case the stock was not issued in the name of Robinson in his own right, as in that case, but issued to him as agent, carrying with it, as we have said, the presumption that the ownership of the stock was in another and not in him. It was so entered upon the books of the company, and so remains to this day, unchanged, serving as a continuous assertion that the stock was not the property of Robinson in his own name, but held by him in the name of another. Here there were no acts of Robinson that could be regarded as a repudiation of the trust; no dividends were ever collected by him, and therefore no refusal or neglect on his part to pay over the same. In that case dividends were regularly collected by Dunham and withheld by him. We cannot, from the facts and circumstances before us in this case, adopt the contention of the appellant and say that such a proceeding as above mentioned would be barred by the statute of limitations. From what we have said, we find no error in the ruling of the court below, and we will therefore affirm its decree.

Decree affirmed, with costs to the appellee.

DOE ex dem. LITTLETON v. ROE et al.

(Superior Court of Delaware. Sussex.
April 20, 1911.)

1. DEEDS (§ 108*)—DELIVERY—RECORD.

A deed takes effect from its delivery, and not from its record; the delivery being essential to complete the conveyance, while the recording of the deed is only essential to maintain its priority in force against subsequent conveyances and incumbrances.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 294-308; Dec. Dig. § 108.*]

2. DEEDS (§ 208*)—DELIVERY—POSSESSION.

Mere possession of a deed by the grantee is not conclusive of its delivery, as the grantee may have received it without the act or intention of delivery on the part of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 627; Dec. Dig. § 208.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. EJECTMENT (§ 9*)—RIGHT OF ACTION—STRENGTH OF TITLE.

Plaintiff in ejectment must recover, if at all, on the strength of his own title, without regard to the strength or weakness of the title of defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.*]

Ejectment by Charles E. Littleton against Josiah C. Johnson. Mistrial.

Action of ejectment (No. 21, February term, 1911). The question of fact involved fully appears in the charge of the court, it being whether the deed of the defendant to the plaintiff, conveying the premises in question, was delivered to the plaintiff to take effect immediately, or was delivered to another to be held until the plaintiff had performed a certain condition, required by the defendant.

Argued before BOYCE and WOOLLEY, JJ.

Robert C. White and James M. Tunnell, for plaintiff. Andrew J. Lynch and John M. Richardson, for defendant.

WOOLLEY, J. (charging the jury). Gentlemen of the Jury: This is an action of ejectment brought by Charles E. Littleton, the plaintiff, against Josiah C. Johnson, the defendant, to recover a tract of land in Broad Creek hundred, in this county, which is now in the possession of the defendant.

In this case there is no controversy about party lines, the dispute being with reference to the whole of a tract of land. The main contention of the plaintiff is that he purchased from the defendant the tract of land in question, and completed the purchase by receiving from the defendant the deed conveying the land to him, the delivery of which was absolute and complete in its nature. The defendant, on the other hand, contends that he made a contract to sell the land to the plaintiff but that the deed was not delivered to take effect immediately, but, on the contrary, it was given to the conveyancer, to be by him held for a period of ten days, during which time the plaintiff was to perform a certain condition, by making payment of a certain sum of money. The issue in this case, therefore, is one of delivery, that is, whether the delivery of the deed, purporting to convey to the plaintiff the title to the premises, was absolute or conditional.

[1] The delivery of a deed is essential to its validity. The recording of a deed is not essential to its validity as between the parties, and is important chiefly to maintain its priority and force against subsequent conveyances and encumbrances. A deed takes effect from its delivery and not from its record, and without a delivery it is void from the beginning.

[2] The mere possession of a deed by the grantee is not conclusive of its delivery, for

he may have received it without the act or intention of delivery on the part of the grantor. Delivery is an act either by the grantor or by another under his direction or with his permission, accompanied with the intention of the grantor that the instrument pass from himself or from his control to the grantee. *Doe ex dem. Guest v. Beeson*, 2 Houst. 264.

From the subsequent admissions and conduct of the grantor with reference to the property intended to be conveyed, as well as from the instrument of conveyance, the grantor's intention of delivery may be gathered and inferred.

[3] A plaintiff in an action of ejectment must recover, if at all, on the strength of his own title, without regard to the strength or weakness of the title of the defendant. Therefore it is the title of plaintiff that is in issue in this case. His title depends upon the validity of the deed under which he makes his claim. The validity of that deed depends upon its delivery, the legal effect of which, so far as to enable the plaintiff to recover, depends upon its absolute or conditional character. If you find that the deed was delivered by Johnson to Littleton absolutely and in completion of their transaction, your verdict should be that: "We find that the defendant is guilty of the trespass and ejectment in the plaintiff's declaration mentioned." If you find that the deed was not delivered at all, or, if delivered, it was delivered upon a condition that it be held by another and withheld from Littleton until a certain condition was by him performed or a certain thing done, then your verdict should be: "We find that the defendant is not guilty," etc.

The jury disagreed.

TRUSTEES OF MUTUAL LOAN ASS'N v. TYRE.

(Superior Court of Delaware. Sussex.
April 18, 1911.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 39*)—FORECLOSURE—NONSUIT.

A nonsuit will not be granted for failure of plaintiff to show that defendant, in an action by a building association to foreclose a mortgage, was a member of the association.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 39.*]

2. ABATEMENT AND REVIVAL (§ 22*)—DISMISSAL AND NONSUIT (§ 53*)—PLEA IN ABATEMENT—NECESSITY.

That plaintiff insolvent loan association had no authority to sue, because the time within which it was authorized by the court to sue had expired, was not ground for a motion for a nonsuit, being matter for plea in abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 148-156; Dec. Dig. § 22;* Dismissal and Nonsuit, Dec. Dig. § 53.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. BUILDING AND LOAN ASSOCIATIONS (§ 8*)
—STOCKHOLDERS—RELATIONS.

The contracts of subscription of stockholders in a building and loan association have the same force as those of stockholders in other corporations.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 8.*]

4. BUILDING AND LOAN ASSOCIATIONS (§ 26*)
—STOCKHOLDERS—NATURE OF RELATION WITH ASSOCIATION.

A stockholder in a building association, by borrowing money, does not alter his relation as stockholder, except that his right to receive profits on the stock is transferred to the association to secure the loan, so that he becomes a debtor of the association; it agreeing to invest the dues and interest it receives from him so that his stock will finally be fully paid, when it must be applied to payment of the loan to him.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 26.*]

5. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—INSOLVENCY—EFFECT ON CONTRACTS.

Insolvency of a building and loan association relieves a stockholder from payment of dues and determines loan contracts; the only thing left to be done being to wind up its affairs, so as to do equity to creditors, debtors, and stockholders.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 63, 80-88; Dec. Dig. § 42.*]

6. BUILDING AND LOAN ASSOCIATIONS (§ 42*)
—INSOLVENCY—RIGHTS OF BORROWERS.

Upon winding up the affairs of an insolvent loan association, a borrower should be charged with the amount of his loan, with legal interest, but should be credited with sums paid as interest on the mortgage according to the rule of partial payments, with the amount of the premium, and any other sums paid on account of the loan, excluding all dues, fines, or payments on account of the stock.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80-88; Dec. Dig. § 42.*]

7. BUILDING AND LOAN ASSOCIATIONS (§ 26*)
—BORROWER—NATURE OF RELATION.

A shareholder in a loan association retains his character as shareholder after he becomes a borrower, though his stock be assigned to the association as collateral for the loan.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 26.*]

8. BUILDING AND LOAN ASSOCIATIONS (§ 38*)
—MORTGAGE—DEBTS SECURED—PAYMENT OF DUES.

A mortgage given to a loan association by a stockholder secures payment of dues upon the stock as well as the debt created by the loan.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 70-73; Dec. Dig. § 38.*]

9. BUILDING AND LOAN ASSOCIATIONS (§ 18*)
—STOCK PAYMENTS—OPERATION—PAYMENT ON MORTGAGE DEBT.

Payments on stock by a borrower from a building association are not ipso facto payments on the mortgage debt pro tanto, even if the stock is assigned as collateral.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 18.*]

10. PAYMENT (§ 41*)—COLLATERAL SECURITIES.

As a rule payments on account of collateral securities are not payments on account of the debt they secure.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 41.*]

11. MORTGAGES (§ 257*)—ASSIGNMENT AFTER MATURITY.

An assignee of a mortgage under an assignment made after maturity of the secured note took it subject to all equities.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 682-687; Dec. Dig. § 257.*]

12. BUILDING AND LOAN ASSOCIATIONS (§ 44*)
—ASSIGNMENT OF MORTGAGE—RIGHTS OF ASSIGNEE.

A building and loan association, which accepted the assignment of a mortgage executed to another association to secure a loan, upon the merger of the latter association with it, assumed by the merger the stock undertaking of the assignor; and upon its insolvency, preventing it from carrying out its contract, it cannot claim any rights which the assignor association could not claim, and hence cannot claim payment of the premium from the mortgagor.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 44.*]

13. MORTGAGES (§ 114*)—ENFORCEMENT—AMOUNT.

A mortgagor can only be charged with the amount actually received under the mortgage, though it was given for a greater sum.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 114.*]

Action by the Trustees of the Mutual Loan Association against James H. Tyre, survivor of Sarah E. Tyre, his wife, and others. Verdict for plaintiffs.

Argued before BOYCE and WOOLLEY, JJ.

Francis H. Hoffecker and C. W. Cullen, for plaintiffs. Andrew J. Lynch and Robert G. Houston, for defendant.

Sci. fa. sur mortgage (No. 25, June term, 1910).

After giving evidence to prove the execution of the mortgage and the nonpayment of the debt secured by it, the plaintiffs rested. Counsel for defendant moved for a nonsuit on the following grounds:

First. That it had not been shown by the plaintiffs that James H. Tyre was a member of the Mutual Loan Association.

Second. That the action was brought when the plaintiffs had no legal status in this court; the second extension of time in which they could bring suit, granted by the Chancellor, having expired on the 22d day of June, 1910, and the third extension of time was not granted until the 13th day of July, 1910, and in the interim between those two times the suit was brought.

WOOLLEY, J. [1] It seems to us that your motion is for a nonsuit on the ground that the plaintiffs have not proved what may be a matter of defense. We cannot grant the motion on that ground.

[2] On the second point the court is satisfied that under the pleas filed in this case,

viz., payment, release, accord and satisfaction, this motion cannot prevail. If your contention is sound in point of law, it could only be reached by plea in abatement going to the right of the party to bring suit.

Therefore we decline the motion for a non-suit.

As proof of the payment of the mortgage debt, the defendant offered in evidence a large number of checks, each being for a sum that aggregated the amount of monthly dues and monthly interest due from himself to the plaintiff association. This tender raised squarely the question of the right of the defendant to have the payment of his dues on stock applied to the credit of and in liquidation of the debt secured by his mortgage.

The question was argued at length upon briefs, and held under advisement from April 14th to April 18th, when the court delivered the following opinion:

WOOLLEY, J. (delivering the opinion of the court). From the evidence and admission of the plaintiff it appears that the Mutual Loan Association and the Workingmen's Loan Association were corporations of the state of Delaware; that the mortgage sued upon was executed by the defendant and his wife on the 19th day of November, 1886, to the Workingmen's Loan Association, to secure the payment of the sum of \$1,000, "at any time within three months from the date thereof" together with lawful interest thereon, payable monthly, and also the sum of \$1, likewise payable monthly, "as and for the monthly installment on each and every of five shares of the capital stock of the said corporation, transferred for money" thereby secured. It further appears that on the 29th of September, 1892, the mortgage was assigned to the Mutual Loan Association, the plaintiff, for the recited consideration of \$1,000, with which association the Workingmen's Loan Association became merged or associated; that before the assignment of the mortgage the defendant and his wife made monthly payments to the Workingmen's Loan Association of \$10 for interest and dues, as provided in the mortgage, and after the assignment and until the 18th of October, 1898, they made like monthly payments to the Mutual Loan Association, in each case making remittances to George R. Maris, who was the secretary of each association; that on the 22d day of June, 1902, the Mutual Loan Association became insolvent and was dissolved. The plaintiff admits that the obligation of the mortgage respecting the payment of interest and dues was fulfilled to the two associations until the 18th day of October, 1898, and that the defendant, while originally a subscriber for five shares of the stock of the Workingmen's Loan Association, was by the merger or relation of the two associations entitled to the benefits of a like number of shares in the Mutual Loan Association, upon the maturity

of which, if the association had continued, the obligation of the mortgagor would have been canceled. The plaintiff claims that the dissolution of the Mutual Loan Association, because of its insolvency, made the principal debt secured by the mortgage at once due and payable, and that there is now due thereon the principal sum of \$1,000, with lawful interest thereon from the 18th of October, 1898, the date of the last interest payment, to the 22d day of June, 1902, the date of the dissolution of the association.

The defendant states that he is prepared to show that he bid a very considerable premium for the money loaned him by the association and which is embraced within the principal debt of \$1,000 recited in the mortgage, and offers to show, by a tender of checks in evidence, that on account of the loan transaction he has made 144 payments of \$10 each, which, after deducting a fine, aggregate \$1,438.10, and that he has therefore paid and discharged the entire principal and interest due upon the mortgage.

It is shown by the mortgage, as well as by the admission of the defendant, that of each monthly payment of \$10, \$5 was paid as interest upon the debt secured by the mortgage and \$5 as dues upon five shares of stock of the association, owned by one of the mortgagors and assigned to the association as collateral.

The tender of the checks as evidence of payment by the defendant of the obligation of the mortgage suggests two questions: First, the status of a borrowing stockholder of a loan association when the association is dissolved before its stock is matured; and, second, the right of a borrowing stockholder, in such a situation, to have his obligation to the association credited with the dues paid by him on his shares of stock.

[3] Building and loan associations are corporations that deal in money. They are distinguished from other corporations that deal in money chiefly in the theory of their financial operations; and the theory of their financial operations, in its original conception, differs chiefly from that of other money corporations in that the full payment upon the subscription to the capital stock is completed at the end instead of the beginning of their business. Stockholders in a building and loan association, however, bear the same relation to their corporation and enter into contracts of subscription of the same force and obligation as do stockholders in other corporations.

[4, 5] When a stockholder borrows money from the association of which he is a member, his contract of stock subscription is not altered and his position as stockholder is not changed, except as his right to receive the profits upon his stock is transferred to the association to secure the payment of the money borrowed. He assumes not a changed but another relation to the association,

and becomes a debtor as well as a stockholder. He therefore has dual relations with the association, because he has made two contracts, one to pay dues upon his stock and the other to pay interest on his loan. The undertaking of the association to him is to so invest the dues and interest it receives, in common with those received from others, that his stock eventually will become fully paid, and when fully paid will be applied in cancellation of his debt for the money borrowed. This is the consideration that induces the stock subscription. The solvency of the association is essential to its performance, and its insolvency defeats its performance and puts an end to the operations of the association. It likewise ends the contract of the stockholder in so far as he is relieved of the further payment of dues, and determines contracts for money borrowed, and nothing remains but to wind up the association in such a manner as to do equity to its creditors, its debtors and its stockholders.

[6] What constitutes an equitable adjustment of the assets and liabilities of an insolvent building and loan association, when the relative rights of stockholders of different classes are considered, or the conflicting claims of borrowing and nonborrowing stockholders are to be determined, as in this case, has been the subject of much dispute and some difference of opinion. There appear to be three views upon the subject. The first is that the relation between the association and a borrowing shareholder, who has given his obligation for an amount equal to the sum borrowed and the premium bid, is changed by the circumstance of insolvency to the relation subsisting between an ordinary creditor and debtor, and that the borrowing shareholder is to be charged with the amount actually received by him, with interest at the legal rate and credited with all payments made, whether by way of dues, interest or premium, according to the rule of partial payments. The second view is that the borrowing shareholder is entitled to credit upon his loan for the amount of interest and premium paid by him, but is not entitled to have the amount of the dues paid by him on account of stock credited upon the loan. The third view differs from the second in that, instead of crediting the borrowing shareholder with the whole premium, it credits him only with the part estimated as unearned. The authorities all agree that the borrower should be charged with the amount loaned him, with interest at the rate fixed by law (6 Cyc. 155, 156), and the authorities, by a clear weight, reject the enforcement of any part of the premium, the principal and remaining point in dispute being the application of dues paid on stock to the discharge of an obligation for money borrowed.

Upon this question we have a decision in our own state which we think rules this

case. In the matter of the Mechanics' Loan Association, heard by Chancellor Nicholson in 1904, upon the report of T. Bayard Heisel, master, it was decided that, in case of the insolvency of a loan association, dues paid upon stock should not be credited upon the obligation for money borrowed, following the law as declared by Mr. Justice Paxon in *Strohen v. Franklin Savings & Loan Association*, 115 Pa. 273, 278, 8 Atl. 843, and in the later case of *Coltrane v. Blake*, 113 Fed. 785, 51 C. C. A. 457.

[7, 8] From these cases, as from others cited by counsel in their very thorough and helpful argument, it appears that the relative rights of borrowing and nonborrowing shareholders in the adjustment of the affairs of an insolvent loan association depend largely upon their status in relation to the association. It further appears that their status is determined by the character of their contract or contracts. One who enters into the contract of a shareholder retains the status of a shareholder whether he thereafter becomes a borrower or not, and if he becomes a borrower, his character as shareholder is not blended with that of borrower, but remains separate and distinct, although his stock may be assigned to the association as collateral for the loan. Primarily, the mortgage given for a loan pledges the property thereby secured for the payment of the dues upon the stock as well as the debt created by the loan, while stock is issued upon a contract of subscription that is silent as to an obligation for money borrowed, and has no relation to such an obligation except as it may thereafter be assigned as collateral to secure its payment. In subscribing for stock in a loan association, each stockholder partakes of the adventure with the hope of profit, and each takes the same hazard and risks the same money in seeking that profit, whether he be a nonborrowing stockholder who first pays his dues and then gets his profits, or a borrowing stockholder who by a loan first takes his profits and then pays his dues with the hope that upon the maturity of his stock his obligation will be returned to him canceled.

[9, 10] Equality of opportunity carries equality of responsibility, and if loss instead of profit comes, it is difficult to see why a nonborrowing stockholder should yield a part of his property to reimburse his equally unfortunate fellow stockholder who happened to be a debtor to the association for money borrowed from it. The stock status of each being the same, it is therefore held by the weight of authority, that payments on stock are not ipso facto payments on a mortgage debt and that dues paid on stock do not ipso facto work a pro tanto extinguishment of the mortgage (*Link v. G. B. Ass'n*, 89 Pa. 15), even when assigned as collateral (*Economy B. Ass'n v. Hungerbushler*, 93 Pa. 258), for it is a general doctrine of the law

that payments on account of collaterals are not payments on account of the debt they secure (*Lord v. Ocean Bank*, 20 Pa. 386, 59 Am. Dec. 728).

[11, 12] As preferences without equities should be given to neither class of stockholders, the borrowing stockholder should not yield for the benefit of his nonborrowing fellow, the advantage of the premium he bid for his loan, when by the dissolution of the association his stock can not mature to cancel it. True it is, the premium that was bid to obtain the loan in this case, was bid to the Workingmen's Loan Association and is included in the real debt of \$1,000 recited in the mortgage, but the Mutual Loan Association took the assignment of the mortgage after the date of payment, stated in the mortgage to be three months after date, and taking it after maturity, it took it subject to its equities. At all events the Mutual Loan Association in accepting the assignment of the mortgage, assumed by merger the stock undertaking of the Workingmen's Loan Association, and failing in that undertaking is in no better position than if the default had been that of the Workingmen's Loan Association in the first instance. Upon its insolvency and default, it cannot claim payment of the premium.

The court will admit testimony of the amount of premium paid by the defendant in securing the loan represented by the mortgage, and will admit in evidence the checks offered by the defendant with the qualification that they be offered and received so as to show only the money paid by the defendant as interest on the mortgage and not as dues on the stock. This testimony is admitted in support of the rule laid down in the case of the Mechanics' Loan Association, *supra*, and which in principle will be applied in this case, namely, that the plaintiff association being insolvent and dissolved, the amount due from the defendant as an advanced or borrowing stockholder is to be ascertained by charging him with the actual amount received by him from the Workingmen's Loan Association, with interest thereon at the rate of 6 per centum per annum from the 19th day of November, 1886, being the date of the loan, to the 22d day of June, 1902, being the date of the dissolution of the Mutual Loan Association; and by crediting him with all sums paid by him as interest, on the mortgage, according to the rule of partial payments, and by crediting him with such other sum or sums, if any, that he may have paid solely on account of the loan or advance, excluding all dues, fines or other payments made on account of stock.

The defendant rested and the plaintiffs moved for binding instructions.

WOOLLEY, J. (charging the jury). Gentlemen of the Jury: There is in this case neither controversy nor dispute as to the facts, the questions and issues involved having resolved themselves into questions and issues of law which the court has already passed upon in rendering an opinion upon the evidence. It, therefore, becomes our duty to instruct you to bring in a verdict for the plaintiffs.

[13] In ascertaining the amount of your verdict, we will state that the mortgage was given on November 19, 1886, that although it was given for \$1,000, the defendant can be charged only with the amount which he received, which was \$925.65. Of that amount he received from the association the sum of \$483.85 on December 3, 1886, and the sum of \$441.80 on March 23, 1887, aggregating the sum of \$925. The defendant should be charged with that aggregate sum, with interest on the two amounts from the dates upon which they were respectively received until the date of the dissolution of the Mutual Loan Association on June 22, 1902.

Having ascertained that total, the defendant is to be credited with 144 payments of \$5 each, beginning on the nineteenth of December, 1886, calculated upon the principle of partial payments, and whatever balance you find should be returned by you as the amount of your verdict.

Verdict for plaintiffs for \$1,006.54.

MOYER et al. v. RENTSCHLER.

(Supreme Court of Pennsylvania. May 17, 1911.)

WILLS (§ 597*)—CONSTRUCTION—NATURE OF ESTATE.

Testatrix devised all real estate to her grandsons, they to receive all her property "share and share alike with the desire and wishes that they are to take good care of the same until the time of their death," and directed that, after the death of her grandsons, "said property is then to descend or go into the possession of their children, * * * provided they have some." The grandsons had no children at the date of the will, but had children living at the time of testatrix's death. *Held*, that the grandsons took a fee-simple estate in the realty.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 597.*]

Appeal from Court of Common Pleas, Berks County.

Bill by William D. Moyer and Oscar A. Moyer against John F. Rentschler. Judgment for plaintiffs, and defendant appeals. Affirmed.

Case stated to determine marketable title to real estate. It appeared from the case stated that plaintiffs were the grandsons of Veronica Klahr, and that they had agreed to sell the real estate in question to John F.

Rentschler, the defendant. Endlich, P. J., filed the following opinion:

"By her will Veronica Klahr gave to her grandsons, William D. and Oscar A. Moyer, all her realty and personalty, adding that they 'are to receive all my property, both personal and real estate, share and share alike, with the desire and wishes that they are to take good care of the same until the time of their death.' In the next paragraph she says: 'After the death of my grandsons, as aforesaid, said property is then to descend or go into possession of their children, * * * provided they have some.' They had none at the date of the will, but did have children living at the time of the testatrix's death. The question submitted is whether the grandsons took a fee simple in the realty or not.

"The words, 'I do hereby bequeath and devise all my real estate and personal property * * * unto my two grandsons,' certainly import an absolute gift, not to be restrained by the precatory language superadded to it. *Boyle v. Boyle*, 152 Pa. 108, 25 Atl. 494, 34 Am. St. Rep. 629; *Bellas's Est.*, 176 Pa. 122, 34 Atl. 1003. What, if anything, is the effect upon it of the succeeding paragraph above quoted? That question seems to be ruled by *Potts v. Kline*, 174 Pa. 513, 34 Atl. 192. Doubtless, the word 'children' is ordinarily a word of purchase; so that the direction that at the death of the first takers the estate is to go to their 'children' may be regarded as evincing an intent that the first takers are to have a life estate only. *Oyster v. Oyster*, 100 Pa. 538, 45 Am. Rep. 388. But it may be construed as a word of limitation, if the language of the will so requires. Any form of words sufficient to show that the remainder is to go by way of descent to those whom the law points out as the general or lineal heirs of the first takers will enlarge their estate for life to an estate tail by implication, a fee simple under our statute. *Pifer v. Locke*, 206 Pa. 616, 55 Atl. 790. It is to be observed that here there is no gift over, should there be no children. Manifestly the gift to them was intended to include the whole line of succession. Moreover, the estate is to 'descend' to them. Under *Haldeman v. Haldeman*, 40 Pa. 29, and other cases, this phrase indicates the character in which they are to take, viz., by inheritance from their parents, and not as a new stock, and thus points to the first takers as vested with an estate of inheritance and to the construction of the word 'children' as a word of limitation.

"It is argued that this effect of the term 'descend' is destroyed by the addition, 'or (i. e., that is to say) go into possession.' But to 'descend and go' is the language passed upon in *Haldeman v. Haldeman*, 40 Pa. 29, and there would appear to be no room

for a decisive distinction between the two forms of expression. It cannot be considered that the phrase 'descend or go into possession' means anything else than 'descend and go to.' Both signify that the estate is to become the property of the persons designated. We have, then, in this will an absolute gift to the grandsons, followed by language which, properly interpreted, confirms the fee-simple estate originally given, but which, in no view, can be regarded as effective to destroy it. It is settled by many decisions, in part enumerated in *Hiestand v. Meyer*, 150 Pa. 501, 505, 24 Atl. 749, and followed in *Jeremy's Est.*, 178 Pa. 477, 35 Atl. 847; *Yost v. Insurance Co.*, 179 Pa. 381, 36 Atl. 317, 57 Am. St. Rep. 604; *Cassidy's Est.*, 224 Pa. 199, 73 Atl. 204, and other cases, that where there is a clear gift in a will it is not to be treated as cut down by a subsequent provision not equally clearly and necessarily manifesting a purpose so to do.

"It follows upon every ground that under the will of Veronica Klahr the plaintiffs have a fee-simple estate in the realty left by her and involved in this action, and that therefore, according to the stipulation of the case stated, they are entitled to judgment. And now, June 25, 1910, judgment is directed to be entered upon the case stated in favor of plaintiffs and against defendant for \$2,-278.80."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Frank S. Livingood, for appellant. John M. Frame and Charles K. Derr, for appellees.

PER CURIAM. The judgment is affirmed, on the opinion of the learned president judge of the common pleas.

KAUFMAN et al. v. NATIONAL LUMBER INS. CO.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. APPEAL AND ERROR (§ 663*)—RECORD—CONCLUSIVENESS.

Where an assignment of error complained that a point submitted was not answered, and the court files a certificate that it was affirmed, and it is not controverted by appellant, the court will not consider the assignment, if it was substantially covered by the general charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

2. APPEAL AND ERROR (§ 970*)—REVIEW—DISCRETION OF COURT.

The discretion of the trial court in refusing to admit in evidence photographs of the locus in quo will not be disturbed, where the evidence was objected to on the ground that the photographs were taken by an amateur and that the jury had personally visited the ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. APPEAL AND ERROR (§ 743*)—ASSIGNMENTS OF ERROR—EXECUTION OF EVIDENCE—REVIEW.

An assignment of error relating to the refusal of certain evidence will not be reviewed, where appellant failed in the assignment to refer to the page of the paper book where the evidence was found, as required by rule 31.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.*]

Appeal from Court of Common Pleas, Bradford County.

Action by M. Kaufman and C. Obenauer against the National Lumber Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fanning, P. J., in refusing judgment for the defendant non obstante veredicto, filed the following opinion:

"Plaintiffs purchased a quantity of timber in Wysox township of C. S. Jakway, and caused the same to be manufactured into lumber. Insurance * * * was procured thereon January 5, 1910, in the National Lumber Insurance Company of Buffalo, N. Y., 'for a period of three months from the 6th day of January, 1910, at noon, to the 6th day of April, at noon, to an amount not exceeding three thousand dollars, upon the said plaintiff's stock of sawed lumber while piled in field on easterly side of road from Gillette bridge to Mercur on Jakway farm in Wysox township, Bradford county, Pennsylvania,' which said lumber, consisting of hemlock, ash, birch, beech, basswood, and maple, and a small amount of chestnut aggregating 151,000 feet, with a market value, as claimed, of \$3,400, was on March 23, 1910, totally destroyed by fire. No question is raised as to notice, proofs of loss, or other preliminary requirements. The principal grounds of defense interposed are: First, that the lumber was not located easterly of the highway leading to Mercur on lands of C. S. Jakway, as set forth in the policy; and, second, that the same was piled in the woods, and not in a field.

"There are two highways leading from Gillette bridge to Mercur—one passing by the Jakway farm buildings, through his improved lands, and coming out at the four corners at Mercur, where there is located a blacksmith shop, store, post office, and dwellings; and the other easterly of which the lumber was piled, also leading to Mercur, but intersecting the state road about one-half mile west of that place. The court could not hold as a matter of law to which road reference was made in the description, even though the first in some particulars seemed to answer more closely the requirements. It was urged that we were requested to charge that if Jakway owned no field on the road, on the east side of which this lumber was piled, the plaintiff could not recover. We understand this request to

mean, and it was urged in the argument, that to meet the requirements of the description the cleared field must come up to and be immediately adjacent to or abutting on the highway. We do not so understand the wording of the policy. If there was a field easterly of the highway, answering the description, even though not abutting, the requirement in that respect would be met. The question whether the highway easterly of which the lumber was piled accorded with the description and was the one designated in the policy was, we think, under all the evidence for the jury to determine. There was testimony that a portion of the lumber piles, varying from a few inches to about one-half of the space occupied by the lumber, projected over on lands of one Gorslina. With reference to this there was a conflict of testimony, and the question of the location of the lumber with reference to the line, if material, was for the jury.

"Relative to the reasons for a new trial, because of the exclusion of the defendant's offer to prove that lumber piled in the woods, brush, or slashing would not have been insured, or was a prohibited risk, would merit serious consideration, but for the fact that in the general charge, and in answer to defendant's points, the court unequivocally instructed the jury if the lumber was so located the plaintiff could not recover. The use of the general term 'field' in the policy was indefinite. Numerous witnesses familiar with the situation described minutely the location of the lumber and character of the surroundings, and the jury were allowed the opportunity of determining this important question by personally viewing the locus in quo. Under the circumstances disclosed we do not feel justified in holding that the conclusion reached by the jury was not warranted by the evidence.

"The rule for judgment non obstante veredicto is discharged, and rule for judgment on the verdict of the jury made absolute, and judgment is directed to be entered thereon."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

Wm. Maxwell and Potter & Potter, for appellant. Rodney A. Mercur, David E. Kaufman, and Lilley & Wilson, for appellees.

MOSCHZISKER, J. The opinion of the court below states the material facts in this case, and adequately covers all of the questions raised by the first, second, third, fifth, sixth, and seventh specifications of error. It is sufficient to say that we see no merit in any of these assignments. They are all overruled.

[1] The fourth specification complains that the court below failed to answer one of the points for charge submitted by the defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ant. Although the record does not contain any reply to the point in question, the trial judge has filed a certificate to the effect that the request was actually affirmed by him. The fact thus certified to is not combated by counsel for the appellant. They simply stand upon the record as sent to this court. It is not necessary to consider this assignment, further than to say that, so far as the defendant was entitled to have the point answered, it was substantially covered in the general charge. Under the circumstances the assignment will not be sustained.

[2] The eighth specification calls attention to the refusal to admit in evidence certain photographs of the locus in quo offered by the defense. The offer was objected to on the ground that the pictures were taken by an inexperienced amateur photographer, that they were not taken with care, and, further, that since the jurors had personally visited the ground, and observed the conditions themselves, the photographs were unnecessary for a proper understanding of the case. This was a matter peculiarly for the trial judge to pass upon in the exercise of his discretion. The assignment is overruled.

[3] The ninth specification goes to the refusal to admit certain evidence offered by the defense for the purpose of showing that the plaintiffs were not the "unconditional and sole owners of the property in dispute." The offer was objected to for several reasons, one of which was: "The defendant, having based his defense specifically upon other grounds, is estopped to set up the one claimed in the offer." This specification as printed in the paper book is in violation of our rule 31, which provides: "When the error assigned is to the admission or rejection of evidence, the specification must quote the questions or offers, * * * together with a reference to the page of the paper book where the matter may be found in its regular order in the printed evidence or notes of trial. * * * Any assignment of error not according to this rule will be disregarded." The appellant fails to give a reference to the page where the matter may be found in the printed evidence. When it is considered that each justice of this court is obliged to examine about 400 sets of paper books during the course of a court year, it will readily be seen that the rule is a highly necessary and important one, which the profession must regard. This faulty specification will not be ruled upon, but in passing we will say that we are not at all convinced that the trial judge fell into error in making the ruling complained of. *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. 346, 22 Atl. 665, 27 Am. St. Rep. 703.

In considering the various assignments we have not overlooked the terms of the policy, particularly the provision that the property

insured was not to be located elsewhere than in the field referred to in the contract, and we have given consideration to the contention of the appellant that the lumber was not piled in a "field." But we are satisfied that the question of the situation, and whether or not the place could be properly termed a field, were both for the jury, and that they were correctly submitted.

The judgment of the court below is affirmed.

URBAN v. FOCHT.

(Supreme Court of Pennsylvania. May 17, 1911.)

NEGLIGENCE (§ 32*)—INJURIES TO LICENSEE.

Where a building contractor erected an elevator for the use of his employes, and an employe of a subcontractor, who was not intended to use it, was injured by its fall, he could not recover therefor against the contractor, though he used it by the permission of the contractor's foreman; plaintiff being but a mere licensee.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

Appeal from Court of Common Pleas, Berks County.

Action by Charles E. Urban, by his next friend, Clemens Urban, against Levi H. Focht. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Trespass to recover damages for personal injuries. At the trial the court entered a compulsory nonsuit, which it subsequently refused to take off; Endlich, P. J., filing the following opinion:

"The Colonial Trust Company contracted with defendant for the erection of a building, which involved certain work subsequently, by mutual consent, taken out of his hands and given to another party, who engaged the firm of Remppis & Co. to perform a part of it. In the course of its performance by this firm, the plaintiff, one of its employes, was injured while using an elevator constructed and operated by the defendant in the prosecution of the work done by him for the use of his employes. The occasion for this was the circumstance that a rope and pulley used by Remppis & Co.'s men for hoisting bolts to the upper floors had been drawn up, because the bricklayers had laid boards across the beams, loaded with brick and interfering with the manipulation of the rope. For the purpose of themselves getting to the upper floors, Remppis & Co.'s men had been in the habit of using ladders, available for that purpose at the time of the accident. Permission was given plaintiff at his request by defendant's foreman to use the elevator in this instance to take up the bolts. It was designed only to raise materials. But there is testimony that in order to take up the bolts it was necessary for some one to go

along to hold them in position. There were several loaded wheelbarrows on the elevator at the time. Three of Remppis & Co.'s men got on with the bolts. When part of the way up, the elevator broke.

"The theory upon which this action was brought against defendant is rather vaguely indicated by the declaration, as amended the second time, in the allegations that, being the contractor for the entire structure and engaged in its erection, he 'maintained and operated an elevator'; that plaintiff, 'in pursuance of his occupation in connection with the erection and construction of the building, * * * was lawfully upon said elevator within the scope and performance of the duties of his employment in connection with the * * * erection and construction of said building'; that thereupon it became defendant's duty safely to construct and maintain the elevator; that it was improperly constructed and maintained; and that plaintiff's injury resulted from this circumstance. The nonsuit was asked for and entered on the ground of nonproof of any relation between plaintiff and defendant upon which the responsibility sought to be fastened upon the latter in favor of the former could be legally predicated.

"It is certain that the relation of employer and employé did not exist between them. It is contended, however, that the firm employing plaintiff was a subcontractor under defendant in the erection of the building. Suppose that to be so. Then, under the doctrine of *Johnston v. Ott Bros.*, 155 Pa. 17, 25 Atl. 751, there was a duty resting upon the defendant to do his part of the work in the erection of the building in a manner consistent with the safety of the employés of Remppis & Co., and for an injury occurring to one of them through defendant's failure to live up to that duty a recovery might be had against him. But there was no obligation upon him by law, and no evidence of any by contract (see *Hoffner v. Prettyman*, 6 Pa. Super. Ct. R. 20), to furnish the subcontractor's employés with special conveniences, such as an elevator, in the performance of their work, or to put at their disposal for that purpose conveniences of that sort provided for his own workmen. Accordingly, had the plaintiff, while on his proper and accustomed way to his work, been hurt by the fall of the elevator, it may be that he would have had a cause of action against defendant. See *Alexander v. Steel Co.*, 189 Pa. 582, 42 Atl. 286; *Kitchen v. Mfg. Co.*, 207 Pa. 558, 56 Atl. 1083. But that was not at all this case. On the contrary, the plaintiff was hurt while using an appliance of defendant which was not there for plaintiff's use, and which the latter had no right, springing from his relation to defendant, to use. True, the defendant's foreman allowed him to use it. But in making use of

that permission plaintiff was a mere licensee, assuming as such the risks involved in the use of the elevator just as it was. It is in the nature of a mere license that its grant creates no duty and imposes no obligation upon the licensor to provide against danger or accident. *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474; *Sweeney v. Railroad Co.*, 10 Allen (Mass.) 868, 87 Am. Dec. 644; *Pelton v. Schmidt*, 97 Mich. 231, 56 N. W. 689; *Gillis v. Railroad Co.*, 59 Pa. 129, 141, 98 Am. Dec. 317; *Maguire v. Magee*, 13 Atl. 551; *Weaver v. Steel Co.*, 223 Pa. 238, 240, 72 Atl. 552, 21 L. R. A. (N. S.) 466.

"In obedience to these principles and authorities, it is not seen how the defendant's application for a nonsuit could properly have been refused; and therefore the rule to show cause is discharged."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

W. B. Bechtel, for appellant. Jefferson Snyder and Wm. J. Rourke, for appellee.

PER CURIAM. The judgment is affirmed, for the reasons stated in Judge Endlich's opinion, discharging the rule to take off the nonsuit.

HOOD v. CONNELL ANTHRACITE MINING CO.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN.

In so far, at least, as the duties of a mine foreman are prescribed by Act June 2, 1891 (P. L. 176), regulating mining operations in the anthracite field, and Act May 15, 1893 (P. L. 52), relating to bituminous mines, there is no substantial basis for a distinction between the acts; protection to the health and lives of those employed in mining operations being the primary purpose of both.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 437-448; Dec. Dig. § 189.*]

2. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN.

The character of duties of a mine foreman is not necessarily changed because he may hire or discharge men, or suggest where and in what capacity they shall work, or how the entries shall be driven or the mines be developed, and he may do all of these things and still be acting in his capacity as mine foreman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 443; Dec. Dig. § 189.*]

3. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANTS—MINE FOREMAN.

Where a mine foreman also acts as the superintendent of the mine without reference to his duties as mine foreman, and as mine foreman does not have exclusive charge of the interior workings, and he is negligent while act-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing as superintendent, the owner may be held liable for the consequences of such negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 443; Dec. Dig. § 189.*]

4. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—ACTION—QUESTION FOR JURY.

In an action for death of a miner, resulting from negligence of the mine foreman, whether the latter acted in the dual capacity of mine foreman and superintendent *held* a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1063, 1064; Dec. Dig. § 287.*]

Appeal from Court of Common Pleas, Sullivan County.

Action by Emma C. Hood against the Connell Anthracite Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trespass to recover damages for the death of plaintiff's husband. At the trial it appeared that Paul Hood, a certified miner, was killed on March 14, 1908, while working in defendant's mine. His death was caused by the falling in of the roof of one of the chambers. The plaintiff claimed that the accident was caused by the negligence of William E. Johnson as mine superintendent. There was evidence that Johnson, who was the mine foreman, was also employed as general superintendent of the mine.

The court charged in part as follows:

"Now we are going to leave it to you, gentlemen, to say what the fact is as to whether William E. Johnson was employed in these mines solely in the capacity of a mine foreman, performing only the duties pertaining to that position, or whether, in addition to that, he was employed by and was acting for the defendant company in a representative capacity, other than the position of mine foreman—whether he was performing duties for the company, we say, in addition to his statutory duties, in the nature of supervising the work there, and such service as devolves upon the superintendent of the mine. If he was acting solely in his statutory capacity as mine foreman, then the company was not responsible for any negligence upon his part; and if you find that he was employed there simply as mine foreman under the statute, that is the end of this case, and the plaintiff cannot recover, and you need not consider anything else. If, however, you find that in addition to his statutory duties he was acting in a representative capacity for the company, performing additional and other duties for it, then you will consider whether the company has been guilty of such negligence as will authorize a recovery against it.

"Now this act of assembly which provides for the appointment of a mine foreman, and under which the mining company is not responsible for the mine foreman's negligence,

does not relieve the mine owner of his liability for the unsafe condition of his mine, except when he complies with the act. It does not relieve him if he has knowledge, through his superintendent, that the mine foreman is incompetent and that the mine is unsafe.

"The statute provides the remedy, and it is incumbent upon the owner when, through his superintendent, he finds the existence of unsafe conditions in the mine, to proceed to have those conditions remedied in the manner pointed out in the statute; and if this man W. E. Johnson was acting for the defendant company in a representative capacity, in addition to his statutory duties as mine foreman, then notice to him of the unsafe or dangerous condition of a place in which a miner was working would be notice to the company.

"If W. E. Johnson was acting in this two-fold capacity that we have mentioned, as mine foreman under the statute and in a representative capacity for the company, then it was his duty, upon being notified of the unsafe condition of the roof, to take steps to remedy it."

Verdict and judgment for plaintiff for \$4,750. Defendant appealed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

Seth T. McCormick and E. J. Mullen, for appellant. Chas. M. Culver, John G. Scouten, and David E. Kaufman, for appellee.

ELKIN, J. [1] If the rule applicable to bituminous mines, as laid down in *Wolcott v. Coal & Coke Co.*, 226 Pa. 204, 75 Atl. 197, applies to anthracite mines, then the question whether Johnson was acting in the dual capacity of mine foreman and superintendent was properly submitted to the jury. The learned counsel for appellant insist that there is a distinction between the act of June 2, 1891 (P. L. 176), regulating mining operations in the anthracite field, and the act of May 15, 1893 (P. L. 52), relating to bituminous mines, in so far at least as the duties of a mine foreman are prescribed. A careful examination of the two acts has satisfied us that there is no substantial basis for the distinction attempted to be made. It is a distinction without a difference, when the purpose to be served by the statutory requirements of each act is taken into consideration. Protection to the health and lives of those employed in mining operations is the primary purpose of both statutes. Indeed, the phraseology and provisions of both acts in many of their essential and important features are almost identical. Difference in mining conditions in the two fields required the legislation to be adapted to the necessities of mining operations existing in each field. Aside from the provisions relating to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

these different conditions, there is but little, if any, real distinction between the anthracite and bituminous acts. As to the protection intended to be afforded to the health and safety of the men so employed, the duties of the mine foreman are practically the same under both statutes. Certainly there are no such distinguishing features as to justify a court in laying down one rule for a mine foreman in the bituminous field, and an entirely different rule for a mine foreman in the anthracite region. After all, this is more a question of fact than of law. Both statutes clearly contemplate that the underground workings shall be under the exclusive charge and supervision of a mine foreman, and, when the mine foreman has the exclusive supervision of the inside workings, the owner is relieved from responsibility for anything that may occur in the mines. In other words, the mine foreman, with a certificate of competency from the commonwealth and a knowledge of the statutory duties imposed upon him, is answerable for the safe conduct of the mining operations. He should be, and in contemplation of law is, the absolute master of the interior workings of the mine over which he has charge as mine foreman.

[2] The character of his duties as mine foreman is not necessarily changed because he may hire or discharge men working under him, or suggest where and in what capacity the men shall work, or how the entries shall be driven or the mines be developed. He may do all of these things, and still be acting in his capacity as mine foreman. Indeed, if he is a competent mine foreman, which the law presumes him to be, he is better qualified to do all of these things than any one else.

[3] The test is, not the particular acts he may do in connection with the underground workings, but whether he has the charge, control, and supervision of these workings to the exclusion of any other authority. When he has this exclusive supervision, no one can dispute his authority as mine foreman, and even the owner cannot interfere with the performance of his duties. It is the duty of the mine foreman to see that all the statutory requirements intended to safeguard the health and lives of the men are properly enforced. What the law contemplates is not always done, and for this reason confusion sometimes arises on account of divided authority. It sometimes happens that the mine owner does not commit the exclusive charge of the interior workings to the mine foreman, but, acting through his superintendent, undertakes to exercise authority over certain parts of the interior workings without reference to the duties of the mine foreman. When this is done, the owner may be held liable for the negligent acts of his superintendent, or those acting under his direct

authority. Again, mine owners in some instances, presumably to avoid expense, make use of the same person in the dual capacity of superintendent and mine foreman. This results in a divided responsibility, and may affect the question of liability in negligence cases. It has already led to an exception to the general rule pointed out by this court in *Wolcott v. Coal & Coke Co.*, supra. It is always safer and wiser for all concerned to follow the statutory rule which requires the underground workings to be in charge of the mine foreman.

[4] However, when this is not done, questions of fact arise, which must as a rule be determined by a jury. In the case at bar we have concluded that whether Johnson acted in the dual capacity of mine foreman and superintendent was for the jury, and we discover no reversible error in its submission. We cannot agree that the act of May 29, 1901 (P. L. 342), changes the status of a mine foreman. There is nothing in the language used to indicate such an intention on the part of the Legislature. The questions of negligence and of contributory negligence, as well as the credibility of the witnesses, were all for the jury.

There are but two assignments of error, one that the learned court below erred in not giving binding instructions for the defendant, and the other in refusing to enter judgment non obstante veredicto for appellant upon the whole record. There is no assignment as to the manner in which the case was submitted to the jury, or as to any specific instruction given by the trial judge. We think the case was for the jury, and that all the questions involved in the controversy were fairly and impartially submitted.

Judgment affirmed.

ORONMULLER v. EVENING TELEGRAPH.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. MUNICIPAL CORPORATIONS (§ 706*)—ACCIDENT AT CROSSING—QUESTION FOR JURY.

In an action against the owner of a wagon to recover for injuries received at a street crossing, question of driver's negligence held for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

2. TRIAL (§ 143*)—CONFLICTING EVIDENCE—QUESTION FOR JURY.

Where the testimony whether of plaintiff or his witnesses is contradictory, and on one part of it he is entitled to go to the jury, and on the other part he is not, it is for the jury to reconcile the conflicting statements and to say which shall prevail.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William F. Cronmuller against the Evening Telegraph, Charles E. Warburton, Founder. From a judgment refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Charles Hunsicker, J. Ernest Nachod, and Joseph W. Hunsicker, for appellant. W. W. Smithers, for appellee.

FELL, C. J. The plaintiff was struck by the end of the shaft of the defendant's delivery wagon while walking on a crossing from the foot pavement to a street car that was standing at a regular stopping place to receive passengers. The negligence of the driver was manifest. He was driving north on the east side of the street on which the car ran south. When 50 or 60 feet from the standing car he turned in front of it to the west side of the street and passed by the car in a space about 9 feet wide with his horse on a fast trot. He knew the car was stopped to take on or let off passengers and that in all probability some one would be passing over the crossing between the curb and the platform, yet, without exercising the slightest care for the safety of others, he came to the crossing from a place where a few seconds before he could not have been seen from the corner where the plaintiff stood. Persons using the public streets owe to each other the duty of reasonable care, and the duty of each is to be determined by the circumstances. The stop of a street car at a crossing is necessarily brief, and any person wishing to get on or off the car has but a few seconds in which to act, and, if delayed to allow a vehicle to pass, he may lose the opportunity to get on or off. The necessity for quick action on his part gives him a right to the use of the crossing that calls for the exercise of a very high degree of care by the driver of a vehicle.

In determining whether the plaintiff's negligence defeated his right to recover, the testimony was this: In his examination in chief, when he was stating what occurred in a narrative form, he said that he stood on the street corner waiting for a car running south. When the car was about stopped and the middle of it was opposite to him, he looked south and then north and saw that the way was clear in both directions; he then took three or four steps towards the car and was struck when within a step of it. On his cross-examination he testified that, when standing on the pavement at the corner, he did not look south but kept looking north.

[1] This left in some uncertainty his position when he looked but it did not contradict his statement that he looked south when the middle of the car was opposite him. Looking

as he advanced would be quite as effective as looking before he started; but, if there was a contradiction that left the net result of his testimony in doubt, he was entitled to go to the jury. It was not in relation to something he was bound to prove to make out his case. He was not required to disprove contributory negligence, but only to make out a case clear of it, and if there was any doubt on the subject it was for the jury to resolve it.

[2] Where the testimony, whether of the plaintiff or his witnesses, is contradictory, and on one part of it he is entitled to go to the jury, and on another part he is not, it is for the jury to reconcile the conflicting statements and to say which shall prevail. *Ely v. Railway Co.*, 158 Pa. 233, 27 Atl. 970; *Glase v. Philadelphia*, 169 Pa. 488, 32 Atl. 600; *Danko v. Railways Co.*, 230 Pa. 285, 79 Atl. 511. Moreover, it must be borne in mind, in considering whether there was contributory negligence, that the car was standing at a street crossing and the wagon came suddenly and rapidly from the east side of the street, its proper place in going north, to the west side. The plaintiff had little reason to apprehend the danger and no opportunity to avoid it.

We think it was error to enter a nonsuit, and the judgment is reversed, with a *procedendo*.

COMMONWEALTH ex rel. EARNEST v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. MUNICIPAL CORPORATIONS (§ 213*)—CIVIL SERVICE COMMISSION—REMOVAL OF CHIEF EXAMINER.

Under Act March 5, 1906 (P. L. 88), creating a civil service commission of the city of Philadelphia, and authorizing the appointment by such commission of a chief examiner, such officer has no power except that delegated to him by the commission, and where he disregards its directions or questions its authority he is guilty of insubordination justifying the commission in removing him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 213.*]

2. MANDAMUS (§ 187*)—REVIEW—FINDINGS OF FACT.

In mandamus against the civil service commission of a city to compel the reinstatement of the chief examiner who had been removed for insubordination, findings of fact of the lower court are conclusive.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

Appeal from Court of Common Pleas, Philadelphia County.

Application by the Commonwealth, on the relation of William D. Earnest, for writ of mandamus against the City of Philadelphia and others to compel his reinstatement

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to public office. From a judgment denying the writ, relator appeals. Affirmed.

The court below (Sulzberger, P. J.) filed the following opinion:

"The relator became chief examiner of the civil service commission on November 23, 1906, at a salary of \$2,400 per annum. On September 4, 1908, the commission requested the relator to resign his office. He refused, and on September 8, 1908, was discharged. The prayer is for mandamus, directing that the relator be restored and that his salary be paid.

"The civil service commissioners in their return allege, in substance, that the relator, as chief examiner, failed in his duty in that he refused to mark the papers of applicants as directed by the commissioners; that his markings in many cases were unjust and inequitable; that his conduct was arrogant and insubordinate; that he refused to follow the advice, instruction, or orders of the commissioners; that on September 4, 1908, Henry Drake, one of the commissioners, in a letter to relator, stated the reason of the latter's dismissal to be 'because of your refusal to follow out the directions that I gave you under authority of the civil service commission'; and that his dismissal was lawful. Whether it was or not is the question in dispute. The act of March 5, 1906 (P. L. 83) was passed to regulate and improve the civil service of the cities in the first class in this commonwealth. Some steps in that direction had been taken before. Indeed, the 'act to provide for the better government of cities of the first class in this commonwealth' (P. L. 1885, p. 37), commonly known as the 'Bullitt Act,' contained a rudimentary civil service law scattered in fragments through its several sections (article 3; article 12, §§ 2, 3; article 15), but did not provide for a civil service commission. By the twentieth section of the act of 1906, it is provided that no officer, clerk, or employé appointed under the act shall be removed, discharged, or reduced in pay or position, except for just cause, which shall not be religious or political, nor until he shall have been furnished with a written statement of the reasons for such action, and been allowed to give the removing officer such written answer as the person sought to be removed may desire. In every case of such removal or reduction, a copy of the statement of reasons therefor, and of the written answer thereto, shall be furnished to the civil service commission, and entered on its public records. The relator contends that there was no just cause for his dismissal, and that in any event the dismissal was not in accordance with the requirements of the law.

"We have carefully weighed the evidence, oral and written, and have reached the conclusion that the relator was insubordinate, and that the commissioners' judgment was

correct that his further continuance was prejudicial to the public service. The immediate cause of his discharge arose out of the fact that the highway department needed inspectors. An examination of 40 applicants was held in April, 1908, only 14 of whom were placed on the eligible list. On May 29, 1908, there was another examination of 22 applicants, only 3 of whom were placed on the eligible list. The highway department needed inspectors. There is no absolute standard of knowledge fixed by general law for the incumbents of this office, nor does the civil service act set up such a standard. It was enacted for another and much deeper purpose; its plain intent being to exclude partisanship, favoritism, prejudice, and caprice from the appointment or removal of persons in public employment. To that end the applicants are to be compared with each other in a mode which eliminates these vicious and disturbing factors, and awards priority to the best man. An inspector of highways ought to know how level a street should be, how concrete ought to be mixed, when a street needs repair, and other related practical things. The degree of expertness required is ordinary and easily attainable by plain mechanics with limited scholastic knowledge. When, therefore, inspectors were wanted, the commissioners determined to relax some of the more ornamental requirements, such as correctness in 'punctuation and capitalization,' meaning that a comma might be omitted or wrongly placed, and that a capital letter written where there should have been a small one, or vice versa, without detriment to the highway service. They so instructed the relator. The latter, no doubt with good intentions, not only objected, but wrote the letter of August 24, 1908. It was offensively insubordinate, in that it refused to obey directions received, declared that they were erroneous, and demanded a specific reiteration of them if he was to heed them. Executive business cannot be promptly and effectively carried on if the orders of the superior may, at the election of the inferior, be made the subject of a protracted argument. Nor is it for the good of the service that clerks, who are ready writers, should pile up records of their wise dissent from the lawful orders of their chiefs. We think that there was just cause for the relator's dismissal.

"The question must still be considered whether the mode of dismissal was in accordance with the terms of the civil service act. The relator contends that the requirements of the above-cited twentieth section were not complied with. We entertain grave doubts whether he is within its protection. The requirement that the statement and answer 'shall be furnished to the civil service commission and entered upon its public records' would seem to mean that officers of the various departments of the

city government must furnish these papers to the civil service commission and appears to have no reference to the proceedings of the commission itself. We have seen that the Bullitt act provided for civil service in a partial way, but left each department to administer it. The weakness of a law which left the appointing chiefs free to act without supervision or publicity soon became apparent. A separate body was needed, which, not having the power to remove or to appoint, might be relied on to supervise and to publish the facts concerning all the departments.

"The circumstance that this civil service commission needs a few examiners and clerks is of little importance in this connection; for, if it cannot be trusted to do so little a thing as to act fairly by these, its whole activity would be merely worthless and the purpose of the act would have failed. We need not, however, finally decide this point; for, if it be waived or overruled, we are of the opinion that the proceedings were entirely regular. The statute contemplates that the officer intending to remove a subordinate must furnish him with a written statement of the reasons for such action, and must allow him to give a written answer before he actually removes him. It may be assumed that such answer will usually deny the offense charged; but, whether it does or not, no mode of trial or further proceeding is provided for, save that the statement and answer become public records.

"In the case before us the commissioners notified the relator orally on September 4, 1908, that they would charge him with insubordination. On the same day he acknowledged this notice in writing. The commissioners sent a written reply to this letter on the same day, informing him that the reason for his discharge was his refusal to follow the commissioners' directions, and that his services would not be required 'after Tuesday, September 8th.' This was a clear written statement of the commissioners' reasons, and it gave him four days' time to file his answer before their intended action would take effect. In point of fact, he prepared an elaborate answer, sent it on September 8th, it was received and considered by the commissioners, was declared by them insufficient, and they dismissed him on September 8th in a written communication. We think that the relator was not deprived of any of his privileges, and has no right to complain of his dismissal.

"The prayer for peremptory mandamus is denied, and the petition is dismissed."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and ELKIN, JJ.

Frank P. Prichard, Albert Smith Faught, Robert D. Jenks, and Vivian Frank Gable,

for appellant. T. D. Finletter and James Alcorn, for appellees.

ELKIN, J. This is a mandamus proceeding to compel the reinstatement of appellant as the chief examiner of the civil service commission. He complains that his removal was without just cause and therefore illegal. He was removed on the ground of insubordination, which, if true in fact, was a just cause within the meaning of the law. Every subordinate should be respectful to his superior officers, and should be willing to discharge his duties as directed. In the administration of civil service laws much must be left to those intrusted with their enforcement. This is especially true of the civil service commission which was created for the express purpose of regulating and enforcing civil service in cities of the first class. If the authority of the commission to regulate its own affairs may be lightly challenged by one occupying a subordinate position, the effective enforcement of civil service in other departments would be greatly weakened. Nothing could be more demoralizing to the public service than insubordination on the part of subordinates in the discharge of their duties. There must be a head to everything. No work is well done without the direction of competent authority. The subordinate may think he is wiser than his chief, and may honestly believe he knows how to do the work better; but, so long as he occupies a subordinate position, his views must yield to those of his superior. Any other view would destroy efficient discipline without which there can be no such thing as orderly and well-regulated government. In this connection it may be well to glance at those provisions of the civil service act under which the chief examiner is appointed. Section 3 of the act of March 5, 1906 (P. L. 83), provides as follows: "The civil service commission in each city shall employ a chief examiner and such other clerks, examiners and employes as it may deem necessary or proper to carry out the purposes of this act." The salaries of the examiners and other employes are fixed by the commission and approved by the mayor. There are no other provisions relating to these appointees. The act is absolutely silent as to what duties they shall perform, or the kind and character of services they shall render. All of these things are left to the discretion of the commission so as "to carry out the purposes of this act." It seems perfectly clear that the Legislature intended the commission to exercise discretionary powers in the appointment of examiners and clerks and in the regulation of the affairs of its own household.

[1] There is nothing in the act to indicate a legislative intention to give the chief examiner, or any other employe, the authority to do any act or thing except under the su-

pervision and direction of the commission. The power to enforce the law is lodged in the commission and not in the subordinates. The chief examiner has no power or authority except such as may be delegated to him by the commission. He acts at all times under the supervision and subject to the direction of the commission. When he undertakes to ignore its wishes, or to disregard its directions, or to question its authority, he assumes a power never intended to be conferred upon him. If he persists in setting up his views in opposition to those held by the commission, he may very properly be classed as insubordinate. It is conceded if appellant was insubordinate within the meaning of the law there was just cause for his removal; but it is contended that the facts do not warrant such a finding. In the consideration of this point we start with the presumption of good faith in the performance of public duties on the part of the commission which removed appellant. The cause assigned for the removal having been challenged, the whole controversy was carefully considered by the learned court below with the result that the commission was sustained. This is the end of the matter unless there was manifest error in the findings of the lower court. It is very earnestly argued here that the evidence did not warrant such a finding. The case is made to turn upon the question of insubordination.

[2] The evidence was largely documentary, although there was some oral testimony. It may be that different minds might reach opposite conclusions from the evidence thus presented. But it has been frequently held that findings of fact will not be reversed on this ground unless there is manifest error. *Plankinton's Estate*, 212 Pa. 235, 61 Atl. 888. We find no such manifest error in the findings about which complaint is made as to warrant a reversal. Indeed, the tone of the letters written by appellant to the commission indicates an unwillingness to follow instructions, and a disinclination to do his work as directed. His general attitude as indicated by his acts and letters is not saved from the charge of insubordination because he said in one letter that he would make the changes suggested if requested to do so. What occurred between a member of the commission and appellant in connection with the marking amounted to a request to make the changes. The learned court below has so found, and we see no error in the conclusion reached. He must have understood, as we believe he did, that the commission desired him to change the markings as indicated by the marginal notes. Whether it was wise or unwise for the commission to adopt a policy of more liberal marking under the circumstances was a question with which the chief examiner had nothing to do.

It was his duty to follow instructions and do as the commission directed. Upon a review of the whole record we see no reason for disturbing the findings and conclusions of the learned court below.

Assignments of error dismissed, and judgment affirmed.

BERGDOLL v. SOPP.

(Supreme Court of Pennsylvania. May 17, 1911.)

MORTGAGES (§ 114*) — CONSTRUCTION — COLLATERAL SECURITY.

Where a loan of \$11,000 was made on condition that the father of the borrower should execute a mortgage for \$8,000 as security, the presumption is, in the absence of special indemnity covenants, that the mortgage was given only as security for the sum named.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 114.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Emma C. Bergdoll against Ernest Sopp. Judgment for plaintiff, and defendant appeals. Reversed.

See 227 Pa. 363, 76 Atl. 64.

From the record it appeared that on or about September 10, 1908, the son of the defendant borrowed \$11,000 from the plaintiff. The latter made the loan on condition that the defendant would execute the mortgage in suit as collateral security to her. Subsequently the son's indebtedness to the plaintiff was increased, and at the time of his death it amounted to \$12,200.27. His estate was insolvent, and the plaintiff received a dividend of 16¹¹/₂₁ per cent. upon her whole claim of \$12,200.27, amounting to \$2,015.95. After receiving the dividend she brought suit upon the mortgage, claiming that it was given to her as security for the whole indebtedness, and that she had the right to apply the \$2,015.95 to the unsecured part of the debt due to her, and to recover the whole amount of the mortgage. The defendant claimed that it was collateral for only \$8,000, and that he was entitled to have the dividend credited pro rata upon that part of the indebtedness which his mortgage secured. He paid the difference, with interest, costs, and counsel fees, and the case proceeded to trial for the determination of a single issue, viz.: Had the plaintiff the right to apply the dividend paid her to the unsecured part of her claim? The trial judge instructed the jury to render a verdict for the plaintiff. The court in banc subsequently entered judgment for the defendant non obstante veredicto, which judgment, on appeal, was reversed by the Supreme Court, with a venire facias de novo. At the next trial the case was submitted to the jury, and a verdict was rendered for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the plaintiff for \$1,668.91, and judgment thereon. The defendant appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Alex. Simpson, for appellant. Joseph Gillan and George S. Graham, for appellee.

POTTER, J. When this case was here before (227 Pa. 363, 76 Atl. 64), we decided that there was evidence upon the record, by a witness named Borasky, which, if believed, would justify a finding that the \$8,000 mortgage in suit had been "given as a general indemnity against any loss on the entire \$11,000 indebtedness." A judgment for the defendant was reversed, with a venire facias de novo, that the case might be submitted to a jury to determine whether the mortgage was "collateral for every dollar of the \$11,000," or simply for \$8,000 of such indebtedness. This witness did not appear at the retrial of the cause, and the only evidence upon the subject was given by the plaintiff herself.

Upon the former trial Borasky said that Mrs. Bergdoll had stipulated "that the \$8,000 mortgage will be as a collateral for the \$11,000 loan"; whereas at the last trial Mrs. Bergdoll's testimony was that at the time the security was negotiated she had said, "I want to be protected," and that the mortgagor's son, for whom the security was being given, replied, "You can't lost a cent in the transaction, because, first, the place would not bring less than \$3,000, even if it was in bankruptcy, then you have my father's mortgage in addition," and that "the father nodded his head." On cross-examination, in reply to the question, "As I understand you, at that conversation it was explained to you that as your debt was \$11,000, or would be about \$11,000, the saloon was worth \$3,000?" she answered: "That is what young Mr. Sopp said. He said you can't lost a cent on this transaction because in case of bankruptcy the saloon would surely bring \$3,000, and then you have the father's \$8,000." Immediately after this, in reply to the question, "The possible debt was \$11,000, and you had \$3,000 sure in the saloon, no matter what happened, and you had the \$8,000 balance?" she said, "Yes."

The testimony just detailed is not in any sense the equivalent of that given by the witness Borasky at the former trial. If it were, the judgment for the plaintiff would not be disturbed; but we cannot sustain the judgment upon the proofs before us. It was a conceded fact that the mortgage was given as collateral for the debt of another. There being no special indemnity covenants therein, in the absence of evidence to the contrary, the presumption is that the mort-

gage was not given as security for more than its principal sum. Therefore it required proof to show that it was intended as security for a larger amount. The evidence produced was insufficient for that purpose. On the contrary, it indicates that the mortgage stood as security only for the amount of the indebtedness over and above the \$3,000 value placed upon the saloon, or, in other words, for \$8,000.

Under the circumstances binding instructions should have been given for the defendant, or this not having been done, judgment non obstante veredicto should have been entered in his favor.

The assignments of error are sustained, the judgment is reversed, and judgment is here entered for the defendant.

GIRARDI v. LAQUIN LUMBER CO.

(Supreme Court of Pennsylvania. May 17, 1911.)

LIMITATION OF ACTIONS (§ 121*)—PLEADING—AMENDMENTS.

Where limitations have run, amendments introducing a new cause of action, or bringing in a new party or changing the capacity in which he is sued, will not be allowed; and where suit was brought against the "Laquin Lumber Company, a corporation," the record cannot be amended, after limitations had run, to name as defendant a partnership composed of six persons trading as the Laquin Lumber Company.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 537-540; Dec. Dig. § 121.*]

Appeal from Court of Common Pleas, Bradford County.

Action by Mary Girardi against the Laquin Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

From the record it appeared that suit was begun against the "Laquin Lumber Company, a corporation." The cause of action arose on April 22, 1908. In February, 1911, the plaintiff made the following motion: "The plaintiff moves the court that the record in this case be amended in all particulars as it may be affected thereby by changing the designation of the defendant to the Laquin Lumber Company, a partnership composed of W. L. Barclay, C. F. Barclay, G. B. Barclay, M. F. Quinn, F. H. Quinn, and F. S. Sherman, trading as copartners." The court overruled the motion.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

M. Lilley and David E. Kaufman, for appellant. Wm. Maxwell, for appellee.

PER CURIAM. This appeal is from an order discharging a rule to amend the record by making new parties defendants after the statute of limitations had become a bar to a

new action. The action was brought against the Laquin Lumber Company, a corporation. The amendment proposed was to name as defendant a partnership, composed of six persons, trading as the Laquin Lumber Company. The allowance of the amendment would have brought new parties on the record. Under the rule established by our cases this cannot be done. Where the statute of limitations has run, amendments will not be allowed which introduce a new cause of action or bring in a new party or change the capacity in which he is sued. If the effect of the amendment is to correct the name under which the right party is sued, it will be allowed; if it is to bring in a new party, it will be refused. *Wright v. Copper Co.*, 206 Pa. 274, 55 Atl. 978.

The order discharging the rule is affirmed.

In re GIVEN'S ESTATE.

Appeal of SMITH.

(Supreme Court of Pennsylvania. May 17, 1911.)

WILLS (§ 423*)—PROBATE—CONCLUSIVENESS OF JUDGMENT.

On the death of the decedent two wills were found. On a contest of the second will certain grandchildren of the decedent were not cited, but a daughter was cited to appear. The will was sustained, and an appeal taken from the register's decree probating the first will. The grandchildren and the daughter were cited in this proceeding, and, it being conceded that the second will was valid, the first will was vacated. Thereafter the daughter petitioned for an appeal from the probate of the second will, which had been probated after the first will had been vacated. *Held*, that the daughter was concluded by the decree on the subsequent appeal from the action of the register in probating the first will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 423.*]

Appeal from Orphans' Court, Chester County.

Petition by Mary J. Smith for an issue devisavit vel non in estate of Mary Given. From a decree dismissing the petition, petitioner appeals. Affirmed.

From the record it appeared that when testatrix died she left two wills, one dated February 26, 1898, the other dated August 6, 1905. The first was probated October 6, 1906; the testatrix having died on September 10, 1906. On August 28, 1907, the second will was probated. On September 21, 1908, an appeal was taken from the probate of the second will by

the executors named in the first will. On October 12, 1908, Mary J. Smith, the appellant, a daughter of the decedent, was served with the citation on the appeal. The decedent's grandchildren, children of a deceased daughter, were not mentioned in the citation, nor were they served. Subsequently an issue was framed, and on February 20, 1909, was tried, and a verdict was rendered sustaining the second will. At the trial the appellant was present. On March 29, 1909, the executors of the second will appealed from the decree probating the first will. In this proceeding the citation was served on the appellant and on all parties in interest. On July 6, 1909, there was a hearing in this appeal, and the second will was offered in evidence to defeat the first will, and the decree of probate of the first will was set aside. On July 27, 1909, the second will was formally probated. On January 27, 1910, Mary J. Smith appealed to the orphans' court from the decree of July 27, 1909, probating the second will. On April 11, 1910, this appeal was dismissed. Butler, J., filed the following opinion:

"If it be conceded that, when the issue of forgery on the second will was determined, the court had no jurisdiction of the matter because of the failure to bring in certain grandchildren of the decedent, that the petitioner who was duly brought in, can take advantage of this circumstance, and is to be looked upon as not then having had her day in court, certainly she is concluded by the proceedings and decree upon the subsequent appeal from the action of the register in probating the first will. Then the petitioner and all other proper parties were regularly in court, the second will was presented as a matter of evidence to defeat the earlier will, the validity of the second will, the due execution of which had recently been determined, was conceded, and thereupon this court decreed the vacation of the probate of the will of earlier date. The register then admitted to probate the will of later date. Under these facts the petitioner may not now contest the validity of this will.

"The petition for an issue is denied, and the appeal is dismissed."

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

M. J. O'Callaghan and A. M. Holding, for appellant. J. Frank E. Hause, for appellees.

PER CURIAM. The order dismissing the petition for an issue is affirmed, on the opinion of the learned judge of the orphans' court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CHARIOTT v. McMULLEN.

(Supreme Court of Errors of Connecticut.
Oct. 5, 1911.)

1. CONTRACTS (§ 295*)—PERFORMANCE—CONSTRUCTION CONTRACTS—SUBSTANTIAL PERFORMANCE.

Literal performance of every detail of the work contemplated by a construction contract according to the plans and specifications is not necessary to recovery thereon; the contractor being entitled to recover if he substantially complies with the contract, notwithstanding slight defects for which compensation may be allowed the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1353; Dec. Dig. § 295.*]

2. CONTRACTS (§ 295*)—PERFORMANCE—CONSTRUCTION CONTRACTS—SUFFICIENCY OF PERFORMANCE.

Plaintiff contracted with defendant to construct roads, and one of the roads was not constructed in certain details as to its width, etc., according to the contract, but it was of practical value to defendant, and its cost to plaintiff was not materially less than if it had been constructed according to the contract. The changes made therein were approved by defendant's engineer, plaintiff acted in good faith in making them, and defendant retained the benefits of the work. *Held*, that defendant could not retain the benefits, and yet repudiate the contract, on the ground that plaintiff had failed to perform according to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353, 1356; Dec. Dig. § 295.*]

Appeal from Superior Court, Fairfield County; William H. Williams, Judge.

Action by Salvator Chariott against John McMullen. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Light, for appellant. Stiles Judson and John J. Cuneo, for appellee.

BORABACK, J. This action was brought to recover a balance alleged to be due the plaintiff from the defendant upon a contract for the construction of a sea wall, of roads, and grading, dated May 14, 1907. The plaintiff alleged a performance of the contract, admitted the payment of \$6,800 on account, and claimed to recover a balance of about \$8,000, which included the sum of \$4,000 alleged and claimed to be due for extra work. The defendant denied the performance of the contract, and the performance of extra work, and then, by way of counterclaim, alleged damages in the sum of \$6,000 for nonperformance of the contract in several particulars. Edwin L. Scofield, the committee to whom the action was referred, after making a specific finding of facts, stated that he had reached the following conclusions: "Upon the facts aforesaid it is found that said contract of May 14, 1907, was substantially performed by the plaintiff. If upon the foregoing facts the engineer, Minor, under the provisions in said contract, was authorized to inter-

pret the plans and specifications as requiring no gutter on the inside of the shore road, then there is due and owing from the defendant to the plaintiff on account of said contract the sum of \$2,145; otherwise, there is due and owing to him the sum of \$1,976.20. Upon the facts aforesaid there is due and owing from the defendant to the plaintiff for extra work (work aside and apart from that required to be done under the contract) done by the plaintiff for the defendant the sum of \$2,186.85." The defendant moved to recommit the report for the finding of additional facts, and the report was sent back to the committee. The committee having filed a supplemental report, the defendant made another motion to recommit, which was denied. A remonstrance to the acceptance of the report was then filed, which was overruled. Judgment was then rendered for the plaintiff to recover of the defendant as stated.

[1] The third assignment of error charges that there was error in holding on the facts found that the contract described in the complaint had been substantially performed by the plaintiff. The plaintiff entered into a written contract to do all the work connected with the improvement of the defendant's property "in accordance with the plans, specifications, and directions of H. R. Minor, C. E." In order to recover, he must show that the contract had been substantially performed. It was not necessary that he should be able to show literal performance of the work in every detail according to the plans and specifications as a condition precedent to a recovery. *West v. Suda*, 69 Conn. 60, 63, 38 Atl. 1015. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially. When this has been done, he may recover for his work, notwithstanding slight and trivial defects in his performance for which compensation may be made by an allowance to the other party. *Woodward v. Fuller*, 80 N. Y. 312, 317. The committee finds that the plaintiff has not completed the work in question in strict compliance with some of the requirements of the contract, but has deviated and departed from it in certain particulars which he specifies. Without enumerating them, it is enough for the present purposes to say that these deviations were either allowed for, being inconsiderable, or were approved of as the work progressed, and at its termination by the engineer, Minor, in a letter to the defendant, which is as follows: "Henry Rossiter Minor, Civil Engineer, So. Norwalk, Conn., Oct. 10, 1907. Mr. John McMullen, New York City—Dear Sir: Mr. Chariott has completed his entire job to my entire satisfaction, and for the last few days I have been going over the work in detail, and now submit a final and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

complete estimate of the work done and amount due the contractor. I also enclose to you my bill in detail for additional work which you have had me do outside of the original contract. Yours truly, Henry Rossiter Minor, C. E. Civil Engineer."

[2] The defendant places special emphasis upon the failure of the plaintiff to complete the "shore road" so called, according to the requirements of the contract. In this connection, the record discloses that the shore road was not constructed in the manner called for by the plans and specifications, in that throughout its entire length it was not of the specified width, and at the westerly end stones of the required size were not used in the foundation, the dressing material, consisting of gravel and loam, of the road above the foundation, was not of the proportions, nor was it laid in the manner, nor was it of the depth called for by the plans and specifications. The width of the road as constructed, the stones used in the foundation, and the manner of laying them, the dressing material provided and its proportion in mixture, gravel, and loam, and the manner of laying it, and its depth throughout the whole length of the road, was approved of as the work progressed and at its termination by the engineer. While the work was in progress the defendant was occasionally upon the premises during a part of the time, being there from Friday nights to Monday mornings, and at other times not so frequently. He was familiar with the kind and character of the work required to be done in the construction of this road, knew of what was being done, and with but one objection permitted the work to go forward. A short time prior to the completion of the road the defendant employed one Linnell, a civil engineer, and a person fully conversant with road construction and with the requirements of the contract in suit, to represent him in an inspection of the work that had been and was then being done by the plaintiff, and to approve or disapprove of the same. An inspection was made by Linnell, and he, in the defendant's behalf, suggested some slight additions to be made in the top dressing of the road. These additions were made by the plaintiff, and Linnell then approved of the work that had been done by the plaintiff in the construction of this road. The road as constructed was one of practical value to the defendant. Its cost to the plaintiff was not materially less than the cost of such a road as the contract called for and the parties contemplated when the contract was made. It appears, therefore, that these changes in the contract complained of were made with the approval of the defendant's engineer. The plaintiff acted in good faith, and did not

profit by the changes. The defendant has received and will retain the benefits of a substantial performance of the agreement, knowing of the departure from its original terms, and through his representatives has finally accepted and approved of the work. Under such circumstances, the defendant should not be permitted to retain the benefits and repudiate the burdens of the contract. *Wiley v. Athol*, 150 Mass. 426, 435, 23 N. E. 311, 6 L. R. A. 342; *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418, 420, 421, 50 Atl. 1028.

It is now urged that the case presented by the finding of the committee which was accepted by the superior court varies from the complaint, in that the plaintiff alleged a full performance of the contract, while the facts found disclosed that there was only a partial performance. This claim might have been considered by the superior court if it had been properly made. *Pitcher v. Christ Church*, 83 Conn. 308, 76 Atl. 272; *Andrews v. Peck*, 83 Conn. 668, 78 Atl. 445, 32 L. R. A. (N. S.) 181. See *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A. (N. S.) 327, and cases cited.

One reason of appeal charges that there was error in overruling the remonstrance against the acceptance of the committee's report. It is alleged in the remonstrance that several facts relating to the issue as to the substantial performance of the contract and tending to show departures therefrom were established by the evidence. It is enough to say with regard to this objection that it is not supported by the record, in which no part of the evidence is given, and it does not appear that any offer was made to show what the evidence before the committee was. Assignments of error must be supported by the record. *Decker v. Mann*, 80 Conn. 83, 87, 66 Atl. 884.

The other reasons of appeal are either immaterial or involved in the ones already discussed.

There is no error.

HIRSCH v. KAUFMAN.

(Supreme Court of Rhode Island. Oct. 4, 1911.)

BILLS AND NOTES (§ 514*)—LIABILITY OF INDORSER—ACTIONS—ADMISSION OF EVIDENCE.

In an action against the indorser on a note, defendant could show that plaintiff agreed that, if defendant would surrender certain securities to the maker, plaintiff would release defendant from his liability as indorser, and that defendant surrendered such security, but plaintiff did not release his liability as agreed.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 514.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Edward Hirsch against Harry Kaufman. Verdict for plaintiff, and case transferred from the superior court on defendant's exception. Case remitted for new trial.

The action was against the indorser on a promissory note.

Benjamin W. Grim, for plaintiff. Bellin & Bellin, for defendant.

PER CURIAM. The court is of the opinion that the defendant should have been allowed to submit, for the consideration of the jury, evidence in support of his claim that the plaintiff agreed with him that, if he would surrender to Weiss, maker of the note in suit, certain security held by him, the plaintiff would release the defendant from his liability as indorser on said note, and that in pursuance of the agreement the defendant did so surrender the security to Weiss, and that the plaintiff did not release the defendant from liability as indorser as agreed, but brought and is prosecuting this suit in violation of his said agreement. The justice of the superior court presiding at the trial erred in excluding evidence tending to support this contention, and the defendant's second exception is therefore sustained.

Case remitted to the superior court for a new trial.

BLOEDE et al. v. MAYOR AND CITY COUNCIL OF BALTIMORE et al.

(Court of Appeals of Maryland. June 24, 1911.)

1. DEDICATION (§ 15*)—INTENT—NECESSITY.
An intent to dedicate land as a highway is essential to a dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 18; Dec. Dig. § 15.*]

2. DEDICATION (§ 44*)—INTENT—EVIDENCE.
The intent to dedicate land as a highway must be clearly proved.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

3. DEDICATION (§ 19*)—REFERENCE TO PLATS.
If the owner designates certain land on a plat as a street, and afterwards conveys lots on such streets, retaining the fee in the street, he thereby dedicates it to the public use, and will be only entitled to nominal damages when it is opened.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85, 87-47; Dec. Dig. § 19.*]

4. DEDICATION (§ 44*)—EVIDENCE.
A claim of dedication as a street may be rebutted by circumstances inconsistent with an intent to dedicate.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 44.*]

5. DEDICATION (§ 44*)—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show an intent to dedicate land for a public street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Petition by Victor G. Bloede and another against the Mayor and City Council of Baltimore and others, involving the allowance of damages in street opening proceedings. From a judgment for defendants, petitioners appeal. Reversed, and new trial granted.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNEE, JJ.

William P. Lyons, for appellants. Joseph S. Goldsmith and German H. H. Emory, for appellees.

PATTISON, J. Ordinance No. 261 of the mayor and city council of Baltimore, approved April 29, 1907, provided for the opening of Eleventh street over the lands of the appellants, who claimed compensation therefor; but the street commissioners held that this street had been dedicated to public use, and allowed them only nominal damages. An appeal was taken therefrom to the Baltimore city court. That court dismissed the appeal and ratified the award of the commissioners. The case is before us upon the exceptions to the rulings of the Baltimore city court upon the admissibility of evidence and the granting of the defendant's prayers and the rejection of the first and second prayers of the petitioners.

[1, 2] "The law governing the dedication of land as a public highway has been very frequently before this court, and its general principles are definitely and firmly established. In every case, an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential; and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists. Dedication will be presumed where the facts and circumstances clearly warrant it; or it may be rebutted and altogether prevented from arising by circumstances incompatible with the supposition that any dedication was intended." *Baltimore City v. N. C. Ry. Co.*, 88 Md. 430, 41 Atl. 911; *Pitts v. Mayor and City Council of Baltimore*, 73 Md. 332, 21 Atl. 52; *McCormick v. Mayor and City Council of Baltimore*, 45 Md. 524; *Glenn v. Same*, 67 Md. 390, 10 Atl. 70.

[3] "It is settled by many decisions that if a street be designated on a plat, made by authority, or by the party himself, as passing over certain lands, and the owner subsequently conveys lots *fronting or binding on such streets*, he *retaining the owner of the fee in the bed of the street*, this is

held to be a dedication of the land over which the street passes to the public use, and on opening the street the owner of the fee will be entitled to a nominal damage only as compensation. In such case, it is held that the existence of the street entered into the consideration of the purchase, and that the grantor has been thus compensated for the use of his ground in the bed of the street, as a public street, and that he is therefore estopped to claim further compensation from the public." *Baltimore City v. N. C. Ry. Co.*; *McCormick v. Mayor and City Council*; *Tinges' Case*, 51 Md. 600; *Pitts v. Mayor and City Council of Baltimore*; *Fliersheim's Case*, 85 Md. 492, 36 Atl. 1093.

"The whole doctrine of dedication to use as a public highway as developed in the decisions in this state rests upon implied covenant to an easement in the highway, and there can be no presumption of dedication where this foundation is wanting. The essential elements or conditions of such a dedication are as follows: (1) A street designated on a plat made or adopted by the party himself as passing over his lands; (2) a subsequent conveyance by him of lots binding on such street; and (3) the retention at the time of the conveyance by the owner of the fee in the bed of the street." *Baltimore City v. N. C. Ry. Co.*

This case must, therefore, be disposed of by the application of the principles established by these authorities.

In the agreed statement of facts found in the record, it is conceded "that the only question sought to be raised by this case is whether or not there has been a dedication of Eleventh street, to the width of 66 feet, through the lands of the petitioners."

In the year 1901 an ordinance was passed by the mayor and city council of Baltimore providing for the acquisition of a lot of ground in the western section of the city, not less than 25 acres in area, for a public park; the same to be located west of Gwynn's Falls, east of Heald's lane, south of Edmondson avenue, and north of Frederick Road. At this time the fee-simple title to a tract of land containing 23.6 acres, including that part of the bed of Eleventh street which is the subject of this controversy, was vested in Samuel D. Schmucker and Robert C. Davidson, surviving trustees of the estate of Henry Clay Miller. Daniel A. Leonard, one of the appellants, at that time president of an improvement association in that section of the city, being interested in the establishment of the proposed park, obtained from the said trustees, at the request of Thomas G. Hayes, then mayor of the city, an option for the purchase of said land for the sum of \$10,000. The option, though given to Leonard, contained, among others, the following condition: "That the said land, when and if purchased at the above price by said Leonard, shall be transferred by him to the mayor

and city council of Baltimore for use as a public park."

The city officials, after examination and investigation of the lands described in the option, concluded that they did not want that part thereof lying to the west of the east side of Eleventh street (the proposed street) "as defined on the official plat of Baltimore county, made by William A. Shipley, county surveyor, in the year 1876," but would purchase that part lying to the east of the east side of said Eleventh street, which contained about 10 acres, for which they would pay the sum of \$4,237.29, or \$423.729 per acre, being the same amount per acre at which the entire lot was offered under the option. The trustees, however, would not sell a part of the lot unless at the time of the sale thereof a purchaser could be found for the remainder of it. It was then that Leonard approached a number of persons soliciting them to purchase the balance of said lot. He finally succeeded in interesting Victor G. Bloede, one of the appellants, who agreed to purchase the entire balance of said lot, about 13.6 acres, at and for the sum of \$5,762.71, being the same amount per acre at which the city had agreed to purchase the 10 acres.

The evidence discloses that, at the time that Bloede agreed to purchase this part of said lot, something was said about Leonard joining him in the purchase; but Leonard states that at the time he did not have the money and was not able to join him in the purchase, and so told Bloede, and did not join him. He testified that at the time he had no definite understanding that he would thereafter acquire an interest in said lands, although he had "a sort of indefinite understanding." Eight years thereafter, in 1909, an undivided one-half interest in said lands was conveyed by Bloede to Leonard. The city having agreed to purchase the 10 acres lying to the east of the east side of Eleventh street, and Bloede having agreed to purchase the 13.6 acres lying to the west of the east side of said street, and the trustees having agreed to accept their offers so made, they reported the sale to the circuit court for Baltimore City.

It is stated by the trustees in their report: "That out of said tract of 23.6 acres * * * they have sold, subject to the ratification of this court, to the mayor and city council of Baltimore, for use as a public park, all that part thereof which lies east of the east side of Eleventh street, and containing about 10 acres, for the sum of \$4,237.29. That, subject to the ratification of this court, and upon the condition hereinafter mentioned, they have sold to Victor G. Bloede, at and for the sum of \$5,762.71, all the remaining part of said above-mentioned tract of land, which remaining part contains 13.6 acres of land, and in all that part of said land which lies west of the east side of Eleventh street. The sale to Victor G. Bloede, above mentioned,

was made upon the understanding and condition that if the sale to the mayor and city council of Baltimore hereby reported, of the other portion of the entire lot owned by your trustees should fail of ratification, then the sale to the said Bloede, above reported, shall not be binding, and he shall be entitled, in that event, to be released therefrom."

Upon this report are indorsed the following agreements:

"The mayor and city council of Baltimore has agreed to buy, upon the terms above mentioned, the property above reported as sold to the mayor and city council of Baltimore. [Signed] T. R. Clendinen, President Park Commission."

"I hereby agree to buy, upon the terms above mentioned, the property above reported as sold to me. [Signed] Victor G. Bloede."

The sales of these lots were finally ratified by the court on the 21st day of May, 1901. On the following day, May 22d, a deed was executed by George Whitelock, trustee, to the said Samuel D. Schmucker and Robert C. Davidson, trustees, conveying to them the said lot of land of 23.6 acres, together with other lands they had purchased from the said Whitelock, trustee, but for which no deed had before been executed or conveyance made, and on the same day the lots so purchased by the city and Bloede were conveyed by Samuel D. Schmucker and Robert C. Davidson, trustees, to the respective purchasers. In the deed from Whitelock, trustee, to Samuel D. Schmucker and Robert C. Davidson, trustees, the following clause was inserted: "All reference to streets, rights of way or roads in the foregoing description are intended for convenience of description, and said reference are hereby declared not to operate or to be intended to operate as a dedication of any of said streets, rights of way or roads to public use." The only part of this deed before us is the clause above stated. This clause, at least, discloses that there was to be no dedication of any part of said lot under that deed, and that the fee in the whole of the lot was to pass, and did pass, to the grantees.

Leonard joined with the trustees in the execution of the deed to the city for the 10 acres purchased by it. The reason therefor is given in the following clause appearing in the deed. "Whereas, the said board of park commissioners agree to purchase from the said parties of the first part (the trustees), through the said Daniel A. Leonard, to whom an option had been given for said purchase, and who unites in these presents for the purpose of conveying any interest under said option he may have thereby acquired in the land." In this deed the land is referred to as "binding on the east side of Eleventh street."

In the deed to Bloede from the trustees, they conveyed to him, in fee simple, all that part of said lot of 23.6 acres which

lies west of the east side of Eleventh street, containing 13.6 acres, more or less. It is true the option to purchase the entire lot of 23.6 acres was given to Leonard; but it will be recalled that it was so given that, in the event of its being exercised and a sale made thereunder, the property was to be transferred to the city. This option was never exercised because of the unwillingness of the city to purchase the whole of said lot. Thus their unwillingness to purchase the whole thereof defeated the exercise of the option. Negotiations, however, were continued along different lines, which, as shown by the record, resulted in the sale of the land by the trustees to the city and Bloede. Although Leonard was active and instrumental in bringing about the sale of this land, it cannot be said that the sale thereof was made to him. In the whereas clause of the deed from the trustees to the city above given, the city recognizes, and so states, that the purchase was made by it from the trustees, and therein explains, in a manner not at all inconsistent with the fact that the land was so purchased from the trustees, why Leonard had joined with them in the execution of the deed.

The trustees wished to sell the entire lot and would not sell to the city a part thereof unless at the time of such sale a purchaser could be found for the balance, and as a result of the efforts of Leonard a purchaser therefor was found in the person of Bloede. That they might be assured of the sale of both lots of land and to prevent the sale of one without the other, the trustees made and reported the sales to the city and to Bloede at the same time and made the sale of one conditional upon the sale of the other, and, to more effectually accomplish the purpose sought, agreements were indorsed upon the report of sales whereby the city, through the president of the park board, agreed to buy, upon the terms mentioned in the report, the property sold to the city, and Bloede agreed to buy, upon the terms mentioned in the report, the property sold to him.

The said trustees, owners of the entire lot, pursuant to these sales made, reported, and ratified on the same days, on the 22d day of May, 1901, conveyed unto the city of Baltimore all that part of the lot that lies eastward of the east side of Eleventh street, and upon the same day conveyed in fee simple, to Bloede, all that part of said lot that lies westward of the said east side of said Eleventh street. By these grants, executed at the same time and with simultaneous effect, the grantors reserved or retained in themselves no part or interest in said lot of land.

At the time of the purchase of this lot of land by the city, its officials were fully informed of the terms and conditions under which the part thereof described in the report of sales was to be sold and conveyed to Bloede, and they knew full well the ex-

tent of his holdings and interest to be acquired thereunder. They knew that by the report of sales, upon which is indorsed their agreement to buy, all that part of the lot of 23.6 acres lying west of the east side of Eleventh street was to be conveyed in fee simple to Bloede, and that to them was to be conveyed only the part thereof lying to the east of said east side of said street, and that by the terms and conditions of said sales no interest in said lands was reserved or retained by the grantors.

To find that there has been a dedication to public use of that part of Eleventh street passing over the land of the appellants, it is first necessary to find the existence of an implied covenant to an easement in said street created by the sale and conveyance to the city of Baltimore, by the said trustees, of the aforesaid 10 acres of land. Before such a covenant can be found to exist, we must find the existence of all the above-stated essential elements or conditions of such a dedication. In our opinion, the third essential element or condition—"the retention at the time of the conveyance by the owner of the fee in the bed of the street"—is wanting in this case.

"A party should not be deprived of his property without compensation, unless there has been some clear and decisive act of dedication." And "as the city makes the claim to exemption from real or substantial compensation for the land taken for the street, by reason of the alleged previous dedication to that purpose, it is incumbent upon it to establish clearly and beyond doubt, that such dedication has been made." McCormick v. Mayor, etc., of Baltimore.

It will be borne in mind that it is only in the deed, and not in the report of sales, that the lot sold to the city is mentioned and referred to as "binding on the east side of Eleventh street." The report which forms the basis for the description in the deed, and to which the deed, in its description, should conform without material variance, described the lot of land so bought by the city as "all that part of said lot which lies east of the said side of Eleventh street."

At the time of the conveyance by the trustees of the lots so purchased by the city and Bloede, respectively, these lands were open or farm lands and not inclosed. There was no fence upon the east side of the proposed Eleventh street upon the line of division between these lots; but this line was marked by stones that had been placed there by the county authorities years before, and after its purchase this line was further marked by additional stones placed upon the line by the park board. The line of the west side of the proposed street was, and is to this time not marked at all, either by fence or stones. The bed of this street, as well as

the other part of the lot conveyed to Bloede, was, before the conveyance, cultivated as farm lands, and since which time has continued to be so cultivated, and the park lot remains uninclosed and in the same condition as when purchased by the city, with the exception that within the last year or two "some cleaning up" has been done upon it.

With the bed of the proposed street in the open, cultivated field, and with nothing to mark its western limits, but with its line upon the eastward side clearly marked, affording convenient means of location and description, it cannot be said, when these facts are considered with other facts and circumstances of the case, that it is "established clearly and beyond doubt that the reference to the street was for the purpose of dedication and not for the purpose of location and description."

[4] "Dedication may be rebutted and altogether prevented from arising by circumstances incompatible with the supposition that any dedication was intended." Baltimore City v. N. O. Ry. Co. In this case the existence of an implied covenant to an easement in said street, created by the aforesaid conveyance to the city, is inconsistent with the express grant of the fee-simple interest in the lands forming the bed of the street, made by the trustees to Bloede at the time of the execution of the deed to the city.

[5] It follows from what we have said that there has been no dedication of the bed of Eleventh street over the lands of the appellants, and that there was error in granting the defendant's prayers asserting that such dedication had been made, and in refusing the petitioners' first and second prayers in which it is asserted that there had been no dedication of the bed of said street. Having decided that there was no dedication, we do not think it necessary to pass upon the exceptions taken to the admission of certain testimony. We shall therefore reverse the judgment of the lower court.

Judgment reversed, and new trial awarded, with costs to the appellants.

NATIONAL BANK OF WILMINGTON & BRANDYWINE v. WILMINGTON, N. C. & S. RY. CO.

(Court of Chancery of Delaware. Aug. 8, 1911.)

1. JUDGMENT (§ 744*) — CONCLUSIVENESS — MATTERS CONCLUDED.

Where a mortgage upon the property of a railroad company was foreclosed by action, and it was not contended that the descriptive clause of the mortgage did not cover freight cars, and the decree of foreclosure included rolling stock, that decree precluded receivers of the mortgagor company from contending later that freight cars were not covered by the mortgage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CORPORATIONS (§ 478*)—REQUISITES—STATUTORY PROVISIONS—INTENT.

20 Del. Laws, c. 579, amending the chattel mortgage law (15 Del. Laws, c. 477), and providing that none of the provisions of the act shall be applicable to mortgages or deeds of trust, including both real and personal property, executed by any corporation to secure an issue of bonds, was intended to remove any existing doubt as to the lien of such mortgages upon personal property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 478.*]

3. RAILROADS (§ 144*) — CONSOLIDATION — MORTGAGES UPON PROPERTY OF CONSTITUENT COMPANIES.

General Corporation Law (22 Del. Laws, c. 392) § 123, authorizes the consolidation of railroad companies; and section 60 provides that when the agreement required by section 59 is signed and filed the separate existence of the constituent corporation shall cease, and the consolidated corporation shall become a single corporation, with all the rights, powers, and privileges of the constituent companies, providing that all rights of creditors and liens upon the property of the original companies shall remain unimpaired, and all their debts, liabilities, and duties shall attach to the consolidated corporation. The entire property, including the rolling stock, of one of the constituent companies of a consolidated railroad was mortgaged, and the mortgage also provided that equipment, replacing old and useless equipment, should be subject to its lien. *Held*, that a car purchased to replace one owned by the constituent company was subject to the lien of the mortgage, even though purchased by the receiver of the consolidated company, and with its funds.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 144.*]

4. RAILROADS (§ 167*) — MORTGAGE — CONSTRUCTION.

A mortgage upon the rolling stock of a railroad provided that new equipment purchased to replace that which was worn out and unfit for use should be subject to the mortgage. A receiver having been appointed, he petitioned for permission to purchase a new freight car, alleging that the one now in use could not be repaired so as to be safe, and that it was entirely worn out. *Held*, that a car so purchased was subject to the lien of the mortgage, even though the old freight car was repaired and again used.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 167.*]

5. RAILROADS (§ 144*) — CONSOLIDATION — MORTGAGES UPON PROPERTY OF CONSTITUENT COMPANIES—PRIORITIES.

Where both of the constituent companies of a consolidated railway corporation had given mortgages, including their after-acquired rolling stock, and the consolidated company purchased equipment to replace the rolling stock of the first constituent company, the mortgage of the first company was a prior lien on the purchased property over that of the second.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 144.*]

Suit by the National Bank of Wilmington & Brandywine against the Wilmington, New Castle and Southern Railway Company, to foreclose a mortgage. On petition of the receiver for instructions as to the disposition of certain property. Property ordered delivered to purchaser at the foreclosure sale.

The property covered by a mortgage executed by the Wilmington and New Castle Electric Railway Company prior to its consolidation and merger with the New Castle and Delaware City Railway Company into the Wilmington, New Castle and Southern Railway Company, having been sold under foreclosure proceedings in this cause, hearing was had before the Chief Justice, the Chancellor being disqualified, on an agreed statement of facts and petition of the receivers for the defendant company, praying for instructions as to the disposition of certain property, more especially a freight car, purchased by said receivers.

Daniel O. Hastings, for purchaser under foreclosure proceedings. Saulsbury, Ponder & Morris and Robert H. Richards, for receivers.

THE CHIEF JUSTICE. This case is before the Court upon an agreed statement of facts, which will sufficiently appear in the following opinion.

The important question to be determined, is whether a certain freight car which was bought by the receivers of the Wilmington, New Castle and Southern Railway Company was covered by the lien of a mortgage executed by the Wilmington and New Castle Electric Railway Company dated August 1, 1896, and recently foreclosed by the order of this Court.

In 1904, and several years subsequent to the execution of said mortgage, the said Wilmington and New Castle Electric Railway Company and the New Castle and Delaware City Railway Company, by agreement, and under the laws of the State, merged and consolidated into the Wilmington, New Castle and Southern Railway Company.

[1] It is not denied that the descriptive language of said mortgage is sufficient to cover a railway car, but it is strongly argued by counsel for the receivers that there was no authority given by any law of this State for including said car, which they claimed to be personal property, in a mortgage which was essentially a real estate mortgage.

The company that executed the mortgage was created by a special act which was enacted some three years before the passage of the General Corporation Law (22 Del. Laws, c. 392) of this State. Said special Act (19 Del. Laws, c. 707) provided, " * * * that the said company, for the purpose of building and equipping the railway, shall have the power to borrow money, if the Board of Directors shall so determine, to an amount not exceeding the sum of \$150,000, and to secure the payment of the same by the issue of bonds, or of the bond and mortgage of said railway,

together with the corporate rights and franchises granted by this Act." Section 2.

It is contended that the authority to mortgage the railway, corporate rights and franchises did not include the right to mortgage rolling stock or any personal property of the company. Although the argument made in support of this proposition is interesting, I do not think it should be considered at this stage of the protracted litigation connected with the mortgage. The question was not raised at any of the arguments made in resisting the foreclosure of the mortgage, and after a most vigorous and able opposition to said foreclosure, on other grounds, a decree was finally made in pursuance of which the property described in the mortgage, including cars, was sold at public sale and purchased by Solomon Hanford, who is now claiming the car in question. No objection was made, at any time, by the receivers, or any one else, to the sale of the cars, and no objection is made now to the sale of any car other than the one in controversy.

Moreover, in a petition filed by the receivers subsequent to the sale, for the purpose of definitely ascertaining whether certain property sold under the foreclosure decree belonged to the purchaser at the sale, it was stated:

"In the opinion of these receivers all the property set forth in 'Schedule A' is covered by the descriptive language of said decree and of the mortgage so as aforesaid foreclosed by said decree. In the opinion of these receivers the property mentioned and set forth in 'Schedule B' is not covered by the descriptive language of said decree or of the mortgage foreclosed thereby. In order that these receivers may be protected in their action in the premises, they respectfully pray your Honor to make an order directing such disposition by them of the property mentioned in 'Schedule A' and 'Schedule B' respectively, as shall seem proper and equitable under the circumstances."

Accordingly a decree was made authorizing and directing the receivers to deliver unto Solomon Hanford, the purchaser, absolutely and unconditionally, all the property mentioned in "Schedule A" attached to the petition; and further authorizing and directing the receivers to deliver unto the said Hanford possession of the property mentioned in "Schedule B," to be held, kept, maintained and cared for by the said Hanford subject to the further order of the Court as to the final disposition thereof, and subject to such further order as the Court should make touching the question as to whether all or any part of said property mentioned in "Schedule B" is covered by the terms of the said decree of foreclosure and by the descriptive language and terms of the said mortgage so as aforesaid foreclosed by said decree.

Among the property mentioned in "Schedule A" is included several cars, and other rolling stock, as well as numerous articles which are clearly personal property that belonged to the Wilmington and New Castle Electric Railway Company before the merger. Included in "Schedule B" is the car in question, and other articles which are clearly personal property, that were acquired at various times between the organization of the Wilmington and New Castle Electric Railway Company and the appointment of the receivers for the Wilmington, New Castle and Southern Railway Company.

For this Court to entertain the contention of the receivers that the Wilmington and New Castle Electric Railway Company had no authority in law to include cars in its mortgage would be, in effect, to hold that its decree of foreclosure was erroneous and void so far as the rolling stock was concerned. Such a ruling would be entirely inconsistent with said decree and the sale made thereunder.

The second contention made by the receivers, is that in this State, at the time of the execution of the mortgage, there was no law authorizing the mortgaging of personal property except the chattel mortgage statute, and that the mortgage in question was to all intents and purposes a real estate mortgage, and was not executed and recorded in conformity with said statute.

[2] The Legislature of this State on February 17, 1897, enacted a supplement to the chattel mortgage law (Chapter 579, Vol. 20, Laws of Delaware, Vol. 15, Laws of Delaware, c. 477) by adding thereto the following words:

"Provided, that none of the provisions of this Act shall be applicable to mortgages or deeds of trust including both real and personal property, heretofore or hereafter executed by any corporation to secure an issue of bonds."

Without undertaking to decide what was the effect of such supplementary Act upon the mortgage under consideration, its intent and purpose was manifestly to remove any doubt that may have existed respecting the lien of such mortgages upon the personal property included therein. And said Act is also significant and pertinent in that it clearly recognizes the fact that such mortgages embraced personal as well as real property. It does seem to have been passed to cover just such cases as this, if not this particular case; and it was certainly the intention of the Legislature, in its enactment, to recognize the power of a corporation to include in a mortgage upon its railway, rights and franchises, property that was clearly personal in its character.

But without regard to this Act, I would repeat here what I have said relative to the first contention made by the receivers. The objection that the mortgage does not conform to the chattel mortgage law, and con-

stitutes, therefore, no lien upon the car in question, could have been as well made to any cars or personal property described in the mortgage and sold without objection, under the decree of the Court.

When the Court made the foreclosure decree, and directed that all the property described in the mortgage should be sold, it necessarily decided that such property was bound by the lien of the mortgage, which would not have been the case if the company that executed the mortgage had no right or authority to include therein its rolling stock. I, therefore, consider that I have already passed upon the first and second questions raised by the receivers.

But while I do not, for the reasons stated, think it necessary or proper to consider the interesting and able arguments made by counsel in support of the receivers' first and second contentions, I do not want to be understood as recognizing the soundness of such contentions. While the authorities appear to be conflicting upon these points, there are many that hold that the rolling stock of a railroad or railway company is not personal property in the ordinary or common law sense, but rather in the nature of fixtures, which are bound by a mortgage upon the railway, rights and franchises of the company. And there are other very strong authorities which take the position that the cars of the company, and whatever else is essential to the operation of the road are necessary incidents and appendages of the railway, and are lawfully covered by a mortgage thereon. *Randolph v. Wilmington & Reading R. R. Co.*, 20 Fed. Cas. 264; *Pulan v. Cin. & C. Air Line R. R. Co.*, 20 Fed. Cas. 32; *Hamlin v. Jerrard*, 72 Me. 62; *Jones on Corporate Bonds and Mortgages*.

I desire to make special reference to the case of *Hamlin v. Jerrard* in this connection. It is also noticed later in this opinion in respect to another point. In the course of a well considered opinion the Court in that case said:

"But all the rolling stock to be acquired, as well as materials and equipment for constructing, maintaining, operating, repairing and replacing the road and its appurtenances, or any part thereof, are within the specific statement of property mortgaged.

"If the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property in esse cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it suffi-

cient to uphold the grant of both together, the one as incident to the other. Their title to the railroad is the foundation of an interest in the cars and engines to be acquired for its use.

"We think that such property as this, of a class specifically mentioned in the mortgage, acquired for lawful railroad purposes, on hand for present use, or to meet expected requirements, is held by the mortgagors subject in equity to the mortgage from the time their title and possession accrued, and that when the trustees become actually possessed of it under the mortgage, they may hold such possession at law against the attacking creditors of the corporation."

The following cases were cited by counsel for the receivers, and some of them seem to sustain their contention:

Miller v. Rutland Ry. Co., 36 Vt. 452; *Williamson v. R. R. Co.*, 29 N. J. Eq. 311; *State Treasurer v. Somerville*, 28 N. J. Law, 21; *Hoyle v. Plattsburgh R. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Howe v. Freeman*, 14 Gray (Mass.) 566; *Coe v. Columbus*, 10 Ohio St. 372, 75 Am. Dec. 518; *Railroad Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 836; *Railroad Co. v. Ft. Howard*, 21 Wis. 45, 91 Am. Dec. 458.

[3] The third and last point made by the receivers, and upon which I assume they mainly rely, is, that even if under the charter of the Wilmington and New Castle Electric Railway Company, and the existing laws of the State at the time of the execution of its mortgage, it were possible that the mortgage could be a lien upon rolling stock, it could not be a lien upon the car in question although the mortgage does, by its terms, embrace cars and other rolling stock of the company; and although the descriptive language of the mortgage includes also property "which may hereafter belong to said company"; and Article 4 of the mortgage provides "that the said Railway Company shall also have full power from time to time to dispose of, according to its discretion, such portion of its equipment, machinery and implements at any time held or acquired for the use of said Company as may have become unnecessary and unfit for such use, replacing the same by new which shall then become subject to the lien of this mortgage."

It is argued first, that Article 4 does not apply to the facts of the present case because there was no actual disposition of the car which it is alleged by the purchaser the car in question was bought to replace. It is insisted that the old car was not worn out or unfit for use, but that it was remodeled and in use when the road was turned over to the purchaser. In the second place, it is contended, and this is obviously the important point in the case, that the mortgage, under the after acquired property clause, cannot by any construction be held to cover any after acquired property other than prop-

erty after acquired by the Wilmington and New Castle Electric Railway Company, the mortgagor. That it could not, therefore, cover the car in dispute which was purchased by the receivers of the Wilmington, New Castle and Southern Railway Company, a corporation created by the consolidation of the Wilmington and New Castle Electric Railway Company and the New Castle and Delaware City Railway Company under the General Corporation Law of this State.

The broad contention of the receivers in this connection, is "That when there is a merger of several corporations into one corporation, under such a statute as ours, and the consolidated corporation thereafter acquires rolling stock, which may by the terminology of the mortgages upon the component constituent corporations, be sufficiently included, and which constituent corporations have included, in their mortgages after acquired property clauses, that those clauses do not cover, and the mortgage cannot be a lien upon rolling stock subsequently acquired by the consolidated corporation." In support of this contention the following authorities were cited, viz.:

Security & Trust Co. v. Louisville R. R. Co. (C. C.) 102 Fed. 398; *Hinchman v. Port Defiance Ry. Co. et al.*, 14 Wash. 349, 44 Pac. 872; *Pullman Palace Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Chicago Ry. Co. v. Kansas City Ry. Co.* (C. C.) 38 Fed. 58.

It is claimed that the first mentioned case (102 Fed.) is particularly in point, and on all fours with the present one. The following words taken from the very long opinion delivered by the Court seem to warrant such claim:

"The after acquired property clause in each of the mortgages can rightly be construed, I think, to extend only to property subsequently acquired by the mortgagor. The consolidated company is a new and different organization." The Court then says: "The case of *Hinchman v. Railway Co.* is quite in point, and in principle the question seems to be covered by the decision in *Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*"

It is not clear why the Court used the language I have quoted, because it does not seem that it was necessary or pertinent to the decision of the case. The facts are very complicated, and the opinion exceedingly long, and it may be that I have not, from my reading of the case, fully comprehended the points involved. But I have not been able to find that the exact question now before me was involved in that case. Even though I should be mistaken in this, it is quite certain that the *Hinchman Case* which was considered "quite in point," is not so in the present case. Neither is the question which the Court said was covered in the *Pullman Palace Car Case* the same as the one involved here.

In the *Hinchman Case* the Court said:

"That no part of the money secured by the mortgage was loaned upon the faith or the credit of the property so afterwards acquired, is apparent. * * * Nor can it be said that it was purchased by the new company to replace the former equipment of the line covered by the respondent's mortgage."

[4] It is contended, I know, that the car in question does not fall within the provisions of the mortgage which I have quoted from Article 4, because it appears from the agreed statement of facts that the car which it is alleged to have been bought to replace as worn out and unfit for use, was in fact repaired, remodeled and continued in use, and was not replaced by the new car. But it also appears from the said statement of facts that the receivers presented to this Court a petition dated August 19, 1909, relative to the purchase of the new car, which recited, among others, the following facts:

"That the said freight car has been in continuous use, excepting at times when it needed to be repaired, by the receivers throughout the whole operation of the road by them until a few weeks ago, when it became so thoroughly out of repair, worn out, defective and useless as that it was impossible to be used by these petitioners in the operation of the said road, or to be repaired and put in such condition as that its further use would be practicable. These receivers have had the old freight car thoroughly examined with the view of repairing it, if possible, but the result of such examination, both by themselves and by mechanics, is conclusive of the fact that it is impossible to repair the old car so that it can be safely used. * * * These petitioners further represent that it is necessary that they purchase such a new freight car to enable them adequately to operate the road and attend to the freight business which comes to the road, and, in the opinion of these petitioners, a failure to purchase such a new car, or otherwise provide said road with such adequate equipment, would be greatly to the detriment of the road and would detract from its value as a going concern, inasmuch as it would lose to the road the very valuable freight business which it now has."

It would be difficult to imagine facts or conditions which would show that a new car was more necessary, or that the old car was more worthless, unnecessary and unfit for use. Upon the representations made in said petition the Court authorized the receivers to purchase the new car, which is now in dispute, and the order was made upon the assumption that the old car was useless for the purpose for which it was acquired and used, and that there was an actual and pressing need for a new car to replace the old one. There can be no question that the new car was obtained to replace one that had become unnecessary and unfit for use,

and it does, therefore, come within Article 4 of the mortgage.

But whether or not this after acquired property was bound by the lien of the original mortgage must depend upon the intention of the parties, the statute and agreement under which the merger or consolidation was effected, and other existing laws of the State.

Inasmuch as the mortgage provided that the company should have power at any time to dispose of any part of its equipment that was unfit for use, and replace the same by new, which should become subject to the lien of the mortgage, it is manifest that it was the intention of the parties that any new car which was acquired to replace an old one should be bound by the lien of the mortgage. This fact, together with the further fact, that the new car was authorized to be bought to replace one that was unfit for use, clearly distinguishes this case from the Hinchman Case, upon which the receivers, and the Court in the 102 Fed. case, so much relied. In the Hinchman Case, it will be remembered, the Court said:

"Nor can it be said that it (the property in question) was purchased by the new company to replace the former equipment of the line covered by the respondent's mortgage."

Section 123 of the General Corporation Law of this State authorizes the consolidation of railway companies, and provides that the consolidated corporation shall "be possessed of, exercise and enjoy all the franchises, rights, powers, privileges, immunities and benefits which any corporation of this State, constituent thereof, was possessed of, or entitled to exercise, under its charter or any law of this State; and shall be subject, within this State, to the conditions and restrictions imposed by its charter, or any corporation of this State, constituent thereof."

Section 59 provides that the directors of the consolidating companies may enter into an agreement prescribing the terms and conditions of consolidation, the mode of carrying the same into effect, &c.

Section 60 is the most important and pertinent part of said Act, so far as the present inquiry is concerned, and it is in the following language:

"When the agreement is signed, acknowledged, filed and recorded, as in the preceding section is required, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall become a single corporation in accordance with the said agreements, possessing all the rights, privileges, powers and franchises, as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated, and all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due on what-

ever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations; * * * provided, that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

In determining the right of each consolidated company after consolidation, the merger agreement and the Act under whose authority the consolidation was effected must be especially considered. The part of the Act most material to the present question is the provision, "that all rights of creditors, and all liens upon the property of either of said former corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective former corporations shall thenceforth attach to said consolidated corporation."

In the agreement of consolidation and merger is found substantially the same provision, viz: "And all the rights of creditors, and all liens upon the property of either of said corporations, parties hereto, shall be preserved unimpaired; and the said corporations, parties hereto, may be deemed to continue in existence to preserve the same," &c.

In that part of the mortgage which described the property bound thereby is the following language:

"Together with all the rolling stock, tools, machinery, implements and materials now belonging, or which may hereafter belong to said Railway Company, and now or hereafter in use, or intended for use upon said railways or property," &c.

Under the foreclosure decree the property was advertised and sold as described in the mortgage.

It cannot be denied that the language of the mortgage, which I have quoted, would be sufficient to cover the car in question if it had been acquired by the Wilmington and New Castle Electric Railway Company after the execution of the mortgage. In other words, it is clearly sufficient in its terms to cover after acquired property. It is equally clear, I think, that it was the intention of the parties to the mortgage that any property acquired at any time to replace that which had become unnecessary and unfit for use should be bound by the lien of the mortgage.

It is not denied that after acquired property may be bound by the lien of a mortgage

executed before the acquisition of said property, but it is claimed that the car in question is not so bound because it was acquired by the receivers of the consolidated company.

I have already referred to the leading cases cited by counsel for the receivers, and relied upon to sustain their position. The following cases were cited by counsel for the purchaser:

Hamlin v. Jerrard, 72 Me. 62; *Wabash, St. L. & Pac. R. R. Co. v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235; *Tysen v. Wabash (C. C.)* 15 Fed. 763; *Strang v. Montgomery & E. R. Co.*, 23 Fed. Cas. 218.

I wish to refer again to the case of *Hamlin v. Jerrard*, because it seems to me to contain not only a very thorough and able treatment and discussion of the subject under consideration, but also to be more in point than any other case that has been cited on either side. The Court in delivering their opinion said:

"It would be an important question, if it were directly presented, whether the net income of the property of the Maine company, so far as it became invested in property such as is described in that mortgage, even if the investment were made by a new corporation that had acquired the right to run the road, could ever rightfully be diverted from its legitimate use in lending additional security to the first mortgage bondholders. It is clear that all accessions to the road and its appurtenances in Maine, after consolidation as before, were accessions to a mortgaged property by the avails of a later mortgage, such mortgage must be postponed to the earlier one on each part, just as if each company separately had put a second mortgage on its own line of road. The consolidated company assumed the debts of its several parts, and recognized the prior liens upon them. It assumed also, by force of law, the burden of having any increased value of the road and its appurtenances, go as security, first, for those prior liens. It cannot claim that its duty was merely to keep them in statu quo, in as good condition as when received, and that, as against the first mortgagees, additions and improvements belong to itself as a distinct entity. If such a claim were sustained, the very income of the property of the Maine road might go to swell its value, and the clauses conveying future acquisitions become void of effect; although the newly acquired property made part of the value of the road itself. The first mortgage on the Maine road, and the first mortgage on the New Brunswick road, remain the first liens on all acquisitions of the consolidated company, which issue from, and become part of the estate to which those mortgages applied. A due regard for vested interests imperatively demands such a legal conclusion and effect. To reach this result, if the original companies have ceased to exist, or to be capable of organization and action, the consoli-

dated company, notwithstanding the articles of union declare it one, must still be regarded, to save the rights of prior creditors, as two, one in Maine, and one in New Brunswick, having the same name and officers, and each representing the original company to whose rights and liabilities it succeeded; with which it has a unity of interest and of obligation. There can be no loss of identity of the original companies in the consolidation, to the prejudice of the rights of prior creditors, or to the destruction of prior liens. See *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665 [23 L. Ed. 757]."

The reasoning of the Court in that case impresses me as being sound in principle, and entirely consistent with the intention and rights of the parties to the mortgage. I, therefore, hold in the present case, that although the car in dispute was purchased by the receivers of the consolidated company, it was nevertheless, after its acquisition, subject to the lien of the mortgage of the Wilmington and New Castle Electric Railway Company, and passed to the purchaser at the sale made under the foreclosure decree.

[5] It was suggested at the argument that if the car purchased by the receivers was covered by the mortgage of the Wilmington and New Castle Electric Railway Company, it was just as clearly covered by similar language employed in the mortgage of the New Castle and Delaware City Railway Company, and the mortgage of the consolidated company.

In reply to such suggestion it may be said that the old car, which the new car was bought to replace, was never owned by the New Castle and Delaware City Railway Company at all; and as the mortgage of the Wilmington and New Castle Electric Railway Company constituted, in my opinion, a lien upon the new car, as after acquired property, the other two mortgages were necessarily junior liens and subordinate to the original mortgage, even if their descriptive clauses were sufficient to include said car.

It is an undisputed fact that all the rolling stock held by the consolidated corporation, or the receivers thereof, except the one car purchased by the receivers, was, before the consolidation, purchased, owned and used by the Wilmington and New Castle Electric Railway Company; and it is undisputed that the New Castle and Delaware City Railway Company never owned any rolling stock at all.

The thought of the receivers seems to be, that because the new car was purchased by them from the income of the consolidated road it could not be a part of the mortgaged property. Upon this point I desire to quote briefly from the opinion delivered by the Court in *Strang v. Montgomery & E. R. Co.*, viz.:

"The next question to be settled is, did the cars and other rolling stock purchased

by the receiver from the income of the road, pass, by the sale, to the purchaser? The mortgage which was foreclosed in this case covered not only the railroad and other real property, but also the cars, engines and other rolling stock, and all descriptions of personal property owned by the railroad company, or to be thereafter acquired. The road and its equipment constituted the complete and entire thing which was covered by the mortgage. The road, on the one hand, and the equipment on the other, were useless unless held and used together. One of the purposes to be accomplished in the appointment of a receiver, was the preservation of the mortgaged property. This could only be done by repairing the track, and replacing the engines and cars when required. Money expended for either of these purposes becomes incorporated into the corpus of the mortgaged property. * * *

"The claim of the petitioners is, that after the road passed into the hands of the receiver, all its income and profits became their property by an absolute title, and, therefore, that the engines, and other property purchased with such income and profits, vests in them, and do not become part of the mortgaged property. * * *

"There is no consideration which would justify the Court in holding that the purchasers of the mortgaged property have not acquired title to the rolling stock bought by the receiver. It was as much a part of the mortgaged property as the iron rails put on the track by him."

In accordance with the foregoing opinion the following order was entered:

"And Now, To Wit, this eighth day of August, A. D. 1911, argument upon the foregoing agreed statement of facts having been heard and carefully considered by the Chief Justice, and the Chief Justice being of the opinion that the new freight car mentioned in Schedule B filed and attached to the Order made by the Chief Justice on the twenty-sixth day of January, 1911, is covered by the lien of the mortgage given by the Wilmington and New Castle Electric Railway Company and that the title to the same passed to the purchaser, Solomon Hanford, under the foreclosure sale, and the said new freight car having been held by the said Solomon Hanford subject to the further order of this Court,

"It is ordered by the Chief Justice (the Chancellor being disqualified to sit in this cause), that Wilmer Palmer and Joseph Chester Gibson, Receivers of the Wilmington, New Castle and Southern Railway Company, be and they are hereby authorized and directed to deliver unto Solomon Hanford, or his assigns, absolutely and unconditionally, the new freight car mentioned in Schedule B, as aforesaid."

The ownership of the freight car being the principal contention, the balance of the property contained in Schedule B was, by consent of counsel, ordered delivered to the said purchaser, absolutely and unconditionally.

PATTEN v. FIELD.

(Supreme Judicial Court of Maine. July 15, 1911.)

1. TRIAL (§ 139*)—DIRECTING VERDICT.

If the evidence would warrant a jury in returning a verdict for defendant, it is error to direct a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. FRAUD (§ 9*)—ACTIONABLE DECEIT—ELEMENTS.

In an action for deceit, it must be shown that defendant made a false representation as to a material fact, that he knew it was false, or made it as a statement of fact of his own knowledge not knowing whether it was true or false, with the intent that plaintiff should rely on it, and that plaintiff was ignorant of its falsity and acted upon it to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

3. FRAUD (§ 64*)—ELEMENTS OF DECEIT—QUESTIONS OF FACT.

Whether the elements of actionable deceit existed in an action therefor were questions of fact to be determined from the evidence and the inferences to be drawn from the facts established.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 67-71; Dec. Dig. § 64.*]

4. FRAUD (§ 64*)—DIRECTING VERDICT.

Where there were facts and circumstances in an action for deceit from which the jury might have reached the conclusion that plaintiff did not believe and rely upon the alleged misrepresentations, it was error to direct a verdict for plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 70; Dec. Dig. § 64.*]

5. TRIAL (§ 139*)—DIRECTING VERDICT—QUESTIONS FOR JURY.

Where fair-minded and unprejudiced persons might reasonably differ on the conclusions to be drawn from undisputed facts, the question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

Exceptions from Supreme Judicial Court, Penobscot County.

Action by Harvey H. Patten against William N. Field. On the case for deceit.

Plea, the general issue, with special plea as follows: "And now the said defendant, William N. Field, by his attorney, comes and defends, etc., when, etc., and says that the said plaintiff, H. H. Patten, ought not to have or maintain his aforesaid action thereof against the said defendant, because the said defendant, William N. Field, avers that after the making of the said supposed promises and undertakings and the accruing of the said several causes of action in the plaintiff's declaration, if any such were made

or accrued, a discharge in bankruptcy was granted to him, the said defendant, by the District Court of the United States for the District of Maine. A certificate of such discharge under seal of the said court granting the same is hereto attached."

At the conclusion of the evidence the presiding justice ordered a verdict for the plaintiff for \$454, and the defendant excepted.

Exceptions sustained.

Argued before EMERY, C. J., and KING, BIRD, and HALEY, JJ.

Martin & Cook, for plaintiff. Fellows & Fellows, for defendant.

PER CURIAM. Action on the case for deceit. In addition to the general issue, the defendant pleaded his discharge in bankruptcy proceedings commenced after the time of the alleged deceit. The case comes up on exceptions to the ruling of the presiding justice directing a verdict for plaintiff.

It appears that the plaintiff, his partner, Mr. Sayles, and the defendant agreed to organize a corporation to purchase a woolen mill property in Uxbridge, Mass. Mr. Sayles was one of the heirs owning the property and was to put in his interest for stock in the corporation; \$25,000 was to be paid to the other heirs, \$1,000 on September 1, 1909, and the balance on September 15, 1909. The plaintiff and the defendant were to organize and finance the corporation and each have a block of the stock equal to that of Sayles. The corporation was organized and the plaintiff paid the expenses thereof. Thereafter the plaintiff and defendant went to New York and made arrangements with certain brokers to undertake the financing of the proposition, to whom it was necessary to pay \$54 for advertising. This amount was for defendant to pay; but, not having the money, he requested plaintiff to pay it for him, saying: "I am all right. * * * I have been holding \$30,000 worth of wool about two years, and it has taken every dollar I could get to pay the storage on that wool. I didn't want to sell on a sacrifice, and I will finance the whole proposition in 60 days." The plaintiff paid the \$54, for which defendant gave him his check on a Boston bank. The check was immediately presented, but there was "no funds" to pay it, and it has not been paid.

On September 1, 1909, a note of the corporation for \$800 on 30 days was made and signed on the back by the plaintiff, defendant, and Sayles. The proceeds of this note, together with a check for \$200 which plaintiff had received from a woman in Maine for the sale of stock, was used to pay the first payment on the property. With respect to the making of this note the plaintiff testified:

"Mr. Field came into the office on the morning of September 1st. 'Now,' he says, 'we have got to raise that thousand dollars.' I says, 'Field, can you pay your half?' 'Well,'

he says, 'there is that \$200 check; we have got to have \$800 more to go with it.' I says, 'I wouldn't want to use this woman's check if this thing isn't going through all right, because I should feel that I ought to pay the woman back if we used the check.' He commenced to talk and wanted to know if I doubted his financial condition. I says: 'I don't know. I suppose you are all right.' He says, 'I am,' and went on to tell his \$30,000 wool story and about the sheep he owned in his own right; that he practically owned a thousand sheep. He says, 'I am good for the whole amount.' I says: 'Field, I am willing to stand one-half of this. I will pay \$400 and you pay \$400, and we will turn the check in.' He says: 'I can't this morning. If you will sign a note with me—that is, have the woolen company on it and Sayles' name—we will take care of it; I will take care of it myself.' He says, 'And then you ain't losing but one-half anyway,' and we took and signed the note."

On October 1st the plaintiff paid the note, and also sent the woman in Maine the \$200 she had sent for stock.

The defendant was not present at the trial, and no evidence was presented in his behalf other than his discharge in bankruptcy. The presiding justice asked plaintiff's attorney how much he claimed, and he replied, "For the note, \$400, and the check, \$54." Thereupon a verdict for \$454 was directed for the plaintiff.

[1] If the evidence in the case would have warranted the jury in returning a verdict for the defendant, the exceptions must be sustained; otherwise, overruled.

[2] To sustain this action there must be clear and decisive proof of each and all the essential elements of actionable deceit; that the defendant made a representation in regard to a material fact; that the representation was false; that he knew it was false, or made it as a statement of fact of his own knowledge not knowing if it was true or false; that it was made with intent that the plaintiff should rely and act upon it; and that the plaintiff was ignorant of its falsity and reasonably believed it to be true, and relied upon it, and acted upon it to his damage. [3] Whether these elements existed in this case were questions of fact determinable from the evidence, and the inferences to be drawn from facts established by the evidence. Had the case been submitted to the jury, they would undoubtedly have been justified in finding for the plaintiff if they accepted his evidence and drew their inferences in his favor. [4] But, on the other hand, would not a verdict of a jury in the defendant's favor be sustainable upon the evidence in this case? It may be conceded that a jury would not have been justified in this case in finding that the defendant did not make a false representation of a material fact, knowing it to be false, and with intent that it should be acted upon by the plaintiff; but

can it be held that a jury would not have been justified in finding that the plaintiff did not reasonably believe the alleged representations, and did not rely upon them, and was not induced by them to pay the \$54, or sign the note, or both? To make the question before us more concrete, assume that a jury had made a special finding that at the time the plaintiff signed the \$800 note he did not believe the defendant's wool and sheep story, and was not induced thereby to sign the note, but signed it because he was personally interested to have the \$1,000 paid, and thereby save the option, and expected the note could be paid from sales of stock; would such finding by a jury be sustainable in this case? We are constrained to the conclusion that it would. Patten did not testify that he believed and relied upon Field's representation about the wool and sheep. Why should he have believed and relied upon this representation on September 1st? It was made to him in New York on August 8th, when Field gave him his worthless check, representing it to be good, and Patten had held that dishonored check for nearly a month as a constant reminder that Field was not only financially worthless, but had boldly falsified about the check. In the absence of any statement by Patten that he did believe and rely upon the wool and sheep story, that essential element of the case can only be found as an inference from Patten's act in signing the note. But we do not think that is the only inference that can be properly drawn therefrom. [5] When fair-minded and unprejudiced persons may reasonably differ in the conclusions to be drawn from undisputed facts, the question is one of fact for the jury.

For the reasons stated, it is the opinion of the court that the case should have been submitted to the jury.

Exceptions sustained.

MARSH BROS. & CO., Limited, v. BELLEFLEUR.

(Supreme Judicial Court of Maine. Sép. 30, 1911.)

1. EXECUTION (§ 99*)—ALIAS EXECUTION—SCOPE OF REMEDY.

Scire facias on a judgment to obtain an alias execution does not lie under Rev. St. c. 78, § 19, where upon the original execution real property has been sold and not levied upon by appraisal and set-off; but an amendment may be allowed, striking out the words pleading the statute.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1, 3; Dec. Dig. § 99.*]

2. SCIRE FACIAS (§ 8*)—AMENDMENT OF WRIT.

A writ of scire facias is amendable in the same manner as declarations in other cases.

[Ed. Note.—For other cases, see Scire Facias, Cent. Dig. § 18; Dec. Dig. § 8.*]

3. ELECTION OF REMEDIES (§ 7*)—RELIEF ASKED.

A bill in equity seeking to convert an equitable title supposedly obtained by a sale on execution into a legal one does not seek substantially the same relief as scire facias to obtain an alias execution, so that the doctrine of election of remedies does not apply.

[Ed. Note.—For other cases, see Election of Remedies, Dec. Dig. 7.*]

4. ELECTION OF REMEDIES (§ 11*)—WHEN EXISTS.

Election exists where a party has alternative and inconsistent rights, and is determined by the choice, but a mistaken selection of a remedy that never existed and its fruitless prosecution until adjudged inapplicable does not prevent the exercise of another, if appropriate remedy, even if inconsistent with that first adopted.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. 11.*]

Report from Supreme Judicial Court, Cumberland County.

Scire facias by Marsh Brothers & Company, Limited, against Absolom C. Bellefleur, to obtain an alias execution. Defendant demurred, and case was reported. Demurrer sustained.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Harry L. Cram, for plaintiff. Reynolds & Sanborn, for defendant.

BIRD, J. Scire facias to obtain an alias execution upon a judgment.

It appears from the writ that plaintiff corporation recovered judgment in the Supreme Judicial Court of Cumberland County on the 22d day of June, 1909, against the defendant for the sum of \$892 damages and costs taxed at \$16.70; that on the 26th day of June, 1909, plaintiff took out execution upon this judgment in due form of law; that a deputy of the sheriff of the county on the 17th day of July, 1909, by virtue of the execution, made a seizure and levy on certain real estate as the property of defendant and, after legal notice, sold the same on the 21st day of August at public auction to the plaintiff; that the execution was returned as fully satisfied; that on the 13th day of September, 1909, the plaintiff brought its bill in equity against said Absolom C. Bellefleur and Mabel Bellefleur, praying that the deed by which said Absolom had previously conveyed the real estate to said Mabel be decreed fraudulent and void; that, a hearing being had on said bill, answer, and replication, the court found the allegations of the complainant's bill, not admitted by the answer, had not been proved by evidence sufficient to warrant a decree against defendants; that, whereas said real estate has not passed by the seizure, levy, and sale and the judgment remains wholly unsatisfied and not reversed or an-

nulled, the plaintiff is in danger of losing all benefit from its judgment. The writ directs defendant to show cause why an alias execution should not be issued on the judgment in accordance with the provisions of section 19, of chapter 78 of the Revised Statutes.

To plaintiff's writ defendant demurs upon the grounds following:

1. There is no authority or warrant either in statute or common law for the remedy by scire facias as invoked by the plaintiff, where property of a judgment debtor attached upon the original writ has been seized by a deputy sheriff and sold at public auction, as is alleged to have been done by the plaintiff in his writ.

2. If such authority or warrant is held to exist, the plaintiff has, by his election to pursue his remedy by bill in equity as alleged in his said writ, deprived himself of the right to any relief under, or benefit of, his action by scire facias.

[1] Upon the first ground, rejecting the words "or common law" as surplusage, the demurrer must be sustained. Scire facias does not lie under R. S. c. 78, § 19, where upon the original execution real property has been sold and not levied upon by appraisal and set-off. *Piscataquis v. Kingsbury*, 73 Me. 326, 331.

The plaintiff, after demurrer filed, moved the amendment of his writ by striking out the words "in accordance with the provisions of section 19, of chapter 78 of the Revised Statutes of Maine," and it is stipulated by the parties that, if the law court sustains the demurrer, it shall determine also if the writ is amendable, and, if so, if the proposed amendment may be allowed.

[2] However formerly held, a writ of scire facias is unquestionably amendable in the same manner as declarations in other cases. 2 *Tidd's Prac.* (1st Am. Ed.) 1036, 1037; *Foster on Scire Facias*, 20, 349, 373, 375; *Jackson v. Tanner*, 18 Wend. (N. Y.) 526; *Peacock v. People*, 83 Ill. 331. Whether after plea of nul tiel record amendment may be made is not necessary to be determined. It has been held that scire facias, being a judicial writ, shall not abate for want of form. (*Foster on Scire Facias*, 349); that errors in matter of form will not be noticed on general demurrer (*McLellan v. Codman*, 22 Me. 308); that a general demurrer cannot reach a defect in the prayer (*Barton v. Vanzant*, 1 Mo. 192); and that the court will give judgment according to law, and not according to the prayer of the plaintiff (*Snowden v. State*, 8 Mo. 483, 487). The defect which is the subject of the first ground of the special demurrer, being one of form, may be amended, R. S. c. 84, § 10. The proposed amendment is allowable. See *Mitchell v. Chase*, 87 Me. 172, 82 Atl. 867.

[3] Upon the second ground the demurrer

cannot be sustained. The doctrine of election of remedies does not apply. The bill in equity and the writ of scire facias do not seek substantially the same relief. The former sought to convert an equitable title supposedly obtained by sale upon execution into a legal title. In this the plaintiff failed. The execution remains in fact unsatisfied. The present suit seeks revival of the judgment and a new execution thereon. *Fleming v. Courtenay*, 95 Me. 135, 49 Atl. 614; *Weeks v. Edwards*, 176 Mass. 453, 57 N. E. 701. Moreover, the doctrine invoked as between proceedings at law and in equity, at least, relates only to original suits. *Larrausini v. Carquette*, 24 Miss. 151.

The cases cited by defendant (*Hussey v. Bryant*, 95 Me. 49, 49 Atl. 56; *Jordan v. Haskell*, 63 Me. 193; *Marston v. Humphrey*, 24 Me. 513), as well as *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109, and *Larrabee v. Lambert*, 34 Me. 79, are readily distinguishable from the facts in the case before us.

[4] In short, election exists when a party has alternative and inconsistent rights, and it is determined by a manifestation of choice. But the mistaken selection of a remedy that never existed and its fruitless prosecution until it is adjudged inapplicable does not prevent the exercise of another, if appropriate, even if inconsistent with that first adopted. *Snow v. Alley*, 156 Mass. 193, 195, 30 N. E. 691; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515; note to *Zimmerman v. Robinson & Co.*, 5 Am. & Eng. Ann. Cas. 962. See, also, *Fleming v. Courtenay*, 95 Me. 135, 49 Atl. 614; *Weeks v. Edwards*, 176 Mass. 453, 57 N. E. 701.

Demurrer sustained.

Amendment allowable on such terms as may be ordered at nisi prius.

SPROWL v. RANDELL

(Supreme Judicial Court of Maine. Sept. 30, 1911.)

1. COURTS (§ 202*)—PROBATE COURTS—RIGHT OF APPEAL.

Neither Rev. St. c. 65, §§ 28-33, nor Rev. St. c. 89, § 7, gives a right of appeal to an executor or an administrator of one aggrieved in his lifetime by an order of a judge of probate.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

2. COURTS (§ 202*)—PROBATE COURTS—APPEAL BY EXECUTOR OR ADMINISTRATOR.

Under Rev. St. c. 65, § 34, providing that any person claiming under an heir at law shall have the same rights as the heir in all proceedings in the probate court, including rights of appeal, an executor or administrator of a deceased heir at law has the same rights of appeal that the heir at law would have if living.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Exceptions from Supreme Judicial Court, Lincoln County.

Petition by Benjamin E. Sprowl against Charles L. Randell for leave to appeal from a decree admitting to probate an instrument as the will of Adelia E. Sprowl. Exceptions by defendant to a refusal to dismiss the petition having been overruled, Fred W. Sprowl, as administrator of Benjamin E. Sprowl, filed an appeal from the decree probating the will, and defendant moves to dismiss the appeal. Exceptions overruled.

Argued before SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Arthur S. Littlefield, for plaintiff. Rodney I. Thompson and W. H. Miller, for defendant.

BIRD, J. This cause has already been before this court upon exceptions to the action of the supreme court of probate in overruling the motion of defendant to dismiss the petition of the present appellant's intestate for leave to enter an appeal from the decree of the judge of probate of Lincoln county admitting to probate the will of Adelia E. Sprowl (Sproul) whose heir at law intestate was. 107 Me. 274, 78 Atl. 450. Pending the consideration of the exceptions intestate died. The exceptions having been overruled by this court, the appellant filed his appeal and reasons of appeal in the probate court at its term held on the first Tuesday of December, 1910, returnable at the April term, 1911, of the supreme court of probate for said county. In the appeal he states that appellant was duly appointed administrator of the estate of Benjamin E. Sprowl, late of Waldoborough, deceased, and alleges that he as such administrator and as representing Benjamin E. Sprowl is aggrieved by the decree of the judge of probate allowing the will and appointing the appellee executor. Upon the entry of the appeal in the supreme court of probate, the appellee moved its dismissal for the following reasons:

(1) Because neither said appeal nor reasons of appeal show any right of appeal, and are insufficient in law.

(2) Because neither said appeal nor reasons of appeal show that Fred W. Sprowl has any right of appeal.

(3) Because neither said appeal nor reasons of appeal show that said appeal was seasonably taken.

The appellee states the question really raised to be the construction of section 34 of chapter 65 of the Revised Statutes.

[1] The appellant claims that he has a right of appeal under the general provisions found in R. S. c. 65, §§ 28-33, and chapter 89, § 7, and, if not, that such right is certainly his by virtue of R. S. c. 65, § 34.

We must conclude that appellant has no right of appeal under the general provisions above referred to, either alone or in connection with R. S. c. 86, § 7. The right of appeal from any decree or order of the pro-

bate court is conferred by statute only, can extend no further than the statute provides, and must be affirmatively alleged and established by the case presented. *Abbott, Appellant*, 97 Me. 278, 54 Atl. 755; *Hayford v. Bangor*, 103 Me. 434, 438, 69 Atl. 688; *Briard v. Goodale*, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526; *Pettingill v. Pettingill*, 60 Me. 411, 419. In sections 28-33, c. 65, R. S., is found no provision for the taking of an appeal by an executor or administrator of a person aggrieved, and R. S. c. 89, § 7, providing for the prosecution and defense by executor or administrator of certain actions pending or commenced during the life of the testator or intestate, is, in the case of appeals, strictly limited to those which have been made. A petition for leave to enter an appeal, even if granted, cannot be held to be an appeal made or taken. In the case under consideration, the intestate, Benjamin E. Sprowl, was the person aggrieved, not his administrator.

[2] Has the appellant the right which he asserts under R. S. c. 65, § 34? This provision was originally enacted as follows: "Any person claiming under an heir at law shall have the same rights in all proceedings in probate courts, including rights of appeal, that the heir may have." Pub. Laws 1931, c. 90. The appellee apparently confines the application of this provision to the heirs of an heir at law, but we think the construction too narrow. As the real estate of a deceased person descends or passes to his heirs at law, so his personal assets descend or pass to his executor or administrator. *Strout v. Lord*, 103 Me. 410, 415, 69 Atl. 694; *Hemenway v. Lynde*, 79 Me. 299, 301, 9 Atl. 620. They vest immediately in the executor or administrator (*Dalton v. Dalton*, 51 Me. 170, 172, 173). And it has been held that the administrator represents the person of his intestate in relation to his personal estate. *M'Vaughters v. Elder*, 2 Brev. (S. C.) 307, 313. Such being the case, the administrator is certainly as much one who claims under the heir at law as an assignee of the heir at law. *Stilphen, Appellant*, 100 Me. 146, 148, 60 Atl. 868. The interest of the deceased heir goes to his administrator, not to his heirs. *Storer v. Blake*, 31 Me. 289. If, under this provision, the heir (or his assignee) of the heir at law alone may appeal, the administrator who is in possession of and responsible for all the goods and chattels, rights, and credits of his intestate is without remedy, if the heir or his assignee refuses to act. As representatives of the same estate, we should have the administrator prosecuting an appeal made by the deceased heir and an heir prosecuting another which the deceased had not made. If success attended the latter, the fruits of the appeal would immediately pass to the administrator of the deceased heir, and not to his successful heir—the appellant. The administrator is directly affected in his pecuniary interest,

the heir but indirectly. The construction we give it renders section 34 of chapter 65, R. S., in harmony with the other provisions of statute as interpreted by prior adjudications. *Downing, Appellant, v. Porter*, 9 Mass. 386; *Veazie Bank v. Young*, 53 Me. 555, 560; *Grant v. Bodwell*, 78 Me. 462, 7 Atl. 12; *Stilphen, Appellant, ubi supra*.

The deceased intestate, Benjamin E. Sprowl, upon the decision of the law court above referred to, would, if living, have had the right to enter his appeal and prosecute it to conclusion. His administrator, as one claiming under him, has the same right as his intestate to do so.

Attention is called to the fact that the appeal alleges that the appellant is aggrieved, but it is fairly inferable from the other facts stated that his intestate was aggrieved, and that the appellant prosecutes the appeal as his administrator.

Exceptions overruled.

FOURNIER v. YORK MFG. CO.

(Supreme Judicial Court of Maine. Oct. 2, 1911.)

1. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden is on plaintiff to show affirmatively that decedent did not, by his own fault, either directly or by legitimate inference contribute to the accident which caused his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where the death of an employé was caused by his own act in producing a contact with a fuse box in a power house, it must affirmatively appear that in doing the act he was not negligent, but in the exercise of due care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where an employé in a power house was injured apparently by coming in contact with a fuse box, and there was no evidence whether he was reasonably attentive and alert to avoid such contact, and he had worked for defendant some time, during which the power house was constructed, and had worked in the power house, the burden was on plaintiff to show that the intestate was in the exercise of due care, and did not negligently contribute to the injury which caused his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 908; Dec. Dig. § 265.*]

Report from Supreme Judicial Court, York County.

Action by Philomen Fournier against the York Manufacturing Company. Case reported. Judgment for defendant.

Action of tort brought under the provisions of Pub. Laws Me. 1909, c. 258, known as the "Employer's Liability Act," to recover damages for the death of the plaintiff's intestate

while he was employed in the defendant's power house, and caused by the alleged negligence of the defendant. Plea, the general issue. At the conclusion of the evidence, counsel for the defendant moved that a verdict be directed for the defendant. The motion was overruled. The case was then withdrawn from the jury and reported to the law court, with the stipulation that "if the motion for the direction of a verdict for the defendant should have been granted, or if the decision shall otherwise be for the defendant, judgment shall be entered for the defendant. If the decision be for the plaintiff, the law court is to assess the damages."

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Geo. F. & Leroy Haley, for plaintiff. Cleaves, Waterhouse & Emery, for defendant.

KING, J. Action of tort by the administratrix of the estate and widow of Charles Fournier, under the provisions of chapter 258, Laws 1909, to recover damages for the death of the plaintiff's intestate while he was employed in the defendant's power house, alleged to have been caused by the defendant's negligence in not warning him of a danger incident to the place where he was directed to work. The case is before this court on report.

The plaintiff's intestate and two other workmen were directed by the defendant's "boss piper" to remove a short section of a six-inch iron pipe connecting two pumps in the power house, and replace it with another piece of pipe to which was to be attached an air chamber. One of the three workmen, Charles Dawley, was an experienced pipe fitter, and the other two, Fournier and Evans, were common laborers or helpers. The six-inch pipe was parallel with the floor of the power house, and its top eight feet and ten inches above the floor. The distance from the top of this pipe to the ceiling was seven feet and one inch. Sixteen inches behind and about thirty-two inches above the six-inch pipe, and apparently parallel with it, was a three-inch steam pipe. The distance from the steam pipe to the ceiling was four feet and five inches. Upon the ceiling of the power house was a "network" of insulated electrical wires, carrying a strong and dangerous current of electricity. Nearly directly over the piece of pipe to be removed and attached to the ceiling was a "fuse box," so called, about seven inches square, and projecting down from the ceiling about two inches and a half. To be more descriptive, there were three fuse "blocks", each about seven inches long and two and one-half inches wide placed side by side. These fuse blocks were of porcelain with brass or copper

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"terminals" inserted into them to which the wires were attached, and between the terminals was a "fuse," so constructed that, in case of a short circuit, it would quickly melt or burn out, thus serving as a safety device. The evidence tends to show that if some part of a person should come in contact with two of the terminals at the same time, or should come in contact with one terminal while the person was standing on an iron pipe or some other thing connected with the ground, when a current of electricity is on the wires, a short circuit would result, and the person would receive a shock. The fuse box was not covered in, and accordingly the terminals were exposed.

Mr. Dawley, the experienced pipe fitter, having screwed an eye-bolt into the ceiling about 12 inches from the center of the fuse box, directed the plaintiff's intestate to attach a chain tackle and fall to the eye-bolt for use in removing and replacing the piece of pipe. Dawley thus described what he saw of the accident to Fournier: "Q. How did he start to get up? A. He passed the chain and fall to Evans on the pump, got up on the pipe himself, and Evans passed him the fall. * * * Q. What happened then, what do you next know? A. The next I knew Mr. Evans hollered. * * * Q. Did you look up? A. I looked. Q. Where was Fournier? A. Well, he appeared to be hanging up in some way. Q. Hanging on the pipe? A. No; up overhead somewhere. Q. Seemed to be hanging to the ceiling, didn't he? A. Yes. Q. Did he still hold the tackle and fall? A. He did. Q. What did you do? A. I hollered for them to shut off the power. * * * Q. Did they shut it off? A. They did. Q. What happened then? A. He dropped. Q. To the floor? A. Yes. Q. What he had in his hands dropped with him? A. It dropped first. Q. He never showed any signs of life, did he? A. No, sir; he didn't."

In cross-examination Mr. Dawley was asked if he did not state to a representative of the defendant company on the day of the accident that, when he looked up, Fournier's feet were on the six-inch pipe, and he answered: "That is the way it looked to me. Q. That is the way it looks to you now as you recall it? A. Yes." He further stated that, as he looked up, it appeared to him that Fournier was standing apparently erect, with his hands in front of him, still holding the chain tackle. Evans was not at the trial; neither party knowing of his whereabouts. Dr. Thompson, who was called to the power house immediately after the accident and examined the body before it was removed, noted a small abrasion, "a * * * place where the skin was scraped off," above the eyebrows, but discovered no other marks or external evidence of injuries. The undertaker, Mr. Bradbury, testified that, in addition to the slight abrasion of the skin which the doctor noted, he discovered, in his examination of the body at the morgue, "a small red

spot on the top of the head. Q. What did the red spot have the appearance of? A. Well, that would indicate several things, of course, but it was similar to a little burn, not a wound or anything of the kind, a very small place it was. * * * Q. As large as what? A. I should say about the size of a dime, as I recall it now. Q. It looked red? A. Just a little red." The foregoing is substantially all the evidence relating to the cause of Fournier's death.

The plaintiff contends that it can be reasonably and logically inferred from this evidence that Fournier's death was caused by an electric shock resulting from a contact of the top of his head with the fuse box.

On the other hand, the defendant insists that such is not a reasonable inference, contending that, if a current of electricity sufficient to produce instant death had entered Fournier's body, there would have been more external evidence of it than the very small red spot on the top of the head, as testified to by the undertaker, but not discovered by the physician; also, that if Fournier stood on the six-inch pipe, as it appeared to Dawley he did, or if he stood with one foot on that pipe and the other on the three-inch steam pipe, it would have been physically impossible for his head to have come in contact with the fuse box; and, still further, that it is unreasonable to suppose that he attempted to stand with both feet on the three-inch steam pipe, which was only four feet and five inches below the ceiling. Moreover, the defendant urges that, under all the circumstances disclosed in the case, it is not unreasonable to conclude that Fournier's death was the result of heart disease, and in support of this the plaintiff relies upon the testimony of Dr. Thompson as tending to show that death from heart disease might be as sudden as the death of Fournier, and that he discovered nothing in his examination of the body that enabled him reasonably to determine whether his death was caused by an electric shock or by heart disease.

The defendant also claims that there was no negligence on its part in not expressly warning Fournier of the fuse box and its dangerous character, because either he knew of it, or by the exercise of ordinary care would have known of it, and, further, because it was not reasonably to be anticipated that the three workmen would undertake to secure a tackle to the ceiling of the power house among the electric wires and beside the fuse box, when the work to be done could have been performed in an easier and safer way from the floor. Again, the defendant contends that Dawley, who directed Fournier to hook the tackle to the eye-bolt, was not a person, "who was intrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendence," was "acting as superintendent with the

authority or consent" of the defendant, within the meaning of chapter 258, Laws 1909.

We do not find it necessary, however, to determine the question of the defendant's negligence, nor whether Dawley was a superintendent within the terms of the statute, since in the opinion of the court the plaintiff's case is otherwise fatally defective.

The defendant's contention that the cause of Fournier's death is not sufficiently proved, but is left as a matter of conjecture only, is not without much weight, and yet, if that were the only objection to the plaintiff's case, we might hesitate to decide that from all the evidence an inference might not reasonably be drawn that in some way Fournier received an electrical shock which caused his death. But, assuming that inference in the plaintiff's favor, still the case is fatally defective, for there is no evidence to show that the deceased was in the exercise of due care. [1] The burden was on the plaintiff to show affirmatively, either directly or by legitimate inference, that Fournier did not by his own fault contribute to the accident which caused his death. This principle is firmly settled in the decisions of this court. See *Gleason v. Bremen*, 50 Me. 222; *State v. Maine Central R. R. Co.*, 76 Me. 357, 49 Am. Rep. 622; *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; *Cunningham v. Iron Works*, 92 Me. 501, 43 Atl. 106. The case is clearly distinguishable from those where a plaintiff is injured while merely passive in the care of the defendant, without any active agency on his own part in the matter, or where a laborer, rightfully in his place in the performance of his duty, is negligently injured by some extraneous interference not reasonably to be anticipated in the exercise of the care to be expected of prudent men in like situations, or where he has an assurance, express or implied, that he will receive timely warning of any such interference, as pointed out in *Maguire v. Fitchburg Railroad*, 146 Mass. 379, 15 N. E. 904. In this case Fournier was not passive in the care of the defendant, but active. [2] It was his act that produced the contact with the fuse box, if there was a contact, and therefore it should affirmatively appear that in doing that act he was not negligent but in the exercise of due care.

[3] But of this there is no evidence. Dawley says that he (Fournier) "got up on the pipe himself, and Evans passed him the fall." What he did further does not appear. It is wholly left to conjecture. There is no evidence tending to show that he did not know of the fuse box and of its dangerous character. He was an intelligent person, had worked for the defendant some time, during which the power house was constructed, and had worked some, at least, in the power house. The room was light, and there was

nothing to prevent his seeing the network of wires on the ceiling, and the fuse box was directly before his eyes when he looked up to the eye-bolt. Whether he did in fact know of it before, or then saw it and appreciated the danger from contact with it, we do not know. He may have. No person who saw the accident itself has informed us how it happened that Fournier came in contact, if he did, with the fuse box. Whether he was reasonably attentive and alert to avoid such a contact, or in a moment of thoughtless inattention by some careless move came against it, does not appear in evidence. The burden was on the plaintiff to show that her intestate was in the exercise of due care, and did not negligently contribute to the injury which caused his death. This in the opinion of the court she has failed to do, and, in accordance with the stipulation of the report, the entry must be:

Judgment for defendant.

HALEY, J., having been of counsel, did not sit.

SIEGEL v. MEGRAW.

(Supreme Court of Pennsylvania. May 17, 1911.)

APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

Findings of fact that arbitrators were not guilty of misconduct will not be reversed, when based on sufficient evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Clarence R. Siegel against John Megraw. From an order discharging a rule to set aside an award of arbitrators, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

I. Hazleton Mirkil and J. Hibbs Buckman, for appellant. Frank P. Prichard and Robert James Earley, for appellee.

PER CURIAM. The learned judges of the common pleas carefully considered the testimony in support of the rule to show cause why the report of the arbitrators should not be set aside, and found that the allegations of misconduct were not sustained. This finding appears to be fully sustained by the testimony. Nothing short of clear error would warrant us in disturbing it.

The order of the court discharging the rule is affirmed, at the cost of the appellant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**COMMONWEALTH ex rel. BARRATT v.
McAFEE, Secretary of the
Commonwealth.**

(Supreme Court of Pennsylvania. May 17, 1911.)

1. JUDGES (§ 8*)—ELECTION—CONSTITUTIONAL LAW.

Const. art. 5, § 15, provides that district judges shall be elected and hold office for the period of 10 years. Const. Amend. 1909 (P. L. 949) of article 8, § 8, provides for the election of judges on the Tuesday next following the first Monday of November in odd-numbered years. A schedule to the amendment provides that district judges holding office at the date of the approval of the amendment, whose terms of office expire in 1911, shall continue to hold their offices until the first Monday in January, 1912. Act April 30, 1874 (P. L. 118), provides that the terms of judges thereafter elected shall commence on the first Monday of January succeeding their election. *Held*, that an election cannot be held in November, 1911, to fill the office of a judge of the court of common pleas or orphans' court whose term expires on January 1, 1913.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 3.*]

2. JUDGES (§ 7*)—TERM OF OFFICE—EXTENSION—CONSTITUTIONAL LAW.

Acts 1911, p. 9, § 2, providing that district and other judges, whose commissions expire on the first Monday of January in odd-numbered years, shall hold their offices until the first Monday of January in the following even-numbered year, is unconstitutional, as an attempt to extend the term of the judges beyond the limit fixed by the Constitution.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 7.*]

3. JUDGES (§ 8*)—VACANCY—APPOINTMENT BY GOVERNOR.

Where a judicial term ends on the first Monday of January, 1913, a vacancy exists which must be filled by the Governor under Const. art. 4, § 8.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 8.*]

4. OFFICERS (§ 55*)—"VACANCY."

The word "vacancy," as applied to an office, has no technical meaning. An existing office without an incumbent is vacant. There is no basis for the distinction that it applies only to an office vacated by death, resignation, or otherwise (citing 8 Words and Phrases, 7259).

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

Fell, C. J., and Brown, J., dissenting.

Appeal from Court of Common Pleas, Dauphin County.

Application by the Commonwealth, on the relation of Norris S. Barratt, for writ of mandamus against Robert McAfee, Secretary of the Commonwealth. From an order dismissing the petition, relator appeals. Affirmed.

Kunkel, P. J., filed the following opinion:

"This cause has been submitted to us without argument, with the suggestion that we shall enter a judgment pro forma, so that the question may be speedily and authoritatively settled by the Supreme Court. How-

ever, we prefer to state our reasons for our judgment.

"The relator is a judge of the court of common pleas No. 2 of Philadelphia, in the First judicial district of Pennsylvania. He was duly elected for the constitutional term of 10 years, commencing on the first Monday of January, 1903, and ending on the first Monday of January, 1913.

"By the constitutional amendment of November 2, 1909, the election of judges can take place only in odd-numbered years. The act of April 30, 1874 (P. L. 118), provides that the term of judges 'shall commence on the first Monday of January next succeeding their election.' The relator contends that as the year immediately preceding the termination of his term is an even-numbered year, in which no election for the office of judge can lawfully be held, the appropriate time for the election of his successor is in the present year, 1911, and he accordingly filed a petition for the printing of his name upon the ballot for the June primary, 1911, with the Secretary of the Commonwealth, requesting him to certify his name for printing upon the primary ballot. The Secretary of the Commonwealth has refused to so certify, and the relator now asks that he be directed to comply with his request.

"Upon the presentation of the relator's petition, the respondent made answer, waiving issuance of the alternative writ, admitting all the facts alleged in the petition and claiming that his refusal to certify relator's name, as requested, is entirely legal. The question, therefore, is one of law.

"The Constitution and statutory provisions relative to the subject are as follows:

"(1) Article 5, § 15, of the Constitution: 'All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well.'

"(2) Act of April 30, 1874 (P. L. 118): 'That the term of office of judge of the Supreme Court and other judges learned in the law hereafter elected shall commence on the first Monday of January next succeeding their election, and they shall be commissioned accordingly.'

"(3) Constitutional amendment of article 8, § 3, adopted November 2, 1909 (P. L. 951): 'All elections for judges of the courts of the several judicial districts * * * shall be held on the municipal election day, namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different time, two-thirds of all the members of each House consenting thereto; provided, that such election shall always be held in an odd-numbered year.'

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(4) Article 4, § 8, of the Constitution: 'He [the Governor] shall nominate, and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint a secretary of the commonwealth and an attorney general during pleasure, a superintendent of public instruction for four years, and such other officers of the commonwealth as he is or may be authorized by the Constitution or by law to appoint; he shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; he shall have power to fill any vacancy that may happen, during the recess of the Senate, in the office of Auditor General, State Treasurer, Secretary of Internal Affairs or Superintendent of Public Instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election, in which case the election for said office shall be held on the second succeeding election day appropriate to such office.'

"(5) Schedule to constitutional amendment of November 2, 1909: 'All judges for the courts of the several judicial districts * * * holding office at the date of the approval of these amendments, whose term of office may end in the year 1911, shall continue to hold their offices until the first Monday of January, 1912.'

[2] "(6) Act of March 2, 1911, in its second section, provides as follows: 'All judges of the courts of the several judicial districts, associate judges and county officers holding office at the date of the approval of said amendments, whose commissions expire on the first Monday of January in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the following even-numbered year.'

"This second section of the act of March 2, 1911, just quoted, is an attempt to extend the constitutional terms of judges beyond the limit fixed by the Constitution, and is therefore of no validity for that purpose. *Commonwealth v. Sheatz*, 228 Pa. 301, 77 Atl. 547.

[1] "The question to be determined is, Can the successor of a judge, whose term ends on the first Monday in January, 1913, be lawfully elected at the November election 1911?

"The present contention arises solely from the operation of the constitutional amendment limiting judicial elections to odd-num-

bered years. Several theories are suggested for the adjustment of conditions to this limitation. One is that the act of April 30, 1874, has either been entirely repealed by the amendment of the Constitution in 1909, or has been so modified thereby, when the term ends in January of an odd-numbered year, as to permit an election in November of the last preceding odd-numbered year.

"The act of April 30, 1874 (P. L. 118), provides that the terms of all judges learned in the law 'shall commence on the first Monday of January next succeeding their election.' There is no language in the amendment limiting the election to odd-numbered years which indicates any intention to either repeal or modify the act of 1874, fixing the commencement of judicial terms. The relator's term continued until the first Monday of January, 1913. To permit the election of his successor in 1911, nearly 14 months before the commencement of the official term, would be in disregard of the provisions of this statute, and would be without precedent in Pennsylvania, so far as we are advised. To so hold would result in confusion and uncertainty, because if, after the election of a successor to the relator in 1911, the relator should die or resign a vacancy would be created, which would be filled by executive appointment, and that would be followed by another election. It is within the limits of possibility that some person other than the relator might be elected in November, 1911, and then, in the event of the death or resignation of the relator before the end of his present term, the vacancy would be filled by executive appointment until the first Monday in January, 1914, followed by an election in 1913. Thus we would have the situation of the Governor's appointee in office until the first Monday in January, 1914, with the successful candidate at the election of November, 1911, claiming the right to the office on the first Monday of January, 1913. The same undesirable situation might likewise arise as to the judicial terms expiring in 1915, 1917, and 1919. Surely a conclusion leading to such complicated and confusing results ought, if possible, to be avoided.

"Another theory is that the schedule to the amendments of 1909, providing that judges whose terms expire in the year 1911 'shall continue to hold their offices until the first Monday of January, 1912,' is to be construed as inferentially extending all judicial terms expiring in January of odd-numbered years to the first Monday of January in the next succeeding even-numbered year. We have no power to read into the schedule to the amendments of 1909 the extension of any judicial terms. The schedule only extends terms expiring in 1911. We must assume that the people did not intend to extend any other terms, else they would have so specifically stated. The expression of one thing in the Constitution necessarily excludes things not expressed. *Page v. Allen*, 58 Pa. 338,

98 Am. Dec. 272. *Etter v. McAfee*, 229 Pa. 315, 78 Atl. 275.

"In our opinion, there is ample provision in the Constitution itself for the adjustment of the present conditions to the limitation of judicial elections to odd-numbered years. If an election cannot legally be held in November in the year immediately preceding the termination of a judicial term on the first Monday of January of any odd-numbered year, a vacancy will exist which can be filled by executive appointment under article 4, § 8, of the Constitution, *supra*, and this appointment will necessarily be followed by an election, either on the first or second succeeding election day appropriate to the office; that is, in November of the first or second succeeding odd-numbered year. Thus, without any new statutory enactment or strained construction of any existing constitutional or statutory provision, the new constitutional limitation of judicial elections can be put into successful operation. It is quite unnecessary to seek for some method other than that which the people have expressly provided in their fundamental law to meet the results caused by the adoption of the late constitutional amendments. Especially is this so when the conclusive inference is, from the schedule extending terms expiring in 1911 to the first Monday in January, 1912, that the people purposely omitted to extend other judicial terms, but left them to the operation of the provisions of the Constitution itself.

"We conclude that ample remedy for the present situation is provided by article 4, § 8, of the Constitution.

"For these considerations thus hastily and perhaps imperfectly stated, we are of opinion that the relator is not entitled to the relief sought by his petition, and the same is now dismissed at his costs."

Argued before FELL, O. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John G. Johnson, for appellant. D. T. Watson, John C. Bell, Atty. Gen., and Ernest C. Irwin, for appellee.

MOSCHZISKER, J. The objection to the act of March 2, 1911, is that it extends for the period of one year the terms of all judges whose commissions expire on the first Monday of January in odd-numbered years. In *Commonwealth v. Sheatz*, 228 Pa. 301, 77 Atl. 547, referring to a term fixed by the Constitution, we said: "The term of office fixed by the Constitution is expressly limited to a definite number of years, and it is not within the power of the Legislature, directly or indirectly, to extend it beyond the prescribed period. * * * There is an implied prohibition against the right of the Legislature to add to the term, where the Constitution has expressly prescribed the du-

ration of the tenure. * * * It is not within the power of the Legislature to * * * extend the term of the office and prevent a vacancy. * * * Holding over * * * is not a new or another term, but a prolongation of the elected incumbent's term. * * *" Article 5, § 15, of the Constitution, provides that all common pleas judges shall hold their offices for the period of 10 years. The schedule adopted by the people to put into effect the amendments of 1909 declares: "All judges for the courts of the several judicial districts * * * holding office at the date of the approval of these amendments * * * whose term of office may end in the year 1911, shall continue to hold their offices until the first Monday of January, 1912." This schedule is a temporary part of the Constitution. "It is only when the Constitution fails to deal with a subject that the General Assembly may legislate upon it." *Commonwealth v. Sheatz*, *supra*. Here the Constitution has dealt with the subject in hand so far as the judiciary is concerned, and the act of 1911 attempts to add provisions to the schedule upon the very matter covered therein. It may be that the draftsman of the schedule thought that he had provided against every contingency, but the words used cannot be construed to mean that from 1911 on, *ad libitum*, the terms of all judges whose commissions might expire in an odd-numbered year shall be extended for a period of 12 months. If such was the idea, it should have been expressed. While the maxim, "*Expressio unius est exclusio alterius*," cannot be applied so as to deprive the Legislature of distinct powers not limited or taken away by the Constitution itself, yet it is properly applicable in the construction of any particular part of the Constitution as limiting the legislative power over the subject therein provided for. In *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272, with this thought in mind, we said, "The expression of one thing in the Constitution is necessarily the exclusion of things not expressed;" and in *Etter v. McAfee*, 229 Pa. 315, 78 Atl. 275, we applied the maxim in construing the amendment of 1909 to the effect that the first election of a state treasurer for the full term of four years should be held in 1912, and we there ruled that the provision excluded a construction which would permit an election before that time. The schedule adopted in 1909 having expressly dealt with the matter, but having omitted to extend the terms of judges, other than those whose commissions expired in the year 1911, the Legislature, in the face of the constitutional provision definitely fixing such terms and the implied prohibition against their extension, cannot supplement the schedule in violation of such prohibition, even as a temporary expedient. Hence the act of 1911, so far as it concerns the terms of the judges, is unconstitutional and void.

The suggestion that the difficulty can be solved by holding that the judges whose terms expire in odd-numbered years shall have successors elected at the municipal election which will occur 14 months before the expiration of their respective terms is likewise open to constitutional objections. Article 5, § 26, of the Constitution, provides that "all laws relating to courts shall be general and of uniform operation." Classification must not only rest upon a plain distinction in the subjects classified, but it must always have a substantial reason back of it amounting to more than a mere convenience. The suggested solution leads to a classification which will destroy uniformity in the election of the common pleas judges, and its effect is permanently to divide such judges into two groups, the members of one to be elected fourteen months, and of the other two months, before the expiration of the terms of their predecessors. The arrangement would be contrary to the long-established public policy of our state, which allows but a short time to intervene between an election and the assumption of office. This policy has strong practical reasons back of it, particularly in the case of a judge elected from the bar, who, after being set apart for judicial work, should not be obliged or permitted, during such a considerable period, to practice his profession for a livelihood. However, these practical reasons would not constitute insurmountable objections, if the proposed classification were a natural one, or one made imperatively necessary by existing conditions. In other words, if the amendments of 1909 left the matter in such a position that the only alternative was to accept the classification, and there was nothing in the Constitution plainly forbidding it, then, ipso facto, the classification and its effect would be there, and the General Assembly could enact proper legislation with reference to it, or, possibly, it might be of sufficient force to annul prior legislation in conflict therewith, such as the act of April 30, 1874 (P. L. 118), which provides that the terms of office of all judges shall commence on the first Monday of January next succeeding their election. But the division is not a natural one; heretofore the only classification of judges known to our law has been founded upon differences in the work performed. The question remains, Is it a necessary one? for under all our cases a new classification will not be permitted, unless there is an apparent reasonable necessity to support it. A classification, for the purpose of applying a different rule or remedy as between persons in the same general category cannot be held to be necessary or permissible, if the situation impelling it is already provided for in our organic law; and the learned court below has held such to be the case in the present instance, taking

the view that the nonelection of successors will create vacancies which it will be the right and duty of the Governor to fill. If the Constitution gives the Governor the power to fill such a vacancy as is here under consideration, since the people failed to say so in words or by necessary implication, we cannot assume that they intended by the amendments of 1909 to change the established rule regarding the time for the election of any of the judges; on the contrary, we must assume that they anticipated the natural legal consequences of their omission to provide for the contingency before us, and that they intended the creation of vacancies and the exercise of the executive prerogative to fill them by interval appointments. The question is, Does the constitutional provision vesting the Governor with the right to fill vacancies apply to the condition which will arise in the event of the expiration of the term of the relator without the prior election of a successor? The proper determination of this case depends upon the answer to that question.

[3, 4] After looking at the matter from every standpoint, we are brought to the conclusion that the view of the court below is the correct one, and that the question must be answered in the affirmative. Article 4, § 8, of the Constitution, as amended in 1909 (P. L. 948), provides: "He [the Governor] * * * shall have power to fill any vacancy that may happen * * * in a judicial office. * * * But * * * a person shall be chosen to said office on the next election day appropriate to such office. * * * The constitution expressly gives to the people the right to choose judges by election, and it gives to the chief executive the right to fill vacancies. This latter right exists whether the vacancy occurs during a term for which an incumbent has been elected or at the expiration thereof, if there is no one to fill the office. The nonelection of a successor, whether it be through a neglect of the people or a failure of the law to afford a proper opportunity, creates a vacancy. "The word 'vacancy,' as applied to an office, has no technical meaning. * * * An existing office without an incumbent is vacant. * * * There is no basis for the distinction that it applies only to an office vacated by death, resignation, or otherwise." 8 Words and Phrases, 7259. Fortunately we are not without our own construction of this word. An interesting dissertation on its meaning will be found in *Walsh v. Commonwealth*, 89 Pa. 419, 33 Am. Rep. 771. There a new county had been erected. The act provided that "the Governor was required immediately to appoint and commission the officers for the new county, who should continue in office until the next general election," and, at such election, "the qualified electors shall elect" county officers. The then constitutional provision was that the Governor might "fill any

vacancy that may happen * * * in any elective office. * * * But * * * a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such general election, in which case the election for such office shall be held at the next succeeding general election." The Governor appointed Walsh less than three months before the date of the "next general election," and the relator was elected to the same office at that election. "He contended that the design of the Legislature * * * was to bridge over the interval between the creation of the county and the next election, by directing the Governor to appoint the new officers;" and "he relied on the second section of the fourteenth article of the Constitution, requiring that 'all vacancies not otherwise provided for, shall be filled in such manner as may be provided by law.' We held that "the word 'vacancy' aptly and fitly describes an office when it is first created and has been filled by no incumbent;" that the law had created a vacancy in the office in question within the meaning of the section of the Constitution which vested the Governor with the right to fill vacancies; that the Governor derived his right of appointment from the Constitution, irrespective of the statute; that this constitutional right could not be abridged or interfered with by the Legislature; that the statute would have to be construed with reference to the Constitution; that it was not to be supposed that the Legislature intended to run counter to the organic law, even to bridge over the interval between the erection of the county and the next general election; and that the Governor's appointee would hold the office until the qualification of a successor, elected at the second general election. The meaning of the word "vacancy" was again under consideration in *Commonwealth v. Dickert*, 195 Pa. 234, 45 Atl. 1058, and it was there ruled that in case of a failure to elect a successor to the incumbent of the office in question "a vacancy exists by reason of the expiration of the term." In *Commonwealth v. Sheatz*, 228 Pa. 301, 77 Atl. 547, the State Treasurer elect died before qualifying, and at the expiration of the term of the incumbent there was no one to fill the office. We held that there was a vacancy, and that the Governor had the right to appoint. By the light of these cases, the learned court below was right in the view that the inevitable effect of the amendments of 1909 will be to cause the offices of all common pleas judges whose terms expire on the first Monday of January in odd-numbered years to become vacant, and that it will be for the Governor to appoint incumbents to serve until successors are chosen by the people at the next appropriate election.

The argument that the solution arrived at will postpone the popular choice is of no avail against constitutional provisions adopt-

ed by the people themselves (*Walsh v. Commonwealth*, supra; *Etter v. McAfee*, supra); nor is the objection that it will make some of the judges appointive and others elective sound in law, for limited interval appointments to elective offices have always been part of our system, and none of these appointments will be for more than one year. The solution works no permanent division in the ranks of the judges, as the situation when thus dealt with is but a temporary one, which will cease to exist after the expiration of the term of the last of the present incumbents in 1919. In the meantime the positions of 39 of the 131 judges of the commonwealth may be affected, unless the people by another amendment should extend their terms or provide that judges can be elected in any year.

The people may have supposed that the schedule of 1909 comprehended all possible contingencies and made all necessary provisions to carry the constitutional changes into effect without disturbing their right to elect immediate successors to the judges then in office. But the difficulty is, if such was their intention, they failed to say it, or so to express themselves that the Legislature, without violence to other fixed constitutional mandates, could carry out their wishes in that respect. In construing any part of the Constitution, we are not at liberty to disregard other applicable provisions, or to supply words omitted, in order to work out a thought which the people themselves had the opportunity to give expression to, had they so desired; nor can we ignore the authority of our own prior decisions. We must take the law as we find it, and we are constrained to hold that the relator's term cannot be extended by act of assembly; further, that his successor cannot be lawfully elected in the year 1911. To permit either would disregard constitutional inhibitions and read that into the organic law which cannot be found therein; while to follow the rule laid down by the learned court below is to conform to the Constitution as it is written and as it has been heretofore construed by this court. It neither takes from nor adds to the Constitution, but simply accepts a remedy there supplied in plain and, under our decisions, unambiguous language.

The assignment of error is overruled, and the judgment of the court below is affirmed.

FELL, C. J. (dissenting). The term of office of the relator as a judge of a court of common pleas will expire on the first Monday of January, 1913. His successor in office cannot be elected in 1912. The question raised by this appeal is whether he should be elected in 1911 or in 1913. The constitutional and statutory provisions relating to the subject are these: (a) Article 5, § 15, of the Constitution of 1874, provides that: "All judges required to be learned in the law, except the judges of the Supreme Court, shall

be elected by the qualified electors of the respective districts over which they are to preside and shall hold their offices for the period of ten years." (b) The act of April 30, 1874 (P. L. 118), fixing the time when the terms of judges shall commence, provides: "That the term of office of Judges of the Supreme Court and other judges learned in the law hereafter elected shall commence on the first Monday of January next succeeding their election." (c) The constitutional amendment adopted in 1909 provides: "All elections for judges of the courts of the several judicial districts * * * shall be held on the municipal election days, namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different time, two-thirds of all the members of each House consenting thereto; provided, that such election shall always be held in an odd-numbered year." (d) To avoid inconvenience in carrying into operation the amendment of 1909, the schedule provides: "All judges of the courts of the several judicial districts * * * holding office at the date of the approval of these amendments whose term of office may end in the year 1911, shall continue to hold their offices until the first Monday of January, 1912." (e) On March 2, 1911, an act was passed that provides that: "All judges of the courts of the several judicial districts * * * holding office at the date of the approval of said amendments, whose commissions expire on the first Monday of January in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the following even-numbered year." (f) The Constitution of 1874 empowers the Governor to fill vacancies in judicial offices "happening by death, resignation or otherwise" by appointment, to continue until the first Monday of January next succeeding the first general election that should occur three or more months after the happening of such vacancy. One of the amendments adopted in 1909 changes the period for which an appointment shall be made by extending it until a successor shall be chosen "on the next election day appropriate to such office," according to the amendment making the election in odd-numbered years.

The learned judges of the common pleas in dismissing the petition for a writ of mandamus held that the act of 1874 is unrepealed and unmodified by the amendment of 1909, and that its provision fixing the commencement of judges' terms "on the first Monday of January next succeeding their election" prevents an election in 1911; that the schedule to the amendments of 1909 did not by implication extend judicial terms; that the act of March 2, 1911, was an attempt to extend the terms of judges beyond the limits fixed by the Constitution, and is therefore invalid. Their conclusion was that an elec-

tion cannot, under the amendment, be held in 1911, and that on the first Monday of January, 1913, a vacancy will exist which must be filled by the Governor. This conclusion is accepted as correct by the majority of my Brethren, but I cannot agree with them.

The situation with which we have to deal may be the result of an oversight; but this is by no means clear, for the words of the amendment have but one meaning, and the people deliberately adopted it. The Constitution provides that all judges of the courts of common pleas shall be elected for a term of 10 years, but nothing in the amendment changes this by the remotest implication. Judges are still to be elected for a term of 10 years, and the amendment merely provides that all of them must be elected in odd-numbered years. This means that the election for judges shall hereafter be biennial. The framer of the amendment of 1909 knew that if it should be adopted it would go into effect immediately upon its adoption, and therefore there could be no election of judges in 1910, and vacancies would exist in some districts for the period of one year, 1911. In view of this the schedule consistently provided that all judges holding office at the date of the adoption of the amendment, whose term would end in the year 1911, should continue to hold office for one year longer. As there could not have been by the terms of the amendment an election for judges in 1910, and the first election of them would occur in 1911, the terms of those expiring in January, 1911, were extended one year. This is as far as the schedule goes, and nothing could be plainer than the expressed intention of the people that after the first Monday of January, 1911, all judges must be elected in odd-numbered years and each for a term of 10 years.

But, if we assume there was an oversight in limiting the extension of terms to those that would end in 1911 and in not applying it to all terms that would end in odd-numbered years, it does not follow that there will be a vacancy. If an adequate provision exists for the election of a successor in each case, whose term will commence with the expiration of the term of his predecessor, there will be no vacancy. This provision is found by reading together, as we should, the amendment and the act of 1874. The amendment requires an election in an odd-numbered year, the act provides that the term of office shall commence on the first Monday of January next succeeding the election. When judges could be elected at any annual election, the appropriate time to elect was in November of the year immediately preceding the end of their terms. Now that they are to be elected biennially only, and in odd-numbered years, the appropriate time to elect is in November of the odd-numbered year, nearest the end of their terms. This

will give effect to both the constitutional and statutory provisions and to the declared purpose of the people that judges shall be elected by them, and that appointments to the office of judge shall be limited to the filling of vacancies happening by death, resignation, or otherwise during the term for which a judge was elected. The act of 1874 must yield to the Constitution, in so far as it is inconsistent with the latter. The amendments are self-operating, and no legislation is needed to give them effect. To sustain the decree of the common pleas will make more than one-third of the judges of the commonwealth appointive for a period of years. It is inconceivable that there was an intention to divide the judiciary of the state into classes by establishing a system making a part elective and a part appointive.

That there are practical objections to the election of a judge 14 months before the beginning of his term of office is of course to be conceded, but the people have so willed, and it is not for courts to set their will aside. Their intent, as expressed in the amendment, is free from all ambiguity, and I can see no justification for the substitution by implication of a different intent, not suggested by a word in the amendment. Unwise legislation is bad enough, but worse than it is its attempted correction by the courts. One is wrong in practice; the other is radically wrong in principle. It is not for courts to say what the law should be, but what it is, and to leave its correction to those on whom that duty devolves.

BROWN, J., concurs in this dissent.

FAUX v. FITLER.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. EVIDENCE (§ 444*)—PAROL EVIDENCE.

A maker of notes cannot defeat his liability thereon by evidence that they were mere memoranda between him and plaintiff of a joint-stock speculation, and that he was not to be called upon to pay in the event of a failure to come out whole on the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944; Dec. Dig. § 444.*]

2. GAMING (§ 49*)—DEFENSE TO NOTES—GAMBLING TRANSACTIONS.

Recovery on notes cannot be defeated on the ground that they were given in gambling transactions, where the maker's own testimony shows that the stock dealings in question were not of such character.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 49.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William J. Faux against Alfred E. Fitler. From a judgment for plaintiff notwithstanding the verdict, defendant appeals. Affirmed.

The following is the opinion of Ralston, J., in the court below:

"At the trial the plaintiff produced the notes. The defendant, the maker, testified that he had invited the plaintiff, the payee, to join him in a stock speculation; that the plaintiff had agreed, and had given him \$3,000 for that purpose, in three different payments; that, when the first money was paid, the plaintiff had his private secretary write out a note for one thousand dollars, * * * which I signed.' His testimony then proceeded as follows: 'Q. What, if anything, was said by you or him as to that note at the time it was drawn up and signed? A. Well, he persuaded me to sign it because he thought it would be a good thing for him to have in case anything occurred to either of us—he should die or I should die. It would be sort of a memo for his estate to have in case of the death of either. Q. What was said about the note at the time it was signed? A. At the time it was signed I think I expected to close up the account before three months. I don't think anything was said about it.' Concerning the second and third notes, the witness testified: 'A. Well, he just asked me to sign this note in each case. There was a note to sign in each case. Q. What agreement, if any, was there between you two men at the time you signed that note, as to what that note should be? A. Why, it was a verbal agreement that the note should be considered as a memorandum of the loan of the money. He said that it was understood between them that the notes were mere memoranda of the transaction, a sort of receipt for the money.' Further: 'Q. What, if anything, was said about your paying the note back, paying the amount of the note? A. Nothing at all.' In describing the stock transactions the witness said: 'I would put up a certain sum of money and the broker would loan the balance and charge interest on it, and buy the stock, and he held the stock certificates as security for the money he advanced.' Referring to the stock thus purchased, he said: 'I didn't pay for them, but I bought them outright.'"

"The plaintiff denied absolutely that he had any interest in the defendant's stock speculations, or that there were any outside conditions concerning the payment of the notes. He testified that the notes simply represented three separate loans to the defendant for their face value, none of which had been repaid.

"The verdict was for the defendant; but the court below entered judgment n. o. v. in favor of the plaintiff for \$4,587, representing the principal of notes with interest."

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCH-ZISKER, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Francis M. McAdams, William H. Wilson, and Joseph P. Rogers, for appellant. Samuel W. Cooper, for appellee.

MOSCHZISKER, J. The plaintiff sued the defendant to recover on three promissory notes, all drawn in regular form, and each of them given by the latter for money received from the former. When this case was here before (223 Pa. 568, 72 Atl. 891, 132 Am. St. Rep. 742) on the question of the sufficiency of the affidavits of defense, we said that it would be "the duty of the trial judge to submit for the consideration of the jury any meritorious defense the defendant may present." The question as to whether or not the defendant would be able to sustain his defense by the proper measure of proof was not then before us. *Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434, 123 Am. St. Rep. 691. It was for the trial judge to pass upon the question of the sufficiency of the evidence when the defendant came to present his defense.

[1] The only real evidence produced by the defendant to overcome the written promissory notes was his own testimony, and we agree with the court below that this was entirely insufficient for the purpose. *Phillips v. Melly*, 106 Pa. 536; *Fuller v. Law*, 207 Pa. 101, 56 Atl. 333. While the defendant attempted to escape liability upon the plea that the understanding was that the notes were mere memoranda between him and the plaintiff of a joint-stock speculation, and that in the event of a failure to come out whole on the transaction, he was not to be called upon to pay them, yet he nowhere in his testimony states that he ever said to the plaintiff, or that the plaintiff said to him, that the notes were not to be paid according to the terms of the written contracts. It is a very usual thing when one friend lends money to another and requests a note as an acknowledgment to remark as a matter of politeness that the written promise to pay is merely taken as a memorandum of the transaction to cover the contingency of death. The testimony of the defendant concerning the making of the notes in suit would be entirely consistent with such an incident. It may be that Mr. Fitler thought and understood that he would not be called upon to pay if the stock transactions were not a success, but the evidence falls far short of justifying a finding that any such contract existed between the parties. The first, second, and fifth assignments of error are overruled.

[2] The third and fourth assignments are overruled for the reason that the defendant's testimony shows that the stock dealings in question were not wagering or gambling transactions.

The judgment of the court below is affirmed.

STEEL v. LINN.

(Supreme Court of Pennsylvania. May 17, 1911.)

WILLS (§ 608*)—CONSTRUCTION—DRY TRUST—RULE IN SHELLEY'S CASE.

Testator gave all his estate to his wife for life, and, on her death, the property to be divided between his four children named, "dureing their Natural lives then said property to be divided eaugly Among their natural Heirs, and I do hereby appoint H. trustee of my Four Children." *Held*, that the children took a vested estate in the remainder, and the naming of the trustee created a dry trust executed by statute, so as to give the children a legal estate, and, the devise over being a legal estate, the two coalesced under the rule in Shelley's Case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.*]

Appeal from Court of Common Pleas, Allegheny County.

Suit by Amelia R. Steel against Peter Linn. From a judgment for plaintiff on case stated, defendant appeals. Affirmed.

Swearingen, P. J., filed the following opinion in the court below:

"Peter Wilbert died testate, June 29, 1880, selsed in fee of certain real estate, described in the case stated, situate in the borough of Carnegie, Allegheny county, Pa. He left a will dated June 28, 1880, which was duly probated after his death, and the same now remains on file in the register's office of said county of Allegheny, and is recorded in Will Book, vol. 22, p. 604. In said will the testator provided, inter alia, as follows: 'Second. I give and bequeath to (Christina Lightner) now my beloved wife all my real personal and mixed property to have and to hold the same for the balance of her natural life, for her own use and behoof and at her death then all of said property to be eaquely divided between my Four Children, Peter, George, Chatharine, Menerva dureing their Natural lives then said property to be divided eaquly Among their natural Heirs, and I do hereby appoint William Hill Esq. the trustee of my Four Children and I do further appoint W. J. Steen and A. J. McQuitty my executors.' The said Christina Wilbert, widow of said testator, died May 20, 1882. William Hill, named as trustee in said will, never accepted said trust nor attempted to perform any duties as trustee.

"By deed of general warranty, dated December 10, 1883, and duly recorded, the said four children, mentioned in said will, conveyed said real estate in fee simple to Winifred Thomas; and that title is now vested in Amelia R. Steel, the plaintiff. By written agreement dated March 9, 1910, the plaintiff and her husband agreed to sell and convey the aforesaid real estate in fee simple unto Peter Linn, the defendant, on or before March 31, 1910, for the consideration of \$8,250, of which \$50 was paid in cash upon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

execution of the agreement, and the remainder was to be paid on or before March 31, 1910. On March 30, 1910, the plaintiff tendered the defendant a proper deed for said real estate, and demanded the balance of the purchase money. The defendant refused to accept the deed and to pay the balance of purchase money, alleging that the plaintiff did not have a good and marketable title to said real estate. This suit was then brought to recover said sum of \$8,200. The parties have agreed upon a case stated, wherein they have stipulated that, if, in the opinion of the court, the said four children of Peter Wilbert, deceased, took title in fee to said real estate, judgment shall be entered in favor of the plaintiff for the sum of \$8,200; but if, in the opinion of the court, the said four children did not take title in fee, that judgment shall be entered in favor of the defendant.

"Two questions were submitted for decision upon the argument: (1) Did the appointment of William Hill as trustee prevent the application of the rule in Shelley's Case? (2) Did the said four children of the testator take an estate in fee under the rule in Shelley's Case, or did they take a life estate only?

"(1) We do not regard the naming of William Hill as trustee for the children of Peter Wilbert as having any effect upon the construction of the devise to them. No object for the creation of a trust was specified in the will, nor were any duties prescribed for the trustee either with respect to the beneficiaries or with respect to the property devised. The trustee never did accept the appointment, and he never performed any duties thereunder. The trust was a dry or passive trust, pure and simple, and it was executed by virtue of the statute of uses. Therefore the estate which the said children took was a legal, not an equitable, one, and the devise over, being a legal estate, the two can coalesce, under the rule in Shelley's Case.

"(2) What was the estate which these children took under the said will? The rule in Shelley's Case is a rule of law, and is not merely a rule of construction of the language of a will. The question always is, Has the testator used language which brings the case within the operation of the rule? If he has done so, his supposed, or even declared, intentions are of no importance. *Hileman v. Bouslaugh*, 13 Pa. 344, 53 Am. Dec. 474; *Kleppner v. Laverty*, 70 Pa. 70; *Curry v. Paterson*, 183 Pa. 238, 38 Atl. 594. It seems clear to us that this testator has used language which brings the interpretation of this will within the rule in Shelley's Case. After the widow's life estate terminated, the testator divided the remainder equally among his four children for their lives, and then directed that it should be divided equally among their natural heirs. In other words,

the share of each ancestor should go to his respective heirs equally. This is not a mode of distribution contrary to the intestate laws, but it is in accordance with them. Appeal of *Cockins*, 111 Pa. 26, 2 Atl. 363. Therefore the rule in Shelley's Case applies, and the four children of Peter Wilbert took title to said real estate in fee. *Reutter v. McCall*, 192 Pa. 77, 43 Atl. 398; *McCann v. Barclay*, 204 Pa. 214, 53 Atl. 767.

"And now, to wit, December 31, 1910, being of opinion that the law is with the plaintiff, it is ordered that judgment be entered in favor of Amelia R. Steel, the plaintiff, against Peter Linn, the defendant, in the sum of \$8,200."

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHIZISKER, JJ.

John L. Prestley, Harry J. Nesbit, and James E. Little, for appellant. Herbert R. Hahn, Lyon & Hunter, and Harrison Bock, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned president judge of the common pleas.

BOCKELCAMP v. LACKAWANNA & W. V. R. CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. EVIDENCE (§ 376*)—DOCUMENTARY—TIME BOOKS.

A time book of an employer is inadmissible to show the hours that an employé worked on a particular day where the book was made from time slips which were not produced, and where the witnesses who made the entries were not produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1623-1646; Dec. Dig. § 376.*]

2. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in an action for personal injuries, plaintiff's testimony shows that, though unable to perform the same kind of physical labor as before, he is earning higher salary, it is error to charge that the jury can consider the loss of his earning capacity, whether it was totally or partially destroyed, and that such a question is in the nature of a guess.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 216.*]

3. DAMAGES (§ 100*)—PERSONAL INJURIES—IMPAIRMENT OF EARNING CAPACITY.

Any allowance for future loss due to impairment of earning capacity must be capitalized, and brought down to its present worth.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 100.*]

4. DAMAGES (§ 98*)—PERSONAL INJURIES—EARNING CAPACITY.

Where, after receiving certain personal injuries impairing plaintiff's capacity to do the work to which he had been accustomed, he performed other work at higher wages, such fact will not prevent the jury awarding damages for permanent injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 235-236; Dec. Dig. § 98.*]

5. CARRIERS (§ 303*)—INJURIES TO PASSENGERS—DEGREE OF CARE.

A railroad company must stop its trains at stations a reasonable length of time to permit passengers to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.*]

6. CARRIERS (§ 303*)—INJURIES TO PASSENGERS—DUTIES OF CARRIER.

Where a passenger is seen alighting, or could have been seen alighting, it is the duty of the carrier to allow him time to alight completely before starting the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224-1243; Dec. Dig. § 303.*]

7. TRIAL (§ 194*)—INSTRUCTIONS—INTERESTS OF WITNESSES.

In an action for personal injuries, it is proper for the court to call the attention of the jury to the number of witnesses testifying to facts showing that plaintiff stepped off a moving train, and should refer to the number of witnesses on each side, their respective interests, opportunities for observation, and other matters affecting the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by John Bockelcamp against the Lackawanna & Wyoming Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

At the trial it appeared that plaintiff, a man 52 years old, was injured on August 26, 1906, while alighting from a train at South Scranton station of defendant company.

At the trial the time book of the Delaware, Lackawanna & Western Railway Company, the plaintiff's employer, was admitted in evidence under the following objection:

"Mr. Torrey: Objected to as not properly proven. Our understanding and information is that the time was differently kept on Sundays from what it was on other days, and we think it important that the person who kept the time or the time slips should be produced, and not secondary evidence.

"Mr. O'Malley: This is offered for the purpose of corroborating the plaintiff, Bockelcamp, and the witness Berry.

"Mr. Torrey: Objected to as incompetent, and not the best evidence.

"The Court: Objection overruled. Exception noted for defendant at whose request a bill is sealed.

"Mr. O'Malley: State to the jury how many hours your time book shows were taken in for Mr. Bockelcamp on that date.

"A. Seventeen hours on the 26th of August."

The court charged in part as follows:

"Inasmuch as it is testified that this is a permanent injury and it is not contradicted, you can also consider, then, what will be the loss of his earning capacity, whether it is totally destroyed or partially

destroyed. You must also consider whether or not he will endure pain and suffering for the remainder of his life by reason of this injury and to what extent, because it does not necessarily follow, even though he may endure pain, that it will be the same degree of pain at all times or continuously. It may appear for a time, and then it may disappear. It is said that there is no way of measuring pain. This is true. Nevertheless the law allows the jury to take that into consideration in rendering compensation to one injured in this manner and under these circumstances. You may consider as a circumstance in the case the number of years that the plaintiff is likely to live in measuring the loss of his earning capacity. Upon this point evidence has been introduced of what is known as the expectancy of life tables, sometimes called the 'Carlisle tables,' and under these tables the expectancy of life of a man of the plaintiff's age would be 19 years and a half. You are not, of course, to assume that he will live these 19 years. He may live much less, he may live possibly longer, yet you are permitted to use this table in assisting you in arriving at a conclusion in ascertaining the amount of damage which he may sustain by the loss of his earning capacity permanently.

"It is in evidence in this case that, while the plaintiff earned \$75 or \$80 a month prior to his injury and that he was employed as a machinist, since his injury he has entered into employment with the same company, not exactly in the same capacity, but more in the nature of a foreman or superintendent over others engaged in the same department in which he was previously engaged, and that he received the same amount of money or something more. The scale of wages in that class of labor having increased, he received the benefit of it in his monthly wages. You must consider this circumstance as an element in the case in measuring the loss of his earning capacity. His trade or occupation before the injury is the one which should guide you primarily, which would be the occupation he probably would have continued in if he had not met with this injury. He may continue in the same employment he is now in, or he may at any time lose it, and then if he was to seek employment in the same occupation which he had heretofore followed, if you believe his story and the story of the physicians as to his injury, he would not be as fit to perform the duties of a machinist as he had been before the time of this injury. It is a very difficult question for jurors to decide, and is in the nature of a guess."

Verdict for plaintiff for \$15,000, upon which judgment was entered for \$6,000, all above that amount having been remitted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

H. B. Gill and James H. Torrey, for appellant. Everett Warren and Houck & Benjamin, for appellee.

MOSCHZISKER, J. John Bockelcamp was seriously injured while alighting from a train on the defendant's road. The train in question consisted of two cars, and was operated by a third-rail electric system. The case was submitted to the jury, and the plaintiff recovered a large verdict, upon which, after a substantial cut, the court below entered the judgment from which this appeal has been taken.

The plaintiff contended that the train had stopped at a regular station for discharging passengers, and that he had immediately attempted to alight, but that, without giving him sufficient time, the train started while he was in the very act of stepping to the ground. The defendant claims that the plaintiff carelessly stepped from a moving train before it had come to a stop. The evidence was conflicting and the case was for the jury, but the assignments question the propriety of certain rulings of the trial judge and the manner in which the issues were submitted.

[1] The second specification complains of the admission in evidence of a time book belonging to the plaintiff's employers, purporting to show the hours that the plaintiff had worked on the day of the accident. Since it was not a book of original entries, and the absence of the time slips from which it was made up were not sufficiently accounted for or the witnesses who made the entries produced, the evidence should not have been admitted. While we sustain this assignment, if it were the only error in the case, we should not consider it of sufficient importance to require a reversal.

[2] The ninth and tenth specifications relate to the charge concerning the plaintiff's loss of earning capacity. The trial judge, *inter alia*, said: "Inasmuch as it is testified that this is a permanent injury and it is not contradicted, you can consider then what would be the loss of his earning capacity, whether it is totally destroyed or partially destroyed." The permanent destruction of earning capacity was again referred to, and, after calling attention to the facts in the case concerning the employment of the plaintiff before and after the accident and the wages earned, the trial judge submitted the issue to the jury, saying: "It is a very difficult question for jurors to decide, and it is in the nature of a guess." These instructions are faulty in several particulars. The plaintiff's own testimony shows that he returned to his old employer, and that, although he is unable to perform the same kind of physical labor that he did before the accident, he now occupies a better posi-

tion and is earning a higher salary. Therefore there is nothing in the evidence to justify the suggestion that his earning capacity has been permanently destroyed, much less "totally destroyed." See *Goodhart v. Penna. Railroad Co.*, 177 Pa. 1, at page 18, 85 Atl. 191, at page 193, 55 Am. St. Rep. 705.

[3] Furthermore, the jury's attention should have been called to the fact that any allowance for future losses due to an impairment of earning capacity must be capitalized and brought down to its present worth. Finally, the use of the word "guess" ought to have been avoided. Jurors should never be told that any of their deliberations are in the nature of a guess, for such a remark is practically a suggestion to them that matters submitted for their determination can be decided without mature judgment and deliberation. These specifications of error are sustained.

[4] The twelfth specification complains that the trial judge said to the jury: "Neither did I intend you to understand that if the plaintiff continued in the occupation that he now is in as foreman that you could not also, notwithstanding that fact, find him entitled to some damages for the loss of his earning capacity." This was not error. Should the plaintiff remain in the position which he now occupies, and continue to earn at least as much as he was capable of earning prior to the accident, it would be strong evidence tending to show that he had not suffered any serious impairment of his earning capacity; but the jury had a right to consider the evidence showing his physical condition and the character of work which he performed both prior to and since the accident, and, if this justified the conclusion that as a result of the accident his future earning power had been reduced, they could award him damages accordingly. As was said in *McLaughlin v. Corry*, 77 Pa. 109, 18 Am. Rep. 432: " * * * The true measure of damages * * * would be the plaintiff's actual permanent loss of earning power, occasioned by the accident. What he gets from his present employers by way of wages cannot go in mitigation of damages; * * * but what he earns from any source may, with other things, be considered as going to prove what his earning powers actually are." The assignment is overruled.

[5] The thirteenth specification complains of the following instruction: "It is the duty of a carrier of passengers like the defendant in this case not only to exercise the strictest vigilance in receiving and conveying the passenger to his destination, but also to set him down safely at his station or the termination of his journey, and, if they fail in this and the plaintiff is injured, without fault upon his part, then he is entitled to recover." The use of the phrase "strictest vigilance" is amply supported by our cases (*N. J. R. R. Co. v. Kennard*, 21 Pa. 203; *Meier v. Penna. R. R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Pitts-*

burg & Connellsville R. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Penna. R. R. Co. v. White, 88 Pa. 327; Phila. & Reading R. R. Co. v. Boyer, 97 Pa. 91; Fredericks v. Northern Central R. R. Co., 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306; Englehaupt v. Railroad Co., 209 Pa. 162, 58 Atl. 154; N. Y., L. E. & W. R. R. Co. v. Daugherty, 11 Wkly. Notes Cas. 437; and, while language found in certain of these cases apparently justifies these instructions as a whole, yet consideration will show that the duty of the carrier is stated too strongly when it is said that, if a railroad fails to set a passenger down safely at a station, he is entitled to recover. It is the duty of a railroad to stop its trains at stations a reasonable length of time to permit passengers to alight (Penna. R. R. Co. v. Kilgore, 32 Pa. 292, 72 Am. Dec. 787; Leggett v. Railroad Co., 143 Pa. 39, 21 Atl. 996; Raughley v. West Jersey & S. R. R. Co., 202 Pa. 43, 51 Atl. 597; Hatch v. Phila. & Reading Ry. Co., 212 Pa. 29, 61 Atl. 480; Brooks v. Phila. & Reading Ry. Co., 218 Pa. 1, 66 Atl. 872; Englehaupt v. Railroad Co., supra; Walthour v. Penna. R. R. Co., 40 Pa. Super. Ct. 252).

[6] Of course, if the passenger is actually seen in the act of alighting by the men in charge of the train, or if under the circumstances of the particular case he should have been seen, then there is a duty to allow him time to alight completely before starting the train, and a failure so to do would be negligence. The trial judge practically so instructed the jury in affirming points submitted by the defendant; hence we do not sustain this assignment.

[7] The seventeenth specification complains that the charge as a whole is inadequate, and that the trial judge gave undue prominence to the testimony of the plaintiff's witnesses and minimized the evidence for the defense.

We do not sustain this assignment, but we take occasion to say that at the next trial, if the testimony is the same, it would be well to call the attention of the jury to the number of witnesses for the defense who testify to facts showing or tending to show that the plaintiff stepped off a moving train. In accident cases, where a strong sympathy naturally goes out to a physically injured man, the trial judge should give careful instructions on the testimony, and in so doing he should deal with the number of witnesses on each side, their respective interests, opportunities for observation, and such other matters as affect the weight of the evidence.

The third specification complains of a portion of the charge which states that, if through the negligence of a railroad a car is permitted to move while a passenger is trying to get off, the company is responsible for any injury which he may sustain. These instructions, standing alone, can justly be criticised because of the omission of any reference to the duty of the passenger; but, as this was cured in subsequent instructions, the assignment is overruled.

The first, fourteenth, fifteenth, and sixteenth specifications, which allege error in not giving binding instructions for the defendant, and in refusing judgment non obstante veredicto, are all overruled.

The fourth, fifth, sixth, and eleventh specifications cover alleged mistakes in recitals of testimony. As these may not occur at the next trial, it is unnecessary to discuss them. The assignments are dismissed.

The seventh and eighth specifications complain of general instructions, in which we see no reversible error. They are overruled.

For reasons before indicated, the second, ninth, and tenth assignments are sustained, and the judgment is reversed with a venire facias de novo.

WHITCOMB v. WHITCOMB.

(Supreme Court of Vermont. Washington.
Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 695*)—RECORD—EVIDENCE.

Where the evidence is not in the record on appeal, the Supreme Court cannot consider whether a finding is sustained thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

2. APPEAL AND ERROR (§ 907*)—EXCEPTIONS—FINDINGS—NECESSITY.

The Supreme Court must assume that a finding was upon sufficient competent evidence, unless it is erroneous on its face, where no exceptions were filed thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

3. PARTNERSHIP (§ 67*)—PARTNERSHIP PROPERTY—PATENTS.

Since a patent right is incorporeal personal property, having the same sanctions as other property, it is the subject of ownership by a partnership.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 67.*]

4. FRAUDS, STATUTE OF (§ 82*)—TRANSFER OF PATENT—ORAL AGREEMENT.

A patent may be transferred by an oral agreement; such agreement not being within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 143-146; Dec. Dig. § 82.*]

5. PATENTS (§ 197*)—TRANSFER—ORAL AGREEMENT.

An oral agreement transferring a patent is not prohibited by Rev. St. U. S. § 4898 (U. S. Comp. St. 1901, p. 3387), requiring assignments of patents to be in writing.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 197.*]

6. SPECIFIC PERFORMANCE (§ 38*)—ORAL CONTRACTS—TRANSFER OF PATENTS.

An oral agreement to transfer a patent will be specifically enforced when properly proved.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 113; Dec. Dig. § 38.*]

7. PARTNERSHIP (§ 67*)—PROPERTY—ACQUISITION OF TITLE—USE OF PARTNERSHIP FUNDS.

The legal title to property was not vested in the partnership merely by the use of partnership funds in purchasing it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 95-100; Dec. Dig. § 67.*]

8. PARTNERSHIP (§ 67*)—PROPERTY—EQUITABLE ASSIGNMENTS.

While the title to property was not vested in a partnership merely because partnership funds were used in acquiring it, it became the equitable assignee thereof by virtue of an agreement between the partners that an undivided half of the property should be assigned to each partner.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 67.*]

9. PARTNERSHIP (§ 344*)—ACCOUNTING—RELIEF—COMPELLING ASSIGNMENTS.

Equity has power to compel an assignment, and could, in a suit for a partnership accounting, order a partner to make an assignment to the firm of patent rights adjudged to belong to

it, and, in case of his refusal to do so, appoint a trustee to make the assignment.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 344.*]

Appeal in Chancery, Washington County; Zed. S. Stanton, Chancellor.

Suit for partnership accounting and dissolution by Friend N. Whitcomb against Harry W. Whitcomb. From a decree determining the parties' interests in the firm property, orator appeals. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

E. L. Scott and Richard A. Hoar, for appellant. J. Ward Carver and John W. Gordon, for appellee.

POWERS, J. These parties were partners in the operation of a large machine shop in Barre. Dissension arose, and the orator brought a bill for an accounting and for a dissolution of the partnership, therein praying, among other things, that a receiver be appointed, and that the property of the firm be ordered turned over to him. The defendant answered the bill, and therein admitted the necessity of a receiver, and one was duly appointed, and he is now in charge of the affairs of the firm. The defendant's answer asserted, among other things, that a certain patent standing in the name of the orator was obtained at the expense of the firm under an agreement that an undivided half of it should be assigned to the defendant, and that it should be used for the benefit of the business. The orator filed a replication joining issue on this answer. Thereupon a hearing was had before a chancellor, who found and filed a statement of facts. The chancellor found that the patent referred to is the property of the copartnership. No exceptions to the chancellor's findings were filed, and a decree was rendered fixing the interests of the respective partners in the assets of the firm, and establishing the firm's ownership of the patent in question, and ordering the orator to assign the same to the receiver within a time fixed, and, in default thereof, appointing a trustee to make such assignment. From this decree the orator appealed. The only question raised pertains to the ownership of this patent.

The orator says in his brief that the finding as to the ownership of this patent is not warranted by the evidence, and that all evidence relating thereto was taken subject to objection and exception. Both those claims are outside the record and consequently they cannot be considered.

[1-6] The evidence is not sent up (Williams v. Wager, 64 Vt. 326, 24 Atl. 765; Holt v. Howard, 77 Vt. 49, 58 Atl. 797; Child v. Pinney, 81 Vt. 314, 70 Atl. 566), and no exceptions to the finding were filed. In these

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

circumstances all this court can do is to assume that the finding was upon competent and sufficient evidence. *Martin v. Wells*, 43 Vt. 428; *Sargent v. Burton*, 74 Vt. 24, 52 Atl. 72. It must stand, therefore, unless it appears on its face to be erroneous. The orator says that a patent cannot be owned by a partnership. But this cannot be so, for a patent right and the privileges thereby granted are incorporeal personal property (*De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. 283, 37 L. Ed. 138), and are entitled to the same rights and sanctions which attend other property (*Cammeyer v. Newton*, 94 U. S. 225, 24 L. Ed. 72; *Densmore v. Scofield*, 102 U. S. 375, 26 L. Ed. 214). They may be transferred by oral agreement, as was here done, and such agreement is not within the statute of frauds, nor within U. S. R. S. § 4898 (U. S. Comp. St. 1901, p. 3387), requiring assignments to be in writing, and will be specifically enforced in equity when properly proved. *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Harrigan v. Smith*, 57 N. J. Eq. 635, 42 Atl. 579; *Searle v. Hill*, 73 Iowa, 367, 35 N. W. 490, 5 Am. St. Rep. 688; *Hammond v. M. & H. Organ Co.*, 92 U. S. 724, 23 L. Ed. 767.

[7, 8] And while it is true that the partnership did not acquire title to the patent simply by reason of the fact that partnership funds were used in obtaining it (*Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 366; *Belcher v. Wittemore*, 134 Mass. 380), it did become, as it lawfully might (*Fresno Home Packing Co. v. Fruit Cleaning Co.*, 101 Fed. 826, 42 C. C. A. 43; *Button Holeing Co. v. Somerville*, L. T. [N. S.] xxxviii, 878), the equitable assignee thereof by force of the agreement.

[9] A compulsory assignment is within the jurisdiction of the court of chancery, and the decree below ordering such an assignment by the orator and appointing a trustee to act in case of his refusal was correct. *Ager v. Murray*, 105 U. S. 126, 26 L. Ed. 942.

Decree affirmed and cause remanded. Let a new time be fixed by the court of chancery within which the orator shall assign to the receiver the patent in question.

SOWLES v. HARTFORD LIFE INS. CO.
(Supreme Court of Vermont. Franklin. Sept. 23, 1911.)

PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

Amendment of a declaration seeking to recover the excess of assessments which defendant had demanded and received of plaintiff in violation of a provision of a policy on his life issued by it that, after he reached a certain age, his assessments should not exceed a certain amount, by averment of breaches of other provisions of the policy, for which recovery is also

sought, introduces a new cause of action, which is not permissible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Exceptions from Franklin County Court; Zed S. Stanton, Judge.

Action by Albert Sowles against the Hartford Life Insurance Company. A motion of defendant was overruled, and it brings exceptions. Judgment reversed, amended declaration dismissed, and cause remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Hiram P. Dee and M. H. Alexander, for plaintiff. C. G. Austin & Sons, for defendant.

HASELTON, J. This is an action of assumpsit. The original declaration was in four counts. After the defendant had pleaded, the plaintiff filed an amended declaration, which also was in four counts. The defendant filed a motion to dismiss the amended declaration on the ground that it introduced a new cause of action, and on other grounds. This motion was overruled. The defendant excepted, and the case was passed to this court without further proceedings in the cause.

In the original declaration the first count says that by virtue of a life insurance policy, numbered 103306, issued by the defendant company in 1888, upon the life of the plaintiff, he was to pay to the company, in order to keep the policy in force, quarterly assessments and expense dues, not to exceed certain sums named, after he obtained the age of 65 years; that he reached that age in 1898; and that thereafter, in disregard of the provision of the contract of insurance just set out, the defendant had demanded and received of the plaintiff quarterly assessments, in excess of the maximum sums required by the contract, aggregating \$300; and that the defendant was indebted to the plaintiff in that sum as for so much money had and received. The second count in the original declaration is like the first except that it declares as for money had and received for like overpayments to the amount of \$300 exacted and received of the plaintiff after he became 65 years of age, under another policy, namely, policy numbered 103665. The third count in the original declaration is like the first, except that it declares as for money had and received for the sum of \$900 exacted and received by the defendant from the plaintiff after he became 65 years of age, under still another policy, namely, policy numbered 108816. The fourth count in the original declaration is simply the common count for money had and received, and declares for the sum of \$1,500, which is the aggregate of the sums

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

declared for in the three preceding counts. It is obvious that this count was joined with the others merely as a matter of customary precaution, and that it was not intended by the pleader to state a further cause of action.

The first count of the amended declaration alleges the contract of insurance, policy numbered 103306, between the plaintiff and the defendant, entered into in 1888, and sets out that the contract provided for assessments for the purpose of forming a mortuary fund and for the creation of a safety fund, which assessments were to be levied upon the plaintiff and upon all other members of the company holding policies similar to that held by the plaintiff; that the assessments were to be made according to a table of graduated ratios; that the plaintiff at the time of the contract was 54 years old; that the money paid to the defendant for a safety fund was to be deposited with a certain security company as trustee to be invested by the security company in government bonds, and that the security company was, on conditions the fulfillment of which is alleged, to pay over to the defendant company, at intervals, the income on such bonds, which income the defendant was to divide among policy holders of the class to which the plaintiff belonged; and that it was agreed that, whenever the safety fund should amount to \$1,000,000 all subsequent receipts therefor should be divided among policy holders of the class to which the plaintiff belonged for the payment of future dues and assessments. The count further alleges that the defendant did not at any time after the date of the policy make any division among the policy holders entitled thereto of the income from the safety fund, notwithstanding the existence of the conditions making such division obligatory, and that on March 1, 1899, the safety fund was far in excess of \$1,000,000, but that, notwithstanding that fact, the defendant did not, and has not since, made any division of safety fund receipts, in accordance with the agreement already referred to, but that, in disregard of its undertakings, it has from time to time without the knowledge and against the will of the plaintiff, and the other policy holders, diverted the safety fund from United States bonds to securities of doubtful character, and has thereby caused a large loss to the fund and to the policy holders. The count further alleges that by reason of its disregard of its undertakings referred to and its misappropriation of the safety fund the defendant ceased to do business under the safety fund plan, and thereby caused the cost of maintaining in force the policy of insurance to far exceed the amount agreed upon in the policy. The count further alleges that in violation of the contract of insurance the defendant has without

right collected of the plaintiff a large sum of money, to wit, \$100 for sending out notices of mortuary assessments, and has also without right collected a further sum of money, to wit, \$500, by way of expense dues in excess of the amount of such dues permitted under the contract, and has in violation of the contract collected of the plaintiff the sum of, to wit, \$100 for the safety fund, and, to wit, the sum of \$2,000 as mortuary assessments in excess of the assessments warranted by the contract, and has, without right, collected of the plaintiff the sum of, to wit, \$100 assessed upon the quarterly calls of the defendant. At this point the count incorporates the cause of action set forth in the first count of the original declaration, and alleges, in accordance therewith, that the defendant has collected and received of the plaintiff the sum of, to wit, \$300 in violation of the stipulation in the contract as to the sums collectible of him after he attained the age of 65 years. The declaration adds an averment that the defendant has from the day and date of the contract disregarded the stipulation therein as to the mortality ratio, and that in consequence thereof has demanded and received of the plaintiff the sum of, to wit, \$1,000. The second count of the amended declaration relates to the policy of insurance issued by the defendant to the plaintiff in 1888, and numbered 103665. Its allegations are similar to those in the first count of the amended declaration, though there are some changes and additions. The third count in the amended declaration relates to policy numbered 106816, issued by the defendant to the plaintiff in 1888. This count is in general like the first count of the new declaration. The fourth count in the amended declaration relates to all three of the policies already mentioned, and, in effect, brings together the allegations of the three preceding counts.

The four counts of the amended declaration cover 31 typewritten pages, and we have not undertaken to go much into the details of the things alleged. They all allege misconduct on the part of the defendant from about 1888 when the policies were issued and the plaintiff was 54 years old down to the present time. They allege that this misconduct, consisting in part of a misappropriation of funds, was a violation of the defendant's contracts with the plaintiff and of its contracts with other policy holders of the same class, and they seek, to recover money paid in consequence of the wrongful doings and exactions of the defendant made in a variety of ways during the entire life of the policies. The *ad damnum* is set at \$10,000. Nothing can be plainer than that this amended declaration introduces a cause of action not contemplated when the original declaration was drawn. *Derosia v. Ferland*, 83 Vt. 372, 385, 76 Atl. 153, 28 L. R.

A. (N. S.) 577, 138 Am. St. Rep. 1092; Estabrooks v. Insurance Co., 74 Vt. 203, 52 Atl. 420. The plaintiff cites Haskins v. Ferris, 23 Vt. 673, Trescott v. Baker, 29 Vt. 459, and Boyd v. Bartlett, 36 Vt. 9. But these cases are all against his contention that the amended declaration introduces no new cause of action. So the amended declaration should have been dismissed on the ground already considered, for, as was tersely said by Judge Steele, the statute does not authorize "a new suit under the guise of an amendment." Dana v. McClure, 39 Vt. 197; Estabrooks v. Fidelity, etc., Co., 74 Vt. 202, 52 Atl. 420; Brodek v. Hirschfield, 57 Vt. 12; McDermid v. Tinkham, 53 Vt. 615; Carpenter v. Gookin, 2 Vt. 495, 21 Am. Dec. 566.

Judgment reversed. Judgment that the amended declaration is dismissed and cause remanded.

RHONE v. SPERRY & BARNES CO.

(Supreme Court of Errors of Connecticut.
Oct. 6, 1911.)

TRIAL (§ 139*)—QUESTION OF FACT OR LAW—DIRECTION OF NONSUIT.

Where there was no evidence from which the jury could reasonably have found that the defendant was negligent as alleged in the complaint, and that plaintiff's own negligence did not essentially contribute to his injury, a nonsuit was properly directed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

Wheeler, J., dissenting.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Charles Rhone against the Sperry & Barnes Company to recover damages for personal injuries alleged to have been sustained by defendant's negligence. From a judgment of nonsuit and from an order refusing to set it aside on plaintiff's motion, he appeals. Affirmed.

George W. Crawford, for appellant. Edmund Zacher and William B. Ely, for appellee.

THAYER, J. After the plaintiff had introduced his evidence and rested his case, the court granted a motion that judgment as in case of nonsuit be rendered for the defendant, and denied the plaintiff's motion to set aside the nonsuit. The record shows that there was no evidence from which the jury could reasonably have found that the defendant was guilty of the negligence alleged in the complaint, and that the plaintiff's own negligence did not essentially contribute to his injury. There was therefore no question of fact to go to the jury pre-

sented by the evidence, and the nonsuit was properly granted.

There is no error. In this opinion the other Judges concurred, except WHEELER, J., who dissented.

WITHAM v. WING et al.

(Supreme Judicial Court of Maine. Oct. 5, 1911.)

1. MECHANICS' LIENS (§ 277*)—PROCEEDINGS—STATEMENT OF LIEN—VARIANCE BETWEEN STATEMENT AND BILL—CONTRACTING PARTIES.

In a suit to enforce a lien for labor and materials, plaintiff offered in evidence a copy of the record of the lien statement, filed in the town clerk's office pursuant to Rev. St. c. 93, § 31, within 60 days after cessation of labor, in order to preserve his lien, stating the name of the owner, the amounts due, description of the property, etc., as required by the statute, and in addition stating the name of the person with whom the contract was made, which the statute does not require. *Held* that, as the statement was received in evidence, and was admissible, only to show that plaintiff had taken the necessary steps to preserve his lien, and not to prove the contract, any variance in the name of the persons contracted with, as alleged in the bill and shown in the statement, would not defeat the lien, only being available to impeach plaintiff's testimony that the contract was made with the person alleged in the bill.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546-554; Dec. Dig. § 277.*]

2. EQUITY (§ 330*)—WAIVER—FAILURE TO DEMUR TO AMENDED BILL.

Where, after demurrer was filed to the original bill for improper joinder of defendants, an amendment to the bill was filed by consent, to which defendants did not demur, but answered by a denial, exceptions to overruling the demurrer to the original bill will not be considered, though the objections urged are open to defendants on appeal.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 330.*]

3. MECHANICS' LIENS (§ 276*)—PROCEEDINGS TO ENFORCE—CONSTRUCTION OF PLEADING—AMENDED BILL.

Paragraph 6 of the original bill in a suit to enforce a materialman's lien alleged that the contract for the work and material was made with W., while paragraph 9 alleged that certain other labor was performed and material furnished by virtue of a contract with W., F., and L. An amendment to the bill alleged that the items sought to be recovered for under paragraph 9 were furnished in carrying out the original contract with W., being additions thereto made necessary by changes which were consented to by him and made by his authority. *Held*, that the amendment alleged a different contract than the original bill with reference to the work and material mentioned in paragraph 9, alleging in effect that such work and material were furnished to W., so that it operated as a discontinuance as to F. and L.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 276.*]

4. APPEAL AND ERROR (§ 1036*)—HARMLESS ERROR—UNNECESSARY PARTIES.

Since the joinder of unnecessary parties defendant is ordinarily harmless error, which may be corrected on final decree by making the

judgment several. the fact that there was no discontinuance in a suit to enforce a materialman's lien as to a defendant who had no interest in the property would not defeat plaintiff's claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.*]

5. MECHANICS' LIENS (§ 197*)—BONA FIDE PURCHASER—NOTICE—CLERK'S CERTIFICATE OF CLAIM—EFFECT.

Under Rev. St. c. 93, § 39, providing that, when any bill in which a materialman's lien is claimed is filed with the town clerk, he shall file in the registry of deeds a certificate stating the names of the parties and describing the property, etc., the town clerk's certificate, so filed, is notice to the world that claimant asserts a lien upon the property described, so that one thereafter purchasing it does so at his risk.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 197.*]

6. MECHANICS' LIENS (§ 166*)—MATERIAL-MAN'S LIEN—ACCRUAL.

A materialman's lien is created by law when the labor and materials are furnished; claimant being required, to perfect his lien for enforcement by bill in equity, only to record his statement of lien in the town clerk's office, as required by statute.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 297; Dec. Dig. § 166.*]

Exceptions from Supreme Judicial Court, Kennebec County, in Equity.

Bill in equity by Charles B. Witham against Flora J. Wing and others. On exceptions and appeal by one of defendants after decree for plaintiff. Exceptions overruled, appeal dismissed, and decree affirmed.

Bill in equity brought by the plaintiff, under the provisions of Revised Statutes, chapter 93, § 33, against Flora J. Wing, L. B. W. Wing, G. Harold Grant Wing, and the Lewiston Trust & Safe Deposit Company, to enforce a lien upon land and certain buildings thereon, situate in Farmingdale, for labor and materials furnished in altering and repairing said buildings. The last-named defendant was the mortgagee of the premises. The case went to the law court on exceptions and appeal by defendants.

Argued before SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

George W. Heselton, for plaintiff. Oakes, Pulsifer & Ludden and Eaton, Keene & Gardner, for defendants.

HALEY, J. This is a bill in equity, brought by Charles B. Witham, to enforce a lien upon land and buildings thereon, situated in Farmingdale, owned by Flora J. Wing, for labor and material furnished in altering and repairing said buildings.

Paragraph 6 of the bill alleges that, by virtue of a contract between the plaintiff and the defendant G. Harold Grant Wing, a son of Flora J. Wing, who is alleged to be the owner of the land and buildings, executed for said G. Harold Grant Wing by his at-

torney, Charles C. Keene, the plaintiff furnished material and labor, all of which entered into and were used in erecting, constructing, altering, and repairing the buildings upon which the lien is claimed, and refers to Exhibit A, which reads:

To making piazza for house in Farmingdale and furnishing material, and to making alterations in said house, as per contract dated March 21, 1910.....	\$300 00
Credit.	
By discount in not furnishing door and stair rail as per contract.....	\$ 13 00
By cash	200 00
	\$213 00
Balance due.....	\$532 00

Paragraph 9 of the bill reads as follows: "That, by virtue of a contract with the said G. Harold Grant Wing, Flora J. Wing, and L. B. Wing, and with the knowledge and consent of said owner and mortgagee, the plaintiff performed certain other labor, and furnished certain other labor and materials, and made certain changes in the specifications of said written contract, all of which are mentioned and described in the statement hereunto annexed and made a part hereof and marked 'Exhibit B,' all of which entered into and were used in altering, constructing and repairing the building located on said lot."

Exhibit B contains 26 items for labor and material furnished from March 28th to May 2d, inclusive. The bill was filed in the clerk's office in Kennebec county, and subpoena issued, as prescribed by the rules of court, to Flora J. Wing, L. B. Wing, G. Harold Grant Wing, and the Lewiston Trust & Safe Deposit Company. The defendants filed an answer with a demurrer therein. Afterwards, with the consent of the defendants, an amendment was filed and allowed. So much of the amendment as is material is as follows:

"All the labor and material referred to in Exhibit A of the plaintiff's bill, for which the plaintiff seeks to recover, were furnished by the plaintiff by virtue of and in pursuance of a contract with the said G. Harold Grant Wing, and the other contracts alleged in the plaintiff's bill to have been made by G. Harold Grant Wing, Flora J. Wing, and L. B. Wing, as stated in paragraph 9 and Exhibit B of the plaintiff's bill, were merely additional to and modifications of the said original contract with G. Harold Grant Wing, mentioned in item 6 of the plaintiff's bill, and were made by his authority and with the consent and knowledge of the owner."

The case was afterwards set down for hearing and was heard, as appears by the record, upon amended bill, answer, admissions of record and proof. The justice who heard the case dismissed the bill as to the Lewiston Trust & Safe Deposit Company and L. B. Wing, with costs for each, sustained

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the bill against G. Harold Grant Wing for \$841.46, with interest and cost, with a lien upon the buildings and land described in the bill, and ordered the property sold to satisfy the judgment. The defendant G. Harold Grant Wing claimed an appeal. The case is before the court upon exceptions and appeal.

The plaintiff offered in evidence a copy of the record of the town clerk of the town of Farmingdale, where the property in question is located, which was admitted, subject to objection and exception by the defendant. This was a record of the lien statement filed by the plaintiff in the town clerk's office, under the provisions of section 31, c. 93, R. S., in his attempt to preserve his lien, within 60 days of the time he ceased to labor or furnish material in the construction, altering, and repairing the buildings. The objection was that it was a variance, and did not set forth such a lien statement as corresponded to the claim in the bill.

It contained all the necessary statements prescribed by the statute to preserve the lien—a statement of the amount due, credits given, a description of the property sufficiently accurate to identify it, the name of the owner—and was subscribed and sworn to. In addition, it contained the statement that the material and labor were furnished by virtue of a contract with G. Harold Grant Wing and L. B. Wing, upon the dwelling house described in the bill, owned by Flora J. Wing.

The defendant contends that by the statement in said claim that it was "for labor done and materials furnished by virtue of a contract with G. Harold Grant Wing, of Portland, in the county of Cumberland and state of Maine, and L. B. Wing of Farmingdale, in the county of Kennebec," afterwards followed by a charge of \$800 for making a piazza on the house and furnishing materials, as per contract dated March 21, 1910, and by the further statement, "to other work and other materials furnished by contract with G. Harold Grant Wing and consent of the owner," two separate lien contracts are shown, and that the plaintiff cannot prove and recover in this action judgment against G. Harold Grant Wing and the land and buildings mentioned upon his individual contract, and upon the joint contract of G. Harold Grant Wing and L. B. Wing.

[1] The statute does not require the claim filed in the town clerk's office to contain the name of the person with whom the lienor contracted. The paper was offered in evidence to show that the plaintiff had complied with the statute in regard to filing his statement in the town clerk's office within 60 days of the time he ceased to labor or furnish material, and was admitted in evidence for that purpose. It was admissible for no other purpose, when offered by the plaintiff. If it contained more than the

statute required, it still contained all the statute required, and was admissible for the purpose of proving that the plaintiff had filed the statement required by law. The fact that the plaintiff stated therein that the work was done and the material furnished by virtue of a contract with G. Harold Grant Wing and L. B. Wing, not being required by statute, would not defeat the lien, but would be evidence that the defendants might use to impeach the testimony of the plaintiff, when he claimed that the contract was made with G. Harold Grant Wing individually, and was undoubtedly used for that purpose at the argument. In order for the plaintiff to maintain his case, it was necessary for him to prove that he had filed in the town clerk's office a certificate containing the statements prescribed in section 31, c. 93, R. S., and the record was offered and admitted to prove that he had complied with the statute, not as proof of his claim, but as proof that the lien claimed had not been dissolved by his neglect to file the statement required by statute within 60 days from the time he had ceased to labor or furnish material.

The case of *Thurston v. Schroeder*, 3 R. I. 272, cited by the defendant, does not apply. That was a petition (corresponding to the bill in equity in this case) for a lien filed against two persons, as joint contractors, for work done and material furnished by the petitioner, and the court held there was not sufficient evidence submitted to prove that the contract, as set forth in the petition, was made by the two respondents, and that the plaintiff suing upon a joint contract of Patterson and Schroeder had, by their written evidence, showed only a several contract with Patterson, which their parol evidence had no tendency to vary. In other words, the court held that all the evidence introduced by the plaintiff had failed to prove the contract alleged. In this case the claim filed in the town clerk's office was not offered or received as evidence of the contract. The defendant's position that a different contract was proved than the one alleged could only be taken after the evidence was all in, at which time the statement in the record of the town clerk's office should have been considered with the other evidence, to show whether the labor and material were furnished upon the individual contract of G. Harold Grant Wing, or upon the joint contract of G. Harold Grant Wing and another.

In the case of *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775, also cited by the defendant, there was a demurrer to the complaint, because it could not be ascertained from an inspection whether the contract alleged in the complaint to have been entered into by the plaintiff and the defendants was made by Mary C. Lavigne or by the defendant John E. Lavigne, or both, and that it

could not be ascertained therefrom whether the plaintiff sought to hold the defendant Mary C. Lavigne under an alleged contract made with her or on account of some interest which she held in the land. The demurrer was sustained.

The exception under discussion is not to the pleadings, but to the admissibility of evidence to show that the statement required by statute to be recorded in the town clerk's office to preserve the lien had been recorded.

In *Garrison v. Hawkins*, 111 Ala. 308, 20 South. 427, a lien case also cited by the defendant, the plaintiff alleged that the contract for lumber which was sued on was made with two defendants, Jerome and Mahale B. Garrison. The court in discussing the case says: "There is no proof that Mahale ever had anything to do with the purchase of the lumber, and what relation, if any, she sustained to her codefendant. But the plaintiff's evidence is full and clear that they contracted with Jerome Garrison alone, and furnished the labor to him." That was a case in which the claim of a misjoinder of parties was taken after the evidence was all in, so that the court might see whether one or both parties were liable. There are many cases holding the same as the above cases, but they do not hold that the lienor had lost his lien by inserting in his statement recorded in the town clerk's office statements not required by law. The record was properly admitted for the purpose for which it was received, viz., that the plaintiff claimed a lien upon the land and buildings therein described, and had recorded the statement required by statute within the time fixed by statute to preserve his lien, if entitled to the lien.

[2] The second exception is to the ruling of the court upon the demurrer, which set forth the improper joinder of parties defendant, under paragraphs 6 and 9 of the bill. The demurrer was filed to the original bill, and assigned as cause of demurrer the improper joinder of defendants. After the demurrer was filed, an amendment was allowed, with the consent of the defendants, and the defendants answered the amended bill by the denial of the matters therein contained. If they had wished to object to the amended bill by demurrer, they should have filed a new demurrer to the amended bill. It was not permissible to argue upon the demurrer filed to the original bill for causes set forth therein after the bill had been amended by consent, and an amendment filed by defendants to their answers, but a new demurrer should have been filed, specifying the objections to the amended bill, so that the record would have shown that it was passed upon after the amendment. As no demurrer was filed to the amended bill, exceptions to the overruling of the demurrer are not properly before the court; but the

objections urged are open to the defendant upon appeal.

It is objected that the amended bill alleges the existence of the same contract as alleged in the original bill. The position of the defendant is that the contract in paragraph 6 was the individual contract of G. Harold Grant Wing, and the contract alleged in paragraph 9 was the joint contract of G. Harold Grant Wing, Flora J. Wing, and L. B. Wing; that they are separate claims and should have been enforced by separate suits against each of the contracting parties; that the plaintiff cannot maintain this action and recover judgment against G. Harold Grant Wing, and the land and buildings, upon his individual contract and his joint contract with Flora J. Wing and L. B. Wing; and that he is seeking to do so by this action.

This objection was well taken by demurrer to the original bill, but the amendment, made by consent, seeks to remove that objection.

[3] Paragraph 6 of the bill alleges the individual contract of G. Harold Grant Wing, and he admits it to be his contract. The amendment set forth that the charges in paragraph 9 of the bill, which allege the labor and material set forth in Exhibit B were furnished upon the credit of G. Harold Grant Wing, Flora J. Wing, and L. B. Wing, were merely additional to and modifications of said original contract mentioned in paragraph 6, made by the authority of G. Harold Grant Wing. If so, then all the items charged for were furnished upon the individual contract of G. Harold Grant Wing. If it was modified and added to with the consent of G. Harold Grant Wing, he was liable for their value, and the amendment was, in fact, a discontinuance of the suit against L. B. Wing and Flora J. Wing, except as she appeared as owner of the property sought to be charged with the plaintiff's lien, and the court would have so ruled, if either party had requested. In fact, the court did so rule by the final decree dismissing the bill as to him with cost.

[4] The fact that there was no discontinuance as to L. B. Wing cannot defeat the plaintiff's claim, for "all persons interested must be parties, either plaintiffs or defendants, and if from overcaution too many be joined the mistake is harmless, and may be corrected on final decree, as the judgment may be several and so framed as to work full and substantial justice." *Brown v. Lawton*, 87 Me. 86, 32 Atl. 733; *Bugbee v. Sargent*, 23 Me. 269. The effect of the amendment was to make plain the claim of the plaintiff that the items sought to be recovered for under paragraph 9 were furnished in carrying out the original contract made with G. Harold Grant Wing, being additions to that contract made necessary by changes and additions thereto, which were all consented to by G. Harold Grant Wing, and that the plaintiff relied upon that contract without regard to who ordered the changes, or who ordered

the work done; that he intended to prove that whoever did order the changes and the work did so as the agent of G. Harold Grant Wing.

The claim of the defendant that the amended bill alleges the same contract as the defendant claims the original bill alleged, and that there is a fatal variance, either of proof or allegations, cannot be sustained, and it is unnecessary to discuss the cases cited to sustain the position that if there was a fatal variance the bill cannot be maintained.

It is next objected that, "If the amendment did change the original bill, the effect must be to void attachments of real estate, and in this case, as the lien depends upon the attachment, no right remains for the court to render a valid lien judgment."

[5] No authorities are cited in support of the above proposition. The plaintiff is not seeking to enforce his claim by attachment in an action at law, under section 40, c. 93, R. S. The case was begun by filing the bill in the clerk's office, not by inserting it in a writ of attachment. No attachment was made. The clerk undoubtedly complied with section 39, c. 93, R. S., and the certificate filed by him in the registry of deeds office was notice to the world that the plaintiff claimed a lien upon the property described therein, and that whoever purchased it did so at their risk.

[6] The lien, if there was one, was created by law when the plaintiff furnished the labor and materials used in altering and repairing the house. The plaintiff, by recording his statement in the form required by law in the town clerk's office within the time fixed by statute, and by bringing his bill to enforce his lien within the time fixed by statute, did all the law required of him to preserve the lien and prevent it from being dissolved, and to subject the property to the payment of the lien judgment he might recover in this bill in equity.

It is next objected that the plaintiff did not run the piazza the full length of the east side of the house; that he stopped 14 inches south of the north corner; that he refused, willfully and intentionally, to extend it. The evidence is clear and convincing that the piazza was built with the knowledge of the agent of the defendant, G. Harold Grant Wing, after it had been discussed whether it would be better to extend it the whole length, or to stop 14 inches from the corner, and that the plaintiff stated he would build it as they wanted it, and he was told to use his own judgment. The objection is without merit. The justice who heard the case found that the plaintiff furnished the material and labor charged for in altering and repairing the premises described in the bill and statement filed in the town clerk's office, and that it was furnished upon the contract of G. Harold Grant Wing, and with

the consent of the owner, who, as a matter of fact, saw the work being done, and gave some orders as to what should be done and how it should be done.

No objection is made to the sufficiency of the proof, authorizing the judgment ordered by the justice who heard the case, if the objections already considered are not sufficient to defeat the action. It is the opinion of the court that the objections are without merit, and that the entry should be:

Exceptions overruled. Appeal dismissed. Decree appealed from affirmed, with cost of appeal.

DICKINSON v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey. Sept. 14, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the view of a driver of an automobile approaching a railroad grade crossing was obstructed by permanent obstructions, so that he could not see the train approaching on the west-bound track until the front wheels of his automobile were on the east-bound track, and it appeared that, upon reaching the top of a hill 200 feet distant from the crossing, he turned off power and proceeded by force of gravity, noiselessly, at a speed of four miles an hour, constantly looking and listening, but hearing no signals, and it further appeared that there were no transient noises nor temporary obstructions to the view, he was not guilty of contributory negligence as a matter of law in not stopping before his view became effective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1189; Dec. Dig. § 350.*]

2. RAILROADS (§ 334*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a traveler upon a highway, without any fault on his part, is placed in a position of imminent peril at a railroad crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence in failing to give proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances; it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1027; Dec. Dig. § 334.*]

3. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff in doubt, the determination of the question must be submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1189; Dec. Dig. § 350.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

*(Additional Syllabus by Editorial Staff.)***4. RAILROADS (§ 327*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.**

A traveler on a highway approaching a railroad crossing must exercise such care as an ordinarily prudent man would exercise under like circumstances in looking and listening for approaching trains, and if he fails to do so, and is injured, he is guilty of contributory negligence, barring recovery, though the railroad company is guilty of negligence also.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

5. RAILROADS (§ 328*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where there are permanent obstructions to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety at a crossing to a place of possible danger.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.*]

Gummere, C. J., and Parker, J., dissenting.

Error to Supreme Court.

Action by Joel Dickinson against the Erie Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Herbert Clark Gilson, for plaintiff in error. Cortlandt & Wayne Parker, for defendant in error.

TRENCHARD, J. This action was brought to recover damages sustained by the plaintiff in the way of injuries to his person and the destruction of his automobile, occasioned by a collision with a locomotive engine operated by the defendant company, at a highway grade crossing at Howells, Orange county, N. Y. According to the evidence introduced by the plaintiff, no bell, whistle, or other warning was given by the defendant's train, and there was no flagman, gate, or electric bell at the crossing. At the trial, and here, therefore, it seems to have been properly conceded that there was thus presented at least a jury question as to the negligence of the defendant. The trial judge nonsuited the plaintiff on the ground of his contributory negligence, and the judgment entered thereon is now here for review.

It appeared that the highway upon which the plaintiff was traveling runs north and south, and the railroad east and west. The plaintiff, who was riding in and operating an automobile, was going in a northerly direction. His wife and daughter were riding with him. As the plaintiff approached the crossing, he came to the top of a hill about 200 feet distant from the crossing, and from that point the highway runs slightly down-grade until a point 20 feet from the track is reached. There were three tracks, the first to be crossed was the east-bound; the second, the west-bound, on which the train was coming; and the third was a siding. When the plaintiff reached the top of the hill, he slowed down, and from that point proceeded "very slowly; about as fast as a man

would walk, four or five miles an hour." The power of the automobile was turned off, and it was at "low speed which acted as a brake." According to the testimony, the automobile then made no noise. As the plaintiff approached, the view to the west was unobstructed. The view to the east, from which direction the train came, was obstructed by a high bank of earth running parallel with the highway for about 500 feet to a point about 26 feet from the tracks. A considerable part of that space was occupied by the defendant's freight shed, and by telegraph poles and other obstructions. The result was, as stated by the trial judge, in dealing with the motion to nonsuit: "It would not be until a person on the highway had cleared the northerly line of the freight shed that he would have a distinct view of the west-bound track to the east for a sufficient distance to make his observation of much practical use. This northerly line of the freight shed is nine feet three inches south from the nearest rail." After referring to the testimony as to the length of the automobile and the position of the plaintiff therein, the trial judge concludes: "It results, I think, from the proofs that Mr. Dickinson could first get a long unobstructed view to the east at just about the time when his front wheels came on the south rail of the east-bound track." It was clearly open to the jury to have drawn like inferences from the testimony. The plaintiff looked both to the east and west, and listened constantly from the time the crossing could first be seen which was at the top of the hill. When the last obstruction (the freight shed) was passed, the train was suddenly seen approaching at a speed of 40 or 50 miles an hour. Whereupon the plaintiff turned the steering wheel to the west and jumped from the automobile, dragging his wife with him. In jumping he injured his knee. His daughter also jumped, and the automobile continued by force of gravity over the first track, and was struck by the locomotive on the west-bound track. The distance between the south rails of the two tracks was 13 feet. The plaintiff and his family all testify that they alighted upon the east-bound track. The learned trial judge held the view that when he jumped the plaintiff was in a place of safety, and nonsuited upon the theory that he was guilty of contributory negligence in not stopping the automobile, instead of jumping. We are of opinion that the nonsuit cannot be supported upon the ground taken by the trial judge, nor upon any other ground.

[4] The defendant first contends that the plaintiff "was bound to stop before crossing the tracks." As a general rule, a traveler on a highway approaching a railroad crossing is bound to exercise reasonable care—that is, such care and prudence as an ordi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

narly prudent man would exercise under like circumstances—in looking and listening for approaching trains before going on the crossing; and if he fails to do so, whereby he is injured, he is guilty of contributory negligence barring a recovery, although the railroad company itself is guilty of negligence. *Passman v. West Jersey, etc., R. Co.*, 68 N. J. Law, 719, 54 Atl. 809, 61 L. R. A. 609, 96 Am. St. Rep. 573; *Swanson v. New Jersey Central R. Co.*, 63 N. J. Law, 605, 44 Atl. 852; *Penna. R. R. Co. v. Pfuell*, 60 N. J. Law, 278, 37 Atl. 1100, affirmed 61 N. J. Law, 287, 41 Atl. 1116. Such duty to look and listen before crossing requires, especially where physical conditions interfere with the free use of vision or hearing, that the traveler should exercise care to select a position from which an effective observation can be made, and to use the necessary means within his control to render the act of looking and listening reasonably effective. *Conkling v. Erie R. R. Co.*, 63 N. J. Law, 339, 43 Atl. 666.

[5] Where there are permanent obstructions to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger, without waiting for hearing to become effective. *Central R. R. Co. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695. But the duty to stop before crossing has not been held in this state to arise except where there are transient noises or temporary obstructions to the view. *Wise v. Delaware, L. & W. R. R. Co.*, 80 Atl. 459; *Merkle v. New York, Lake Erie, etc., R. Co.*, 49 N. J. Law, 473, 9 Atl. 680; *Central Railroad Co. v. Smalley*, 61 N. J. Law, 277, 279, 39 Atl. 695; *Keyley v. Central R. R. Co.*, 64 N. J. Law, 355, 45 Atl. 811.

[1] We have pointed out that in the present case it was open to the jury to find that the view of the plaintiff to the east was obstructed, so that he could not see the approaching train until the front wheels of his automobile were on the first or east-bound track. The uncontradicted testimony was that the automobile made no noise as it proceeded downgrade to the crossing, and there was no evidence of other transient noises, nor of temporary obstructions to the view. Under the cases cited, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in not stopping before his view became effective. Since the plaintiff was not negligent up to the point where the train came into view, no negligence can thereafter be imputed to him as a matter of law, because, as we have pointed out, it was open to the jury to find that,

when he cleared the freight shed so as to enable him to see the approaching train, the front wheels of his automobile were on the first rail of the first track, and only about 13 feet from the west-bound track. *Dobbs v. West Jersey & S. R. Co.*, 78 N. J. Law, 679, 75 Atl. 905; *Danskin v. Pennsylvania R. Co.*, 79 N. J. Law, 526, 76 Atl. 975.

[2] The defendant argues that the plaintiff should have stopped his automobile on the first track, instead of jumping. But clearly his failure to stop and his conduct in jumping cannot be said to be negligence as a matter of law. Where a traveler, without any fault on his part, is placed in a position of imminent peril at a crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence, as in failing to give the proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances; it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care. *Weston v. Pennsylvania R. Co.*, 74 N. J. Law, 484, 65 Atl. 1015, and cases there cited. In the case at bar the plaintiff was confronted by a sudden peril, without any fault upon his part, and by reason of the failure of the defendant's servants to give proper signals. It may well have been, as the plaintiff testifies, that he could not determine, in the time at his disposal, on which track the train was coming. He was required to act quickly. He might have applied the brakes, taking the chance of the train being on the first track and the risk that the brakes would fail to work. He might possibly have attempted to escape by resort to some other means. If he had chosen any such other courses, and had been struck by the train, it might have been argued with equal weight that he should have jumped when he had the opportunity.

[3] We are of opinion that the evidence left the contributory negligence of the plaintiff in doubt, and the determination of the question should have been submitted to the jury.

The judgment of the court below will be reversed, and a venire de novo awarded.

GUMMERE, C. J., and PARKER, J., dissenting.

CROTOIS v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
Sept. 21, 1911.)

*(Syllabus by the Court.)***FALSE IMPRISONMENT (§ 15*)—DEFENSES—
FAILURE TO PAY RAILROAD FARE.**

When the conductor of the defendant's train was justified in causing the arrest of the plaintiff for a violation of section 59 of the general railroad act of 1903 (P. L. p. 674) in knowingly and willfully proceeding on the defendant's train beyond the distance for which he had paid his fare without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, the plaintiff in such circumstances could not subject the defendant company to liability for false imprisonment by tendering to the conductor the amount of the fare after he has been thus legally arrested at the end of the journey.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 15.*]

Error to Supreme Court.

Action by Frederick E. Crotois against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Vredenburg, Wall & Carey, for plaintiff in error. Abner Kallsch and Samuel Kallsch, Jr., for defendant in error.

TRENCHARD, J. The plaintiff's action was for assault and battery and false imprisonment. On the trial, at the Essex circuit, it appeared that on March 12, 1909, the plaintiff was riding upon a local train of the defendant company, east bound from Philadelphia to Jersey City. According to the plaintiff's testimony, he was riding on the return half of an excursion ticket bought in Jersey City. It appeared that by the company's regulations three collection points for tickets upon local trains were established upon such route—the first at Philadelphia, the second at Trenton, the third at New Brunswick. Upon the trip in question the conductor, after leaving Philadelphia, took up the Trenton tickets, and punched those reading beyond Trenton, including the plaintiff's. After leaving Trenton the conductor proceeded to take up the New Brunswick tickets, and the plaintiff handed him his ticket, but whether it was punched and returned to the plaintiff is in dispute. After the train left New Brunswick, the conductor demanded plaintiff's ticket, whereupon the plaintiff insisted that the conductor had taken his ticket, and had not returned it. This the conductor denied, and insisted that the plaintiff should look through his pockets, and the conductor looked through his collected tickets, but neither found the plaintiff's ticket. Thereupon the conductor demanded fare from the plaintiff from New Brunswick to Jersey City, which the plaintiff refused to pay. Upon the arrival of the train in Jersey City, the

plaintiff was arrested at the instance of the conductor by an officer to whom the conductor had telephoned to be in waiting. Immediately following the plaintiff's arrest he was taken to an office in the terminal building, and there, according to the plaintiff's testimony, he tendered to the conductor the amount of the fare from New Brunswick to Jersey City; but according to the defendant's witnesses he did not tender such fare to the conductor.

The arrest of the plaintiff was grounded upon an alleged violation of section 59 of the general railroad act of 1903 (P. L. p. 674). That section provides, among other things, that, "if any person having paid his fare (on any train of any railroad) for a certain distance shall knowingly and willfully proceed on such train beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid the payment thereof," he may be apprehended, etc. In laying down the law of the case in his charge to the jury, the learned trial judge assumed that the conductor was justified from the circumstances on the train in setting in motion section 59 of the act. The legal propriety of such assumption may well be doubted. Assuming, for present purposes, the validity of the section in question, which is disputed by counsel for the defendant in error, we incline to think that the evidence herein recited, and other evidence unnecessary now to be mentioned in detail, as to what occurred on the train, presented a jury question as to this phase of the case. The statute is penal, and must be strictly construed. In order to justify action under it, the passenger must have traveled, not only without paying his fare, but also with intent to avoid payment thereof. *Badewitz v. West Jersey & Seashore R. R. Co.*, 75 N. J. Law, 268, 67 Atl. 1067; *Tldey v. Erie Railroad Co.*, 66 N. J. Law, 384, 49 Atl. 427, affirmed 67 N. J. Law, 352, 51 Atl. 1110. But, in view of the result of the trial, it is unnecessary for us to now pass upon the propriety of the assumption by the trial judge that the conductor was justified as a matter of law in ordering the plaintiff's arrest.

After having thus assumed that the conductor was justified in setting in motion the machinery of the fifty-ninth section, the trial judge further instructed the jury that the arrest took place when the conductor pointed out the plaintiff to the officer on the platform in Jersey City. He then charged, in effect, that the right of the plaintiff to recover depended upon whether the plaintiff thereafter, in the office to which he was taken, made a bona fide offer of the fare to the conductor, and concluded by saying: "Is it proved to your satisfaction that this money was offered to the conductor and refused by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the conductor fairly and squarely? If so, the plaintiff is entitled to a verdict; if not, the defendant is entitled to a verdict." That instruction, assigned for error by the defendant, we think requires a reversal.

As already pointed out, the judge assumed, perhaps improperly, the existence of the facts necessary to constitute a justification for the arrest; but, at least, there was evidence warranting a finding of those facts by the jury. Supposing, therefore, the plaintiff had been lawfully arrested for a completed violation of section 59, he could not render the arrest unlawful, and subject the company to an action for false imprisonment, by afterwards tendering to the conductor the amount of his fare.

The judgment below will be reversed, and a venire de novo awarded.

EASTWOOD v. RUSSELL

(Court of Errors and Appeals of New Jersey.
Oct. 2, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 862*)—COLLATERAL INHERITANCE TAX—AMENDMENT OF STATUTES.

The act of 1906 (P. L. 1906, p. 432), amending "an act to tax intestates' estates, gifts, legacies, devises and collateral inheritance in certain cases" (P. L. 1894, p. 318), being unconstitutional by reason of its defective title, in no wise changed or affected the prior act of 1894, which latter act continued to exist as if the amendment of 1906 had never been passed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 862.*]

2. TAXATION (§ 859*)—COLLATERAL INHERITANCE TAX—"PROPERTY TAX."

A tax levied upon property passing by will by virtue of the act of 1894 (P. L. 1894, p. 318) is not a property tax to which the provision of Const. art. 4, § 7, par. 12, was designed to apply.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 859.*]

3. STATUTES (§ 126*)—CONSTITUTIONAL LAW—TITLE OF ACT.

It is not permissible for a person assessed under the act of 1894 (P. L. 1894, p. 318) upon property acquired by him by will to assert that the title of that act does not express its object, in that the title contains the word "gifts," while the body of the act places a tax on property transferred by "deed, sale or gift * * * to take effect * * * after the death of the * * * grantor or bargainor," and that the alleged extra titular objects cannot be cut out of the act, because the act in this regard is severable, allowing the excision of the asserted objectionable features.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 195; Dec. Dig. § 126.*]

4. APPEAL AND ERROR (§ 1082*)—REVIEW—QUESTIONS OF FACT.

Where a person assessed under the act of 1894 (P. L. 1894, p. 318) contends that the property, which is the subject of the tax passed to him, not by will, but by contract between him and the testator, and presents ex parte affidavits to the surrogate, to prove such agreement, and the Supreme Court on certiorari removing said assessment for review makes no finding of

fact, the question of the force or competency of such affidavits does not come before this court upon writ of error reviewing the judgment of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1082.*]

Error to Supreme Court.

Proceedings between George E. Russell and John H. Eastwood for an assessment of a collateral inheritance tax. Judgment imposing tax was affirmed by the Supreme Court, and John H. Eastwood brings error. Affirmed.

Lum, Tambllyn & Colyer and Frank H. Sommer, for plaintiff in error. Edmund Wilson, Atty. Gen., for defendant in error.

VOORHEES, J. On March 24, 1908, John Eastwood, a resident of Belleville, in Essex county, died leaving a will wherein he appointed John H. Eastwood, the plaintiff in error, his executor, to whom he devised and bequeathed, with a few exceptions, his entire estate, valued at about \$700,000. The estate so passing to and claimed by John H. Eastwood, a relative of the testator, but not a son or within the exempted degrees, was assessed March 15, 1909, by the surrogate of Essex county under the so-called collateral inheritance tax act of 1894 (P. L. 1894, p. 318), and the tax ascertained to be \$35,435.65. The imposition of this tax was resisted by John H. Eastwood, but was affirmed by the Supreme Court. This writ of error is sued out to review that judgment. By act approved May 15, 1906 (P. L. p. 432), sections 1 and 4 of the above act of 1894 were amended. In Neilson v. Russell, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673, this court held that the purpose of the act of 1894 was not to impose a transfer or succession tax, but legacy duties. In Dixon v. Russell, 79 N. J. Law, 490, 76 Atl. 982, we likewise held that the title of the amendment of 1906 "contains no intimation that the purpose of the statute as amended is to impose taxes upon the transfer of property which has been bequeathed by a testator," and declared the act of 1906 invalid because its object was not expressed within its title. Const. art. 4, § 7, par. 4.

[1] It is here argued by the plaintiff in error that the amendment of 1906 (so far as concerns matters arising after its enactment) wiped out and rendered nugatory, sections 1 and 4 of the act of 1894 by substituting the act of 1906, and, the latter act having been declared unconstitutional, as above stated, there was no legislation extant at the time of the testator's death capable of sustaining the tax. The answer to this proposition is that the act of 1906, being unconstitutional, was without effect at all upon the act of 1894. Central R. R. Co. of N. J. v. State Board of Assessors, 75 N. J. Law, 786, 69 Atl. 245, is in point, where it is said: "The

fact that the supplement of May 18, 1906, is void does not in our judgment operate to destroy the act itself. The supplement never had any vitality. It is as if it had never been passed, for it cannot be conceived that the Legislature intended that the whole act should fall unless the provision of the supplement could be ingrafted upon it." The contrary of this proposition is, however, insisted upon by the plaintiff in error to this extent, as set out in his brief: "An unconstitutional statute is nevertheless a statute. That, though it be judicially declared unenforceable because in conflict with the organic law, still remains an enactment of legislative intent which the courts must reckon with, and which the judicial department has no power to expunge." We are referred to the following cases as supporting this principle: *Rader v. Township of Union*, 39 N. J. Law, 509; *Union Township, Committee of, v. Rader*, 41 N. J. Law, 617; *Atty. General v. Angelsea*, 58 N. J. Law, 372, 33 Atl. 971; *Rutgers College v. Morgan*, 70 N. J. Law, 477, 57 Atl. 250; *Riccio v. Hoboken*, 69 N. J. Law, 664, 55 Atl. 1109, 63 L. R. A. 485; *Lang v. Bayonne*, 74 N. J. Law, 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391; *Smith v. Howell*, 60 N. J. Law, 384, 38 Atl. 180; *Allison v. Corker*, 67 N. J. Law, 601, 52 Atl. 362, 60 L. R. A. 564. The theory is that because an unconstitutional act may form the basis of an amendment which eliminates its vice, and thereby become a valid enactment, there must be substance in the previous faulty legislation to give this result. *Allison v. Corker*, supra, is the leading case, holding that the judicial department proceeds with reference to unconstitutional legislation in personam, and therefore adjudged an act merely unenforceable, but still existent and capable of vitalization. It is to be noted that this case, as well as those above cited which bear upon this subject, carefully limits its scope to acts, the body of which contains the infirmity, and not to those having a faulty title. Aside, however, from this consideration, it is not perceived how an amendatory act unenforceable, if you will, because of a title defective, so as to be always and under all circumstances ineffective, can be held to have changed, or in any way modified the prior valid act upon which it was sought to be ingrafted. As above said, in it, it wrought no change; hence the original act never passed out of existence, and needed no revivifying. Therefore the effect of *Dixon v. Russell* was not to revive the act of 1894, but to declare that it had in no way been altered by the attempted amendment of 1906.

The dangers inhering in holding that abortive attempts to alter laws should have the effect of nullifying the law as it stood before are too evident to require any comment. It is enough to suggest that a yielding to this argument might have resulted in the abolition of the court of oyer and terminer

and the county courts in 1895, when the unconstitutional acts making the county judges elective (P. L. 1895, 323, 647, 807) were declared void in *Schalk v. Wrightson*, 58 N. J. Law, 50, 32 Atl. 820, and in *Johnson v. State*, 59 N. J. Law, 271, 35 Atl. 787, Id., 59 N. J. Law, 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373, and might have rendered insecure the practice in error when the Legislature attempted to provide for a review of the facts by writ of error, at first in 1890 (P. L. 1890, p. 33) declared unconstitutional in *Falkner v. Dorland*, 54 N. J. Law, 409, 24 Atl. 403, and in *C. R. of N. J. v. Tunison*, 55 N. J. Law, 561, 27 Atl. 929, and again in 1899 (P. L. 1899, p. 323) declared invalid in *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. Law, 647, 44 Atl. 702. *Lang v. Bayonne* supra is not pertinent. The learned Chief Justice in that case said: "I am unable to accept as sound doctrine * * * that an unconstitutional law is void ab initio, and affords no protection for acts done under its sanction." And proceeded to hold that it must be regarded as valid, until declared unconstitutional, as far as individual judgment and obedience thereto are involved. It must also be borne in mind that, when the judgment of a court declares what the law is, that declaration means that it has always existed as so declared. The act of 1906, being unconstitutional, by reason of its defective title, in no wise changed or affected the prior act of 1894, which latter act continued to exist as if the act of 1906 had never been passed.

But the plaintiff in error attacks the act of 1894 itself as unconstitutional, and argues that the imposed tax should be set aside. The reasoning is that the right to acquire property through acts inter vivos is a natural and unalienable right, included in the Constitution—section 1, article 1—(*Brennan v. United Hatters*, 73 N. J. Law, 729, 65 Atl. 165, 9 L. R. A. [N. S.] 254, 118 Am. St. Rep. 727), while the right of acquisition, through intestate succession or testamentary disposition, is a mere creature of the law, existing by the favor of the state.

[2] The argument further continues that "property" acquired by either of these two methods is subject to taxation, but only in the manner prescribed by article 4, § 7, par. 12, Const., reading: "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value." So, if the imposition made by the act of 1894 is a tax on property, it must fall, because of the various exemptions made by the act, but, if an exaction upon the succession, it may be justified because that succession exists by the grace of the state; such not being a direct tax upon property. But, because there is united in the act as well property transferred by "deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor" rights acquired directly from

acts *inter vivos*, that acquisition is a right not given by the grace of the state, and the imposition, though termed a succession tax, is in reality a tax upon property.

The plaintiff in error has not acquired property by an act *inter vivos*, and therefore that aspect of the statute is not here involved. What passed to him, and so far as this case shows is claimed by him, clearly must be in virtue of the gracious policy of the state in granting to him a privilege to acquire it through a testament, and not in the assertion of his right "by deed, grant, sale or gift." Therefore we do not find it necessary to deal with the contention that the tax is a property tax, to which the provision of the Constitution was designed to apply. In *Nelson v. Russell*, *supra*, a legacy duty was declared to be imposed by the act. That is not a tax regulated by the above paragraph of the Constitution. This contention, therefore, fails.

[3] But it is further urged that the title of the act of 1894 does not express its object in that the title contains the word "gifts," while the body of the act places a tax on property transferred by "deed, grant, sale or gift * * * to take effect * * * after the death of the * * * grantor or bargainor." We find it unnecessary to consider this argument, for the reason that the plaintiff in error must derive his right to the property in question under a will, and not as a grantee, or bargainee, as hereinbefore noted and as hereinafter explained, and therefore this attack upon the statute cannot render the act inoperative, as against the plaintiff in error, if there may be excised from the body of the act those objects asserted by him to have been omitted in the title. The rule in such cases was laid down in *Rader v. Township of Union*, 39 N. J. Law, 510, as follows: "It will answer every purpose of law and of public policy to declare in such cases as the one now under advisement the unlawful superaddition to the declared object of the statute to be inoperative and void. This can always be done when the objectionable feature stands by itself, and is separable as a distinct thing from the body of the act, and there is no reason to suppose that the portion thus eliminated constituted an essential motive to the enactment of the law." But it is said that the alleged extra titular objects cannot be cut out of the act, because the enactment was of a comprehensive scheme of taxation, and the view is not warranted that the Legislature would have passed such a statute for the remainder only. The very distinction which counsel makes between the privilege of the transmission of property by testament and succession and the right to transfer it by contract, if it be a valid distinction, is so plain that it would seem to overthrow the argument that the two provisions of the act are so inseparably connected that the whole

must fall, and that there was no legislative intent to pass the act, save as a whole. It seems to be clear that this portion can be separated from the rest in each instance, and there will then remain a complete valid statute, embracing the primary object of the Legislature, capable of being enforced afterwards, and that such remainder is not dependent upon the eliminated portion but on the contrary, is quite independent thereof, and separable therefrom so as to overcome any presumption of legislative intent to pass the act only in its original entirety. *New Brunswick v. Fitzgerald*, 48 N. J. Law, 457, 8 Atl. 729; *Johnson v. State*, 59 N. J. Law, 538, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; *Fagan v. Payne*, 75 N. J. Law, 851, 59 Atl. 568.

[4] Still another position taken against the tax is that John H. Eastwood became entitled to the property by virtue of a contract made between him and the testator in the latter's lifetime, and not by testamentary succession. The alleged agreement is set forth in certain *ex parte* affidavits presented to the surrogate who fixed the tax at the time the matter was before him for that purpose. The substance of the agreement thus displayed is that when the plaintiff in error was less than a year old his parents and the testator agreed that testator would adopt the infant, and maintain, educate, and take care of him, and subsequently to the adoption it was the understanding and agreement between the testator and the infant that in consideration of his continuing to live with the testator (to whom he had gone in infancy) as a son and of his valuable services rendered to the testator the testator would treat him as a son, and, upon testator's death, he should receive testator's property. The attempted proof of the facts by *ex parte* affidavits was in no way effective to bind the state in an adjudication by the surrogate, whether he was or was not invested with jurisdiction for that purpose. They were not competent proof in the Supreme Court in the certiorari proceeding. *Klein v. Adams Express Co.*, 61 N. J. Law, 530, 40 Atl. 445; *State v. Gardner*, 34 N. J. Law, 327. No affidavits were taken in that court pursuant to the rule granted for that purpose, and no finding of fact was made by the Supreme Court. If the Supreme Court had made a finding favorable to the contention of the plaintiff in error, there would be a question whether there was any testimony to support such finding, but, inasmuch as the court has not made any such finding, the question as to the force or competency of the affidavits is not before us. *Sisters of Charity v. Cory*, Col. 73 N. J. Law, 699, 65 Atl. 500. For aught that appears in the record, the plaintiff in error claims under the will of the testator.

The judgment of the Supreme Court must be affirmed, and it is so ordered.

McCOOL v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey.
Sept. 14, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A traveler who in approaching a three-track railroad grade crossing stopped when his horse's head was 10 or 12 feet from the nearest rail of the nearest track, upon which a freight train was passing, and waited before going forward until it had passed out of sight 200 feet or more away behind a permanent obstruction to the view, cannot be said to be negligent as a matter of law in not waiting for the freight train to get further away, when there was no evidence of any noise from it interfering with the plaintiff's hearing at the time he started forward.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1174; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

When from the evidence the jury may legitimately find that the view of a traveler approaching a three-track railroad grade crossing was so obstructed to his right by a permanent obstruction that up to and at the last point at which he might reasonably decide that it was necessary for him to give up looking to the right, and either look to the left or ahead for the footing of his horse, he could not see the train unknown to him approaching from the right at great speed, and without giving the statutory signals, and which struck his wagon as he was clearing the third track, the question of the alleged contributory negligence of the plaintiff is for the jury.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 350.*]

Gummere, C. J., and Swayze, Bergen, and Voorhees, JJ., dissenting.

Error to Supreme Court.

Action by John McCool against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wescott & Wescott, for plaintiff in error.
Gaskill & Gaskill, for defendant in error.

TRENCHARD, J. This writ of error brings up for review a judgment entered upon a verdict directed for the defendant at the Camden circuit in an action brought to recover damages for injuries sustained in a crossing accident. The verdict was directed for the defendant upon the ground of the plaintiff's contributory negligence.

At the trial it appeared that the plaintiff was a young man 24 years of age. In the month of October, 1907, he was driving a light, covered delivery wagon, drawn by a slow, old horse, in an easterly direction, along Kohler street, in South Gloucester, and came to the crossing of defendant's tracks, upon which both steam and electric trains are operated, the latter by the third-rail system. There are three tracks, all of them used for trains, and running northerly and southerly and at right angles to the street.

As the plaintiff approached the crossing, his view of the tracks on the right-hand or southerly side was obstructed, first, by a board fence bounding the property of one Howlett, and extending for a distance of 100 feet parallel to and about 22 feet distant westerly from the nearest rail of the first or westerly track. This fence was about six feet high, and obstructed a view of the tracks, but not of a train coming upon the tracks. Beyond the fence, and standing seven feet nearer to the tracks and running parallel therewith for a distance of 75 feet or more, was a high, tight signboard, the top of which was 13 feet above the level of the rail, and which admittedly constituted a complete obstruction to the effective view of the track to the south. The proofs show that a person traveling in the center of Kohler street does not get a view of the tracks to the south for a sufficient distance to be of any practical use until he has at least reached a point 48 feet west from the nearest rail of the furthest track, which point is about 24 feet westerly from the nearest rail of the nearest track. At that point a person can see the railroad to the south far enough to give him a view of about 650 feet of the easterly or third track, upon which an electric train of three cars was coming, unknown to the plaintiff, and admittedly without giving the statutory signals. Of course, from that point forward the view down the track lengthens. About 1100 feet from the crossing the track curves towards the west. As the plaintiff approached the crossing, a freight train was passing on the westerly or nearest track, going south. It was a long train, made up of 22 cars, and drawn by a locomotive engine. The plaintiff testified that he stopped long enough for the freight train to go 100 or 200 feet down the road. He says: "I waited for the freight train to get out of the way so I could have a clear vision of the track, and see if there were any other trains coming." Van Dexter, a witness called for the defense, testified that the freight train had got about 200 yards from the Kohler street crossing when McCool started to go across, or when his horse got his feet on the first track; and, again, he says that the freight train had got 100 or 150 feet beyond the sign referred to when the horse's feet reached the nearest rail. The same witness further testified that when the horse stopped (short of the crossing), and while the freight train was passing, the horse's head was about 10 or 12 feet from the nearest rail. The plaintiff testified that after waiting for the passing of the freight train to open up a clear view of the track, and then looking carefully both ways and listening, and seeing and hearing nothing, he proceeded slowly, continuing to look and listen, and the fact is that he reached the furthest track and his horse had got clear

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of it when the wagon was struck by the electric train coming from the south.

No contention is made, and in view of the proofs none can be made, that the direction of a verdict can be justified because of want of proof of negligence of the defendant.

[1] The verdict for the defendant was directed upon the ground of contributory negligence. It seems to have been rested upon the theory, and it is here contended (1) that the plaintiff started across the track while the freight train still blocked his view; or (2), if that be not so, that careful observation upon the part of the plaintiff would have disclosed the approach of the electric train in time for him to have avoided the collision. We are of opinion that there is no view of the evidence which renders the alleged contributory negligence of the plaintiff a court question.

Of course, if the evidence conclusively showed that the plaintiff attempted to cross while the freight train obstructed his view of the train approaching upon the other track, he might well have been held guilty of contributory negligence barring a recovery under the authority of *West Jersey R. R. Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064, and *Penn. R. R. Co. v. Pfuelb*, 60 N. J. Law, 278, 37 Atl. 1100, affirmed 61 N. J. Law, 287, 41 Atl. 1116. We agree that it was open to the jury to find from some of the evidence that the plaintiff did that thing. But it was also open to them from other evidence, some of which we have recited, to find that, when he attempted to cross, the freight train no longer obstructed his view. The evidence tends to show that he stopped when his horse's head was 10 or 12 feet from the nearest rail of the nearest track, and upon which the freight train passed, a very good place for the purpose considering conditions present; that he waited there until the freight train had gone out of sight behind the signboard. The plaintiff in effect so testified, and he is corroborated by a consideration of the testimony as to the relative positions of the plaintiff, the signboard, and the freight train at the moment the plaintiff started. It was therefore clearly open to the jury to find that when he started from his safe place of observation the freight train no longer obstructed his view, but was so far in the distance that a reasonably prudent person might judge that it was time to go forward. There appears to have been no evidence, and there is in this case no necessary inference, that the freight train as it disappeared in the distance made any noise which interfered with the plaintiff's hearing at the time he started forward. No such contention is made by the defendant.

[2] We are also of opinion that it cannot be said as a matter of law that careful observation upon the part of the plaintiff would

have disclosed the approach of the electric train in time for him to have avoided the collision. It was necessary for him to make his observation once for all before entering upon the tracks, because he could not safely turn or retreat after he had once embarked upon the crossing. These tracks were dangerous places, and on both sides of the crossing were cattle guards and other dangerous equipment of the third-rail system. It was reasonable to infer that from the place where he started his horse, after having stopped to look, to the place where he was when the train struck his wagon, he had a distance of about 60 feet to travel. Respecting his rate of speed, he had first to start his horse, which, of course, took some time, and then he proceeded at a walk until he got upon the middle track, when he discovered the electric train approaching, at which juncture he urged his horse into a trot. It is not unreasonable to infer that his average speed was not more than 2½ miles per hour. Now, defendant's own evidence was to the effect that the speed of the train during the same time was about 25 miles per hour, and it was reasonable for the jury to infer from the fact of collision in connection with the plaintiff's evidence as to his having a clear view that the train must have been going faster than this, or the horse more slowly, or otherwise the train would not have caught him. The evidence on the part of the plaintiff was that the speed of the train was "very high," perhaps 40 or 50 miles an hour. Now, assuming that the train was going only 10 times as fast as the vehicle, it would go 600 feet while he was going 60 feet. At 20 times as fast it would go 1,200 feet. But at any point beyond 650 feet it would have been out of sight of the plaintiff if he had happened to stop when he first got a clear view. At any point beyond 1,100 feet, the train would have been on or beyond the curve, and hence more difficult, or impossible, to see. And so if he was a little nearer to the track, or at the last point at which he might reasonably decide that it was necessary for him to give up looking to the right, and either look to the left or ahead for the footing of his horse, it is quite easy to conclude that, notwithstanding the exercise of reasonable care, he was caught at the crossing, for the collision is reasonably attributable to the high rate of speed of the train, coupled with the absence of the appropriate signals.

We conclude, therefore, that the question of contributory negligence of the plaintiff was for the jury.

The judgment of the court below will be reversed, and a venire de novo awarded.

GUMMERE, C. J., and SWAYZE, BERGEN, and VOORHEES, JJ., dissenting.

PUSHCART v. NEW YORK SHIPBUILDING CO.

(Supreme Court of New Jersey. Oct. 3, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—SAFE TOOLS.

It is the duty of the master to provide for the use of the servant tools which are reasonably safe and fit for the purpose to which they are to be applied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-184; Dec. Dig. §§ 101, 102*]

2. MASTER AND SERVANT (§ 258*)—PLEADING (§§ 205, 354*)—INJURIES TO SERVANT—DEFECTIVE TOOLS—PLEADING—DEMURRER.

Where a servant seeks to recover from his master for an injury caused by reason of a defect in a tool furnished by the master, good pleading requires that the declaration shall so specify the character of the defect as to reasonably apprise the master of the case to be made against him. Such lack of certainty, however, although affording sufficient ground for striking out the declaration on motion, cannot be taken advantage of on general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258; Pleading, Cent. Dig. §§ 491-510, 1092-1095; Dec. Dig. §§ 205, 354*]

3. MASTER AND SERVANT (§§ 217, 219*)—INJURY TO SERVANT—DEFECTIVE TOOLS.

When the defect in a tool used by the servant is obvious, the servant who uses it assumes the obvious risk of danger to himself, but he cannot assume an obvious risk in such case for a fellow servant who does not know of the defect or danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 578, 610-624; Dec. Dig. §§ 217, 219*]

On Demurrer to Declaration.

Action by Jacob Pushcart against the New York Shipbuilding Company. Demurrer to declaration overruled.

Argued February term, 1911, before GUMMERE, C. J., and REED and TRENCHARD, JJ.

Wescott & Wescott, for plaintiff. Gaskill & Gaskill, for defendant.

TRENCHARD, J. The declaration demurred to avers, in effect, that the plaintiff was employed by the defendant at its plant as a common laborer; that the defendant placed upon its floor a bar of iron, and directed the plaintiff to stand on one side thereof and hold against it a tool for the purpose of resisting blows struck by another person on the opposite side of the bar of iron; that the defendant gave another of its employes a hammer with which to strike the iron; that it became the duty of the defendant to furnish the employé whose duty it was to strike the iron a hammer reasonably safe in its construction and condition;

that the defendant neglected its duty in this respect and furnished such employé an old, defective, dangerous, and unsuitable hammer; that because thereof, when it was struck against the iron, it glanced and struck the plaintiff, whereby he was injured, etc.

The first ground of demurrer requiring consideration is that the declaration fails to apprise the defendant of any negligence on its part.

[1] It is the duty of the master to furnish for the use of the servant tools which are reasonably safe and fit for the purpose to which they are to be applied. *Tompkins v. Machine Company*, 70 N. J. Law, 330, 58 Atl. 393; *McDonald v. Standard Oil Company*, 69 N. J. Law, 445, 55 Atl. 289; *Campbell v. Gillespie Company*, 69 N. J. Law, 279, 55 Atl. 276.

[2] We have pointed out that the declaration charges that the tool furnished was dangerous and unsuitable, or, synonymously, unsafe and unfit. Further, the respects in which the tool furnished was unsafe and unfit are alleged, namely, that it was old and defective. Of course, good pleading requires that the declaration should so specify the character of the defect as to reasonably apprise the master of the case to be made against him. But such lack of certainty cannot be taken advantage of on general demurrer. It constitutes a formal defect, and the remedy is a motion to strike out the pleading. *Van Horn v. Central R. R. Co.*, 38 N. J. Law, 133; *Race v. Easton & Amboy R. R. Co.*, 62 N. J. Law, 536, 41 Atl. 710; *Minnuci v. Philadelphia & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229; *Esslinger v. Boehm*, 79 Atl. 267.

The only other ground of demurrer requiring consideration is this: That the risk of injury suffered by the plaintiff was assumed by him.

[3] When the defect in the tool used by the servant is obvious, the servant who uses it assumes the obvious risk of danger to himself; but he cannot assume an obvious risk in such case for a fellow servant who does not know of the defect or danger. *Campbell v. Gillespie Co.*, 69 N. J. Law, 279, 55 Atl. 276. See, also, 28 Cyc. 1204. The plaintiff declares that he was ordered to stand and hold a tool against the iron bar opposite the point at which his fellow servant was to stand and strike with a hammer. From a consideration of the allegations of the declaration alone, it cannot be said as a matter of law that the plaintiff could observe, or ought in the exercise of reasonable care to have observed, the condition of the hammer in the hands of his fellow servant, and so be deemed to have assumed the risk.

The plaintiff is entitled to judgment on the demurrer.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

TISCHMAN v. ERIE R. CO.

(Supreme Court of New Jersey. Oct. 3, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—SIGNALS—QUESTION FOR JURY.

The question being whether or not a bell on a locomotive engine was rung in approaching a grade crossing, testimony of the plaintiff that he stopped 10 or 15 feet from the tracks and looked and listened for the train, and that he did not hear any bell, and that no bell was rung, justifies the submission of the question to the jury, though the defendant company's engineer and fireman testified that it was rung.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 850.*]

2. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

When, from the evidence, the jury might have legitimately found that the plaintiff, who stopped his heavily loaded team and made careful observations 10 or 15 feet from the defendant's railroad tracks at a grade crossing, could not see more than 200 feet in the distance because of the darkness of the night and a "very heavy" snowstorm, though on a clear day there was a clear view of the tracks for 1,200 feet from that point, it was a question for the jury whether he was guilty of contributory negligence in going forward, when the testimony tended to show that the crossing gates were open, that the automatic crossing gong was silent, and that the train which, unknown to him, was approaching at a speed of 35 miles an hour, and which struck his wagon, gave no statutory signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1165-1172; Dec. Dig. § 850.*]

Error to Circuit Court, Hudson County.

Action by Otto Tischman against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1911, before GUMMERE, C. J., and REED and TRENCHARD, JJ.

Collins & Corbin, for plaintiff in error.
Weller & Lichtenstein, for defendant in error.

TRENCHARD, J. This action was brought to recover damages for personal injuries sustained by the plaintiff in a collision with the defendant's train at the "County Road" crossing of the defendant's tracks on the outskirts of Jersey City. The trial resulted in a verdict for the plaintiff, and the judgment entered thereon is now here for review.

The proofs at the trial tended to show the following matters of fact: The plaintiff, a man 28 years old, approached the double-track grade crossing in question at 6:30 o'clock on the evening of January 16, 1909, driving in a loaded garbage wagon drawn by two horses. The night was dark and stormy. At the time it was snowing "very heavily." The plaintiff was quite familiar with the crossing at which the defendant maintained gates, an automatic gong, and also a signboard upon which was printed, "Watchman on duty from 7 a. m. to 7 p. m." When the plaintiff reached a point 10 or 15

feet from the tracks he stopped, looked both ways and listened, but neither saw nor heard the train which, unknown to him, was approaching at a speed of 35 miles an hour. He testified that he did not hear any bell or whistle, and that no bell was rung and no whistle blown. The gates at the crossing were open, and the automatic gong was silent. The plaintiff then went forward, his horses on a walk, still looking and listening, and his wagon was struck by the engine coming upon the first track, and he was thereby injured. According to the testimony upon the part of the plaintiff, it was impossible on account of the severity of the snowstorm to see more than 200 feet. It further appeared that from the point where the plaintiff stopped there was a clear view on a clear day 1,200 feet up the track in the direction from which the train approached. According to the testimony upon the part of the plaintiff, the automatic gong at the crossing was out of order.

It is now contended (1) that there was no evidence from which the jury could legitimately find that the bell on the engine had not been rung as directed by the statute, and hence that the trial judge erred in submitting that question to the jury; and (2) that contributory negligence upon the part of the plaintiff conclusively appeared. These questions, and only these, are raised by assignments of error based upon exceptions.

[1] We are of opinion that the state of the testimony justified the trial judge in submitting to the jury the question whether or not the bell on the engine was rung as directed by the statute. The accident having occurred within the corporate limits of a city, the trial judge in his charge limited the negligence of the defendant to a finding by the jury that the defendant failed to ring a bell upon the engine as directed by section 35 of "an act concerning railroads." P. L. 1903, p. 663. We are not concerned with the legal propriety of such instruction, because the defendant did not object to it at the trial, and does not complain of it here.

Passing, then, to the question raised and argued, we think that the testimony of the plaintiff that he stopped 10 or 15 feet from the tracks, and looked and listened for a train, and that he did not hear any bell and that no bell was rung, fully justified the submission of the question whether the bell was rung to the jury, though the defendant's engineer and fireman testified that it was rung. *Rogers v. West Jersey R. R. Co.*, 75 N. J. Law, 568, 68 Atl. 148. The cases of *Elising v. Erie Railroad Co.*, 73 N. J. Law, 343, 63 Atl. 856, and *Holmes v. Pennsylvania Railroad Co.*, 74 N. J. Law, 469, 66 Atl. 412, are not parallel.

[2] We are also of opinion that the question of the alleged contributory negligence of the plaintiff was for the jury. This ques-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion must be determined without reference to chapter 35, P. L. 1909, p. 54, or chapter 98, P. L. 1909, p. 137, because the accident in the present case occurred before such statutes took effect. The argument of the defendant seems to be that if the plaintiff had exercised due care in making his observation, when he stopped for that purpose 10 or 15 feet from the tracks, he would have seen the approaching train. It is predicated upon the undisputed fact that on a clear day he would have had an unobstructed view of the track for 1,200 feet. But that contention ignores the fact that it was a dark and stormy night and that it was open to the jury to find that the snowstorm was so severe that the plaintiff could not see more than 200 feet. The testimony upon the part of the defendant tends to show that, in fact, because of the snow the lights on the train could not be seen more than 100 feet away. It was also open to the jury to find from the evidence that from the point where the plaintiff stopped to make his observations to the point at which he was struck he had to travel about 30 feet, that his average speed, considering that he had first to start his heavily loaded team, was $2\frac{1}{2}$ miles an hour, and that the speed of the train was 35 miles an hour. It is seen, therefore, that the jury might legitimately infer that when he started the train was at least 420 feet away. In going forward he had to look not only in the direction from which the train came, but the other way, and also ahead for the footing of his horses. Taking into consideration the fact that the gates were open, that the automatic gong at the crossing was silent, and the evidence that the statutory signals were not given, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence. On the contrary, the inference is clearly permissible that he was struck at the crossing notwithstanding due care upon his part.

The judgment of the court below will be affirmed.

SMITH et al. v. ABBOTT.

(Court of Chancery of New Jersey. Sept. 22, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 519*)—ADMINISTRATOR WITH WILL ANNEXED—ANCILLARY ADMINISTRATOR.

2 Gen. St. 1896, p. 1429, § 21, provides that any deed by an administrator with the will annexed, for land sold pursuant to a power or direction in the will vested in the executor, shall be as valid as if it had been executed by the executor named in the will; and such administrator shall have the same powers as to the sale of testator's land as were vested in the executor. Orphans' Court Act (P. L. 1898, p. 725) § 23, provides that if any nonresident die possessed of lands within the state, the surrogate of the county shall, upon proof of death,

issue letters of administration; and if any executor or administrator of a nonresident neglects for 60 days to apply for letters testamentary, or of administration, the surrogate may issue letters of administration to any person he selects, either with the will annexed or otherwise. *Held* that, while a testamentary power of sale given an executor does not cease upon the death or removal of the executor, as at common law, but now passes to an administrator with the will annexed, a power of sale of realty situated in New Jersey, given to foreign executors named in a nonresident's will, cannot be exercised by an ancillary administrator with the will annexed, appointed by the orphans' court of the county in which the realty is situate, where the executors are acting as such in the jurisdiction of testator's domicile.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.*]

Bill by Lizzie Smith and another against Albert C. Abbott for the construction of a will. Decree as stated.

Isaac H. Nutter, for complainants. John J. Crandall, for defendant.

LEAMING, V. C. The bill is filed for the purpose, ostensibly, of procuring the construction of a will. I am unable to find any provision of the will which needs construction. The power of sale given by the will to the executors, to which the bill especially refers, is susceptible of but one meaning, and does not admit of construction; it specifically directs the executors to make sale of the real estate therein referred to. I apprehend, however, that the real purpose of the bill is to have this court determine whether, as a matter of law, a power of sale of real estate situate in New Jersey, by which power is given to executors named in the will of a nonresident, can be exercised by an ancillary administrator cum testamento annexo appointed by the orphans' court of the county in which the real estate is situate, in a case in which the executors named in the will, or the survivors of them, are acting as such in the jurisdiction of the domicile of the testator. While the answer to this inquiry would seem to belong to the orphans' court, on application for confirmation of any sale which may be made, I am not entirely clear but that, under the issues as framed, this court should give the matter its consideration pursuant to the prayer of the bill.

Section 24 of the orphans' court act (P. L. 1898, p. 722) expressly authorizes an executor of the domicile of a nonresident to make sale of land in this state pursuant to a power contained in the will of testator for that purpose, providing the will has been executed in accordance with the laws of this state, and an exemplified copy of the will and foreign letters have been duly filed and recorded in this state. Under the facts stated in the bill, and admitted in the an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

swer, a power of sale clearly resides in the surviving Pennsylvania executors.

At common law a testamentary power of sale of an executor was treated as a personal trust; with the death, resignation, or removal of the executor, the power died. An administrator cum testamento annexo could not, in consequence, exercise the power. *Denn ex dem. McDonald v. King*, 1 N. J. Law, 432. This has been changed by our statute; the power now passes to an administrator cum testamento annexo, except in certain cases specifically referred to in the statute. 2 Gen. St. 1895, p. 1429, § 21. But this statute clearly has reference to the survival of the power of sale where the executorship has become vacant, and an administrator cum testamento annexo has been appointed as the successor in office of the person or persons named in the will; it does not relate to an ancillary administrator in this state, where the executor named in the will of a nonresident is acting as such in the state of the domicile of the testator. This is manifest, not only from the language, but also from the general purpose, of the act. The only other statute which has been brought to my attention which could possibly confer the power on an ancillary administrator with the will annexed, in a case of the nature already stated, is section 29 of our orphans' court act, under which section letters cum testamento annexo may be issued on the estate of a deceased nonresident on the application of a creditor of the testator. An examination of this section will disclose that it nowhere confers upon the administrator cum testamento annexo so appointed, either expressly or by implication, the power of sale which the will gives to the executors of the foreign jurisdiction. In the absence of a statute conferring the power, the common-law rule must be recognized.

I am convinced that under the facts stated in the bill the local administrator cannot exercise the power of sale contained in the will.

ALLMAN et al. v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA et al.

(Court of Chancery of New Jersey. Sept. 15, 1911.)

(Syllabus by the Court.)

1. INJUNCTION (§ 163*)—PRELIMINARY WRIT—SUBPENA AD RESPONDENDUM—DISSOLUTION.

When a preliminary writ of injunction issues, a subpoena ad respondendum must be taken out with it, and returned into court within the time prescribed by rule for the return of service of the injunction, or, in default, the injunction will be dissolved on defendant's motion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 368; Dec. Dig. § 163.*]

2. INJUNCTION (§ 169*)—DISSOLUTION—SPECIAL APPEARANCE—LEAVE OF COURT.

To make such motion, the defendant, not being in court by plea, answer, or demurrer, would have to appear formally for the purpose. And if he desires to appear specially for that purpose only, and not have his appearance operate to clothe the court with jurisdiction over him generally in the suit, it seems he must obtain leave of the court to enter such an appearance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 372; Dec. Dig. § 169.*]

3. INJUNCTION (§ 132*)—"PRELIMINARY INJUNCTION"—"AD INTERIM RESTRAINING ORDER."

There is a material distinction between a preliminary writ of injunction and an ad interim restraining order. The injunction runs, to use its language, until the defendant "shall have fully answered the bill of complaint and our said court shall make other order to the contrary." An ad interim restraining order always commands the defendant to show cause on a certain day why an injunction should not issue, and he is thereby brought into court for the purpose of that motion only, and thus afforded an opportunity to litigate with the complainant as to the propriety of the issuance of an interlocutory injunction, without the filing of an answer and without appearing generally in the cause.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5502, 5503.]

4. INJUNCTION (§ 133*)—MANDATORY INJUNCTION—WHEN ISSUES.

Mandatory injunctions are rarely granted before final hearing, and are, as a general rule, strictly confined to cases where the remedy at law is plainly inadequate.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 133.*]

5. INJUNCTION (§ 137*)—INTERLOCUTORY INJUNCTION—WHEN ISSUES.

To justify the issuing of an interlocutory injunction, the case made by the complainant must exhibit a right free from doubt or reasonable dispute; and the writ will not issue where the complainant's case is doubtful on the law or the facts. To doubt is to deny.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 309; Dec. Dig. § 137.*]

Bill by Michael Allman and others against the United Brotherhood of Carpenters and Joiners of America and others. Application for preliminary injunction denied.

Samuel F. Leber, for complainants. Henry Carless, for defendants.

WALKER, V. C. This is an application for a preliminary injunction, the complainants being all of the members of Local Union 1787 of the United Brotherhood of Carpenters and Joiners of America, and the suit is brought against the United Brotherhood of Carpenters and Joiners of America, a national union of carpenters and joiners, and, succinctly stated, the bill prays for a decree restoring the complainants to full membership rights in the defendant association, alleging an illegal suspension therefrom, and also prays an injunction restraining the defendants from boycotting any of the complainants

and any person employing or intending to employ the complainants or any of them. The bill was filed July 24, 1911, and an order was made thereon the same day, commanding the defendants to show cause on the 1st day of August then next why an injunction should not issue according to the prayer of the bill, and also ordering that in the meantime, and until the further order of the court, the defendants and each of them, their agents, servants, attorneys, confederates, and any and all persons acting in aid of or in conjunction with them or any of them, be restrained from conspiring, agreeing, or combining to obstruct or prevent any of the complainants from procuring employment, and from interfering with any person, firm, or corporation employing any of them, and from declaring or threatening any boycott against any of them, and from declaring or threatening any boycott against any of the products of any person, firm, or corporation employing them, and from printing, issuing, publishing or distributing any copy of any newspapers, magazine, circular, letter, or document which shall in any manner refer to any of the complainants or their association, Local Union 1787, as being non-union, unfair, or scabs, and from procuring the dismissal from employment of any of the complainants. On the return day an order was made on application of defendants' counsel continuing the hearing on the order to show cause to August 22, 1911, and on that date the matter was continued to August 24, 1911, when it came on to be heard upon bill and affidavits, and on affidavits on behalf of defendants, in the presence of counsel of both parties.

As one of the contentions on behalf of the defendants, it was urged that no injunction should be awarded, and that the bill should be dismissed, because no subpoena ad resp. had been taken out and served upon the defendants, although four weeks had elapsed since the filing of the bill.

[1] It is entirely settled that upon the issuance of a preliminary writ of injunction a subpoena must be taken out and served. *Lee v. Cargill*, 10 N. J. Eq. 331. The penalty for neglect is dissolution of the injunction. If a preliminary injunction had issued in this case, instead of a temporary restraining order, the motion now made on behalf of the defendants would have to be granted. In *Lee v. Cargill*, Chancellor Williamson said that the practice would be thereafter strictly followed, requiring the subpoena to be taken out with the writ of injunction and returned into court within the time prescribed by the rule for return of service of the injunction. The reason is that the suitor who would restrain his adversary must use due diligence in expediting the cause. The bill in this cause prays for an answer without oath, but, upon the issuance of either a preliminary injunction or a preliminary restrain-

ing order, the defendants might have come in and answered the bill on oath, and such answer would have been evidence for them on motion to dissolve the injunction, or in resisting its issuance, notwithstanding the prayer for answer without oath. *Ireland v. Kelly*, 60 N. J. Eq. 308, 47 Atl. 51. But no answer is required without a subpoena compelling it.

[2] If a complainant could obtain a preliminary injunction and not summon the defendant to answer the bill, he could thereby perpetually enjoin him without litigating the matter in dispute between them, unless the defendant voluntarily appeared and answered. Ordinarily defendants do not voluntarily appear. They are generally unwilling to involve themselves in the annoyance and expense of litigation, with the hazard of defeat, unless compelled to do so by a compulsory process of the court; and that is why it is that a complainant obtaining a preliminary injunction is required to speed his cause and bring the defendant compulsorily into court at the earliest day, and afford him an opportunity to answer involuntarily, and obtain the benefit of his answer. The writ of injunction now rarely issues upon the filing of a bill, but in its stead an order is usually made requiring the defendant to show cause on a certain day why an injunction should not issue, and usually that order contains an ad interim restraint and is generally called a restraining order, although sometimes it is called an injunction order. Now, an order to show cause serves the purpose of a subpoena issuing with a preliminary writ of injunction to this extent; it compels the defendant's appearance on the return of the order, thus affording him an opportunity, by the use of ex parte affidavits, to combat the complainant's claim to a preliminary injunction, without his having to answer or appear generally. Of course, he may make this resistance by answer and affidavits as well as by affidavits alone, but does not have to file an answer, and thus put himself voluntarily in court. If on the return of the order to show cause it is made absolute, and a preliminary injunction is ordered to issue, then a subpoena must go out with the injunction, unless, of course, the defendant has already voluntarily answered.

[3] There is a material distinction between a restraining order and an injunction. 16 Am. & Eng. Ency. (2d Ed.) p. 349; *Dean v. Bonnell*, 4 N. J. Law J. 348. In this case (*Dean v. Bonnell*) the bill for injunction was filed and an order to show cause, including a restraint, was made, and the hearing thereon adjourned several times, and then a motion was made on the part of the defendant to dismiss the bill on the ground that no subpoena to answer had been issued. Vice Chancellor Dodd observed that the case of an order to show cause was different from that of an injunction, the order itself com-

manding the defendant to show cause on a certain day being sufficient to bring him into court.

Upon the authorities, therefore, my conclusion is that a subpoena is not required to be taken out with a restraining order which commands the defendant to appear on the return day and show cause why an injunction should not issue, but that when a preliminary injunction issues *ex parte* upon the filing of a bill without any order to show cause being made, as it sometimes does, it runs, to use its language, until the defendant "shall have fully answered the bill of complaint, and our said court shall make other order to the contrary"; and, if the defendant would seek to have the restraint removed, he must answer (unless the chancellor shall allow the motion to be heard on affidavits under rule 123), and he can be compelled to answer only by the service of subpoena for that purpose. He is never obliged to appear voluntarily. If on the hearing of an order to show cause a preliminary injunction is awarded, then a subpoena must be issued with the injunction, and, if it is not issued and returned served within the time prescribed by the rule for the return of the injunction (*Lee v. Cargill*, *ubi supra*), the injunction would be dissolved on the defendant's motion. To make this motion, the defendant, not being in court by plea, answer, or demurrer, would have to appear formally for the purpose. *Groel v. United Electric Co.*, 68 N. J. Eq. 249, 251, 59 Atl. 640. And if the defendant desires to appear specially for the purpose of making the motion to dissolve only, and not to have his appearance operate to clothe the court with jurisdiction over him generally in the suit, he must doubtless obtain leave of the court to enter such an appearance. *Dan. Ch. Pl. & Pr.* (6th Am. Ed.) 453. In the unreported case of *Reimers v. Magowan* (July 9, 1901, Docket 23, p. 389), in which a preliminary injunction had issued without a subpoena having been issued and return served within the time in which the injunction was returnable, counsel for the defendant Skirm applied for and obtained leave from Vice Chancellor Reed to appear specially for the purpose of moving to dissolve the injunction as to him, and, such appearance being entered, the injunction was on hearing of the motion dissolved as to that defendant.

This brings me to the consideration of the propriety of the issuance of a preliminary injunction. In the first place, let it be stated that there is neither allegation nor proof that the defendants have printed or distributed any magazine or document asserting that Local Union 1787 or its members

are nonunion, unfair, or scabs, and in that respect the restraining order is too broad, and it would, therefore, to that extent have to be modified. All that the defendants did in this regard was to publish in their official journal "The Carpenter" in the April number, 1911, "that Local Union 1787, by orders of the G. E. B. (General Executive Board) has been and at this moment stands suspended from our organization." It was not proved that there is any threat or intention of repeating even this assertion. In this situation a preliminary injunction should be refused. *Penna. R. R. Co. v. National Docks Ry. Co.*, 52 N. J. Eq. 555, 30 Atl. 580. The other part of the case refers to the alleged unlawful suspension of Local Union 1787 from the national body and the prayer for restoration to membership, and of attempts of the defendants to prevent the complainants from obtaining employment by means of the boycott, threats, etc. As to this, the denials of the defendants under oath are as explicit as the sworn assertions of the complainants, and put the facts relied upon for the injunction in such a state of equipoise or doubt as, under the well known rule, to forbid of the issuance of a preliminary injunction. It is perfectly well settled that, whenever the complainant's case is doubtful on the law or the facts, a preliminary injunction will not issue. To doubt is to deny.

[5] To justify the issuing of an interlocutory injunction, the case made by the complainant must exhibit a right free from doubt or reasonable dispute. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.

[4] As to restoration to membership on account of the alleged illegal suspension from the national body of Local Union 1787, a mandatory injunction would be required, and such writs are rarely granted before final hearing, and are, as a general rule, strictly confined to cases where the remedy at law is plainly inadequate. *Lord's Ex'rs v. Carbon, Iron Mfg. Co.*, 38 N. J. Eq. 452. It was conceded on the argument that this case did not fall within the exception to the rule. Therefore no mandatory injunction may preliminarily issue for the restoration of the local to the general body.

Other questions raised and discussed on the hearing are without controlling force, and it is unnecessary to decide them.

Upon this whole matter I am constrained to the conclusion that the complainants are not entitled to a preliminary injunction, and the restraining order must therefore be dissolved. No costs will be awarded on this application. The costs will abide the event of the suit.

BALLANTINE et al. v. YOUNG et al.

(Court of Chancery of New Jersey. Sept. 26, 1911.)

1. CORPORATIONS (§ 157*)—STOCK—DIVIDENDS—CASH DIVIDENDS.

Where a corporation which had accumulated a surplus several times greater than its capital, in addition to its usual dividend, declared a 200 per cent. dividend, at the same time giving the stockholders power to subscribe at par for a new issue of stock of the same amount, the dividend was a cash dividend, and not a stock dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 584-586; Dec. Dig. § 157.*]

2. LIFE ESTATES (§ 15*)—CORPORATE STOCK—DIVIDENDS—CASH DIVIDENDS.

While ordinary cash dividends, where stock is bequeathed to one for life, remainder to another, go to the life tenant, the extraordinary dividends are apportioned between him and the remainderman; and hence, where a corporation which had accumulated a surplus several times greater than its capital, in addition to its regular dividend, declared a 200 per cent. dividend, at the same time giving the stockholders the power to subscribe for a new issue of stock of the same amount, the dividend was extraordinary, and should be apportioned in the ratio that the surplus at testator's death bears to the whole surplus accumulated up to the time it was declared.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

3. TRUSTS (§ 217*)—MANAGEMENT OF PROPERTY—INVESTMENTS.

Where trustees under a will held the legal title to stock in a corporation which paid very large dividends, and had accumulated a very large surplus, the trustees were, upon the declaration of an extraordinary cash dividend, justified in investing the dividends in a new issue of stock, which the corporation at the same time offered its stockholders at par.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301-309; Dec. Dig. § 217.*]

4. LIFE ESTATES (§ 15*)—STOCK—NEW STOCK—RIGHT TO SHARE IN.

The right to subscribe for new shares which command a premium is, where corporate stock has been bequeathed to one for life and remainder to another, considered a part of the principal.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

5. TRUSTS (§ 217*)—MANAGEMENT OF PROPERTY—INVESTMENTS.

Where trustees under a will were authorized to continue any investments or securities, and part of the estate consisted of stock in a corporation which, to treble its capital stock, in addition to the regular dividend, declared a 200 per cent. cash dividend, and gave all shareholders the right to purchase two new shares for each share they then owned, the trustees having purchased such shares were entitled to hold them; for by investing a cash dividend in stock they merely preserved their proportionate interest in the property, and did nothing more than continue their investments.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 217.*]

6. LIFE ESTATES (§ 15*)—CORPORATE STOCK—NEW STOCK.

Where corporate stock was bequeathed to one for life, remainder to another, and the corporation, in the form of a dividend, issued new stock to all stockholders, the stock so issued

is an extraordinary dividend, and must be apportioned between the life tenant and the remainderman.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 15.*]

7. LIFE ESTATES (§ 15*)—CORPORATE STOCK—NEW STOCK—APPORTIONMENT.

In apportioning a stock dividend between the life tenant and the remainderman, the apportionment should be made on the basis of the company's accounts.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 15.*]

8. LIFE ESTATES (§ 15*)—CORPORATE STOCK—NEW STOCK—CAPITAL.

Where corporate stock, which was bequeathed to one for life and remainder to another, secured the holder the right to purchase on favorable terms shares of another corporation, that right is capital belonging to the remainderman.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

Bill for directions by Jeanette Ballantine and others, as trustees of the will of John Ballantine, against Alice J. Young and others. Instructions given.

See, also, 76 N. J. Eq. 613, 75 Atl. 1100.

John O. H. Pitney, for complainants. Gilbert Collins, for remaindermen. Chauncey G. Parker, for life tenants.

STEVENS, V. O. This is a bill filed by trustees of the will of John Ballantine, asking for directions.

[1] The testator owned 25 shares of the Central Trust Company of the par value of \$50 each. Its capital stock was \$1,000,000. Its undivided surplus at the time of testator's death (April 27, 1895), \$5,776,113.70. It paid regular semiannual dividends at the annual rates of, first, 50 per cent., then 60 per cent., and then 80 per cent. On April 28, 1909, the surplus had increased to \$15,579,696.65. In June 1909, its capital stock, by appropriate action on the part of the directors and stockholders, was increased to \$3,000,000. The stockholders were given the right to subscribe at par for the new issue of \$2,000,000; that is, each stockholder might subscribe for two new shares for every old one he held. Contemporaneously a special or cash dividend of 200 per cent. was declared. The trustees took this dividend and used it to pay for the new stock, which stock they still hold.

By his will, testator gave his residuary estate to trustees in trust (speaking generally) to pay over a part of the income to his children during their respective lives, and at their deaths to divide certain parts of the principal among his grandchildren.

The first question is, Who is entitled to the dividend of the Central Trust Company issued under the circumstances above described, the life tenants or the remaindermen?

It seems to me plain that the dividend is a cash dividend, and not a so-called stock dividend. There is nothing, either in the substance or form of the transaction, that indicates that it was other than what it purports to be. *Gray v. Hemenway*, 206 Mass. 126, 92 N. E. 31, 138 Am. St. Rep. 377. It is true that the company at the time it declared the dividend gave an option to subscribe to the new stock, and that its officers anticipated that the new stock would be paid for with the cash dividend; but it did not attempt to compel the subscription. The stockholder could do as he pleased. He would, almost as a matter of course, elect to take the stock with the money thus provided; for the stock was selling for many times more than its par value.

[2] Ordinary cash dividends go, of course, to the life tenant. Is this an ordinary or an extraordinary dividend? It seems to be extraordinary for three reasons: (1) It was declared in addition to the regular dividend; (2) it was much larger, exceeding the net profits made in the preceding year; and (3) it was evidently made for the special purpose of enabling the stockholders to avail themselves of the new subscription. If these concurring circumstances do not make the dividend extraordinary for the purpose of apportionment, I do not know what could make it so. The distinction has been adverted to, apparently with approval, by the Court of Errors, in the *Lang Case*, 57 N. J. Eq. 326, 41 Atl. 705, and I do not feel at liberty to disregard it. I, therefore, think, on the doctrine of that case, that the dividend is apportionable between principal and income in the ratio that the surplus at testator's death bears to the surplus accumulated thereafter up to the time the dividend was declared.

[3-5] The trustees, as a matter of fact, took the dividend and invested it in the new shares, which sell at a very large premium. They were justified in doing so. *Bouch v. Sproule*, 12 App. Cas. 385; *Malam v. Hitchens* (1894) 3 Ch. 578; and so the next question is, To whom does this premium belong? To the life tenant, or to the remaindermen? It has been held repeatedly that the right to subscribe for new shares which command a premium is a part of the principal, and belongs to the latter. *De Koven v. Alsop*, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; *Davis v. Jackson*, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *Eisner's Appeal*, 175 Pa. 143, 34 Atl. 577; *Richmond v. Richmond*, 123 App. Div. 117, 108 N. Y. Supp. 298; *Brown v. Brown*, 72 N. J. Eq. 667, 65 Atl. 739. That the trustees have actually subscribed for and taken the shares cannot alter the legal rights of the parties. By giving the life tenant a charge upon the stock thus held, for his proportion of the

cash dividend (*Malam v. Hitchens*, supra), the relative rights of the parties are easily adjusted. So much of it as may be needed will be sold to satisfy the charge.

The next question is whether the trustees have the right to hold the stock that may remain unsold after the charge is satisfied. It seems to me that, having the right to take the stock, which, after it was taken, gave them no greater interest in the company than they had before—merely changed the form of their holding—they have the right to retain it. The authority given by the will is "to continue any investments or securities." By agreeing to take the company's stock in exchange for the company's money, they are merely preserving their proportionate interest in the property, and so doing nothing more than continuing their investment in it.

[6] The next question relates to the so-called 15 per cent. stock dividend of the Delaware, Lackawanna & Western Railroad Company. This represents surplus earnings invested in the stock of two branch roads, now merged with the main road, and about \$3,000,000, applied in 1907, to the payment of maturing bonds issued as part of the capitalization. The whole sum represents surplus permanently devoted to capital account. To whom does this dividend belong? It is strongly contended that it belongs to principal. I feel compelled, however, by the state of the authorities to hold that it is, in part, income, and that it should be apportioned between the life tenant and the remaindermen. While the case of *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650, was somewhat, in other respects, shaken by the decision in the *Lang Case*, it was not disapproved on this point. On the contrary, it was, apparently without much or any discussion, followed by the Court of Errors in *Ashurst v. Potter*, 29 N. J. Eq. 625. While this latter case stands, there cannot be any doubt as to what this court must do. Since it was decided, the question has undergone discussion by the Supreme Court of the United States, in *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, and by the courts of last resort in England, in Massachusetts, in Illinois, and other New England States, in all of which it has been held that issues of stock based on earnings are part of the principal. On the other hand, the Court of Appeals of New York, in *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230, and some Western and Southern state courts have followed Pennsylvania in giving stock dividends to the life tenant. As a matter of logic, it is difficult to resist the reasoning leading to the conclusion that stock dividends are, in fact, principal; for the life tenant, as is universally held, is not, in the absence of fraud or improper conduct, entitled to the earnings until they are distributed. They are not, in fact, distributed, but, on the contrary, put permanently into

capital account when new stock is, without any money equivalent, allotted to the whole body of stockholders. But discussion is out of place, for *Ashhurst v. Potter* is, as I have said, controlling. I would merely add that in most cases, at least, stock dividends can hardly be called regular or ordinary dividends. They must, as a rule, be extraordinary. They represent no particular part of the earnings or surplus. Like all the other stock, they represent, not only surplus, but the entire property of the company. Being extraordinary, they must, according to the rule of the *Lang Case*, be apportioned where there has been a surplus accumulated before testator's death.

[7] I think, in the absence of fraud, or some very special circumstance, the apportionment should be made on the basis of the company's accounts. To apportion them according to the judgment of an expert or of the court, as to whether the various items of disbursement are chargeable to current or capital, would be practically impossible. Proof on the one side would necessitate proof on the other. Even if the court, in the case of a foreign corporation, had power to compel exhibition of a multitude of items, stretching perhaps over a series of years, the length of time required for the examination, the expense of it, the doubt, after all, whether items (e. g., relating to the cost of new bridges, new rails, new machinery, new equipment) were properly chargeable to one account or the other, or, if to both, in what proportion, would of themselves be prohibitive of the inquiry.

I have discussed another phase of the question of stock dividends in *Day v. Faulks*, 81 Atl. 354, in an opinion filed contemporaneously with this. What I said in that case may, to a certain extent, apply here. For the reasons already given, the extraordinary cash dividend of 50 per cent. paid by the Delaware, Lackawanna & Western Railroad Company must also be apportioned.

[8] The option to subscribe to shares of the coal company is evidently capital. It was the right to purchase on favorable terms a new thing. If an option to subscribe to new stock of a corporation, whose stock the trustees hold, is capital, so, a fortiori, is an option to purchase stock they do not hold.

LEYDEN v. LAWRENCE et al.

(Court of Chancery of New Jersey. Sept. 18, 1911.)

1. INSURANCE (§ 606*)—INTEREST OF MORTGAGEE—SUBROGATION.

A mortgagee of real estate has an insurable interest therein, and when he insures the property at his own expense and solely for his own benefit, the insurer, if obliged to pay a loss occasioned by injury to the property, may be

subrogated pro tanto to the rights of the mortgagee under the mortgage.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1509; Dec. Dig. § 606.*]

2. INSURANCE (§ 581*)—LOSS—CREDIT.

Where insurance has been taken by the mortgagee of real estate at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor in case of loss is entitled to have the avails of the policy applied for his benefit toward the discharge of the indebtedness.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1447; Dec. Dig. § 581.*]

3. INSURANCE (§ 606*)—PARTIAL SATISFACTION—PROCEEDS OF INSURANCE LOSS—SUBROGATION.

Where an insurance clause in a mortgage gave the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so, the mortgagee was at liberty to insure at his own expense and solely for his own benefit; and, in the absence of proof that the insurance effected was for the joint benefit of the mortgagor and mortgagee, or at the mortgagor's expense, except the fact that the insurance, in amount, was in excess of the amount due on the mortgage, it could not be held that the mortgagor was entitled to have the amount of the loss credited on the mortgage; and hence the insurer, having paid such loss, was entitled to be subrogated to the rights of the mortgagee.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1504–1511, 1514–1516; Dec. Dig. § 606.*]

Action by James J. Leyden against Elijah W. Lawrence and others. Decree for complainant.

See, also, 79 Atl. 615.

French & Richards, for complainant. A. H. Swackhammer, for defendants.

LEAMING, V. C. [1, 2] At a former hearing touching the sufficiency of a plea which had been filed by complainant to the crossbill of defendant, I held as follows: "It is settled in this state that a mortgagee of real estate has an insurable interest therein, and when such mortgagee, at his own expense and solely in his own behalf, procures insurance on the mortgaged property for the better security of his debt, the insurer, if obliged to pay a loss occasioned by injury to such property, may be subrogated pro tanto to the rights of the mortgagee under the mortgage. *Sussex County Mutual Insurance Co. v. Woodruff*, 26 N. J. Law, 541; *Nelson v. Bound Brook Insurance Co.*, 43 N. J. Eq. 256 [11 Atl. 681, 3 Am. St. Rep. 308]; *Lawrence v. Union Insurance Co.* (Sup.) 76 Atl. 1053. It may be said to be equally well settled that if the insurance has been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. *Pearman v. Gould*, 42 N. J. Eq. 4 [5 Atl. 811]." I further held at that time that with the fact established by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mortgagor that the insurance in question had been taken by the mortgagee at the expense and for the benefit of the mortgagor, as well as for his own protection, pursuant to the clause in the mortgage which authorized the mortgagee so to do, the mortgagor would be entitled to have the avails of the policy applied for his benefit toward the discharge of his indebtedness. A further examination of the subject, at the conclusion of the final hearing on an answer filed to the cross-bill, assures me that the above statement of the law, as recognized in this state, is accurate.

At the final hearing, no evidence was introduced in behalf of cross-complainant, in support of the averment of the cross-bill to the effect that the insurance in question had been effected by the mortgagee in pursuance of the agreement contained in the mortgage, and no evidence was introduced in behalf of the defendants to the cross-bill upon that subject. There is therefore an entire absence of any evidence to establish the fact that the insurance was effected by the mortgagee for the joint benefit of himself and his mortgagor, or at the mortgagor's expense, except the fact that the insurance was, in amount, in excess of the amount due on the mortgage, and that the mortgage authorized the mortgagee to effect insurance at the expense of the mortgagor, in the event of the failure of the mortgagor to keep the premises insured. I am entirely satisfied, under this condition of the evidence, that the claim of cross-complainant that the insurance was effected pursuant to the clause in the mortgage cannot be sustained. The clause in the mortgage gave to the mortgagee the option to take out insurance at the expense of the mortgagor, but did not compel him to do so. The mortgagee was at liberty to insure for the joint benefit of himself and his mortgagor at the expense of the mortgagor, or to insure at his own expense solely for his own benefit; and it is impossible to indulge the inference that the mortgagee did insure at the expense or for the benefit of the mortgagor, in view of the fact that the insurance effected by the mortgagee was, by its terms, solely for his "mortgagee interest."

[3] It was urged in behalf of cross-complainant, however, that, as the clause in the mortgage authorized the mortgagee to insure at the expense of the mortgagor, the mortgagee was denied the privilege of insuring in any other manner, and a line of cases decided by the New York Court of Appeals was cited in support of that view; but I find nothing in the cases cited to support that proposition. On the contrary, in *Foster v. Van Reed*, 70 N. Y. 19, 28 Am. Rep. 544, it is held that such a provision in a mortgage does not prohibit or prevent an insurance by the mortgagee on his interest as mortgagee, at his own expense and in his own behalf.

I entertain the view, therefore, that the failure on the part of the cross-complainant to establish as a fact that the insurance in question was placed by the mortgagee at the expense of the mortgagor, or for the benefit of the mortgagor, or in any manner, or for any purpose, other than that which appears upon the face of the insurance policies, is operative to defeat the relief sought by cross-complainant. It follows that the insurance companies, in whose behalf this suit for the foreclosure of the mortgage is brought, are entitled under the assignment of the mortgage from the mortgagee to enforce the mortgage lien. I reach this conclusion independently of the fact that the policies of insurance contained a clause providing for subrogation in behalf of the insurance companies in case of loss. It is therefore unnecessary to here determine whether these provisions for subrogations, which were annexed to the policies some days after the policies were issued, are effective.

I will advise a decree pursuant to the prayer of the bill.

MOORE v. COUNCILMAN et al.

(Court of Appeals of Maryland. June 22, 1911.)

1. BROKERS (§ 86*)—COMMISSIONS—EVIDENCE—EMPLOYMENT.

Evidence in a broker's action for commissions for procuring a purchaser for property to be sold on foreclosure held to show that a trustee appointed to make the sale did not employ petitioner to effectuate a sale or recognize his authority to sell.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 86.*]

2. MORTGAGES (§ 507*)—FORECLOSURE—PROCURING PURCHASER.

One trustee appointed to sell property on foreclosure could not bind his cotrustee, so as to charge the proceeds of the sale with commissions, by his individual agreement to employ a broker to effectuate the sale.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 507.*]

3. BROKERS (§ 60*)—COMMISSIONS—SALE—NECESSITY.

To entitle a broker to commissions, the purchaser procured must actually purchase upon the terms agreed, unless his failure to do so is caused by the vendor's fault.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 91; Dec. Dig. § 60.*]

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

Petition by Caleb J. Moore against James B. Councilman and others, filed in proceedings involving the sale of mortgaged land, for brokers' commissions for effectuating the sale. From an order dismissing the petition, petitioner appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. Kemp Bartlett and Charles Lee Merriken, for appellant. Col. D. G. McIntosh and William S. Bryan, Jr., for appellees.

BRISCOE, J. The facts upon which the decision of this case must turn are so fully and clearly stated in an opinion by Judge Burke, who decided this case in the court below, and set out in the record here, that we need not restate them but will transcribe them on this appeal. They are as follows:

On the 24th of September, 1902, Mrs. Sadie C. Councilman filed a bill of complaint in this court against her husband, James B. Councilman, and others. The allegations of this bill need not be examined. The bill appears among the proceedings in this cause. It prayed for the appointment of a receiver, for a decree declaring that Mrs. Councilman was entitled to a lien for betterments of the property known as "Woodhome," and that property be sold to satisfy said lien and also a mortgage thereon executed by James B. Councilman to her amounting to \$72,500. Mr. Councilman, in addition to this mortgage, was also indebted to his wife in a large sum of money. This court appointed the Safe Deposit & Trust Company receiver of the property. Mrs. Councilman died in 1906, and Mr. William Sheppard Bryan, her executor, was made party plaintiff in her stead. Under her will the said Deposit & Trust Company was appointed trustee of her estate. On the 18th of March, 1907, this court decreed that Mrs. Councilman had no lien by way of betterment on the fee-simple interest in Woodhome; but reserved in the decree the question of the rights of the executor of Mrs. Councilman under the mortgage. This decree was affirmed in *Bryan v. Councilman*, 106 Md. 380, 67 Atl. 279. On the 18th of September, 1907, this court decided that under the rule in *Shelly's Case* James B. Councilman under his uncle's will took a fee-simple estate in Woodhome. It follows from this construction of the will of James B. Councilman, the elder, that the mortgage was a lien upon the fee-simple interest in that property. The mortgage being overdue and in default, the court passed a decree on the 1st day of October, 1907, for the sale of the mortgaged property, and appointed David G. McIntosh and Edward N. Rich trustees to make the sale. The trustees were required by the decree "to bring into this court the money arising from said sale to be distributed under the direction of this court, after deducting the costs of this suit and such commissions to the said trustees as the court shall think proper to allow." The trustees advertised the property at public sale, and offered it at public auction on November 14, 1907; but, receiving no satisfactory bid, they withdrew it. On the 29th of May, 1908, the trustees reported to the court as follows: "The trustees now report that they have received from Dr. Theodore Cook an offer for the whole property, containing about two hun-

dred and twelve (212) acres, for \$42,500, and upon the terms set out in a letter from said Cook addressed to these trustees, under the date of May 27, 1908, which has been accepted by the trustees, subject to the approval of this court, and which letter is annexed hereto as part of this report. And these trustees respectfully recommend that the sale be ratified and confirmed by this court, the sum named as a purchase price being the largest which these trustees have been able to get after constant and repeated efforts made by themselves and by the Safe Deposit & Trust Company, all of which is respectfully submitted." Exceptions were filed to the sale by the purchaser and certain judgment creditors. These exceptions were overruled and the sale was finally ratified, an appeal was taken from the order of the final ratification, and this order was affirmed in *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404.

It appears from the facts stated that James B. Councilman had really no interest in the property. He had mortgaged it for a great deal more than it sold for. The only parties to the cause who had any real or substantial interest in the property or in the proceeds of the sale were the creditors of James B. Councilman, and the executor and trustee of Mrs. Councilman's estate. In the proceedings to which we have referred Mr. Edward N. Rich represented James B. Councilman, the mortgagor, and Col. McIntosh appeared for the executor, and also for the trustee under the will of Mrs. Councilman—the Safe Deposit & Trust Company. On the 5th of March, 1909, Caleb J. Moore, doing business under the name and style of Moore & Walton, a licensed real estate broker, filed a petition in this case alleging: First. "That heretofore, to wit, in the month of February, in the year 1908, the defendant James B. Councilman, who was then in the city of Philadelphia, in the state of Pennsylvania, took up with Messrs. Bamberger Bros. & Co. of that city the matter of finding a purchaser for the real estate in these proceedings mentioned; that the said firm of Bamberger Bros. & Co., who were then engaged as real estate brokers in the city of Philadelphia aforesaid, took up with Messrs. Shriver, Bartlett & Co., of Baltimore City, in the state of Maryland, the matter of finding a purchaser for said property; that the said Shriver, Bartlett & Co., being engaged in the commercial collection business, solicited the services of your petitioner, who was then and is now a licensed real estate broker, to find a purchaser for said property." Second. "That, pursuant to the solicitation set forth in the preceding paragraph of this petition, your petitioner offered the said property for sale to several persons, and among the persons to whom he offered the property for sale was Dr. Theodore Cook, Sr., who shortly thereafter became the purchaser of said property at and for the sum or price of \$42,500; that the trustees in these proceedings reported to this

honorable court the sale aforesaid, which sale has since been finally ratified and confirmed." Third. "That your petitioner was the procuring cause of the aforesaid sale to Dr. Cook, and is therefore entitled to receive the usual commissions of 5 per cent. on the purchase price of said farm, or the sum of \$2,125."

The petition then prays that an order be passed allowing that sum out of the funds in the hands of the trustees in these proceedings.

Mr. Bryan, as executor, the Safe Deposit & Trust Company, trustees, and Col. McIntosh, as trustee, filed answers to this petition. The answer of the executor is as follows:

"(1) That he knows nothing of his personal knowledge of the matters alleged in the petition of Caleb J. Moore, and therefore requires clear and full proof of every matter of fact alleged therein.

"(2) This respondent, as executor of Sadie C. Councilman, holds the mortgage for the satisfaction of which the property in these proceedings mentioned was sold to Dr. Theodore Cook, and is therefore entitled to the entire net proceeds of the sale of said property after deducting therefrom the proper costs of the sale.

"(3) This respondent not only never consented to the employment of the said Caleb J. Moore, but, so far as this respondent can recall, never even heard of said Moore in any connection whatever until after the petition here being answered was filed.

"(4) This respondent is advised, believes, and therefore charges that James B. Councilman, the mortgagor, had no authority to employ the petitioner herein or any other broker or agent to secure a purchaser for the property sold in these proceedings on such terms that the petitioner, or any other broker or agent, should be compensated for his services out of the portion of the proceeds of the sale of such property which are required to pay the mortgage debt and costs of the proceeding; and that, therefore, even if the allegations in the petition, if true, would be taken to give the petitioner, Moore, a claim of any sort against James B. Councilman, the mortgagor, they are without avail to give the petitioner any claim against this respondent, the executor of the mortgagee, or against any one claiming through or under this respondent.

"(5) This respondent is advised, and therefore charges, that it was not within the power of any person without first being authorized by an order of this court to make a valid contract to employ the said Caleb J. Moore to perform any services in connection with the sale of the property before the court in these proceedings for which services said Moore was to be compensated out of the proceeds of the sale of said property.

"(6) This respondent on information and belief denies that the said Caleb J. Moore was the procuring cause of Dr. Theodore

Cook's agreeing to purchase said property; and this respondent on information and belief also denies that the said Caleb J. Moore had anything to do with inducing Dr. Cook to make an offer to purchase the property in this proceeding mentioned."

The answer of the Safe Deposit & Trust Company, trustee, accepts the answer of William S. Bryan, Jr., executor of Mrs. Councilman. The answer of Col. McIntosh, trustee, is as follows: "This respondent in reporting the sale of the property in question to this court with his co-trustee was not cognizant of any claim for commissions which had or could be made on account of the sale of said property, and therefore no reference was made thereto in said report. This respondent does not admit any authority on the part of James B. Councilman to employ brokers for the sale of the property in question, the said Messrs. Bamberger Bros. & Co. of Philadelphia, or Messrs. Shriver, Bartlett & Co. of Baltimore City, or the said petitioner, Caleb J. Moore, and this respondent never had any communication with the said James B. Councilman in reference to a sale of the property, did not represent him in the proceedings, and had no communication with either or any of the brokers claimed to have been engaged in offering the property for sale, and did not employ them or either of them to make the sale. And this respondent so far as his knowledge goes denies that the purchaser Theodore Cook, Sr., was induced to buy the same through the instrumentality of either or any of said brokers, and he denies that the petitioner is entitled to commissions claimed by him out of the proceeds of sale reported to this court."

Upon the pleadings as thus stated testimony was taken in open court, and from an order of the circuit court for Baltimore county dated on the 9th day of June, 1910, refusing and disallowing commissions to the appellant and dismissing the petition, this appeal has been taken.

The rules and principles of law controlling broker's commissions for the sale of real estate established by this court have been settled by a number of recent adjudged cases, and it will only be necessary to refer to a few of them as supporting the general principle announced by all of them. *Hollyday v. Southern Agency*, 100 Md. 296, 59 Atl. 646; *Walker v. Baldwin*, 106 Md. 632, 68 Atl. 25; *Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103; *Keener v. Harrod*, 2 Md. 70, 58 Am. Dec. 706. The complete answer, however, to the appellant's contention in this case is that the facts as disclosed by the record do not bring the case within a single principle asserted by the adjudged cases. The trustees who were appointed by the court deny that they employed him to make the sale, and they are here resisting his application. The executor, Mr. Bryan, denies in his answer that he ever employed

or consented to his employment to make the sale. His testimony is confirmatory of the answer filed by him and set out in the record.

Col. David G. McIntosh, one of the trustees in his testimony, in support of his answer, testified in answer to the following interrogatories: "Q. 2. Will you please tell his honor whether or not you ever in any way directly or indirectly employed Mr. Moore or Bamberger or any other real estate broker for the purpose of selling this Councilman property? State further everything you did in the matter in a narrative form. A. I never employed or was privy to the employment of Dr. Cook or Bamberger in this meeting— Mr. Bryan: You mean Mr. Moore or Bamberger. Witness: Yes; Mr. Moore. And I do not think I ever heard Mr. Moore's name called until long after the sale, and probably when this petition was filed it was a surprise to me. The Court: The petition for fee? Witness: Petition for commission; yes, sir. Mr. Rich is correct, I think, in stating that Bamberger's name was mentioned at a meeting at the Safe Deposit Company, but I do not understand from my recollection that there was any discussion as his language would imply about commissions; and I am pretty distinct that after a long interview about the terms of the sale, because there were a number of propositions embraced in it, and we went backwards and forwards over those with Dr. Cook, that after all that had been gotten through with and our minds had finally been pulled together to the acceptance or agreement to accept his offer a question was asked, as I recollect, incidentally, 'How about commissions? Is there any commission?' I think that was asked by Mr. Marshall. And the reply was made instantly—I think it came from Dr. Cook—'No, there will be no question about commissions.' And the propriety of reporting the sale with commissions was not considered by me at all. Forty-two thousand five hundred dollars was, we thought, a very low figure; and I am unable to say what the effect of adding commissions or subtracting commissions out of that would have been. I had been engaged trying to sell the property to other parties, and I never knew of Cook—I mean, yes, Cook—until a short time previous. I heard it through the Safe Deposit Company. I never heard of this claim of Moore or of Bamberger as having anything to do with the sale. I think that is all I have to say." By an agreement of counsel, it was admitted that Mr. Edward N. Rich, the cotrustee, would testify: "I had no conversation with any one representing Bamberger Bros. &

Co. until after the sale to Dr. Cook when I saw the agent—I think Mr. Moore—and I deny any liability for commissions."

[1, 2] It is quite clear from the correspondence contained in the record that Mr. Rich did not intend to employ or recognize the authority of the petitioner to make the sale, and, even if this be conceded, it would not bind his cotrustee, Col. McIntosh, so as to affect the fund. *Latrobe v. Tiernan*, 2 Md. Ch. 480; *Sewall v. Costigan*, 1 Md. Ch. 208; *Cohen v. Wagner*, 6 Gill, 236. It is not shown that Mr. James B. Councilman had any authority whatever to represent the trustees to bind the fund here, and it does not appear that he had any substantial interest in the property. In *Carroll v. Mangnese Safe Co.*, 111 Md. 258, 73 Atl. 605, Judge Schmucker in delivering the opinion of the court said, in order to recover under the facts in that case for services, it was necessary for the party to prove also either that in making the agreement in respect to compensation he acted on behalf of the appellee with express or implied authority for that purpose, or that the agreement was subsequently adopted or ratified by the appellee, or its fruits accepted with knowledge of the circumstances of their acquisition. As in that case, so in this, the record failed to supply legally sufficient evidence of proper authority on the part of the alleged agent or ratification of his acts by the defendant, and there was no recovery. The cases of *Tyson v. Mickle*, 2 Gill, 377, *Gray v. Lynch*, 8 Gill, 404, and numerous other cases from other jurisdictions relied upon by the appellant and cited in his brief, rest upon an entirely different principle, and are not applicable here.

[3] In the case of *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 49, it was distinctly held that it is not sufficient that the broker should produce a person who enters into an agreement to purchase, but he must actually purchase by complying with the terms agreed upon unless his failure to do so is occasioned by the default of the vendor. The following cases are in full accord with those we have cited: *Attrill v. Patterson*, 58 Md. 251; *Melvin v. Aldridge*, 81 Md. 658, 32 Atl. 389; *Leopold v. Weeks*, 96 Md. 288, 53 Atl. 937; *Martien v. Baltimore*, 109 Md. 268, 71 Atl. 966; *Slagle v. Russell*, 114 Md. 418, 80 Atl. 164.

For the reasons stated, we are in entire accord with the conclusion reached by the learned judge who decided this case in the court below, and we therefore affirm the order appealed from.

Order affirmed, with costs.

**LAUREL CANNING CO. OF PRINCE
GEORGE'S COUNTY v. BALTI-
MORE & O. R. CO.**

(Court of Appeals of Maryland. June 22, 1911.)

**1. COURTS (§ 78*)—RULES OF COURTS—POWER
TO ADOPT—CONTRARY TO LAW.**

A court cannot adopt court rules contrary to a constitutional provision or a statute, unless, in the latter case, in pursuance of the Constitution, and cannot by that means deprive a litigant of a right secured by law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 276-281; Dec. Dig. § 78.*]

**2. COURTS (§ 79*)—CONSTITUTIONAL LAW (§
821*)—RULES OF COURT—ABATEMENT OF AC-
TIONS—REASONABLENESS OF RULES.**

A court rule adopted by the circuit court of a county not containing any very large city and having four terms of court a year, requiring the transfer to the stet docket of all cases on the trial and appeal dockets, and undisposed of for four successive terms, and providing that a case shall abate after being on the stet docket for four continuous terms, is reasonable, and not prohibited by the Declaration of Rights, art. 19, giving every man a remedy for injury, and entitling him to justice without denial or delay, or article 20, providing that the trial of facts is one of the greatest securities of the lives and estates of the people.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 79; * Constitutional Law, Cent. Dig. §§ 950-955; Dec. Dig. § 821.*]

**3. TRIAL (§ 11*)—DOCKETS—REMOVAL FROM
STET DOCKET—DUTY OF DEFENDANT.**

If plaintiff permits a case to remain on the stet docket for a length of time which will abate it under the court rules, defendant is not bound to have it removed to the trial docket to save it from abatement.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 11.*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

Action by the Laurel Canning Company of Prince George's County against the Baltimore & Ohio Railroad Company. From an order refusing to transfer the case from the stet docket to the trial docket, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

R. R. Boardman and James J. Lindsay, for appellant. James A. O. Bond and Francis Neal Parke, for appellee.

BOYD, C. J. This is an appeal from the ruling of the lower court in refusing to transfer the case from the stet docket to the trial docket of that court for the March term, 1910. The court held that the case had abated under one of its rules, which is as follows: "The clerk shall prepare and keep a stet docket and shall enter thereon, at the end of each term of court, all such causes from the trial and appeal dockets as shall have been thereon undisposed of for four successive terms. That after a case shall have remained on said stet docket for four continuous terms it shall abate, and

no further action shall be had thereon; but any case may, before it so abates, be transferred from the stet docket to the trial docket for the ensuing term of court, provided notice that application for such transfer will be made at the first day of the ensuing term of court be given in writing by the party desiring such transfer, or his attorney, to the opposite party, or his attorney, one month before the commencement of said ensuing term, and if such case be transferred, and shall not be tried and disposed of at said ensuing term of court, it shall at the end of the said term abate, and no further action or proceeding shall thenceforth be had therein." The record is not very satisfactory, as the docket entries do not show the date the case was placed on the stet docket, although they do show that the record of it was transmitted from the circuit court for Montgomery county on May 31, 1906, and the notice of application to have it transferred from the stet docket to the trial docket was not given until February 8, 1910. The bill of exceptions also states that the court had before it as evidence at the hearing of the petition the two dockets containing the records of the proceedings, which showed the time the clerk had entered the case upon the stet docket, and it is not claimed by the appellant that the court did not act in accordance with the rule, but, on the contrary, it is contended that it did so act under a rule which could not be validly adopted.

Assuming then, as we must, that the court followed the terms of the rule, there was a period of nearly three years after the case was put on the stet docket before the plaintiff even asked to have it put on the trial docket; and, although the record does not show when it was originally instituted, it was nearly four years from the time it was placed on the docket in the Howard county court before the application was made. It is apparent, therefore, that the plaintiff was not exhibiting any great anxiety to have its constitutional right of trial by jury, of which it now claims it has been deprived, very speedily asserted. As there are four terms of court each year, and the rule allows a case to remain on the trial docket four successive terms, and then on the stet docket for four terms, the parties have about two years in which to try a case after it reaches the trial docket before it abates. It may be that in a very large city ordinary suits may not always be reached for trial in that time, but there can be no possible danger of such conditions in a county of the size of Howard. It was suggested at the argument that the judges may be sick, or for some such reason the parties could not have a case tried within the time named in the rule, although they were not responsible for the delay, but no such conditions were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shown in this case. If the inability to have the case tried be the result of sickness of the judges, or other causes which the parties could not control, another question would arise, but, as we have said, no such cause is shown, and it could not well be that one or more of the three judges of that circuit could not hear the case during the period of two years. If all of them had been disqualified, the case could have been removed for that reason to another circuit under the provision of the Constitution. As shown by the record, the rule was adopted by Judge Miller, who was then a member of this court, and by Judges Jones and Roberts, each of whom afterwards became such. A very similar rule has been in effect in some of the other counties of the state for a number of years, and the writer of this opinion knows of one that was originally adopted by Judge Alvey and his associates in the circuit over which they presided, and there may have been others. While this court has not heretofore been called upon to consider the validity of such a rule, we approach its consideration with the knowledge that at least four of its former members have given their sanction to such rules by the adoption of them, and that under one of our own rules (28 [80 Atl. xli]) it is provided that no case will be continued beyond the third term after the transmission of the record to this court, unless by leave of the court, and that, "unless such leave be obtained, the case shall not be placed on subsequent court dockets without an order of the court, and upon the expiration of three terms of court after it is so dropped the appeal shall be dismissed, unless otherwise ordered by the court, before the expiration of the third term." By section 1 of article 26 of the Code it is provided that "the judges of the several courts of law and of equity may make such rules and orders from time to time for the well-governing and regulating their respective courts and the officers and suitors thereof, and under such fines and forfeitures as they shall think fit, not exceeding twenty dollars for any one offense, all of which fines shall go to the state."

[1] Of course, we understand that the power to make rules would not authorize a court to adopt one which was contrary to a constitutional provision or a statute (unless the Constitution had authorized the court to adopt it in such terms as could not be limited by the Legislature) or could take away from a party litigant a right positively secured by law. The appellant cited article 19 of the Declaration of Rights "that every man, for any injury done to him in his person or property ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to law of the land," and article 20, "that the trial of facts, where they arise, is one of the greatest securities

of the lives, liberties and estate of the people," and other provisions of the Constitution, but nothing in them prevents the court from adopting rules requiring trials of cases within a reasonable time. A suitor may have the right of a jury trial guaranteed him, but, if a plaintiff does not file his declaration as required by the rules of court, the case may be non prossed, or, if a defendant does not file his plea as required by such rules, judgment by default may be rendered against him. If that were not so, courts would not only be helpless in the conduct of their business, but parties would oftentimes be subject to great annoyance and injustice if the courts could not make and enforce such rules. If a case is on the trial docket and the rules or practice of the court require trial at a particular time, or as reached on the docket, there can be no doubt that the court can enforce its rules and insist upon trial, although it may result in the plaintiff being required to non pros. his case. Indeed, if the rule so provides, it is the duty of the court to enforce it, unless there be sufficient cause shown for continuance or other disposition of it. A defendant might insist upon trial if he has the right to do so, and if instead of doing so he agrees that the case can be put on the stet docket, and there is such a rule as this, he has the right to assume that, unless the case is brought up for trial in accordance with the rule, it will be abated at the expiration of the time. A plaintiff has rights, but a defendant has also, and if the latter consents to a case going on the stet docket, or does not demand trial before it is placed thereon, is he, notwithstanding such a rule as this has been adopted and is supposed to be in force, to be subjected to trial at any distant date the plaintiff may demand it? His witnesses might be dead or beyond his reach.

[2] It cannot, therefore, be said that it is an unreasonable provision to require trial during one of eight terms after a case gets on the trial docket in a county of the size of Howard. The plaintiff could have renewed the suit even after it had abated, and could then have enforced it if his own delay had not permitted sufficient time to elapse to make it subject to the statute of limitations.

[3] It may be said that the defendant could have had it brought forward from the stet docket, but, if the plaintiff was willing to have the case remain on the stet docket for the length of time the rule provided, the defendant is not required to take steps to have it brought forward. We are not informed by the record whether there are other rules of court which could save a case from abating, if it be placed on the stet docket to await the decision of other cases involving similar questions, or because it had been enjoined, or for some similar reason, and no such question is presented in this case, but, taking the record as we find it,

the case was apparently permitted to remain on the trial docket for four successive terms, and then, without any special reason, was permitted to remain on the stet docket for more than four terms. So, without considering it from any other standpoint, we are of opinion that the rule as applicable to the present case is a reasonable one, and within the power of the court to pass.

We find nothing in the authorities cited by the appellant in conflict with that conclusion. The case of *Hoyer v. Colton*, 43 Md. 421, so much relied on, was altogether different from this. The constitutional provision then under consideration gave the right to have the record removed to some other court, "whenever any party to such cause, or the counsel of any party, shall make a suggestion, in writing, supported by the affidavit of such party or his counsel, or other proper evidence, that the party cannot have a fair or impartial trial in the court in which such suit or action * * * is pending." The Legislature passed Act 1874, c. 94, providing that "in all civil cases where an order for removal shall have been passed in any cause, the party upon whose motion said order was passed shall pay or tender to the clerk of the court in which said cause was pending at the time of said order for removal the costs of the record in said case, within sixty days after the passage of such order, and shall cause the said record to be transmitted to the court to which the same was ordered to be removed within said sixty days." And upon failure so to do the court had the power to strike out the order for removal and reinstate the case. This court held that such conditions were a restraint upon the constitutional right of removal, which the Legislature had not the power to impose, but we cannot understand how that in any way reflects upon the question now before us. If a court adopted a rule which undertook to deprive a party of a jury trial, if he was entitled to it under the Constitution, of course, it would be invalid, but it does not follow that it cannot by its rules require pleadings to be filed or cases to be tried within reasonable times. If courts could not so require, the one party to a suit would be at the mercy of the other, as we have pointed out above.

Order affirmed, the appellant to pay the costs.

GILLAN v. WEST.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. HUSBAND AND WIFE (§ 205*)—ACTIONS BETWEEN.

A wife cannot sue her husband on a note during coverture.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 744-748, 755; Dec. Dig. § 205.*]

2. LIMITATION OF ACTIONS (§ 73*)—DISABILITIES.

In an action by an administrator of a married woman against her husband on a note, the period of the wife's coverture is properly excluded in ascertaining the time at which the presumption of payment on the note arose.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 73.*]

Appeal from Court of Common Pleas, Franklin County.

Action by Arthur W. Gillan, administrator, against Thomas H. West. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that Clara A. Funk and Jacob R. Funk were husband and wife, and that the latter made the note in suit, dated April 1, 1881, in the sum of \$3,500, payable to Clara A. Funk. Mrs. Funk died on April 13, 1893. In December, 1906, Jacob R. Funk was adjudged a weak-minded person, and Thomas H. West was appointed his guardian. The action was brought on June 11, 1909. There was evidence that Mr. and Mrs. Funk lived together until the wife's death.

Plaintiff presented this point: "If the jury believe from the evidence that plaintiff's intestate, Clara A. Funk, was the wife of Jacob R. Funk, the ward of the defendant, from the date of the note sued on, April 1, 1881, until April 13, 1893, the date of her death, then, under all the evidence in the case, your verdict should be for the plaintiff."

Answer: "We affirm that point."

Defendant presented this point: "That under all evidence in this case the verdict must be for the defendant." Answer: "This point we decline to affirm."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Walter K. Sharpe, O. C. Bowers, W. T. Omwake, and Irvin C. Elder, for appellant. Charles Walter and D. Watson Rowe, for appellee.

POTTER, J. [1] The substantial question raised by this appeal is as to the right of the wife to bring suit upon a promissory note against her husband during coverture. This question was distinctly answered in the negative in *Small v. Small*, 129 Pa. 366, 18 Atl. 497. And the ruling was followed in *Kennedy v. Knight*, 174 Pa. 408, 34 Atl. 585, where it was said in an opinion approved by this court that on the authority of *Small v. Small*, supra, the principle that a married woman cannot bring suit against her husband while they are living together is to be regarded as firmly established.

[2] It was also held in the same case that the statute of limitations does not run against the claim of the wife during coverture. In Act June 8, 1893 (P. L. 344) § 3, it is expressly provided that a married woman may not sue her husband, except "in proceedings for divorce, or in a proceeding to protect or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

recover her separate property whensoever he may have deserted or separated himself from her without sufficient cause, or may have neglected or refused to support her." As the present case falls within none of these exceptions, the trial judge was entirely right in excluding the period of the wife's coverture in ascertaining the time at which the presumption of payment upon the note in question arose.

The assignment of error is overruled, and the judgment is affirmed.

STANDARD SOAP & OIL CO. v. PRINTZ DEGREASING CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—FINDINGS OF FACT.

Where all the assignments of error on an appeal in equity are directed to findings of fact, and not one to the decree, the decree will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2906; Dec. Dig. § 719.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Standard Soap & Oil Company against the Printz Degreasing Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Jacob Singer, David Bortin, and Emanuel Furth, for appellant. Gordon A. Block and Clinton O. Mayer, for appellee.

BROWN, J. The main prayer of the bill filed by the appellant in the court below was for the specific performance of a contract with the appellee. Under two facts found by the learned chancellor he concluded that the appellee was justified in canceling the contract and dismissed the bill. If these facts were properly found the decree inevitably followed.

Counsel for appellant realized the burden that rested upon them in asking that the findings of fact by the court below should be reversed, and 38 assignments of error have been filed. Only 4 were needed for a reversal of the decree, if the court erred in passing upon the right of the appellee to terminate the agreement and to enforce the provisions of its tenth clause. Though the numerous assignments complain of the court's findings and of what was not found, not one is to the decree, and it cannot therefore be disturbed. We have repeatedly referred to the mistake of multiplying assignments of error. As a rule, when they are unduly numerous, they are "suggestive of firing at random in the bushes in the hope that a stray shot may

produce a favorable result." *Clay v. Western Maryland R. R. Co.*, 221 Pa. 439, 70 Atl. 807. Of the numerous shots fired in this case, not one has hit the decree. It has escaped all of the assignments, and we must, therefore, assume it to be correct. *Johnston's Estate*, 222 Pa. 514, 71 Atl. 1053. If it is right, it is of little moment what led up to it. *Fullerton's Estate*, 146 Pa. 61, 23 Atl. 321. And, as it is the wrong from which the appellant suffers, if it was improperly made, it must be assigned as error. *Seltzer v. Boyer*, 224 Pa. 369, 73 Atl. 498.

The appeal is dismissed, at appellant's costs, and the decree affirmed, without prejudice to its right to bring an action at law for the recovery of the \$300 paid on February 20, 1907, for 50 tons of oil which were never delivered.

In re MIFFLIN'S ESTATE.

(Supreme Court of Pennsylvania. May 17, 1911.)

1. WILLS (§ 687*)—CONSTRUCTION—ESTATE CONVEYED.

Where a will gave the property of testatrix in trust to her seven children, so that each should receive one-seventh of the income without liability for debts during his or her life, and, on the decease of any of her children leaving issue, the issue were to take the proportionate share of the parent in fee simple, and, on the death of any of the children without issue, the income of the child so dying was to be divided equally among the surviving children, the issue of any child who might then be dead to take the part their parent would have taken if living, "such accruing shares to be regarded in all respects as parts of their original shares, both as to the enjoyment and transmissions thereof," the quoted clause referred to the shares originally taken by the children, and not to the shares coming to the grandchildren through the death of childless uncles and aunts.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 687.*]

2. WILLS (§ 687*)—CONSTRUCTION—PARTICU- LAR WORK—"ACCRUE."

In a will which provides that on the death of any of the testatrix's children without leaving issue the income of a child so dying was to be divided equally among the surviving children of the testatrix, the issue of any of the children who might then be dead to take between them the part which their parents would have taken if living, "such accruing shares to be regarded in all respects as parts of their original shares, both as to the enjoyment and transmissions thereof," the word "accrue" means to come by way of increase; to be added as increase.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 687.*]

For other definitions, see Words and Phrases, vol. 1, pp. 101-103.]

3. WILLS (§ 687*)—CONSTRUCTION—ESTATE CONVEYED.

In a will providing that, on the death of any of testatrix's children without issue, the income of a child so dying is to be divided equally among the surviving children, the issue of any of the children who might then be dead to take between them the part which their par-

ent would have taken if living, "such accruing shares to be regarded in all respects as parts of their original shares, both as to enjoyment and transmissions thereof," the construction of the quoted clause as referring to the shares originally taken by the children, and not the shares coming to grandchildren through the death of childless uncles and aunts, is not affected by a provision that each of the children should have the power to limit and appoint by will, the income coming to him or her so that it would be enjoyed for life by a surviving widow or husband, and that, if any of the children should leave issue, the child might appoint and limit how his or her child should take, whether in fee simple or for any other estate, upon trusts or otherwise.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 687.*]

4. WILLS (§ 687*)—CONSTRUCTION—ESTATE CONVEYED.

Where a will provides for the disposition of testatrix's property after the death of any of her children, for whom the property had been held in trust, without issue surviving, to beneficiaries indicated, "to receive and pay over the rent and income of such share or shares," in the absence of a limitation over, or any express or implied restriction upon the payment of the body of the estate, the quoted words carry with them the right to the principal absolutely.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 687.*]

5. WILLS (§ 629*)—CONSTRUCTION—GENERAL RULES.

Where an instrument suggests it, the law encourages a construction favorable to the unfettering of an estate rather than one which leads to a prolonged restraint upon its free alienability.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Sarah L. Mifflin, deceased. From a decree dismissing exceptions to an adjudication as to the trustee's distribution of the fund, Thomas Mifflin appeals. Reversed, and cause remitted, with direction to modify decree.

Exceptions to adjudication. From the record it appeared that Sarah L. Mifflin provided in her will: "All the rest and residue of the property and estate to me belonging or subject to my appointment I devise and appoint unto my brothers, John Large and James Large, their heirs and assigns, in trust, for the sole and separate use of my children, James L. Mifflin, Thomas Mifflin, John L. Mifflin, William Mifflin, Mary Mifflin, Martha Mifflin, and Phebe Morris Mifflin, to receive and pay over to them or to permit and suffer them to take, receive and enjoy, each an equal seventh part of the rents, issues, interest and profits thereof, for and during their respective lives, but without liability to the debts or engagements of them my said children or any of them; and upon the further trust on the decease of my said children respectively if leaving any children or child or the issue thereof to survive him or her, to grant, assign, and convey his or her proportionate share of the said resid-

uary property and estate to and among the children or child of the issue thereof of my said children, if but one solely, if more than one equally share and share alike, the issue of deceased children of my said children to take equally the share or shares his or her parent would have taken, if living, in fee-simple; but if any one or more of my children shall die without leaving any child him or her surviving, then upon the further trusts to receive and pay over the rents and income of such share or shares of such decedent or decedents to and equally among my surviving children or the issue of any of them deceased leaving issue, share and share alike, such issue taking the share if more than one equally, if but one solely, which their parent or parents would have taken if living, such accruing shares to be regarded in all respects, as part of their original shares, both as to the enjoyment and transmissions thereof: provided that each of my children shall have power to limit and appoint by will in writing to take effect after death, the rents and income of his or her share to any surviving widow or husband he or she may leave to receive and enjoy the same until the death or marriage of such widow or husband, whichever may first happen; and provided that as respects any of my children who may leave issue at his or her death upon the further trust to assign, grant and convey his or her share of said property and estate to and among his or her child, children or issue or he or she may limit and appoint by writing in the nature of a last will and testament, whether in fee-simple or for any other estate upon trusts or otherwise; and upon default of any such will or appointment upon the further trust after the decease of any of my children who shall leave issue to survive him or her to hold the shares of any such issue who may be born during my life-time upon the like trusts and with the same powers as the shares hereinbefore devised or appointed in trust for my own children; Provided that it shall be lawful for any of my grandchildren or more remote issue so born within my life-time to dispose of his or her share of said property and estate absolutely and in fee-simple to whomsoever it may please him or her to give and devise the same; and provided if any one of my children be the last survivor of my family without leaving any issue of any of my children him or her surviving, then upon the further trust to assign and convey all the said trust estate and property as he or she shall by last will and testament direct, limit and appoint in fee-simple or for any less estate."

By appointment of the orphans' court the Land Title & Trust Company became trustee under the said will, and the principal accounted for by the said trustee is the subject of the adjudication from which this appeal has been taken.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The testatrix, Sarah L. Mifflin, died June 23, 1856, and left to survive her seven children: John Mifflin (who died July 8, 1859); Martha Mifflin (who died May 2, 1867); Thomas Mifflin (who died August 29, 1870); Phebe Mifflin (who died April 10, 1872), all childless and intestate; James L. Mifflin (who died September 25, 1872, leaving three children and a widow, and who exercised his power of appointment by will and devised his "estate, interest and property" under the will of his mother to his widow for life, then to his children under the trusts of his will); Mary Mifflin (who died February 3, 1873, childless and intestate); and William Mifflin (who died May 13, 1899, leaving a widow but no issue, and who exercised his power of appointment in favor of his widow, Ann P. Mifflin, for life, without any limitation over; the widow died October 24, 1909). The sole surviving descendants of the testatrix are the three children of James L. Mifflin, viz., James Mifflin, Dorothea T. Frohock, and Thomas Mifflin. They are the only grandchildren of Sarah L. Mifflin, the testatrix, and they were all born during her lifetime.

The court below first awarded the entire balance of principal and income in accordance with the appointment contained in the will of James L. Mifflin, which directed that, after the death of his widow, the property should be held in trust for his children, to pay them the income during life, without liability for their debts, and upon their death, in trust for such uses as said children might respectively appoint and limit by will, or, in default of appointment, to their right heirs at law; but later, in a supplemental and amended adjudication, one-third of the estate was awarded to the trustees named in the will of James L. Mifflin, and the other two-thirds to the trustees under the will of Sarah L. Mifflin. Upon exceptions filed by Thomas Mifflin, the appellant here, the whole of the estate was again awarded to the trustees under the will of James L. Mifflin.

Error assigned was the refusal of the court below to award absolutely to appellant and the other two grandchildren of Sarah L. Mifflin the part of the trust estate which under her will was previously enjoyed by Mary Mifflin and William Mifflin.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKEER, JJ.

John G. Johnson, D. P. Hibberd, and Samuel P. Tull, for appellant. Eli Kirk Price, for appellee.

MOSCHZISKEER, J. [1] The question to decide is, Do the three grandchildren of the testatrix, all of whom were born during her lifetime, take the shares of their uncle and aunt, William Mifflin and Mary Mifflin, absolutely and free of trust? The testatrix provided that the property should be held in trust for her seven children so that each should receive "an equal seventh part" of the income,

without liability for debts, during his or her life; that, upon the decease of any of her children leaving children or issue, they were to take the proportionate share of the parent "in fee-simple"; that, upon the decease of any of her children without leaving children or issue, the income of a child so dying was to be divided equally among the surviving children of the testatrix, the issue of any of her seven children who might then be dead to take between them the part which their parent would have taken if living, adding, "such accruing shares to be regarded in all respects as part of their original shares, both as to the enjoyment and transmissions thereof." We construe the clause last quoted as referring to the shares originally taken by the children of the testatrix, and not to shares coming to grandchildren through the death of childless uncles and aunts. The word "their" used in connection with the phrase "original shares" is significant. It could not be referred to the grandchildren, for they had been given no "original shares."

[2] To "accrue" is "to come by way of increase; to be added as increase" (Webster's New International Dictionary); and the grandchildren had no "original shares" that anything could be added to by way of increase. The testatrix's plan seems to have been to keep her seven children on a par at all times, whereas no such idea is indicated as to grandchildren. The first and primary thought, and the only intention manifested in the will concerning grandchildren, down to the writing of the clause in question, was that upon the death of any of the seven children their children should take a fee simple, not in trust. Although the subsequent provisions make it possible for the respective children of the testatrix to limit the estates to be taken by their children directly through them, they fail to show any general or uniform plan for keeping the grandchildren on a par, such as the testatrix evidently intended to preserve for her own children; on the contrary, they indicate quite a different idea. All of which leads us to interpret the clause as having no reference to shares which might fall to grandchildren, after the death of their own parent, through the decease of an uncle or aunt without children him or her surviving.

As we view the will, the thought of the testatrix was that the property should be held in trust for her seven children, each to be paid an equal portion of the income. If any of them should die leaving children, the latter should take the share of their parent in fee simple absolute. If any of them should die without leaving children or issue, the share of one so dying should be divided among the survivors of her seven children, the issue of a previously deceased child to take between them the portion that their parent would have taken if living, and that any accretions which might in this way come to a surviving child of the testatrix should

be held in trust and treated as part of his or her original share, this restriction not to apply to the grandchildren.

[3] Of course, the will must be looked at from its four corners, but we find nothing therein to vary the conclusions just stated. Immediately after the clause in question, the testatrix provided that each of her seven children should have the power to limit and appoint by will the income coming to him or her so that it would be enjoyed for life by a surviving widow or husband; and also, if any of said children should leave issue, such child might limit and appoint how his or her "child, children or issue" should take, "whether in fee-simple or for any other estate, upon trusts or otherwise." This gave the power to each of the children of the testatrix to cut down and limit the estate of inheritance which would go to his or her children or issue upon and through the death of any one of the original seven children leaving issue him or her surviving, but it did not affect property coming to grandchildren through the death of a childless uncle or aunt, after the decease of their parent.

The testatrix displayed a special interest in the issue of her children born during her own lifetime, and she evidently desired that such grandchildren or issue should not have the absolute control during their lives of the shares which might come to them from their respective parents unless such parents should so appoint by will. In order to carry out this wish, and evidently for the protection of this special class, she provided that if any one of her seven children should die leaving issue who were born during the lifetime of the testatrix, and if the child so dying should not appoint by will how the share of such grandchildren should be enjoyed, then the shares inherited by such grandchildren should be held "upon the like trust and with the same power as the shares hereinbefore devised or appointed in trust for my own children," adding, however, "that it shall be lawful for any of my grandchildren or more remote issue so born within my lifetime to dispose of his or her share of said property * * * absolutely * * * to whomsoever it may please him or her to give or devise the same." This all has reference to shares which might be transmitted from any one of the seven original children to his or her children or issue, and it has no reference to a share coming directly to a grandchild of the testatrix through the death of a childless uncle or aunt, as in the present case.

[4] The words employed by the testatrix in providing for the disposition of the property after the death of any of her seven children without leaving any child him or her surviving, viz., "to receive and pay over the rents and income of such share or shares" to the beneficiaries indicated, in the absence of a limitation over or any express

or implied restriction upon the payment of the corpus, carry with them the right to the principal absolutely. *Millard's Appeal*, 87 Pa. 457; *Bellstein v. Bellstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692; *Showers's Estate*, 211 Pa. 297, 60 Atl. 789; *Schuldt v. Herbine*, 3 Pa. Super. Ct. 65. There was an express restriction so far as the children of the testatrix were concerned, for she provided that shares so accruing to them should be regarded in all respects as a part of their original shares; but, as we read the will, she failed in this connection to make any such provision concerning grandchildren, or to place any other restriction upon the payment of the principal to grandchildren who might take an interest in the property through the death of a childless uncle or aunt.

[5] Where an instrument suggests it, the law encourages a construction favorable to the unfettering of an estate rather than one which leads to a prolonged restraint upon its free alienability. Here the primary and underlying intent expressed by the testatrix was that the second generation should take her property in fee simple absolute; hence the estates of the grandchildren should not be cut down or restricted in any instance unless a manifest purpose so to ordain, or to permit the first generation so to appoint, can be found in the will; and this, so far as the present contingency is concerned, we fail to see. We therefore conclude that the corpus of that part of the estate of the testatrix which was last enjoyed by her two children, William Miffin and Mary Miffin, should have been awarded to the appellant, Thomas Miffin, his brother, James Miffin, and his sister, Dorothea T. Frohock, in equal parts, absolutely and free of all trusts.

The assignments of error are sustained, and the record is remitted to the court below, with directions to modify its final decree in accordance with the views expressed in this opinion, the costs to be paid as may be ordered by the orphans' court.

DELAWARE, L. & W. R. CO. v. TOBY-HANNA CO., Limited.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. ADVERSE POSSESSION (§ 8*) — PROPERTY SUBJECT—RAILROAD RIGHT OF WAY.

To be a part of a railroad right of way so as to overcome a claim to land by adverse possession, it must have been acquired by condemnation proceedings, or, if acquired by purchase, the burden is on the railroad, when its right to hold is challenged, to show such circumstances as would have warranted its condemnation.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 14; Dec. Dig. § 8.*]

2. ADVERSE POSSESSION (§ 8*)—LAND SUBJECT—RAILROAD LANDS NOT PART OF RIGHT OF WAY.

Land outside of its right of way purchased by a railroad for general prospective railroad

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purposes is subject to limitations, and title to it may be acquired as against the company by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 14; Dec. Dig. § 8.*]

3. EMINENT DOMAIN (§ 58*) — EXTENT OF RIGHT—RAILROAD PURPOSES.

A railroad charter granted prior to General Railroad Law Feb. 19, 1849 (P. L. 79), authorizing the company to occupy land which shall be necessary or suitable for the intended road, restrict the company's rights to such quantity of land as is necessary and essential for the purpose designated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

4. ADVERSE POSSESSION (§ 96*) — OPERATION AND EFFECT—EXTENT OF POSSESSION.

Where land was purchased by a railroad company 50 years before a suit by the company to recover possession, but was never dedicated to public use, the party in possession acquired title to only so much of the lot as was actually occupied by structures adversely for more than the statutory period, where the balance of the lot was open and used by the public without restraint in hauling material for shipment from the railroad company's siding.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533-536; Dec. Dig. § 96.*]

Appeal from Court of Common Pleas, Monroe County.

Action by the Delaware, Lackawanna & Western Railroad Company against the Tobyhanna Company, Limited. From the judgment, both parties appeal. Affirmed.

Ejectment for land in Coolbaugh township. This appeal is from a retrial after a reversal of a former judgment in favor of the plaintiff. See 228 Pa. 487, 77 Atl. 811. The facts are stated in the opinion of the Supreme Court, and in the report of the former appeal.

Plaintiff presented the following points:

(1) The land claimed by the defendant by adverse possession, having been purchased by the plaintiff for railroad purposes, and having been used for the construction of switches adjacent to and diverging from its main track, was held by the said railroad for a public use, under the grant of its right of way, and no title could be acquired by the defendant to the surface of any portion of what was used for such a purpose, by adverse possession, however long continued.

(2) The defendant having purchased the lot of land 700 feet in length and 125 feet in width from the center between main tracks, and having used the same for one of its main tracks, for switches, sidings, and passenger station, freight station, and necessary platforms and approaches thereto, such use was a public use, and made the entire lot part of a public highway, and title cannot be obtained to any portion of the same by adverse possession, however long continued.

(3) It is the undisputed evidence that the plaintiff used the piece of land 700 feet long and 125 feet in width as a part of its right

of way, and for public use, and that all parts of it were continuously used so except that physically and actually occupied by the buildings of the defendant; and, as to this part, the defendant could gain no title by adverse possession, because its possession was an encroachment upon the right of way of the railroad company.

(4) There is no particular width of land recognized by the law of Pennsylvania as the right of way of a railroad. This right of way consists of a strip of land of varying widths as the necessities of the railroad may require for the construction of its main tracks, sidings, turnouts, switches, stations, and approaches thereto.

(5) When land is acquired by a railroad corporation, either by purchase or condemnation, and is actually used for its railroad, no title can be gained to any portion of what is then used by adverse possession, however long it may be continued.

The court charged in part as follows:

"The court cannot agree with either one of the contentions of the parties in this case, because the plaintiff replies to the contention of the defendant, that it never has had adverse possession of this property because it has been used by the public and by the plaintiff company for a number of years, and, in addition to that, that it is within its right of way, and that no adverse possession can be obtained against the right of way of a railroad company, and therefore the defendant is not entitled to any part of this land. Adverse possession, or the right to property by adverse possession, is where a person, or a corporation, if you please to call it so, which is an artificial person, has had the exclusive, continuous, uninterrupted, notorious, and adverse possession of a piece of land for 21 years. You will notice all the elements that are there. It must be open, which is nearly the same as notorious, exclusive, continuous, uninterrupted, and adverse, and, in order for you to sustain the contention of the defendant company in this particular as to the whole lot of land, you would have to find it, with those qualifications; and, while that question is for you, gentlemen of the jury, the court is of the opinion under all the testimony that it is not warranted by it—that is, as to the whole tract—because it was not fenced in (there was a fence on the lower side of it) and it was used according to some of the evidence, if you believe it, by the public generally, including the railroad company, and by teams, etc., and notwithstanding the fact that there were certain acts done upon this lot by the defendant company, including the piling of piles and other lumber there for the purpose of shipment on the Delaware, Lackawanna & Western Railroad, that that would not come up to the full measure of proof that would be required to give exclusive posses-

sion to this whole tract of land. And I think we will go so far as to instruct you, gentlemen of the jury, that, under the evidence, there is not sufficient to warrant such a conclusion on your part. We do say to you, however, that while it may not have had the exclusive possession of all of this land that, under the evidence of the defendant company, if you believe it, and we see no reason why you should not, because it is uncontradicted, the defendant company had constructed on this piece of land about seven or eight feet of its office and a feedhouse, and that they had been there for very much longer than 21 years, and that, in addition to that, they had used this feedhouse and the cellar under the store, the entrance to which was on what is claimed to be the railroad side of the line, and, if you find from all the evidence in the case that the defendant company has used this land in this way, the storehouse, and the feedhouse, and has for a period of over 21 years used the land in order to have access to the feedhouse and the storehouse, we say to you that, as far as those two places are concerned, the office and the feedhouse, that it would have such adverse possession, if you believe it was open, notorious, exclusive, continuous, and uninterrupted for a period of 21 years, as would prevent the plaintiff company from recovering, as far as they, the buildings and land under them are concerned, in this action of ejectment."

"As to the other buildings that were put upon these premises, which according to the testimony as we recollect it, varied from seven to ten years, namely, the shed and the coal bin, we say to you that there being no such evidence of adverse possession for the period required by law, and for the land upon which they stand, the plaintiff is entitled to recover, and that for all the other land in this tract not occupied by these buildings, the office and the feedhouse, we say to you that the railroad company is entitled to recover, subject as we have stated to the right of the defendant company to have access to its office and cellar under the office and to its feedhouse."

"If you find, therefore, that the defendant company did have adverse possession under the qualifications as made by the court, and as we say to you, gentlemen of the jury, in the court's opinion, the evidence warrants you in so finding, although the question is for you, we say to you that your verdict should be in favor of the plaintiff for the land upon which the horse shed is erected, the land where the coal bin is erected, and all the other land not covered by the feedhouse and the office, subject to the right of the defendant company to free access to and from the office, the cellar thereof, and the feedhouse as it has been wont to have for a period of 21 years, and over."

Verdict for plaintiff for all the land mentioned in the writ of ejectment, except that

covered by the part of the office of the defendant company on the said land mentioned in said writ, and that covered by the feedhouse with the privilege to the defendant company of access to the cellar under said office, and said feedhouse over the land aforesaid. Both plaintiff and defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

A. Mitchell Palmer, for Delaware, L. & W. R. Co. F. B. Holmes, for Tobyhanna Company, Limited.

STEWART, J. If the record in the first of these appeals discloses any material fact that was not considered, or any question that was not decided when the case was before us in the former appeal reported in 228 Pa. 487, 77 Atl. 811, it has escaped us. We see no ground whatever for misapprehension of what was there decided; but inasmuch as the "tremendous importance of the question raised not only to the plaintiff, but to all the railroads of Pennsylvania" is urged upon us, we shall endeavor to restate what was there decided in a way which will remove all possible ground for misunderstanding, as well as any lurking suspicion that that decision conflicts with settled doctrine. First of all, let it be understood that we did not there hold that title to any part of a railroad company's right of way can be acquired by adverse user. We distinctly held that that question was not before us, and we expressed no opinion in regard thereto.

[1] The contention of the plaintiff was that the lot in dispute was part of its right of way. This was denied by the defendant, and into that inquiry we entered at some length. Our conclusion was adverse to the plaintiff's contention on the facts before us. We have here the same facts to deal with. The lot was acquired by the railroad company more than 50 years ago by purchase. Its railroad had then been constructed upon land adjoining, and was then being operated. How the company entered upon that land originally we are not informed. To perfect its right of occupancy, it subsequently purchased from the owner a strip of land 700 feet in length and 100 feet in width; that is to say, the ground used as its roadbed, with 50 feet of ground on either side of its center line. It acquired by the same conveyance, but as a separate tract, the lot in dispute, thus described in the conveyance: "Also such additional lands for depot or railroad purposes at * * * Tobyhanna stations, as are included within the boundaries following, to wit: At Tobyhanna, beginning with the center line of said railroad at a point one hundred feet north of the north corner of the foundation of the water tank and running thence westerly on a line at right angles with the line of the said railroad one hundred and twenty-five feet in width to a corner; thence southerly parallel with and one hundred and twenty-five feet from the center line of said

railroad, seven hundred feet to a corner; thence easterly on a line at right angles with the line of said railroad, one hundred and twenty-five feet to the center line of said railroad; thence along said center line seven hundred feet to the place of beginning. Thus including on the westerly side of the railroad for the said distance of seven hundred feet, seventy-five feet in width over and above and outside of said one hundred feet hereinbefore conveyed for right of way." This lot has for years been bisected by a public road, dividing it into two nearly equal parts. The controversy is over one of these. The contention of the plaintiff assumes that the lot is part of the railroad's right of way. Herein consists the fallacy. The fact that it was acquired by purchase, and not in the exercise of the company's right of eminent domain, we regarded as a matter of significance; not that a railroad company may not acquire its right of way in either manner, but because certain incidents attach in the one case that do not in the other. A railroad company can acquire adversely to the owner by condemnation when it establishes a purpose in the condemnation falling within the express letter of the law, giving it the franchise to take; whereas by purchase nothing adversely can be acquired. In the one case the fact of condemnation indicates a public use, and that fact becomes established by the appropriation; in the other, it indicates nothing, and establishes nothing but title in the acquirer. A railroad company may lawfully acquire lands not strictly essential to the operation of its road, but which may conveniently and profitably be used in connection therewith; but it is only for the acquiring of such as are essential that the law makes provision by allowing the high franchise to be exercised for their procurement. These essentials are a roadway, not exceeding a given width, except where physical conditions require greater places selected for sidings, turnouts, depots, and engine or water stations.

If it be conceded that these essential lands properly fall within what, for the want of a better term, we call right of way, and when acquired by condemnation are impressed with a public use, and therefore not to be interfered with, the question remains, Can as much be affirmed of a strip of land such as that here in dispute, acquired by purchase, without any adjudication that, when acquired, it was needed for one of the purposes for which condemnation was allowed? We answered that question in the former appeal in the negative, and we repeat the answer here. That is to say, no presumption arises from the fact of purchase that the land so acquired was for necessary purposes in connection with the operation of the railroad. Had the railroad company at that time attempted to acquire this land by condemnation, the burden would have been upon it to show that it was neces-

sary and essential, the declared public use would have become a matter of record, and the land could not thereafter have been devoted to other purposes. The mere act of purchase committed the company to no particular use of the land. It may say to the party from whom it purchases, "We want it for some purpose for which we could legally condemn it"; and in the deed the vendor may recite that it is conveyed for such purpose, but this impresses no use in which the public is concerned or could enforce. It remains a matter that concerns only vendor and vendee. What then will impress it with a public use and bring it within the sanctity of right of way? We answer nothing but an actual dedication of the land to that use by so employing it, or other equally decisive act. The plaintiff company had laid its tracks upon and over the land embraced in a larger strip, thus devoting it to a plain and manifest public use in an unmistakable way. If it has built switches upon the land acquired by purchase, that again is a decisive act which secures it in the enjoyment of the land acquired. But as to so much of this land as is now claimed by the defendant through adverse use the plaintiff has done absolutely nothing upon it to indicate any purpose whatever it had in acquiring it. Up to the present time, it has been free to dispose of it, or apply it to any lawful use except as its vendor can be heard to question its right so to do. For the company to say now, more than a half a century after the acquisition, that it needs it for a purpose for which it could have originally condemned it, is not only to beg the question, but in itself affords a refutation of the claim. Fifty years and more have elapsed since it acquired title, and during all that time, upon its own admission, the lot has not been required for the exercise of its franchise. How, then, could it have been acquired by condemnation? We are not overlooking our decisions to the effect that a railroad company may in condemning land anticipate future needs with respect to those things which are essential. We make no attempt to define the limits to this right of anticipation when we say that attempted provision covering a period of 50 years in matters of this kind must either be pure conjecture resting on no substantial basis, or inspired prophecy, and with respect to condemnation of land the law bases its procedure on neither. Our effort has been to show the fallacy in the assumption on which the argument on behalf of the plaintiff proceeds that the land in dispute by the fact of purchase became a part of the railroad company's right of way. To be a part of its right of way, it must have been acquired as such by condemnation proceedings, or, if acquired by purchase, the burden must be on the railroad when its right to hold is challenged to show such circumstances as would have warranted its condemna-

tion. We state no new proposition. All that we have said has fullest warrant in *Shamokin Valley Railroad Co. v. Livermore*, 47 Pa. 465, 86 Am. Dec. 552. In *Robinson v. Railroad Co.*, 161 Pa. 561, 29 Atl. 268, it is said by Mitchell, J.: "It is not intended to interfere with the discretion of the corporation in the location of its stations, sidings, etc., nor with its right to do what good engineering required, but the exercise of both must be in good faith for the purposes the statute permits, and the necessity, extent, and location of extra appropriations for such purposes must be definitely shown. The charter limitation of 66 feet is mandatory, except in the cases the charter itself specifies, and it cannot be set aside or evaded at mere will. While the discretion is in the corporation, its exercise, when challenged in a court of law must like every right be sustained by showing the circumstances under which the charter authorizes it."

[2] To summarize: (1) However true it may be that no part of the right of way of a railroad company can be acquired adversely, there is no authority for holding that property of a railroad not included in its right of way may not be so acquired. (2) Nothing is included in right of way except what is the subject of condemnation, and when a railroad company asserts a public use in land it has purchased, to overcome the adverse possession by another, its claim can only be sustained by showing the existence of conditions which would have permitted it to condemn the land in the first instance, or actual dedication to such use. (3) If such conditions exist to-day, it may recover what it has lost by appropriate proceedings. (4) If these do not exist, it is fairly persuasive that they never did.

[3] So far, we have proceeded on the assumption that appellant has no other or wider privilege of condemnation than is allowed under the general railroad law of February 19, 1849 (P. L. 79), and its supplements. The claim is made that it is not subject to the limitations and restrictions of that act, inasmuch as it has succeeded to all the rights and privileges of the *Ligetts Gap Railroad Company*, incorporated under the act of April 7, 1832 (P. L. 1831-32, p. 316), and by the subsequent act of April 14, 1851 (P. L. 628), merged with appellant company, and that the charter of the earlier company contains no restriction as to the amount of land the company could appropriate. A reference to the charter of that company shows that the power granted was in express terms limited to the appropriation of such land as was necessary for the exercise of the corporate franchise. The company was authorized "to occupy for that purpose (the building of its road) land which shall be necessary or suitable for the intended railroad." The act of February 19, 1849, gives exactly the same right; the only dif-

ference being that the latter defines expressly what are necessary and essential purposes. Certainly quite as much land was required for the construction of railroads and their operation in 1849 as in 1832. The limitation of the right to lands necessary for the intended road fixed upon the earlier company the same burden that rests upon the appellant company when its right to take lands is challenged of showing the necessity that requires it. The assignments of error on this appeal are overruled.

[4] We have yet to consider the appeal by the defendant from the same judgment. The verdict was a recovery by the plaintiff of all the land in dispute except so much as had been occupied by the defendant's structures for more than the statutory period. The defendant claimed title to the entire lot by adverse possession. As we read the charge of the court, it was "a binding instruction to the effect that the defendant's evidence was not sufficient in law to overcome the plaintiff's written title, except as to so much as was covered by defendant's improvements. The jury certainly so understood it. Was this error? We have examined the evidence with much care without being convinced that the instruction was erroneous. It lacks one essential—the possession shown was not exclusive. Certainly it was not of such a character as to put the plaintiff on notice. The circumstances suggest a permissive use rather than a hostile holding. The defendant's occupancy and use of the land was in some respects peculiar to itself, but nevertheless others used it for their own purposes with a like freedom. It was an open lot admitting of public travel upon and over it from all points. The public used it without restraint in hauling material for shipment from the plaintiff's siding. The principal use of it by defendant was for storing lumber for like shipment. The evidence indicates strongly that the lot was regarded by the public as a common. Their use of it, concurring with that of the defendant, without let or hindrance, is wholly inconsistent with defendant's claim that it was during this period holding hostilely to the plaintiff.

The assignments of error in this appeal are likewise overruled, and the judgment is affirmed.

RUSSELL v. HENRY C. PATTERSON CO.
et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. CORPORATIONS (§ 426*) — OFFICERS — COMPENSATION—RATIFICATION.

A resolution passed by a majority of the board of directors of a corporation increasing the salaries of two of its directors as officers of the company where the salaries are found by the court to be fair and reasonable compensation for the services rendered may be ratified and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

confirmed at a regular stockholder's meeting by a majority of the stockholders, who are also directors, notwithstanding the vote and protest of a minority stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1704, 1710-1716; Dec. Dig. § 426.*]

2. CORPORATIONS (§ 426*) — OFFICERS — COMPENSATION—RATIFICATION.

The act of the directors of a corporation in increasing the salary of two of the directors as officers of the company is not void, but only voidable, and may be ratified by the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1704, 1710-1716; Dec. Dig. § 426.*]

3. CORPORATIONS (§ 426*) — OFFICERS — COMPENSATION—RATIFICATION.

Though directors of a corporation voting at a board meeting act as agents of the corporation occupying a fiduciary relation, they may as stockholders ratify their own voidable acts as directors, if the ratification involves no fraud, since as stockholders they hold no trust relation to the company which would deprive them of the right to vote according to their own interests.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702-1704, 1710-1716; Dec. Dig. § 426.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Henry A. Russell against the Henry C. Patterson Company and others for an injunction. From a judgment for plaintiff, certain defendants appeal. Reversed, and bill dismissed.

The court entered the following decree: "That the said Henry C. Patterson Company and its officers and directors and the said Edwin H. Coane, C. Conde Freas, and Bertram L. Kimball, defendants, are hereby perpetually restrained from carrying into effect the motion of February 9, 1909, set forth in the plaintiff's bill filed in this case and from paying to the said Edwin H. Coane and C. Conde Freas the salaries mentioned in said motion or any part thereof in excess of \$1,200 per annum which they the said Edwin H. Coane and C. Conde Freas were receiving at the time of said motion, to wit, February 9, 1909. That the said Edwin H. Coane and C. Conde Freas are hereby ordered and directed to return into the treasury of the said Henry C. Patterson Company such sums as they may have received as salaries in excess of the rate of \$1,200 per annum on or subsequent to February 1, 1909. That the defendants Edwin H. Coane, C. Conde Freas, and Bertram L. Kimball shall pay the cost of this suit."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Horace Haverstick and F. P. Prichard, for appellants. G. Von Phul Jones, for appellee.

MESTREZAT, J. The Henry C. Patterson Company was incorporated January 20,

1904, under the laws of Pennsylvania, and is engaged in the lumber business. It has a capital stock of \$50,000, divided into 500 shares of the par value of \$100 each. From September 1, 1908, to the date of the hearing by the court below, the stock was held as follows: Edwin H. Coane, 348 shares; C. Conde Freas, 1 share; Bertram L. Kimball, 1 share; and Henry A. Russell, 150 shares. The by-laws fixed the number of directors at four, and the board is composed of the plaintiff and the three defendants. At the annual meeting of the stockholders, held February 9, 1909, Coane, Freas, Kimball, and Russell were re-elected directors for the ensuing year, and at a meeting of the board of directors held on the same day Coane was re-elected president, Kimball vice president, and Freas secretary and treasurer. Article 3, § 4, of the by-laws of the corporation, provides as follows: "The board of directors shall have charge of the general conduct of the business affairs of the company, and establish such rules and regulations, and from time to time alter or amend the same, as in their opinion are expedient to the welfare of the company. They shall, from time to time, fix the compensation of the officers." At the time of the election of the officers in February, 1909, the salary of the president and of the secretary and treasurer was \$1,200 each per annum, said amounts having been fixed at a meeting of the board of directors in July, 1908, when they were reduced from \$1,500. At a meeting of the board on February 9, 1909, after the election of the officers, a motion was made to fix the salary of the president and of the secretary and treasurer at \$2,000 per year for each, dating from February 1, 1909. Coane, Freas, and Kimball voted for the motion and Russell against it. These salaries have been paid to the officials in accordance with the resolution. From the organization of the company until July, 1908, Russell acted as vice president of the company, and was actively engaged in the conduct of the business. In the early part of his employment, he received a salary, as vice president, of \$2,500 per year. Freas, as secretary and treasurer, and Charles G. Miller, Russell's brother-in-law who was acting as general manager, each received the same, and Coane as president in lieu of a fixed salary the profit on one branch of the company's business amounting to about \$1,500 per year, the total salaries of the four persons being \$9,000 a year. Owing to certain losses and changes in the location of the company's business, the salaries were reduced to \$1,500 per year, and thereafter to \$1,200 per year. Then Russell notified the officers of the company that he would no longer continue to render services to the company, and Miller withdrew from the company. Coane, as president, thereafter

devoted much more of his time to the business of the company, and at the time of the hearing in the case was devoting practically all of his time to its general business. Freas at all times devoted the whole of his time and attention to the company's business. The work of the company which had formerly been done by the four stockholders and Miller is now done by Coane, Freas, and a clerk whose salary is \$1,300 per year. At the annual meeting of the stockholders of the company held February 8, 1910, which was their first meeting held after the resolution of the board of directors adopted February 9, 1909, increasing the salaries, a resolution was passed ratifying and confirming the action of the board of directors fixing the salaries of the president and of the secretary and treasurer each at \$2,000 per year. Coane, Kimball, and Freas voted for the resolution and Russell against it.

On January 10, 1909, Russell filed this bill to restrain the officers of the company from further paying the salaries, and to compel Coane and Freas to return into the treasury of the company the excess of salaries above \$1,200 per annum. The bill averred, *inter alia*, that the salaries were exorbitant, unreasonable, and unfair, and that the increase was illegal because it could not have been made without the votes of Coane and Freas, the incumbents of the offices. The learned judge held that the resolution of the board of directors increasing the salaries was void, and that the resolution adopted by the stockholders ratifying and affirming the resolution of the board was also void and of no effect, and entered a decree restraining the officers and directors of the company from carrying into effect the motion of February 9, 1909, increasing the salaries of Coane and Freas, and directing them to return to the treasury of the company such sums as they had received as salaries in excess of \$1,200 per year. The defendants Coane, Freas, and Kimball have appealed.

The defendants requested the court to find that the "increase of salaries was reasonable and a just compensation for the services rendered." The court declined to affirm the point in the form in which it was submitted. The learned judge, however, in answering the point said: "The amount of the salaries of Coane and Freas as increased to \$2,000 per annum each is probably not more than reasonable compensation for the services rendered, particularly in the case of Coane who appears to have devoted much more of his time to the work of the company after the withdrawal of the plaintiff from an active part in the management of its affairs, and it probably would have cost the company quite as much to employ other persons to perform that part of the labor now done by Coane and Freas, which does not strictly pertain to their duties as officers." He then gives as a reason for not

unqualifiedly affirming the point that as stockholders Coane and Freas were interested in making their stock more valuable, and that, if they did not desire to perform the manual labor then performed by them, they, as officers and directors, could employ others to do the work, and that the plaintiff could not and probably would not complain. This reason for not affirming the point after having found the facts above stated we do not regard as tenable. The learned judge was simply requested to find whether the compensation voted by the directors as salaries was reasonable and just, and not whether the directors should have employed others to perform the services. The directors had a right to serve the company in the capacity of officers or employes, and to receive compensation for such services if legally employed by the company. The finding of the learned judge required him to affirm the point, and it must be so regarded.

[1] The learned court below held that the question in controversy in this case was settled by our decision in *Schaffhauser v. Brewing Co.*, 218 Pa. 298, 67 Atl. 417. We there held, as stated in the syllabus, that "the president of a corporation cannot, against the protest of a minority of the board of directors, and as against stockholders who choose to challenge the action, sustain a claim for an increase of salary, the right to which, if it exists, is secured by his own vote as a member of the board which allows it." In his ruling the learned judge failed to distinguish the facts of the case cited from those of the present case. The question involved in the *Schaffhauser Case* was whether the directors may bind the corporation or a minority stockholder by voting a salary or compensation to one of their number who either is or is not an officer of the board. In the present case, the question is whether a majority of the stockholders, who are also the directors, may at a regular stockholders' meeting ratify and confirm against the vote and protest of a minority stockholder a resolution of a majority of the board of directors increasing the salaries of two of such directors as officers of the company where such salaries are found by the court to be fair and reasonable compensation for the services rendered. In the *Schaffhauser Case* the president of the corporation, who was a director, claimed the right to recover the compensation solely upon the resolution of a majority of the board of directors increasing his salary. In the present case, the right to the compensation rests upon the action of a majority of the directors ratified by a majority in interest of the stockholders in making a reasonable increase of salaries of two of the directors who as such and as stockholders voted for the increase.

The single question for consideration here, therefore, is whether under the circumstances of the case the ratification of the action of the majority of the directors by a majority

in interest of the stockholders bound the corporation as against a dissenting stockholder to pay the salaries of the president and of the secretary and treasurer of the company. The answer to the proposition depends upon (a) whether the action of the directors in increasing the salary of the two members of the board was void or voidable, and (b) whether the two directors whose salaries were increased and whose votes were necessary to pass the resolution increasing the salaries could vote at a stockholders' meeting held to ratify the action of the directors.

The salaries of \$2,000 given each of the officers were not only compensation for services rendered as executive officers, but also to compensate for such services as would be rendered by clerks and other employes of the corporation. As suggested above, the effect of the learned judge's findings is that the salaries were not excessive or unreasonable, but, on the contrary, not more than reasonable compensation for the services rendered. These facts, which appear by the record, eliminate any actual or intentional fraud on the part of the directors in voting compensation to the two officers. There is nothing in the case which would warrant the finding that there was any actual fraud on the part of the directors in increasing the compensation to \$2,000; on the contrary, the evidence was sufficient to warrant a finding that a salary of \$2,000 per annum to each of the two officers did not exceed just compensation to them for the services rendered. The voting of the salaries by the directors, however, constituted a technical or constructive fraud, and for that reason payment of the salaries could not be enforced against the company in the absence of its authorization by the charter, a by-law, or some proper confirmatory act of the company.

[2] We do not think the act of the directors in making an increase in the salaries was void, but voidable. The directors of a corporation are its agents and occupy a fiduciary relation to it. They are governed by the rules applicable to such relationship. They are not technically trustees, yet they occupy a fiduciary relation towards the corporation which prevents them from dealing with themselves to the detriment of its interests. A director cannot contract with a corporation when its interests conflict with his private interests. His action in such cases, however, may be accepted or rejected at the option of the corporation. If he has contracted with himself, the corporation may deem it expedient and to its interest to approve and accept his action. This is frequently done, and this the corporation has the authority to do. On the other hand, the corporation clearly has a right to repudiate his act when for any reason it desires to do so. It follows, therefore, that the act is voidable at the election of the corporation. *Ashhurst's Appeal*, 60 Pa. 290; *Graves v. Mono Lake Hydraulic Mining Co.*, 81 Cal. 303, 22 Pac. 685; *Stewart v. Lehigh*

Valley R. R. Co., 38 N. J. Law, 505; *U. S. Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; *Barr v. Railroad Co.*, 125 N. Y. 263, 23 N. E. 145; *Hedges v. Paquett*, 3 Or. 77; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; 2 *Thomp. on Corp.* (2d Ed.) § 2043; 2 *Cook on Corp.* §§ 649, 657.

The well-settled general rule is that any act of a board of directors may be ratified by the stockholders which they could originally have authorized. This proposition seems to be sound in principle and supported by the authorities. Of course this assumes that the act is not fraudulent or detrimental to the interest of the corporation. The stockholders could not bind the corporation by ratifying a contract made by the directors with the company which would fraudulently dispose of or waste the assets of the corporation. But where the contract is reasonable and fair, and a consideration has been received by the corporation, the stockholders may ratify it, and thus bind the corporation. *U. S. Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; *Continental Ins. Co. v. N. Y.*, etc., *R. R. Co.*, 187 N. Y. 225, 79 N. E. 1026; *In re George Newman & Co.*, L. R. (1895) 1 Ch. Div. 674; 2 *Thomp. on Corp.* (2d Ed.) § 2048. In the section cited, Judge Thompson says: "It follows from the fact that the stockholders are in a substantial sense the corporation that many acts which the directors or their executive officers may do outside the scope of their powers may become ratified and validated by the acquiescence of the body of shareholders; and, in general the body of shareholders can ratify and confirm any act done by the directors or other officers of the corporation without a precedent authorization which the shareholders could have authorized originally, unless the acts offend against the public or involve the rights of creditors. In other words, they may ratify any act so done unless the corporation is, by its charter or governing statute, or by the rules of the common law having reference to public policy, precluded from doing it in the first instance."

[3] We are of opinion that the resolution of the stockholders ratifying the action of the directors in increasing the salaries was not invalid because it was done by the votes of the same individuals by whose votes the resolution of the board of directors was passed and two of whom were the recipients of the salaries. At the meeting of the board, the voting was done by the directors as agents of the corporation, occupying a fiduciary relation to the corporation which prevented them contracting with their principal or voting themselves compensation for their services. When these directors voted as stockholders in a stockholders' meeting, they held no trust relation to the company which would deprive them of the right to vote as their interests dictated. As shareholders, they, like other owners of the stock, had a voting capacity to the extent of the number of shares they held in the corporation. The

right to vote their shares was a privilege of which they could not be deprived. While the majority stockholders may not use their voting power to defraud the minority stockholders, yet they have the right to protect their own interests in the stock by voting as they deem best in the stockholders' meeting. This might, as it did in the case in hand, result in sustaining them in obtaining a salary from the corporation. But their action cannot be condemned for that reason, as it must be assumed that they believed that in so voting it was to the advantage and interest of the corporation. They owed the duty of good faith to the other stockholders in the management of the affairs of the corporation, and the other stockholders owed a like duty to them. Each stockholder had a right to vote in the shareholders' meeting as he thought best to protect his own individual interest. Such interest would naturally and necessarily influence him in voting, but it would not deprive him of the right to vote on the ratification of the action of the directors. To hold otherwise would be to permit a minority stockholder to control the majority stockholders and their property. This cannot be done. The majority stockholders may not as against the corporation and a minority stockholder dissipate or waste its funds or fraudulently dispose of them in any way, either by ratifying the action of the board of directors in voting themselves illegal salaries or by any other act. But, where the action of the board of directors is not fraudulent or unfair to the extent of amounting to fraud and the action of the directors may be ratified by the shareholders, the well-settled general rule is that the stock of the director who is benefited is to be counted, even though the vote would have failed had his stock not been voted. 2 Cook on Corp. § 662; Booth v. Land, etc., Co., 68 N. J. Eq. 536, 59 Atl. 767; Bjornsgaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48; United States Rolling Stock Co. v. Railroad Co., 34 Ohio St. 450, 32 Am. Rep. 380; Foss v. Harbottle, 2 Hare, 461; Beatty v. Northwest Transportation Co., 5 Can. L. T. 277; Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889; Blinn v. Riggs, 110 Ill. App. 87; U. S. Steel Corporation v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742.

We have disposed of the important and controlling question in the case. We do not deem it necessary to determine the other question suggested by the appellee that the resolution adopted at the stockholders' meeting is invalid because it makes salaries effective as of a past date. It is not exactly clear whether the appellants received any salary for the few days prior to the date of the resolution of the board of directors increasing their salary, but, if they did, it may be regarded as disposed of under the maxim *de minimis*. The court below did not discuss the question, neither has appellant's counsel.

For the reasons stated, the decree of the court below is reversed, and the bill is dismissed, at the cost of the appellee.

KEATOR v. HUNSICKER.

(Supreme Court of Pennsylvania. May 23, 1911.)

BILLS AND NOTES (§ 473*) — ACTION — AFFIDAVIT OF DEFENSE.

In action on notes, the affidavit of defense set up that before they were given plaintiff held a certificate of stock belonging to defendant, and that when the notes were given plaintiff took an option to buy certain of the shares represented by the certificate, if the notes were not paid at maturity; that no demand for payment was made, and plaintiff still held the stock certificate, and the notes were paid by the exercise of the option to take shares to the extent required for such payment. Held insufficient to prevent judgment.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 473.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Anna W. S. Keator, executrix of the last will of John F. Keator, deceased, against Clayton M. Hunsicker. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHIZISER, JJ.

J. S. Freeman, for appellant. John F. Powell and Lester B. Johnson, for appellee.

FELL, C. J. This appeal is from an order making absolute a rule for judgment for want of a sufficient affidavit of defense, in an action by the payee against the maker of two promissory notes given for money borrowed.

It is averred in the affidavit of defense that prior to giving of the notes the plaintiff purchased of the defendant 78 shares of the stock of a corporation named, and a certificate for 625 shares, with power to transfer, was placed in the custody of the plaintiff under an agreement, the terms of which are not set forth. That when the first note was given, and as a part of the same transaction, the defendant gave to the plaintiff an option to buy additional shares of the stock, if the note was not paid at maturity, at \$25 per share, and authorized him to take the shares from the certificate for 625 which he held, and in which was included the 78 shares before sold. A like agreement was made when the second note was given, except that no price at which the stock was to be taken in payment of the note was named. It is further averred that no demand for the payment of the notes was made at their maturity, that the stock certificate is still in the possession of the plaintiff, and that the defendant believes and expects to be able to prove that the notes were paid by the ex-

ercise of the option to take shares of stock to the extent required for payment.

The right to purchase the stock was to be exercised only in the event of the nonpayment of the notes, and to the extent only that it might be necessary to pay them. The transaction was simply the borrowing of money, the giving of notes therefor, and the pledging of stock as collateral security, with power to convert the collateral in case of default in payment. There has been no actual conversion. The certificate is in the possession of the plaintiff in the form in which it was pledged. He has exercised no right in relation to it, except to retain it; nor has he done anything to give rise to the inference of an acceptance of the stock in payment. His holding of it is by virtue of a prior and independent agreement made before the money was borrowed. The averment with respect to the application of the stock to the payment of the note is not an averment of a fact, but of a conclusion, and is not only unsupported by any facts or circumstances justifying it, but is inconsistent with the facts alleged in the affidavit of defense.

The judgment is affirmed.

PIERCE v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. MINES AND MINERALS (§ 125*)—DEPOSIT OF CULM—ACTION FOR DAMAGES.

In an action by a landowner against a coal company to recover damages for culm deposited on plaintiff's land by a stream, where there was evidence that culm from defendant's mine was so deposited, the case is for the jury, though there may be evidence that culm from other mines was also deposited on the land.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 125.*]

2. APPEAL AND ERROR (§ 260*)—FAILURE TO ASSIGN ERROR.

Appellant cannot complain of a ruling sustaining objections to evidence, where no exceptions were taken at the trial, and the errors were not assigned for error on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Harry W. Pierce against the Lehigh Valley Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant submitted the following point: "(1) If the jury believe that any other culm than that which came from the defendant's operations got upon the plaintiff's land in the flood of 1902, the defendant being liable only for the damage done by its own culm, and there being no evidence of the pro-

portion of the defendant's culm to the whole amount upon the plaintiff's land from which the jury could make such an apportionment, the verdict must be for merely nominal damages. Answer: The fourth point we are unable to affirm as it is expressed, and we therefore deny it, and it is not read."

The jury rendered a verdict in favor of the plaintiff for \$9,120, calculated as follows: Total damage, \$15,500; per cent. to Lehigh Valley Coal Company at 40 per cent., \$6,200; loss by delay in payment of damage, \$2,920. The court afterwards set aside the allowance of \$2,920 awarded as compensation for delay, and entered judgment in the remainder of the verdict.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

J. B. Woodward, F. W. Wheaton, and John T. Lenahan, for appellant. William S. McLean and John A. Opp, for appellee.

MESTREZAT, J. The defendant alleges the court erred in refusing to instruct the jury that there was no evidence from which they could apportion the defendant's culm to the whole amount deposited on the plaintiff's land, and therefore the verdict should be for nominal damages. There is no assignment alleging error of law in the trial of the case. After the first trial in the common pleas, which resulted in a verdict for nominal damages under the instructions of the court, the defendant appealed to the superior court, where it was held that the plaintiff was entitled to compensatory damages, and that there was sufficient evidence to submit to the jury to determine whether and to what extent the culm deposited by the defendant in the stream damaged the plaintiff's land. On the next trial, there was a verdict and judgment for the plaintiff, and from that judgment this appeal was taken.

[1] We do not agree with the learned counsel for the appellant that there was any substantial difference in the evidence submitted on the two trials. Both parties possibly strengthened their position by additional evidence, but after a careful review of the testimony we are satisfied that the case was for the jury, and that the evidence warranted the verdict which was rendered in the second trial. Of course, the evidence did not show with mathematical certainty the exact amount of culm from the defendant's collieries deposited on the plaintiff's land; that could not be expected; but it was sufficiently certain to justify the jury in finding the proportion of culm which they did find came from the defendant's collieries. In determining the accuracy of the verdict as to defendant's proportion of the culm on the plaintiff's land, it must not be overlooked that the jury, at the request of the defend-

ant, spent three days in examining the premises with the assistance of two "showers" appointed by the court, who were intimately acquainted with the places from which culm was produced along the Susquehanna river and its tributaries. This aided the jury greatly in passing on the vital question in the case. Under the evidence submitted, the jury would have been justified in finding that a greater proportion of the culm than 40 per cent. came from the defendant's collieries.

[2] We are at a loss to see why the learned counsel for the appellant should complain of the court's ruling sustaining the objection to the defendant's offer to show on cross-examination by plaintiff's witnesses that there was culm in the river, other than the defendant's, when no exception was taken on the trial to such ruling, and it is not assigned for error on this appeal. The learned counsel well knows that if he desired to have the alleged error corrected he should have assigned the ruling of the court for error. It is idle to complain of the action of the court as is done in the printed brief, and attempt to use it as an argument to sustain the allegation that the court erred in not directing a verdict for nominal damages. When the plaintiff rested on the trial of the cause, if the defendant company thought he had failed to show its proportion of culm deposited on the land, it should have declined to offer any testimony, and ask for binding instructions. It was sufficient for the plaintiff, in the first instance, to introduce evidence warranting the jury in finding that culm from the defendant's collieries was deposited on his land, and caused the injury complained of. That is what was done. The defendant company did not ask for binding instructions at the conclusion of the plaintiff's testimony, but introduced its own testimony to meet the plaintiff's case. The defendant cannot now complain that the plaintiff's case was in part made out by its own testimony. The learned court below instructed the jury that the burden was upon the plaintiff to show that his injuries resulted from the deposit of the defendant's culm on his premises, and that, "if you believe that the culm on the plaintiff's land came partly from defendant's operations and partly from those of other people, what was the defendant's share of it, its proportion of it? What was the defendant's proportion of the injury which was done by the washing of its loose culm down upon the plaintiff's land? Before you can find compensatory damages against the defendant, it is necessary for you to determine how much of that damage the defendant was responsible for." There was ample evidence to support the jury's finding as to the proportion of the defendant's culm deposited on the plaintiff's land, and the judgment is affirmed.

PIERCE v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

DAMAGES (§ 69*)—DETENTION OF PAYMENT.

In an action to recover damages for injury to land, where the claim was for \$50,000, while the verdict was for only \$6,200, and the claim was strongly insisted upon in its entirety at the trial, and at no time did plaintiff offer to receive less than his original demand, damages awarded by the jury for detention of the payment of plaintiff's claim were properly disallowed by the court.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 137-140; Dec. Dig. § 69.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Harry W. Pierce against the Lehigh Valley Coal Company. From a judgment setting aside an item of damage in verdict for plaintiff, plaintiff appeals. Affirmed.

See, also, 81 Atl. 141.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

William S. McLean and John A. Opp, for appellant. J. B. Woodward, F. W. Wheaton, and John T. Lenahan, for appellee.

MESTREZAT, J. This was an action of trespass to recover damages for injuries which the plaintiff alleges he sustained by reason of the deposit of culm and other coal refuse upon his land from the defendant's colliery. The jury, under the instruction of the court, returned a special verdict, in which they found for the plaintiff \$6,200 damages and \$2,920 as compensation for delay in payment of the sum awarded as damages. The learned court set aside the part of the verdict that allowed compensation for the delay in payment, and directed judgment to be entered for the amount of the damages. The plaintiff alleges error in the court's action in not allowing compensation for detention of the damages. This is the only question in the case.

The facts fully warranted the court in disallowing the damages awarded for the detention of the payment of the plaintiff's claim. As appears by the evidence, and as stated by the court, the claim was for \$50,000, and it was strongly insisted upon in its entirety at the trial. At no time did the plaintiff offer to reduce the claim, or to accept any smaller sum than his original demand. The fact that the verdict in his favor was for only \$6,200 shows that the demand was excessive, extortionate, and unreasonable, and one which the defendant was fully warranted in contesting. The officers of the defendant company would manifestly not have been justified in paying the claim. Had they done so, they would have failed to perform their duty, and would have been respon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sible to the company. It is true that the defendant company declined to pay any sum whatever, and took the position that it was not liable for any damages; but in passing upon the question now under consideration it must not be overlooked that on the first trial of the cause the lower court sustained this view, and a verdict for nominal damages only was rendered for the plaintiff. That judgment was reversed by the superior court, and the second trial resulted in the judgment from which this appeal was taken. At no time did the plaintiff offer or indicate a willingness to accept anything less than the original demand, and, notwithstanding the defendant company's erroneous view of the law as to the plaintiff's right to recover compensatory damages, it was fully justified, as the present verdict shows, in resisting a recovery of the plaintiff's claim.

The right to compensation for delay in the payment of damages arising out of a tort depends upon the circumstances of the case. It is therefore usually a question for the jury under the evidence submitted. If the fault in nonpayment of the claim rests with the defendant, he cannot complain if he is required to compensate for the delay. If, on the other hand, the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff, and required to pay damages for the delay in the settlement of the claim. The court should so instruct the jury, and if they disregard the evidence, and wrongfully return a verdict awarding compensation for the delay, the court should set aside that part of the verdict, where the amount can be ascertained; and if it cannot be ascertained the entire verdict should be set aside, and a new trial awarded. If it is clearly developed on the trial of the cause that the claim is extravagant and unreasonable, and warranted the defendant in resisting payment, the court should direct the attention of the jury to the evidence, with instructions that if it is credible the plaintiff would not be entitled to recover compensation for the delay. In such a case the only question for the jury would be the credibility of the witnesses, and if they persisted in returning a verdict against the manifest weight of the evidence it should be promptly set aside by the court. A verdict on this, as on every, question submitted to a jury should be sustained by the credible evidence, and when it is not the clear duty of the court is to set it aside.

The judgment is affirmed.

NOWLIS v. HURWITZ.

(Supreme Court of Pennsylvania. May 23, 1911.)

TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

Where an inadvertent error as to the law was made in an instruction, it is no ground for reversal, where it was in conflict with other instructions given and with the whole trend of the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by William Nowlis against Joseph Hurwitz. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHISKER, JJ.

Frank A. McGuigan, for appellant. Evan C. Jones and Andrew Hourigan, for appellee.

PER CURIAM. This was an action to recover salary for 49 weeks, under an express contract of employment at \$50 per week for an indeterminate period. The defendant denied the employment, and alleged that the plaintiff was his partner in the business in which the services were rendered. There was no dispute in relation to the time of service.

The main ground of complaint is that the charge contained the instruction that, unless the evidence showed that the plaintiff had worked 49 weeks, he was not entitled to recover anything. This instruction was clearly erroneous, since no period of service was provided for in the express contract set up by the plaintiff. The mention of a fixed period as essential to any recovery was inadvertently made in the earlier part of the charge. It was followed by the instruction, many times very clearly repeated, that the only question for the jury was whether there was an employment or a partnership, and that if an employment was found by the jury the verdict should be for the full amount claimed. Taking the charge as a whole, there is no reason to believe that the jury was misled. We have repeatedly held that an error in the statement of testimony in a charge should be called to the attention of the judge before the jury retires, in order that it may be corrected. The same rule should apply where the error is as to the law, and it is evident that it was inadvertently made, because in conflict with other instructions given and with the whole trend of the charge.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

WENTZ v. BLAIR et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 429*)—ACTION AGAINST—WHEN LIES.

Where the heir of decedent sued the administrator for moneys had and received, but there has been no adjudication of the estate, and nothing to show any promise by the administrator to pay any sum to plaintiff in lieu of her distributive share, the action will be dismissed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 429.*]

2. APPEAL AND ERROR (§ 211*)—REVIEW—COMPULSORY NONSUIT.

Plaintiff cannot complain of a nonsuit before he had an opportunity to introduce all his testimony, where the record does not show that he offered any additional testimony, or made any objection to the alleged premature closing of the case, or to the rejection of any testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1302; Dec. Dig. § 211.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Elizabeth Wentz against R. J. Blair and others. From an order refusing to take off compulsory nonsuit, plaintiff appeals. Affirmed.

On motion to take off the nonsuit, Hall, P. J., filed the following opinion:

"The counsel for the plaintiff in the brief filed on his motion to take off the compulsory nonsuit in the above case seems to have entirely misapprehended the reasons that moved the court to direct that a nonsuit be entered.

"Conceding, for the purpose of this discussion, that all of the facts alleged by the plaintiff are true and susceptible of proof, that W. H. Courtright, as executor of his wife, Clarissa Courtright, embezzled the funds of her estate, which were bequeathed to her heirs, of whom the plaintiff in this action is one, that he wrongfully converted them to his own use, and removed from this state and the jurisdiction of this court, thereby committing a 'devastavit' which rendered him personally liable to the plaintiff, that he afterwards admitted these facts in various letters asking for further time, and promised to pay her the amount due from her mother's estate, and that his moral obligation so to do was a sufficient consideration for this promise, and an action would properly lie in the court of common pleas to enforce it, the fact still remains that the amount due to the plaintiff does not appear in these letters, and can only be properly ascertained by an adjudication in the orphans' court. The court of common pleas has no jurisdiction to determine this question. If a citation had been issued to W. H. Courtright in his lifetime, or to his ancillary administrator after his death, and the amount of his indebtedness to this plaintiff had been

adjudicated by the orphans' court, we would have no hesitation in ruling that the amount so determined could be collected from his personal estate, under the evidence offered in this case, by appropriate proceedings in this court; but, in the absence of such an adjudication by the proper tribunal, we are of the opinion that the plaintiff's case presents a preliminary question for determination which does not come within the jurisdiction of this court to decide.

"Under the circumstances of this particular case, we are aware that this ruling works a serious hardship to the plaintiff, and we would be very glad if it were possible under the law to hold otherwise; but after a most careful and serious consideration we are convinced that any other ruling would be reversible error.

"There is no merit in the plaintiff's contention that we should not have granted the nonsuit until he had finished putting in his evidence. The nonsuit was granted upon the admission by the plaintiff's counsel in open court that no adjudication had ever been made by the orphans' court. This being admitted, as it ousted our jurisdiction of the case, under our view of the law, it would have been entirely useless to take up the further time of the court by the introduction of evidence on other matters.

"The motion to take off the nonsuit is therefore denied."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Wm. C. Johnston and James R. Scouton, for appellant. William S. McLean and William S. McLean, Jr., for appellees. Q. A. Gates, for administrator Blair.

MESTREZAT, J. The plaintiff failed on the trial to prove the claim for which the action was brought, and was properly nonsuited. The statement shows the demand was for \$1,100, with interest from August 1, 1883, for moneys had and received by W. H. Courtright during his lifetime, to the use of the plaintiff.

[1] As suggested by her counsel, the plaintiff claimed, as a creditor of Courtright, that he promised in writing to pay her certain sums of money to extinguish his indebtedness to her, that she is not suing for a distributive share of any estate, and that the action brought by her does not involve the necessity of determining any question as to the amount of a decedent's estate. The burden was therefore upon her to show to the satisfaction of the jury a certain indebtedness due from W. H. Courtright to her, for which an action for money had and received would lie. In this she entirely failed. The written promises on which she relies were contained in certain letters in evidence; but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a careful examination of them does not disclose that Courtright promised the plaintiff to pay her \$1,100, or any other specified sum. He acknowledged that, as administrator, he received certain moneys belonging to the estate of the plaintiff's mother, in which the plaintiff had an interest. It further appears by the letters that he made plaintiff a proposition to pay her and the other heirs certain sums of money, but it was on the condition that they would receipt to him in full for the claims they had against him as administrator of his wife's estate. There is nothing in the evidence to show that the plaintiff accepted the offers contained in the letters. It is not averred in the statement that W. H. Courtright filed an account as administrator of his wife, nor is it averred that a decree of distribution was made by the orphans' court, distributing the funds in his hands, and awarding to the plaintiff any specific sum as administrator; and, as has been said, there was nothing to show any promise in writing by the administrator to pay any certain sum to the plaintiff in lieu of her distributive share in her mother's estate. Under these circumstances, the court could not permit the jury to guess that Courtright was indebted to the plaintiff in the sum of \$1,100, or in any other definite sum for which a verdict could be rendered in an action for money had and received.

[2] The record does not disclose that the court below entered the compulsory nonsuit before the plaintiff had an opportunity to introduce all her testimony. It only appears by the opinion of the court, in refusing to take off the nonsuit. We cannot, however, reverse the court for refusing to take off the nonsuit because it was granted before the plaintiff had concluded her testimony, or because the court had rejected part of her testimony. The right to a nonsuit is determined on the evidence before the court, and not on evidence which was offered and rejected by the court. The plaintiff should have offered her additional testimony and, if rejected, had an exception noted. If the evidence should have been admitted, the ruling would have been reversible error, although, without it, the nonsuit would have to be sustained. There is no objection or exception on the record to the alleged premature closing of the case, or to the rejection of any testimony; and hence those questions cannot be reviewed on this appeal.

The facts found by the learned court below justified it in opening the judgment entered on the award of arbitrators, and letting the defendants into a defense; and therefore the first and second assignments are not sustained. The learned court below has found and stated the facts, and we will not discuss them here.

The judgment is affirmed.

In re MEYER'S ESTATE.

Appeal of WEISS.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. HUSBAND AND WIFE (§ 14*)—ESTATE BY ENTIRETIES.

Act June 8, 1893 (P. L. 344), enlarging the capacity of a wife to acquire and dispose of property and to sue and be sued, does not change the nature of the wife's estate nor destroy the legal unity between husband and wife, and does not abolish an estate by entireties existing between them.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 14.*]

2. BANKRUPTCY (§ 139*)—RIGHTS OF TRUSTEE IN BANKRUPTCY—ESTATE BY ENTIRETIES.

Where a testator gives his residuary estate to his daughter and her husband absolutely and forever as tenants by entireties, a trustee in bankruptcy of the husband is not entitled during the life of the wife to any part of the principal or income.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 139.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of C. A. A. Meyer. From a decree dismissing exceptions to adjudication C. J. Weiss, trustee in bankruptcy, appeals. Affirmed.

From the record it appeared that testator died December 19, 1902, leaving a will by which he gave his residuary estate to his daughter, Clara L. Beihl, and her husband, Ernest H. Beihl, "absolutely and forever, as tenants by entireties." On July 2, 1909, Ernest H. Beihl was adjudicated a bankrupt by the United States District Court, and Charles J. Weiss was appointed his trustee in bankruptcy. The trustee in bankruptcy claimed that one-half of the fund before the court should be awarded to him as the property of the bankrupt. The auditing judge disallowed the claim.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

George P. Rich, for appellant. Harvey Gourley, for appellee.

STEWART, J. The appeal is by the trustee in bankruptcy of the estate of Ernest H. Beihl from a decree of the orphans' court in the adjudication of the account of the trustees under the last will of C. A. Adolph Meyer, deceased, awarding the fund before the court to Ernest H. Beihl and Clara, his wife. The appellant claims the fund in virtue of his office in bankruptcy, the appellees on the ground that the estate vested in them as husband and wife. It is not questioned that under the will through which this estate was derived husband and wife took by entireties, if indeed such estate may still be created. The contention of appellant is that this venerable and unique common-law estate has been abolished in Pennsylvania

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the act of June 8, 1893 (P. L. 344), not in express terms, but by unavoidable implication. The act of June 8, 1893, was meant as a substitute for the earlier act of June 3, 1887 (P. L. 332), which it expressly repeals. The primary object in each was the same—to emancipate married women from restraints and disqualifications with which they had been fettered by the common law. The later act embraces within its scope all that was gained for married women by the earlier, and at the same time it removes other disqualifications which the earlier left undisturbed; but it can no more be affirmed of one than of the other, that it discloses a legislative purpose to change the nature of any estate which married women could theretofore have acquired, or destroys or in any way interferes with the legal unity which characterizes the relation of husband and wife, in deference to which, and for its better protection perhaps, this peculiar estate by entireties was invented. The title to the act of 1887 reads: "An act, relating to husband and wife, defining the rights to and over their property, to make conveyances and contracts, authorizing them to sue and be sued on their contracts, and for torts, and defining the interest of husband and wife in the estate of each by will or otherwise."

[1] The title to the act of 1893 reads: "An act, relating to husband and wife, enlarging her capacity to acquire and dispose of property, to sue and be sued, and to make a last will, and enabling them to sue and testify against each other in certain cases." Since it is squarely ruled in *Bramberry's Estate*, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64, that the act of 1887 was, like the act of 1848, intended to protect the property of the wife from the dominion or control of the husband but not to change the nature of her estate, or destroy the legal unity of the relation, it follows that the present contention can be sustained only as it can be shown that the act of 1893 in its advance upon the act of 1887 unmistakably discloses a purpose to change the nature of the married woman's estate which she holds by entireties, and reduce it to a tenancy in common. The provision in the act which it is thought reveals such purpose is as follows: "That hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, contract, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person," etc. The argument on behalf of appellant proceeds: "In fact, it is difficult to conceive how there can be much broader language severing the legal fiction of unity between husband and wife and putting her, with respect to any property that she may own, on an equal footing

with men." A comparison of this provision in the later act with that which more nearly corresponds in the earlier will show how utterly unimportant in this particular connection is the change introduced. It reads: "Hereafter marriage shall not be held to impose any disability or incapacity in a married woman, as to the acquisition, ownership, possession, control, use or disposition of property of any kind, in any trade or business in which she may engage or for necessities, and for the use, enjoyment and improvement of her separate estate, real or personal; or her right and power to make contracts of any kind, and to give obligations binding herself therefor; but every married woman shall have the same right to acquire, hold, possess, improve, control, use or dispose of her property, real and personal, in possession or expectancy, in the same manner as if she were a feme sole, without the intervention of any trustee, and with all the rights and liabilities incident thereto, except as herein provided, as if she were not married, and property of every kind owned, acquired or earned by a woman, before or during her marriage, shall belong to her, and not to her husband or his creditors," etc. If it can be said of the earlier act that no intent can be discovered therein to change the nature of the estate of a married woman, or to destroy the legal unity of husband and wife, with quite as much reason can the same be affirmed of the later, whether regard be had to the title or the provisions above quoted. It is unnecessary to repeat here the reasoning of the court in the case above cited. It was satisfactory to the court then, and its correctness has never since been questioned. With the judicial interpretation of the act of 1887, to the effect that it did not change estates by entireties, it is hardly supposable that when the Legislature in 1893 came to substitute another act for that, if the intention was to put an end to "the legal fiction of unity between husband and wife," and abolish such estates, that it would have left such intent to be derived by implication, and that, too, from provisions in the substitute which no more clearly indicate such intent than those in the act repealed, to say nothing of its rejection of the easier, simpler, and more certain method it might have adopted, the enacting in a single line that thereafter estates in entireties should be held as estates in common. Were there nothing else in the case to forbid the implication which the appellant seeks to raise, that feature of the act of 1893 which limits the right of the wife to divide her estate or protect it from the husband by adverse legal proceedings only in case the husband has deserted, or refused to support her, would be sufficient in itself. This qualification and restriction of the right to sue the husband shows clearly that, however much the identity of relation

has suffered by modern legislation, enough of it remained to call for the protection of the wife against the husband at least to the extent of leaving existing estates by entireties untouched. We find nothing in the case supporting appellant's contention, and therefore overrule the assignments of error which challenge the action of the court in denying him participation in the fund.

[2] It is further complained of as error that the court refused to order proper security to be given for the payment to the trustee of one-half the income arising during the life of the wife from the fund for distribution. Whatever the rights of the trustee may be with respect to the fund in the event of the husband surviving his wife, it is too plain for discussion that, except as estates by entirety no longer exist, he can have no present right of enjoyment. We have just held that they do still exist. In estates of this kind husband and wife are not joint tenants or tenants in common, but both are s^ubs^ued of the entirety, per tout et non per my. As a consequence neither can dispose of any part without the consent of the other, but the whole must remain to the other. It follows that the interest of the appellant in the fund in dispute, under all our authorities defining this kind of estate, and its characteristics, is at most a contingent one. He is not presently substituted for the husband, and cannot be. His right to the use and enjoyment of any part of the fund must await the happening of the contingency of the husband surviving the wife. Until that happens, the wife's right to the enjoyment of the whole may not be disputed by any one claiming under the husband. The very enlightening discussion of the subject in the able opinion of Judge Thayer, approved and adopted by this court in *McCurdy v. Canning*, 64 Pa. 39, and which has consistently been followed, makes further citation of authority for the views here expressed unnecessary.

This assignment of error is likewise overruled, and the appeal is dismissed.

IN RE MEYER'S ESTATE.

Appeal of BEIHL et ux.

(Supreme Court of Pennsylvania. May 23, 1911.)

BANKRUPTCY (§ 139*)—BANKRUPTCY OF HUSBAND—ESTATE BY ENTIRETY.

Where an estate has been given by will to a husband and wife as tenants by entirety, the orphans' court in awarding the fund to them cannot require them to enter security for the protection of the husband's trustees in bankruptcy, if the husband should survive the wife.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 139.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the adjudication of the estate of C. A. A. Meyer. From a decree sustaining exceptions to the adjudication, Ernest H. Beihl and wife appeal. Modified.

From the record it appeared that Clara L. Beihl and her husband, Ernest H. Beihl, were tenants by entireties under the will of testator. The fund was awarded to them notwithstanding the claim of Charles J. Weiss, trustee in bankruptcy of Ernest H. Beihl, to one-half of the fund. The trustee filed the following exception to the adjudication: "(3) The learned judge further erred in awarding the whole of the said fund to Clara L. Beihl and her husband, Ernest H. Beihl, as tenants by entirety, without making any provision for the protection of the rights of the said Charles J. Weiss as trustee in bankruptcy of the said Ernest H. Beihl." The court in an opinion by Gummey, J., sustained the exception, and directed that security should be entered in the sum of \$11,000 for the protection of the trustee in bankruptcy in the event of the husband surviving the wife.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Harvey Gourley, for appellants. George P. Rich, for appellee.

STEWART, J. This appeal is from the same decree that was considered in the preceding case. Meyer's Estate, No. 1, 81 Atl. 145. There the appeal was by the trustee in bankruptcy alleging error in awarding the fund to the appellees, and in the refusal of the court to require security in advance of actual distribution for the payment of one-half the income of the fund as it accrued to the trustee in bankruptcy of the husband's estate. Here the appeal is by the parties awarded the fund, husband and wife, from so much of the decree as required of them, before receiving the fund, security for the payment over to the trustee in bankruptcy of one-half the fund in the event of the husband surviving the wife.

In the other appeal we held that the trustee in bankruptcy acquired nothing but a contingent interest; that, inasmuch as the husband and wife held by entireties, no present right of enjoyment resulted to one claiming through the husband or in his right; and that the demand for security for the income was properly refused. The wife's right to present enjoyment of the estate is not to a part, but to all of it; and this may not be denied her in order to protect a contingent interest of one claiming through the husband. To impose such condition upon the exercise and enjoyment of her right, as was here directed, resolves the estate into a tenancy in common. Being an estate by entire-

ties neither husband nor wife could, under any circumstances, require an accounting by the other; nor could either restrain the other against consuming more than an equal part. The effect of requiring security as a condition of the wife's enjoyment of her estate would be to restrain consumption by her of her own property in order that her husband's creditors might be protected. She received the estate on no such condition. It is hers to consume if she so desires. The husband would be powerless to prevent it by legal proceedings, and those claiming under him have no higher rights.

This appeal is sustained, and the decree is modified by striking therefrom the order for security for the protection of the trustee in bankruptcy, in the event of the husband surviving his wife, in the sum of \$11,000, before distribution is made to the appellants, of the award to them under the adjudication; and, as so modified, the decree is affirmed. The costs on the appeal to be paid by the appellees.

WEISS v. BEIHL et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

BANKRUPTCY (§ 301*)—ACTION BY TRUSTEE—ALIENATION OF PROPERTY—INJUNCTION.

A trustee in bankruptcy of a husband has no standing to maintain a bill to restrain the husband and wife from alienating property which they hold as tenants by entireties.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 301.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Charles J. Weiss, trustee in bankruptcy, against Ernest H. Beihl and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

George P. Rich, for appellant. Harvey Gourley, for appellees.

STEWART, J. The facts on which this suit in equity was based are fully recited in the two appeals, next preceding, from the decree of the orphans' court of Philadelphia (Meyer's Est., No. 1, 81 Atl. 145, and Meyer's Est., No. 2, 81 Atl. 147), and need not be here repeated. Those appeals superseded this, and the conclusion arrived at in them settles all that was involved in the bill filed in this case. The bill was filed before the trustees had settled their account and prayed an injunction restraining Beihl and his wife from alienating the property and further relief. The bill was demurred to and the demurrer sustained.

The appeal is from that decree, and it is dismissed.

COMMONWEALTH v. PLYMOUTH COAL CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. MINES AND MINERALS (§ 92*)—PILLARS OF COAL—POLICE POWER.

Anthracite Mining Act June 2, 1891 (P. L. 183) art. 3, § 10, provides that owners of adjoining coal properties must leave a pillar of coal in each seam worked by them along the line of adjoining property. Held a valid exercise of the police power.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.*]

2. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW.

Anthracite Mining Act June 2, 1891 (P. L. 183) art. 3, § 10, provides that owners of adjoining coal properties must leave a pillar of coal in each seam worked by them along the line of adjoining property. Held not a deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 296.*]

3. EMINENT DOMAIN (§ 2*)—RIGHT TO COMPENSATION.

Anthracite Mining Act June 2, 1891 (P. L. 183), art. 3, § 10, provides that owners of adjoining coal properties must leave a pillar of coal in each seam worked by them along the line of adjoining property. Held, that such act does not violate Const. art. 1, § 10, providing that private property shall not be applied to public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

4. EMINENT DOMAIN (§ 1*)—DEFINITION.

The right of eminent domain is the power of the state to apply private property to public purposes on payment of just compensation. The provision for compensation is no part of the power, but a limitation on its use imposed by the Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2362-2366; vol. 8, p. 7649.]

5. CONSTITUTIONAL LAW (§ 81*)—"POLICE POWER."

The police power of a state is the right to prescribe regulations for the good order, peace, protection, comfort, convenience, and morals of the community, and its essential quality as a governmental agency is that it imposes on persons and property burdens designed to promote the health and safety of the public at large.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

Appeal from Court of Common Pleas, Luzerne County.

Bill by the Commonwealth, on the application of David T. Davis, Inspector of Mines of the Ninth District of the First Anthracite Coal Inspection District of Pennsylvania, against the Plymouth Coal Company. From decree in favor of plaintiff, defendant appeals. Affirmed.

Ferris, J., filed the following opinion:

"The anthracite mining act of June 2, 1891 (P. L. 176), is entitled, 'An act to provide for the health and safety of persons employ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith.' Section 10 of article 3 of this act reads as follows: 'It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width, that taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties, and with the inspector of the district in which the mine or property is situated.' The bill avers that the plaintiff, being the mine inspector for the proper district, gave notice to the defendant company of a meeting to be held, at which the said company was notified to instruct its engineer to be present and meet the engineer of the Lehigh & Wilkes-Barre Coal Company, the owner of an adjoining mine, for the purpose of determining the width of a barrier pillar to be left by the said two coal companies between their properties as required by the mining act, but that the defendant company refused to permit its engineer to attend such meeting, and generally refused to leave any barrier pillar between its workings and those of the Lehigh & Wilkes-Barre Coal Company.

"The prayers are (1) for an injunction enjoining the defendant from working its mines or coal property adjoining the mines or coal property of the Lehigh & Wilkes-Barre Coal Company without leaving a barrier pillar of coal of the thickness or width of at least seventy feet in each vein; (2) requiring the defendant to file with the mine inspector a certified copy of a survey as required by law; and (3) for general relief. To this bill the defendant has filed an answer admitting the plaintiff's averments of fact to be true, but (1) denying the necessity for such a barrier pillar, and (2) averring that section 10 of article 3 of the mining act is unconstitutional.

"If the constitutionality of this provision be conceded for the purpose of discussion, and if the question of the necessity for any barrier pillar at all between these properties may be regarded as an open one, the decision of that question would seem to be committed by the statute to the tribunal of experts thereby constituted, viz., the mine inspector and the engineers of the owners of the ad-

joining coal properties. The purpose of the enactment is to secure the safety of the workmen in the mines. The law declares that 'it shall be obligatory' on the mine-owners to leave such a barrier pillar as the tribunal of mine experts referred to shall determine to be sufficient for that purpose. It is for them to fix its width. Until they say that none at all is needed for the safety of the men, the obligation imposed by the statute remains. It might, perhaps, be well argued that the Legislature did not intend to impose upon the owners the burden of leaving a boundary pillar of unmined coal where it clearly appears to be unnecessary for the safety of the employés. If none at all were needed, it would seem idle for the inspector and engineers to fix a width of, say, one foot, for the sake, merely, of literal compliance with the statutory obligation of leaving a pillar of some width. If, therefore, we may apply the maxim that the law does not require a vain thing, there is room for the construction that, investing in the inspector and engineers the power to determine how wide the barrier pillar should be to secure safety, the intent of the lawmaking power was to also empower them to say, if such be the fact, that the safety of the men does not require a barrier pillar of any width at all. But, be that as it may, it is evident that the act does not warrant a mine owner in refusing to permit his engineer to participate in determining the question of the width of, or the need for, a barrier pillar simply because he, the mineowner, does not consider one necessary. In our opinion the law requires such a pillar to be left, unless the inspector and engineers, after due examination of the premises and consideration of the subject, determine that none is needed to secure the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water.

"The constitutionality of the boundary pillar provision of the act is attacked upon two grounds: (1) Because it is said to violate section 10 of article 1 of the Pennsylvania Constitution, which provides that private property shall not be taken or applied to public use without authority of law and without just compensation being first made or secured; and (2) because it is claimed to be in conflict with the fourteenth amendment to the federal Constitution, which provides that no state shall deprive any person of life, liberty, or property without due process of law. The defendant contends that by requiring adjoining mineowners to leave a barrier pillar of coal between their workings the act deprives them of a property right (viz., the right to mine such coal) without compensation therefor and without due process of law. Both the right of eminent domain and the police power of the state are attributes of sovereignty. They are inherent rights of the supreme power, founded upon

the social compact and essential to any form of government.

[4] "In our jurisprudence the right of eminent domain is defined to be 'the power of the state to apply private property to public purposes on payment of just compensation to the owner.' 10 Am. & Eng. Ency. of Law (2d Ed.) 1047. The provision for payment of compensation, however, is no part of the power itself, but a limitation upon its use imposed by the Constitution. *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. [5] 'The police power of the state,' says Judge Orlady in *Com. v. Beatty*, 15 Pa. Super. Ct. 5, 15, 'is difficult of definition, but it has been held by the courts to be the right to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which does not encroach on a like power vested in Congress or state Legislatures by the federal Constitution, or does not violate the provisions of the organic law; and it has been expressly held that the fourteenth amendment to the federal Constitution was not designed to interfere with the exercise of that power by the state [citing *Powell v. Penna.*, 127 U. S. 678, 9 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Powell v. Commonwealth*, 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350]. Its essential quality as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large. The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle, equally vital, because equally essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owners' use of it shall not be injurious to the community [citing *Boston Beer Co. v. Mass.*, 97 U. S. 25, 24 L. Ed. 989, at page 17 of 15 Pa. Super. Ct.]. 'The state still retains an interest in his (the wage earner's) welfare, however reckless he may be. The whole is no greater than the sum of all its parts, and, when the individual health, safety, and welfare are sacrificed, the state must suffer.' This declaration was adopted by the United States Supreme Court in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383 [42 L. Ed. 780], invalidating a state statute which limited the employment of men in underground mines, smelting works, etc., to eight hours a day.' By the decision from which we have just quoted, it was held that the act of April 29, 1897 (P. L. 30), forbidding the employment of adult women for more than 12 hours a day, etc., was not in conflict with the Constitution of Pennsylvania nor with the federal Constitution, but was a valid exercise of the police power in

the interest of the public health, even though it referred to a particular class of the public, viz., adult women engaged in the kind of employment mentioned in the act, and even though it did indirectly restrain the employee's freedom of contract.

"So, also, in *Commonwealth v. Brown*, 8 Pa. Super. Ct. 339, 351, 352, it was said by Judge Rice that 'in the exercise of the police power of the state it (the Legislature) may enact laws in the interest of public morals, and to protect the lives, health, and safety of persons following specified callings, and thus indirectly interfere with freedom of contract'—i. e., with individual liberty and the right to acquire and use property. But, of course, such classification with reference to occupation must be reasonable and dictated by a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the others. Laws enacted in pursuance of such classification and for such purposes are, properly speaking, neither local nor special. They are general laws because they apply alike to all that are similarly situated as to their peculiar necessities. *Ayars' Appeal*; 122 Pa. 266, 281, 16 Atl. 356, 2 L. R. A. 577; *Commonwealth v. Gilligan*, 195 Pa. 504, 510, 46 Atl. 124. The point we desire to emphasize here is that, to be a valid exercise of the police power in the interest of the public safety, a statute need not necessarily be applicable to the whole body of the general public, but may affect a specified class only. Thus in *Holden v. Hardy*, 169 U. S. 366, 393, 18 Sup. Ct. 383, 388, 42 L. Ed. 780, it was said by our highest court, speaking by Mr. Justice Brown that, 'while the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary prior to the adoption of the Constitution for the protection of the operatives, but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this laws have been enacted in most of the states designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. * * * In (states) where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, means of signaling the surface, for the supply of fresh air, and the elimination of dangerous gases, etc. * * * These statutes have been repeatedly enforced

ed by the courts of the several states their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional.' Mr. Justice Brown then refers to certain cases where such laws were held to be constitutional under the police power, and among them to *Commonwealth v. Bonnell*, 8 Phila. 534, in which the late Judge Harding of this court held the mine ventilation act of March 3, 1870 (P. L. 3), to be a constitutional exercise of the police power.

"So, also, in *Chicago, W. & V. Coal Co. v. People*, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554, a provision in the mining act of that state requiring the mineowner to pay the fees for the inspection of mines by a state inspector was held to be valid and constitutional under the police power, though its effect was to deprive the owner of property, to wit, the money required to be paid as fees. It was there said, as it might equally well be said in the case at bar: 'The mining of coal is recognized as a dangerous and hazardous business, and is a productive industry of the greatest importance. For many years in this state many thousands of men have been engaged in that character of work, and a proper safeguard of their lives and health is a matter of so great interest and necessity that no subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subserve their safety. * * * Speaking of the payment of the inspector's fees: 'The expense thus incurred is imposed because of the peculiar dangers of the surrounding situation and subserves, not only the interest of the miners, but alike protects the mineowner; and hence the payment of the fee (in this case, the leaving of coal for a barrier pillar) can be properly imposed upon the mineowner without violating any provision of the Constitution.' That case was followed by *Consolidated Coal Co. v. People*, 186 Ill. 134, 57 N. E. 880, 56 L. R. A. 266, where it was held that the same mining act (which, in essentials, is similar to our own) did not deny to mine operators the equal protection of the laws, nor take their property without due process of law in violation of the fourteenth amendment of the federal Constitution.

"Still closer in its facts to the case now before us is *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. There the mining act in question provided, *inter alia*, that 'no owner or tenant of any land containing coal shall open, or sink, or dig, excavate or work in any coal mine or shaft on such land, within five feet of the line dividing said land from that of another person or persons, without the consent in writing of every person interested in, or having title to such adjoining lands,' etc. This provision was claimed to be unconstitutional as being an infringement of the rights of private property. It was held to

be a proper exercise of the police power and not unconstitutional in the respect claimed, the court saying: 'This is no undue assumption of the right to apply the police power to a subject which does not fall within it; for regulations (on this and other subjects mentioned) have long been recognized as wholesome and reasonable, and as fit subjects for the exercise of the police power, as tending to preserve the rights of the citizen and promote the welfare of the commonwealth. The mining of coal is one of the largest industries carried on in the state. In mining proper support and ventilation are necessary * * * for the health and safety of the miner engaged in a dangerous employment, and for that reason the public welfare requires it. * * * This rib of solid coal not to be mined into by either of the adjoining owners was to be contributed by each in equal parts for the mutual benefit of each, for the protection of the surface, to secure independent systems of ventilation, drainage, and workings, and in aid of an industry so great and widely diffused that the state as a whole is interested therein. * * * This regulation works no hardship on one for the benefit of another, but is impartial, just, and reasonable, imposing a common burden for the benefit of all such owners.'

"The police power is distinguished from the right of eminent domain in that the state by exercising the latter right takes private property for public use, thereby entitling the owner to compensation under the Constitution, while the police power, founded as it is on the maxim, '*Sic utere tuo ut alienum non lædas*,' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health, or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power. 22 Am. & Eng. Ency. of Law (2d Ed.) 916, and cases there cited.

[1] "For example, in the case at bar, the state does not take the coal in the barrier pillar and convert it to a public use, but leaves it in the ownership and possession of the adjoining mineowners. The coal itself is not taken. The property right affected by the statute is not ownership, but use, of the material thing—the right to mine it out. Nor does the state take that right for public use. The act does not transfer the right to mine out the coal from the owner to some one else for the public benefit, but prohibits that right from being exercised by any one—that is, destroys it, to prevent a possible calamity, to wit, the flooding of mines, and

to protect the lives of that class of the general public whose safety would be thereby endangered, and incidentally to conserve the mine property of the owners themselves. In this latter aspect of the case the destruction of the right to mine the coal bears some analogy to the destruction of buildings to prevent another sort of calamity—a conflagration. True, in the latter case the disaster is imminent, while here it is uncertain; so that perhaps a closer analogy in that respect would be the statute law requiring fire escapes to be placed on certain structures in order to avert a possibly remote catastrophe. Such laws were held to be a valid exercise of the police power of the state in *Fidelity Insurance Trust & Safe Dep. Co. v. Fridenberg*, 175 Pa. 500, 507, 508, 34 Atl. 848, 52 Am. St. Rep. 851.

[2, 3] "The enactment here in question does not authorize a taking of property for public use, is not an exercise of the right of eminent domain, and therefore is not unconstitutional, because of failure to provide for compensation; but it regulates the use of tangible property—the coal in the pillar—by requiring the owner to use it (negatively by leaving it unmined) as not to injure the rights of others, or, in another aspect of the case, does not affect tangible property at all, but destroys an intangible property right (that of mining out the pillar coal) in the interest of the public safety. In either case it is, in our opinion, an exercise of the police power, justified by the circumstances, and not violative of either the state or the federal Constitution.

"By agreement of counsel this case is to be determined as upon final hearing, the depositions taken for use on motion to continue the preliminary injunction to be considered as evidence produced in open court on such hearing. In pursuance of this agreement of counsel, and upon admissions contained in the answer, and from the testimony, we make the following findings of fact:

"(1) The plaintiff is the mine inspector of the ninth subdistrict of the first anthracite coal inspection district of Pennsylvania; and the Plymouth Coal Company, defendant, and the Lehigh & Wilkes-Barre Coal Company are mining corporations of this commonwealth, each employing more than ten persons.

"(2) The said two coal companies are the owners, proprietors, lessees, and occupiers of adjoining coal properties in the borough of Plymouth, Luzerne county, Pa., and within the limits of the said subdistrict of the first anthracite coal inspection district.

"(3) The plaintiff as mine inspector gave to the president of the defendant company a written notice dated August 31, 1900, stating that a meeting would be held at the former's office on September 2, 1900, for the purpose of deciding upon the width of a boundary pillar of coal to be left between the coal properties of the said two companies, pursuant to the provisions of section 10 of article 3 of

the anthracite mining act of 1891, a copy of said section being embodied in the notice, and requested that the defendant's engineer be instructed to attend such meeting to consult with the engineer of the Lehigh & Wilkes-Barre Coal Company for the purpose aforesaid.

"(4) The defendant company declined to permit its engineer to attend such meeting, and refuses to leave any unmined coal as part of a boundary pillar between its coal property and that of the Lehigh & Wilkes-Barre Coal Company, claiming a legal right to mine to the boundary line of its property, and denying the constitutionality of section 10, art. 3, of the said mining act.

"(5) No determination of the width of or necessity for such boundary pillar had been made, as required by the act, up to the time of filing the bill in this case, nor has it been made since, so far as the court is advised.

"Conclusions of Law.

"(1) Section 10 of article 3 of the anthracite mining act of June 2, 1891 (P. L. 183), is a valid exercise of the police power of the state, and is not in conflict with the Constitution of the United States nor with the Constitution of Pennsylvania.

"(2) That enactment requires a boundary pillar of coal to be left unmined between the mine workings of the defendant company and the Lehigh & Wilkes-Barre Coal Company of such width as the proper mine inspector and the engineers of the said two companies shall deem necessary to the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water, unless, after due investigation and consultation, they shall decide that no such barrier pillar is required to insure the safety of such employes upon the happening of the contingency stated in the act. The same act requires the making by said engineers and inspector of duplicate surveys of the face of the workings along such pillar, and the filing of a copy of the same with the owners of the adjoining properties and with the mine inspector.

"(3) The preliminary injunction heretofore granted should be continued until the width of such a boundary pillar, or the absence of necessity for one, shall have been determined by said inspector and engineers and surveys made and filed as required by the act, or until they shall duly decide that no such pillar is needed for the safety of the employes of either mine.

"(4) The costs of this proceeding should be paid by the defendant."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHIZSKER, JJ.

Wm. C. Price, F. W. Wheaton, and John T. Lenahan, for appellant. Evan C. Jones and Thomas H. Atherton, for the Commonwealth.

PER CURIAM. The decree appealed from is affirmed on the opinion of Judge Ferris.

COMMONWEALTH ex rel. SHELP et al. v. VANDEGRIFT et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. CORPORATIONS (§ 283*)—STOCKHOLDERS—MEETINGS—ELECTION OF OFFICERS.

Eighteen hundred and eighty-seven shares in a corporation were represented at an annual meeting of stockholders out of a total of 2,081 outstanding. After the election of a chairman at the meeting by a viva voce vote, some of the stockholders demanded that a stock vote be taken for the chairman, and, on the refusal of this demand, they withdrew for the purpose of breaking the quorum. After their withdrawal, 992 shares, all of those remaining, were voted for officers elected for the ensuing year. *Held*, that the election was valid, and that the withdrawing members had no right to maintain quo warranto proceedings to oust the officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 283.*]

2. CORPORATIONS (§ 195*)—STOCKHOLDERS—MEETINGS—QUORUM.

A corporate by-law providing that the holders of a majority of the stock shall constitute a quorum for the transaction of business at any regular or special meeting, and, if no quorum be present at any meeting so called, a less number may meet and adjourn from time to time till a quorum be present, does not authorize a portion of the stockholders to withdraw from a meeting in order to break a quorum.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 744; Dec. Dig. § 195.*]

3. CORPORATIONS (§ 57*)—BY-LAWS—EFFECT.

The by-laws of a corporation when duly enacted are written into the charter and are a part of the fundamental law of the corporation, binding, not only on the corporators and the corporation, but on those dealing with it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 157-159; Dec. Dig. § 57.*]

4. CORPORATIONS (§ 195*)—STOCKHOLDERS—MEETINGS.

Stockholders attending an annual meeting, and then without cause voluntarily withdrawing, are in no better position than those who voluntarily absent themselves in the first instance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 744; Dec. Dig. § 195.*]

5. CORPORATIONS (§ 283*)—OFFICERS—ELECTION—TIME FOR HOLDING ELECTIONS.

The duty of holding an annual election of officers of a corporation being imposed by statute, and the time and place for holding it being fixed by the by-laws, the duty as to the time and place of holding the election is quite as imperative as the provision relating to the amount of stock necessary to constitute a quorum.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1195-1205, 1207-1235; Dec. Dig. § 283.*]

6. CORPORATIONS (§ 195*)—STOCKHOLDERS—MEETINGS—DEPRIVATION OF RIGHT TO VOTE.

A stockholder not voting cannot get relief from the court if he voluntarily refrain from voting if he had an opportunity, and his claim of right to vote was not excluded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 745, 746; Dec. Dig. § 195.*]

7. CORPORATIONS (§ 195*)—STOCKHOLDERS—MEETINGS—WITHDRAWAL OF STOCKHOLDERS.

Not even the majority of the stockholders of a corporation can capriciously withdraw, af-

ter an annual meeting is legally organized, for the very purpose of breaking a quorum, and obtain relief from the courts on the ground that a quorum was not present when the act complained of was done; the act of a majority of those present at a legally constituted meeting being the act of the corporation, though less than a majority of the total number of the stockholders or shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 744; Dec. Dig. § 195.*]

8. CORPORATIONS (§ 196*)—STOCKHOLDERS—MEETINGS—MODE OF VOTING.

Corporate stockholders may at an annual meeting select a chairman by a viva voce vote, where there is no statute or by-law to the contrary; a stock vote not being necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 745, 746; Dec. Dig. § 196.*]

9. CORPORATIONS (§ 196*)—STOCKHOLDERS' MEETINGS—ELECTION OF CHAIRMAN.

Even if a stock vote were demandable for the election of chairman at an annual stockholders' meeting, a request therefor coming after the organization has been effected is too late.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 745, 746; Dec. Dig. § 196.*]

Appeal from Court of Common Pleas, Philadelphia County.

Quo warranto by the Commonwealth, on the relation of Jerome H. Shelp and others, against Asa W. Vandegrift and others. From a judgment for respondents, relators appeal. *Affirmed*.

Magill, J., found the facts to be as follows:

"This matter is before the court on demurrer by relators to answers filed by respondents to an information for quo warranto. The answers in question are responsive and under oath, and by the demurrers filed the statements contained therein are admitted to be true. Upon the pleadings it appears that an annual meeting of the stockholders of the Philadelphia Veneer & Lumber Company, Incorporated, was held January 20, 1910, at the time and place prescribed by the by-laws, which meeting was attended by 11 stockholders owning 1,887 shares of a total issue of 2,081 shares. Four of the relators, Jerome H. Shelp, S. S. Koller, Stanley S. Shelp, and Charles H. Kunkel, were present at the meeting. Article 10, § 3, of the by-laws of the corporation, provides: 'The holders of a majority of the stock issued shall constitute a quorum for the transaction of business at any regular or special meeting. If no quorum be present at any meeting so called, a less number may meet and adjourn from time to time, until a quorum be present.' A quorum was present at the meeting which was duly organized, and at which Asa W. Vandegrift, one of the respondents, was elected chairman. As shown by the answer, after the election of the chairman, Stanley S. Shelp, one of the relators, requested that a new election for chairman of the meeting be had by stock vote. He was informed by the chairman that his request was too late as the meeting had already elected its chairman,

and thereupon, without appealing from the decision of the chair, or taking any other method of questioning the ruling, said Stanley S. Sheip, Jerome H. Sheip, S. S. Koller, and Charles H. Kunkel, the relators, withdrew from the meeting, having previously notified the chairman that, unless they were permitted to have a new election by stock vote on the question of chairman, they would withdraw for the purpose of making no quorum, and prevent the further transaction of business. After the relators above named had withdrawn from the meeting those remaining proceeded to an election, and respondents were elected to the several offices as set forth in the information and answer, the chairman having first appointed a judge and two tellers to conduct the election, who were duly sworn, etc., at which election, as shown by the answer, 992 votes were cast for each of the candidates, being a majority of the total number of shares represented at the meeting at the time of organization, but less than a majority of the whole number of shares issued. It is evident that the difficulty arose through the efforts of two factions of the stockholders to secure control of the offices of the corporation, and the relators, Jerome H. Sheip, S. S. Koller, Stanley S. Sheip, and Charles H. Kunkel, clearly appear to have withdrawn from the meeting for the sole purpose of preventing an election, and, having done so, they subsequently called a special meeting of the stockholders on February 11, 1910, for the purpose of electing officers, and at an election held on that date by themselves, and acting through proxies for other stockholders, elected themselves as officers of the corporation. This meeting was called by them, or some of them, upon the assumption that they at the time of the call for the special meeting continued to be directors of the corporation by virtue of their election in the previous year, and that they held over as such directors by reason of the alleged fact that the directors elected at the meeting of January 20, 1910, were not duly and properly elected."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Alex. Simpson, Francis Shunk Brown, and Ira Jewell Williams, for appellants. Frederick J. Shoyer and Henry Arronson, for appellees.

ELKIN, J. [1] This is a proceeding by quo warranto to test the right of respondents, or either of them, to hold the respective offices of president, vice president, secretary and treasurer, and director of a certain corporation named in the suggestion for the writ. The controversy grows out of alleged irregularities in holding the annual meeting of stockholders for the purpose of electing a board of directors. If this meeting was regularly organized in the first instance with a quorum present, and subsequently some of

the shareholders for the purpose of breaking the quorum and preventing an election at the time and place fixed by the by-laws, capriciously and without just cause withdrew, the decision of the questions raised by this appeal under the great weight of authority must be adverse to the contentions of appellants.

[2] The by-laws of the corporation in question provide, *inter alia*, as follows: "The holders of a majority of the stock issued shall constitute a quorum for the transaction of business at any regular or special meeting. If no quorum be present at any meeting so called a less number may meet and adjourn from time to time until a quorum be present."

[3] It is argued for appellants that the by-laws of a corporation, when duly enacted, are written into the charter and are a part of the fundamental law of the corporation, binding, not only upon the incorporators and the corporation, but upon those dealing with it. With this proposition we can have no quarrel because it is settled law under the authority of our own cases. *Millward-Cliff Cracker Co.'s Estate*, 161 Pa. 157, 28 Atl. 1072; *Wayne Title & Trust Co. v. Electric Railway Co.*, 191 Pa. 90, 43 Atl. 135; *Worthington v. Electric Railway Co.*, 195 Pa. 211, 45 Atl. 927. It is contended that the legal effect of the by-law under consideration in the present case is to require, not only a majority of the stock issued to be represented when the meeting is organized, but that no business can be transacted if at any time after the organization and during the course of the meeting a sufficient number of shareholders withdraw to reduce the number of shares remaining below the amount necessary to constitute a quorum. In other words, that the plain meaning of the by-law is that no corporate act can be done except at a time when a majority of the stock issued is present. The second provision of the by-law is called to our attention for the purpose of strengthening the argument. If no quorum, be present, a less number may meet and adjourn from time to time until a quorum is secured. This provision of the by-law, it is argued, must be read in the light of the ordinary rules of parliamentary practice, which means that, if at any time the number present becomes less than a quorum, there is no power to do anything except to adjourn until a quorum be present. As correct statements of general principles of law, many of these propositions cannot be gainsaid. The validity of a corporate act is as a general rule tested by the requirements of the by-laws, and, when there is a positive direction to do an act in a particular way or in some specific formal manner, failure to observe the requirements imposed by the by-laws may, and as a rule does, render the act invalid. In the present case several things must be taken into consideration in disposing of the questions raised. In the first place, the by-laws

do not provide how many shares of stock shall be required to be voted in order to make a valid election of members of the board of directors. The by-laws only provide how much stock shall be present at the meeting to constitute a quorum. As an illustration, there were 2,081 shares issued and outstanding in the present case at the date of the annual meeting. To constitute a quorum it was necessary to have at least 1,041 shares present, and, if there had only been that amount of stock represented, 521 shares would have been sufficient to carry the election of each director. The learned court below has found as a fact that 992 shares were voted for each of the respondents. Appellants undertake to show by the figures that this was an erroneous finding. The discrepancy may be explained upon the theory that some shares were voted when the ballot was taken that had not been noted at the convening of the meeting. However, in the view we take of the case, the discrepancy pointed out is immaterial. Whether respondents received 992 or a less number of votes, they received not only a majority of the votes represented by the stock voted, but the entire vote of all the shares participating in the election. When appellants withdrew from the meeting and refused to participate in the election, they forfeited the right to have their stock counted in the election of a board of directors. They must stand or fall on the ground that they had the legal right to withdraw and refuse to participate in the meeting, and when they did so withdraw, thus leaving less than a majority of all the stock issued remaining when the final ballot was taken, the election of the respondents was invalid because a quorum was not then present. This brings us to the pinch of the case.

When the meeting convened, 1,887 shares out of 2,081 were represented in person or by proxy. This was 846 shares more than were required to constitute a quorum. A majority of all the stock issued being represented, it was clearly the duty of those present to organize the meeting and proceed with the election. This was done. The president called the meeting to order and directed the secretary to note those present and the number of shares represented either in person or by proxy. He then stated to the meeting that the first business in order was the nomination and election of a chairman. Two nominations were made, one by the relators and the other by the respondents. A motion to close the nominations was then made and carried. Without objection from any one the meeting proceeded to elect a chairman by a viva voce vote, with the result that Mr. Vandegrift was declared elected. There was no call for a division or a poll of the vote. After the chairman had been thus declared elected, one of the appellants requested that a new election by stock vote be held. The chairman announced that the request came

too late, as the meeting had already been organized. No appeal was taken from the ruling of the chairman, but the stockholder who made the request stated that, if a new election of a chairman by stock vote was not allowed, the faction represented by him would withdraw for the purpose of breaking a quorum and to prevent any further business being transacted. In accordance with the suggestion made, they did withdraw and refused to participate in the election of a board of directors at that meeting. Before withdrawing, they were notified that the election of directors would be by stock vote. After their withdrawal, the meeting having already been organized, those stockholders who remained proceeded in a regular and orderly manner with the election. A judge and two tellers were appointed and duly sworn to perform their duties according to law. Nominations were made in the regular way and a stock vote by ballot taken with the result that 992 shares were returned as having been voted for each of the appellees, who were declared duly elected directors.

The case therefore turns upon the question of the right of the appellants to withdraw from the annual meeting under the circumstances hereinbefore referred to for the purpose of breaking a quorum. Fortunately we are not left in the position of groping our way in the dark for an answer, but have the light of credible authority as our guide. 2 Cook on Corporations (6th Ed.) § 606, among other things, says: "After the meeting is organized, the majority cannot withdraw and organize another meeting. Where a part of the stockholders secede from the meeting and hold another on the pretext of disorder, but in fact by reason of a previously designed plan, the election by the seceders is not legal." 1 Thompson on Corporations (2d Ed.) § 910, states the rule in the following language: "If a meeting is once organized and all parties have participated, no person or faction can then, by refusing to vote or by withdrawing, thereby defeat the organization or render the proceedings invalid, and neither can seceders organize another meeting and hold a valid election. Even a majority cannot withdraw after the meeting is organized and hold a valid election." 1 Savidge on the Formation and Management of Corporations in Pennsylvania, § 725, expresses the view that: "It seems, after a meeting of a corporation is organized, the majority cannot withdraw and organize another meeting unless it be done in good faith to escape disorder." Mr. Justice Mercur in the Appeal of Gowen, 10 Wkly. Notes Cas. 65, speaking for this court, said: "Those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of an election regularly made by those who do attend. Such absentees present no ground for relief from their misfortune or their folly."

[4] Stockholders who attend a meeting,

and then without cause voluntarily withdraw, are in no better position than those who voluntarily absent themselves in the first instance. In *Com. ex rel. Langdon v. Patterson*, 158 Pa. 476, 27 Atl. 998, Mr. Justice Mitchell, in discussing the rights of stockholders to organize a meeting under facts somewhat similar to those in the case at bar, said, *inter alia*: "The call to withdraw was not to all the stockholders, or even to all desiring an orderly and legal election, but to the party of the relator, and was so understood, both by themselves and the others. It was without any justification in law, and there was no sufficient evidence to submit to the jury in that behalf." In the present case there was no justification in law for the withdrawal, and the call was, not to all the stockholders, but to the party of the relators. There was no disorder of any kind, and, as we see it, nothing to be gained by the withdrawal except to break a quorum, and this is not a sufficient cause. Even the majority after the regular and legal organization of the meeting did not have the right to capriciously and without justifiable cause withdraw for the declared purpose of breaking a quorum in order to prevent an election.

[5] In this connection, it is worthy of comment that the duty of holding an annual election is imposed by statute, and the time and place for holding it are fixed by the by-laws. The duty as to the time and place of holding the election is quite as imperative as the provision relating to the amount of stock necessary to constitute a quorum. It was not only the privilege of appellants to participate in the annual election of directors, but it was a duty imposed by law upon them. They should have remained in the meeting to exercise their privileges and perform their duties. When they did not do so, but without sufficient cause withdrew, they are not in position to complain about the acts of those who remained and performed their duties in a regular and lawful manner.

[6] A stockholder, not voting, cannot get relief from the courts if he voluntarily refrain from voting, if he had an opportunity, and his claim of right to vote was not excluded. *State v. Chute*, 34 Minn. 135, 24 N. W. 853. In the case at bar the right of appellants to vote their stock at the election for directors was not denied. They could have remained in the meeting and voted their stock for candidates of their own selection. In the *Argus Printing Co. Case*, 1 N. D. 434, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. Rep. 639, the court, in discussing this question, said: "A minority must have a right to insist, after a meeting is organized, the majority shall not withdraw from it and organize another meeting at which the minority must appear or lose their rights.

Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business."

[7] We have given due consideration to the very able argument of learned counsel for appellants, and have examined with an open mind all of the authorities and decisions relied on to support it, but have not been convinced of the wisdom or necessity of applying the no quorum rule to the facts of the present case. In our opinion the sounder and safer rule, as above indicated, is that even a majority cannot capriciously withdraw after the meeting is legally organized for the very purpose of breaking a quorum, and then ask the courts for relief on the ground that a quorum was not present when the act complained of was done. Where there is a legally constituted meeting, the acts of a majority of those present are the acts of the corporation, though such majority is less than a majority of the total number of stockholders or shares. 6 Am. & Eng. Ency. of Law (2d Ed.) 1004. In the present case there was a legally constituted meeting when the chairman was elected because several hundred shares more than a majority of all the stock issued, as the by-law required, was present before an organization was attempted.

[8] When no provision is made in the by-laws for a chairman, the meeting itself should proceed to select one. It frequently happens that provision is made for the president to preside at the stockholders' meeting, but, when no such provision is made, a chairman may be selected by the stockholders at the organization of the meeting. The chairman so selected need not necessarily be a stockholder, nor is there any particular formality required in his selection. The ordinary parliamentary usages apply to meetings of this character. 1 *Thompson on Corporations* (2d Ed.) § 905. In discussing this question, the Supreme Court of Massachusetts said: "There is nothing in the nature of the office which requires him to be a stockholder, although from convenience the usage is to elect one of the stockholders to perform the duty. But his duties, like those of a clerk, are merely ministerial, and can in no way affect the validity of the doings of the corporation or the rights of those claiming under them." *Stebbins v. Merritt*, 10 Cush. (Mass.) 27. In the absence of a statute or by-law otherwise providing, stockholders may select a chairman to preside at the annual meeting by a viva voce vote. [9] A stock vote is not required to give validity to the meeting. In the present case, even if a stock vote was demandable, the request, coming after the organization had been effected, was too late.

Judgment affirmed.

**NORTH MOUNTAIN WATER SUPPLY CO.
v. TROXELL et al.**

(Supreme Court of Pennsylvania. May 23, 1911.)

INJUNCTION (§ 176*)—SCOPE OF RELIEF—WATER SUPPLY.

Where, at the suit of a water company in which it alleges a great scarcity of water, a preliminary injunction is granted compelling the opening of a dam so that the water of a lake may be released into the stream below to a certain amount, the court cannot in its final decree after the emergency requiring the preliminary injunction had passed direct that it stand in force to give similar relief whenever a similar emergency shall arise, especially where there is no prayer in the bill for such a decree.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 176.*]

Appeal from Court of Common Pleas, Luzerne County.

Bill by the North Mountain Water Supply Company against E. R. Troxell and others for an injunction. From a decree for plaintiff, defendants appeal. Reversed, and injunction dissolved.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

J. B. Woodward and W. S. McLean, for appellants. Paul Bedford, George R. Bedford, and Henry W. Palmer, for appellee.

MESTREZAT, J. We think the learned court erred in entering a final decree that "the (preliminary) injunction should stand in force to give similar relief whenever a similar emergency shall arise." There was no prayer in the bill for such relief, and the emergency, the only ground for issuing the preliminary injunction, having passed, the bill should have been dismissed.

The plaintiff filed the bill on September 19, 1908, averring, *inter alia*, that by reason of the extraordinary, prolonged, and unprecedented drouth, extending over a period of some three months, the streams tributary to Harvey's Lake had practically dried up, and, unless plaintiff company could immediately make use of the waters of Harvey's Lake, substantially equivalent to the outflow when the dam was closed on June 12th, its consumers in and about the borough of Nanticoke would within five days be without water, "and there is no other way by which the lack could be supplied." The bill prayed that, owing to the exigencies of the case, an injunction might issue, commanding the defendants to open, or permit to be opened, the gates of the dam at the outlet of Harvey's Lake to allow the outflow of water from said lake equivalent to 3,000,000 gallons each day, and that the defendants be enjoined from preventing the outflow of that quantity of water from the lake. A preliminary injunction was issued as prayed for. The effect of the injunction, as stated in the opinion of

the learned judge, was "simply to permit the flow from the lake into the creek, of water now held back by the dam, which without the dam would long ago have gone down the creek to be used or wasted." The court further said in its opinion in continuing the preliminary injunction that "we decide the matter at the present stage largely upon the public interest involved, and expressly upon the understanding that the private right to claim damages shall not be prejudiced;" and the decree continuing the injunction directing the release of 3,000,000 gallons of water provided that "the release of water shall be permitted only for such time and to such extent as the present emergency and scarcity of water continues, subject to termination sooner upon application and cause shown at any time." The final decree entered October 6, 1909, was as follows: "That the preliminary injunction was properly granted on September 19, 1908, and continued on September 28, 1909, upon the conditions then prescribed, and in view of the emergency then existing; and while such emergency has now passed away, the injunction will stand in force to give similar relief whenever a similar emergency shall arise, each party to pay just the costs which they have respectively incurred."

The correctness of the decree awarding the preliminary injunction is not now before us, and need not be determined. It was presented for our consideration in *North Mountain Water Supply Company v. Troxell*, 223 Pa. 315, 72 Atl. 621, and, for the reasons stated in the opinion, the decree was affirmed. The merits of the case were not considered. The final decree proper is therefore that "the injunction will stand in force to give similar relief whenever a similar emergency shall arise, each party to pay just the cost which they have respectively incurred." This decree is manifestly erroneous. The prayer of the bill was granted and the decree continuing the injunction provided that "the release of water shall be permitted only for such time and to such extent as the present emergency and scarcity of water continues." The defendants having opened the gates of the dam and the avowed purpose of the injunction having been accomplished by permitting "the flow from the lake into the creek of water now held back by the dam, which without the dam would long ago have gone down the creek to be used or wasted," and the emergency and scarcity of water assigned as the reason for granting the preliminary injunction having passed, it is apparent that the final decree should not have continued the injunction. We did not pass on the merits of the preliminary injunction when the case was here before, and, if "a similar emergency shall arise" hereafter and plaintiff again attempts to procure an injunction for a like purpose, this record should not deprive the defendants of an opportunity to have the

rights of the parties judicially determined. The trial judge concedes that in continuing the preliminary injunction he decided the matter "largely upon the public interest involved, and expressly upon the understanding that the private right to claim damages shall not be prejudiced." It appearing that at the date of the final decree there was no occasion for issuing or continuing the injunction as prayed for in the bill, the decree was erroneous, and therefore in entering the final decree there was no necessity for determining the rights of the parties to the waters of the lake and creek or the right of the defendants to maintain the dam. The decision of those questions may well await an occasion when their judicial ascertainment in an appropriate action is required to determine the issue between the parties.

The decree is reversed and the injunction is dissolved, each party to pay the costs which they respectively incurred in the court below, and the appellee to pay the costs of this appeal.

FELIN et al. v. LOCUST REALTY CO., Inc., et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

MECHANICS' LIENS (§ 103*) — STIPULATION AGAINST LIENS—SUBCONTRACTORS.

A subcontractor is bound by stipulation in contract between the owner and contractor against liens, and is not relieved because the property was conveyed during the construction of the building, and before the contract between himself and the contractor was made, nor because the plans submitted to him showed the name of the new owner, where the contract was indexed in the prothonotary's office in the name of the contractor, as provided by Act June 4, 1901 (P. L. 440) § 18.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. § 103.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles F. Felin and others, trading as Charles F. Felin & Co., against the Locust Realty Company, Incorporated, and others. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHIZISKER, JJ.

Wayne P. Rambo and Ormond Rambo, for appellants. Preston K. Erdman and Charles L. Lockwood, for appellee Locust Realty Co. D. Howard Evans and Henry P. Brown, for appellee Moore & Co.

POTTER, J. In this action, which was a *scire facias* upon mechanic's lien, the only defense set up was the fact that the contractor, Moore & Co., a corporation, by its agreement duly executed and filed in the office of the prothonotary, had stipulated that

no lien should be filed against the contemplated building, either by itself or by any subcontractor. Jonker D. Lit was the original owner of the ground, and it was with him upon August 8, 1907, that Moore & Co. entered into a written contract for the construction of the building. Subsequently the Locust Realty Company was incorporated, and by deed dated October 8, 1907, Lit conveyed the premises on which the building in question was in course of construction, to the Locust Realty Company, and at the same time assigned to the Realty Company his interest in the contract with Moore & Co. The contract between the plaintiffs in this case and Moore & Co. was made January 2, 1908, and the first materials were delivered by them on January 16th. Upon the trial plaintiffs contended that they were not bound by the stipulation against liens in the contract between Lit and Moore & Co., but that there was a later verbal contract between the latter and the Locust Realty Company under which materials were furnished by them. The trial judge held that the plaintiffs were not entitled to recover, and directed a verdict for defendants. He gave no reason for his conclusion and filed no opinion. In *Pennock v. Realty Company*, 224 Pa. 437, 73 Atl. 930, the validity of a mechanic's lien filed by another subcontractor in the same operation as that which is here in question was involved. It was there held that the subcontractor was bound by the stipulation against liens contained in the original contract, and that he was not relieved by the fact that the property had been conveyed to another party during the construction of the building and before the contract with the subcontractor was made. Our Brother Elkin, speaking for the court, there said: "In the case at bar there was no new contract. The building was erected from the beginning to completion under the original contract. The rights and duties of the parties were fixed by that contract. The materials and labor were furnished under that contract. The notice as to the waiver of liens filed of record bound every one who furnished materials or labor under that contract."

In the present case, unless there was evidence of a new contract sufficient to be submitted to the jury, the trial judge was right in giving binding instructions for the defendants. It is not suggested that there was a new express contract; but it is argued that one may be inferred from the circumstances. We can see nothing in the evidence in this case to distinguish it upon its facts from the principle upon which the decision in *Pennock v. Realty Company*, *supra*, was based. It appears from the undisputed evidence that the building was completed in accordance with the terms, and for the price agreed upon, in the original contract with Lit. Counsel for appellants urge that in the plans

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and specifications submitted to them the buildings were described as the property of the Locust Realty Company, and it is suggested that, if the plaintiffs had examined the mechanic's lien docket, they would have found no contract with that company on file or indexed in its name. But in section 18 of the act of June 4, 1901 (P. L. 440), it is provided that "the prothonotary shall enter it (the contract) in the judgment index in the name of the contractor," in order to bind subcontractors. Appellants, as subcontractors, made their contract with Moore & Co., the original contractor, and were bound to search against it. If they had done so, they would have found the contract for the erection of the building upon which they were asked to estimate; and, further, that it contained the stipulation that no liens should be filed against the property.

It becomes unnecessary to consider the question of the constitutionality of the statute, which was raised by counsel for the defendants. From the discussions in the opinions of this court in *Vulcanite Portland Cement Co. v. Allison*, 220 Pa. 382, 69 Atl. 855, and in *Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 74 Atl. 357, it appears, in substance, that the mechanic's lien act of June 4, 1901, in so far as it is not clearly divergent from, and an advance upon, the old law, is valid and must be sustained. It cannot be fairly contended in the present case that the lien under consideration falls under any of the provisions of the statute which change or add to the mechanic's lien law, as it was prior to 1901.

The assignments of error are overruled, and the judgment is affirmed.

HUEY v. CHRIST.

(Supreme Court of Pennsylvania. May 23, 1911.)

PARTNERSHIP (§ 304*)—ACCOUNTING—RIGHTS OF SURVIVING PARTNER.

In accounting between the administrator of the deceased partner and the surviving partner, the latter is entitled to credit for money paid in renewal of insurance policies on properties mortgaged in securing the joint bond of the partners, for payment of taxes, interest on the mortgage, and payments in reduction thereof, and to interest on such advances.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 701, 702; Dec. Dig. § 304.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Arthur T. Huey, administrator of the estate of William H. Huey, against Amos H. Christ. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Andenried, J., filed the following opinion in the court below:

"The plaintiff claims \$19,604.40 of the defendant. It is conceded that the defense set up is good to the extent of \$13,713.28. This last-mentioned amount is made up of \$1,851.78, which it is averred has been paid by the defendant on behalf of the plaintiff in satisfaction of sundry bills enumerated in a schedule annexed to the affidavit of defense, and of \$11,851.60, which constitutes half of the sum paid by the defendant in satisfaction of the debt secured to the Cosmos Building & Loan Association by a mortgage on No. 1209 Market street, Philadelphia. Against the remainder of the plaintiff's demand, viz., \$5,891.12, the defendant sets up by way of defense counterclaims aggregating \$11,521.17, which may be itemized as follows: (1) Interest on half of the amounts advanced by defendant for interest, dues, etc., on the Cosmos Building & Loan Association mortgage secured on No. 1209 Market street, \$4,134.48; (2) half of the amount advanced by the defendant for premiums on fire insurance policies pledged to holders of the mortgages secured on No. 1209 Market street, \$1,934.75; (3) interest on half of the amount advanced by the defendant for said insurance premiums, \$301.89; (4) half of amounts advanced for taxes, interest, and in reduction of the mortgage debt on Cape May lots, \$2,539.12; (5) interest on half of the said advances on Cape May lots, \$513.93; (6) dividends on 12½ shares of the stock of the Philadelphia Rye Whisky Distilling Company collected by plaintiff, \$2,078.

"Without going into a discussion of the general subject of the right of a partner or a tenant in common to insure the property in which he is interested, and demand from his copartner or cotenant reimbursement to the extent of the latter's proportionate part of the outlay, it is sufficient to say that in our opinion the right of the defendant to insure No. 1209 Market street at the common expense of the plaintiff and himself is quite clear. When Mr. Huey died, the property was subject to the payment of two mortgage debts. The bonds which had been given to the mortgagees bound both him and the defendant, and provided that they should keep the property insured in a specified amount for the benefit of the mortgagees. The failure of the surviving obligor to perform this condition would have resulted in a demand for the repayment of the principal of the mortgage debts, and, in default thereof, the foreclosure of the mortgages. Had Mr. Huey lived, there can be no doubt that the defendant might have protected their joint bond by performing its condition, and would have had the right, had he done so, to call on his co-obligor for the return of half of his outlay in the matter. The death of Mr. Huey did not deprive the defendant of that right. Moreover, the agreement made on April 28,

1903, between the various parties interested in No. 1209 Market street, contemplated the continuance of the loans secured thereon by existing mortgages. This could not have been effected except by the renewal from time to time of the fire insurance policies pledged to secure these loans. It was therefore absolutely essential to the carrying out of the purposes of that agreement that the insurance should be kept alive, and we think that by necessary implication the defendant was authorized to do so at the expense of the plaintiff to the extent of one-half of its cost.

"The lots at Cape May, N. J., formed originally part of the assets of the firm of Huey & Christ. They were expressly excluded from the purchase which the defendant made of certain of the assets of that firm, and continued to be copartnership property. It was the right of the defendant, as surviving partner, to manage and dispose of the remaining assets of the firm, and for one-half of his necessary expenditures in preserving the common property pending sale he has a right to reimbursement against the plaintiff, as administrator of his deceased partner. The necessity of the expenditures made by him for the payment of taxes and interest cannot be questioned; nor have we any doubt, under the facts stated by the affidavit of defense, that the payment made by the defendant in reduction of the mortgage indebtedness charged on this property was equally necessary. There is nothing in the fifth clause in the agreement of April 28, 1903, to justify the contention that the defendant may not claim reimbursement for his outlays in this behalf before a sale of the Cape May lots has been effected.

"The only remaining question relates to the defendant's counterclaims for interest on his advances made for the preservation of the partnership properties in the payment of

interest, insurance premiums and mortgage debts. This requires no extended discussion. As pointed out above, the defendant had the right to make these payments. Half of them were for the benefit of the estate of his deceased partner, now represented by the plaintiff. The general rule is that on money advanced for the use of another interest at the lawful rate is payable from the time when the advance is made. A contract to pay interest is in such case implied by the law. *Sims v. Willing*, 8 Serg. & R. 103; *Harris v. Mercur*, 202 Pa. 318, 51 Atl. 971. This rule was not questioned by the Supreme Court in the case of *Guthrie v. Baton*, 227 Pa. 339, 76 Atl. 71, cited by the plaintiff. All that was decided in that case was that under the agreement then under consideration interest could not be included in the computation of the 'original cost' of certain land in which the parties had been dealing. There is nothing in the agreement of April 28, 1903, that excludes from the operation of the general rule above laid down any of the items of outlay on which the defendant claims interest.

"We are of opinion that, with the exception of the sixth, all of the counterclaims above enumerated constitute valid defenses to the plaintiff's claim, and that since their amount exceeds the sum of \$5,891.12, for which judgment is asked, the plaintiff's rules must be discharged."

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Maurice Bower Saul, for appellant. Thos. D. McGlathery and H. Le Grand Ensign, for appellee.

PER CURIAM. The order of the court discharging the rule for judgment is affirmed on the opinion of Judge Audenreid.

FRAZIER v. W. H. H. SLACK & BRO.

(Supreme Court of Vermont. Windsor. Oct. 10, 1911.)

1. TAXATION (§ 204*)—EXEMPTION STATUTES—CONSTRUCTION.

Exemptions from taxation are strictly construed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 322-346; Dec. Dig. § 204.*]

2. STATUTES (§ 245*)—CONSTRUCTION.

A statute classifying property for purposes of taxation, enacted to secure the direct production of state revenue, ought to be liberally construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. § 245.*]

3. TAXATION (§ 231*)—PROPERTY SUBJECT TO GENERAL TAXATION—RAILROAD PROPERTY.

Under P. S. 706, 707, 797, providing for the taxation of property acquired, constructed, or used for railroad purposes, and declaring that real and personal estate used in operating a railroad shall not be set out in the grand list, property leased by an electric railroad company for 99 years, and used exclusively in its business and in the operation of its road, is not subject to general taxation, though the company may under the lease use the property for other than railroad purposes, and though it does not show that it does not intend to put the property to other uses in the future.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

4. TAXATION (§ 231*)—RAILROAD PROPERTY.

Where property leased to an electric railroad company for 99 years is used exclusively in the operation of its road partly within and partly without the state, the method for determining for taxation the value of the property on the basis of its use in the state is that prescribed by P. S. 797, and the fact that the property is used partly within and partly without the state does not make it subject to general taxation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

5. TAXATION (§ 839*)—VALUATION—QUADRENNIAL VALUATION.

Under P. S. 547, 555, 561, directing how the tax list shall be made when an inventory is properly filled out and returned, and providing for doubling an ascertained value when a taxpayer willfully omits to make an inventory, or to answer any interrogatory therein, the right to double the amount of an ascertained value exists only where the failure of a taxpayer to return an inventory or to answer an interrogatory therein is willful, and where the failure is not willful the quadrennial appraisal is properly referred to to determine the valuation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 839.*]

6. TAXATION (§ 353*)—PRESUMPTIONS—PERFORMANCE OF STATUTORY DUTIES.

In the absence of any finding on the subject, the court will presume that listers, adopting the quadrennial valuation in determining the valuation of property for taxation, found that the owner's failure to include the property in his inventory was not willful, so that the right to double the ascertained value, given by P. S. 561, for the willful failure to make an inventory, did not exist.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 353.*]

Exceptions from Windsor County Court: Willard W. Miles, Judge.

Assumpsit by trustee process under the statute for the collection of taxes by William H. Frazier against W. H. H. Slack & Bro. Heard on an agreed statement of facts. Judgment for plaintiff, and both plaintiff and defendants except. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Fred C. Davis and Edward B. Buck, for plaintiff. Herbert H. Blanchard, Herbert G. Tupper, and Edward B. Flinn, for defendants.

MUNSON, J. The plaintiff sues as collector of the town of Springfield to recover taxes assessed against the defendants on the list of 1908, on property leased by the defendants to the Springfield Electric Railway Company for 99 years, which is claimed to have been exempt from general taxation as property belonging to said railway company and acquired and used for railroad business and purposes. P. S. 706, 707, 797. The property in question is set in the list in two parcels, designated as "power house, lot and building," and "house lot and building." The defendants concede that the dwelling house is taxable, if properly listed. It is agreed that the property described as power house, lot and building has been used "for developing and furnishing power, light and heat by the Springfield Electric Railway Company in operating its railroad, and in and about its railroad business, and for no other purpose."

[1, 2] The plaintiff does not question but that this is property which "belongs" to the railway company within the meaning of the statute. His claim is that the words "used for railroad business or purposes" ought not to be construed to include it. He likens the water power and its accessories to the wood lots or coal mines which furnish the fuel which produces the steam that affords the motive power of a steam railway, and supports his claim by a reference to Vermont Central Railroad Co. v. Burlington, 28 Vt. 193, where the court distinguished between land which the company was authorized to take as essential to the exercise of its franchise and land purchased for convenience or profit, and held that the latter was taxable. It is not necessary to inquire as to the justness of the comparison drawn by the plaintiff. In the case cited there was a charter exemption from all taxation, and it is well settled that exemptions from taxation are to be strictly construed. In re Hickok's Estate, 78 Vt. 259, 62 Atl. 724; Force v. Delta, etc., Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590. Here there is no exemption from taxation, but a classification for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purposes of taxation. A classification made to secure the direct production of a state revenue is presumed to be advantageous to the state, and the same reason which is held to require a strict construction in one case would suggest a liberal construction in the other.

[3] The lease to the railroad company authorizes the use of the power for other than railroad purposes, and it is claimed that the defense fails because it does not appear but that the company intends to put it to other uses in the future. This claim apparently results from the plaintiff's theory that the property subjected to the special tax is only such as might have been taken under the right of eminent domain. But the law of eminent domain is not the criterion in matters of taxation. *Stiles v. Newport*, 76 Vt. 154, 56 Atl. 662. It was within the power of the Legislature to withdraw this property from general taxation, whether acquired by condemnation or purchase, and even if incapable of acquirement by condemnation. It has in terms withdrawn "all property acquired, constructed or used for railroad business or purposes." It is not necessary for the defendants to negative an intention of the railroad company to use the property at some future time for the other purposes mentioned in its lease. It was in fact used exclusively in the operation and business of the road at the time of the appraisal by the state officials, and this is sufficient. See *Deerfield River Co. v. Wilmington, etc., Co.*, 83 Vt. 548, 77 Atl. 862. As to the objection that the entire property is withdrawn from general taxation, when for aught that appears but a trifling part of it may be in use, it is enough to say that the Legislature has not made the complete utilization of the property for railroad purposes the test of the classification.

[4] The railroad served by this power is partly within the state and partly without; and in view of this fact the plaintiff seeks to bring the case within the rule, given in *Swanton Village v. Highgate*, 81 Vt. 152, 69 Atl. 687, 16 L. R. A. (N. S.) 837, that when property is put to a mixed use, part of which affords a basis of taxation and part not, and there is no way of separating the parts, the whole is taxable. But the cases are dissimilar in every feature, only one of which need be noticed. The statute imposing this special tax expressly provides a method for determining the value of the property upon the basis of its use in this state.

The statement presenting the case says it is agreed that all the proceedings in making up the grand list were regular, except that the defendants and the railway company claim that the action of the town officials in appraising and setting this property in the list was in violation of P. S. 797. This is the

section which provides that the property of corporations which are subject to this special tax shall not be set in the grand list nor stated in the inventories returned to the listers. But the agreed statement shows that, although this property was not returned in the defendant's inventory, its valuation was determined, not by doubling its real value, but by reference to the quadrennial appraisal. Counsel argue this matter without raising any question as to the construction of the agreed statement, and we treat the point regarding the method of determining the valuation as before us.

[5, 6] The statute directs how the list shall be made when an inventory is properly filled out and returned. P. S. 547, 555. It provides for doubling an ascertained value when a person willfully omits to make, swear to, and deliver an inventory, or to answer any interrogatory therein. P. S. 561. It does not specifically direct what shall be done when no inventory is returned, or an interrogatory is left unanswered, and the listers are satisfied that the failure to return or to answer was not willful. But inasmuch as the statute gives no right to double unless the failure to return or to answer is willful, it is clear that cases where the failure is not willful are to be treated as within the first class; for, unless this is done, there will be no taxation of the property, and an intention to reach this result is certainly not to be presumed. In the absence of any finding on the subject, it is to be presumed that the listers were mindful of their duty, and did not adopt the quadrennial valuation without finding that the failure to include this property in the proper answer was not willful.

Judgment affirmed.

STOKES v. MASON.

(Supreme Court of Vermont. Franklin. Oct. 10, 1911.)

BREACH OF MARRIAGE PROMISE (§ 28*)—DAMAGES—AGGRAVATION.

A woman, suing for breach of promise of marriage, may recover damages for her seduction by means of the promise.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. §§ 40-43; Dec. Dig. § 28.*]

Exceptions from Franklin County Court; Willard W. Miles, Judge.

Action by Minnie M. Stokes against Chandler L. Mason for breach of promise to marry. Demurrer to amended declaration overruled, and declaration adjudged sufficient, and defendant brings exceptions. Affirmed, and cause remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Hogan & Hogan, Emmet McFeeters, and M. H. Alexander, for plaintiff. C. G. Austin & Sons, for defendant.

MUNSON, J. This case presents the single question whether a woman who has been seduced by means of a promise of marriage can recover, in a suit for breach of the promise, damages for the seduction by way of aggravation. The question is new in this state, but has been passed upon frequently in other jurisdictions. It is generally held that such a recovery may be had. Three or four states hold the contrary. *Anderson v. Kirby*, 125 Ga. 62, 54 S. E. 197, 114 Am. St. Rep. 185, 5 Am. & Eng. Ann. Cas. 103, and note; *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63. The arguments turn largely upon the ancient and settled rule of the common law that a woman cannot recover damages for her seduction, because she is a consenting party to the wrongful act. It is said, on the one hand, that to permit her to show the seduction in aggravation of the damages sustained from the breach of the promise is to permit her to recover indirectly what the law has emphatically and consistently forbidden her to recover. It is said, on the other hand, that she cannot recover the full damage resulting from the breach of the promise unless permitted to show all the circumstances contributing to the distress of mind which is an acknowledged element of her damage. We do not deem it necessary to rehearse in detail the arguments which have been advanced on this question. They will be found fully presented in the Rhode Island case cited above. In that case nothing appeared, except that there was a promise of marriage and that subsequently there was sexual intercourse. The declaration in this case alleges that the intercourse was induced by the promise.

It seems clear that the plaintiff in a suit for a breach of promise of marriage, who has been seduced by means of the promise, does not recover the full damage caused by the breach unless permitted to show the fact of seduction. Does the rule which prevents her from maintaining a suit for the seduction prevent her from recovering this element of damage when suing for the breach of promise? It is true that the nature of the damage would be the same in both cases, and that if a recovery of it is allowed in an action for breach of promise the law will be permitting in one case what it denies in the other. But the relations of the parties and the inducement to the intercourse are not entirely the same when there is a promise of marriage as in other cases; and the difference may have a bearing on the right of recovery. The ground on which the law denies a recovery for the seduction is that the parties are equally in fault. It

probably cannot be said in strictness that the relative situation of the parties in this respect is changed by the woman's reliance on a promise of marriage; for she is nevertheless a responsible and consenting party to an immoral act. But, as bearing upon the right to a complete remedy for the broken promise, it may properly be said that the quality of her assent is modified by the promise. As a suitor seeking redress for a breach of promise of marriage, she is not a party to the wrong complained of, nor in any way disentitled to full compensatory damages from her promisor. He has obtained marital privileges on the faith of a promise which, if unfulfilled, operates as a fraud; and the fact that the law does not permit a remedy for the seduction is no reason why the law should deny her full compensation for the breach of promise, on his plea that she was equally responsible for the sexual intercourse. The question may not be entirely free from technical difficulties, but there is an element of justice in this solution of it that cannot be gainsaid.

Judgment affirmed, and cause remanded.

BOARD OF EDUCATION OF BOROUGH OF FLEMINGTON v. STATE BOARD OF EDUCATION et al.

(Supreme Court of New Jersey. June 6, 1911.)

(Syllabus by the Court.)

1. CERTIORARI (§ 4*)—RIGHT TO REVIEW—EXISTENCE OF OTHER REMEDY.

The court will not review by certiorari the action of a local board of education under the school law until redress has first been sought in the special tribunals provided by the act.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—CONTRACTS—ORGANIZATION OF NEW DISTRICT.

The board of education of a township employed a teacher to teach in a certain named school "under the control of said board of education," and he accepted the employment, and agreed to perform his duty thereunder, and to observe and enforce the rules prescribed for the government of the school by the board of education. Subsequently the portion of the township in which the school was situated became by law a separate school district. *Held*, that the new school district was not bound by the contract.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 71-80; Dec. Dig. § 41.*]

3. MUNICIPAL CORPORATIONS (§ 36*)—DIVISION—ADJUSTMENT OF PRE-EXISTING LIABILITIES.

Where the Legislature creates a new municipal corporation, embracing part of the territory of an existing municipal corporation, it may impose on the former the obligation of existing contracts of the latter; but in the absence of legislation to that effect, the old corporation remains liable for pre-existing obligations.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 105-111; Dec. Dig. § 36.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ORGANIZATION OF NEW DISTRICT—EXISTING CONTRACTS.

Section 34 of the school law (P. L. 1903 [2d Sp. Sess.] p. 15) does not impose upon a new school district erected out of a portion of the territory of an existing school district the obligation of a contract with a teacher.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 71-80; Dec. Dig. § 41.*]

5. ASSIGNMENTS (§ 19*)—CONTRACT ASSIGNABLE—EMPLOYMENT.

It is not consistent with the general principles of our law to hold that a contract for personal services is assignable, so that the assignee may command the labor of one who has never agreed to serve him.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 28-31; Dec. Dig. § 19.*]

6. CONSTITUTIONAL LAW (§ 120*)—OBLIGATION OF CONTRACT—CONTRACT OF MUNICIPALITY.

The creation of a new municipal corporation out of a portion of the territory of one already existing does not impair the obligation of existing contracts. The old municipality remains liable notwithstanding its dismemberment.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 279-285, 292; Dec. Dig. § 120.*]

7. MUNICIPAL CORPORATIONS (§ 27*)—DIVISION—POWERS OF LEGISLATURE.

The Legislature possessed the power to divide counties and towns at its pleasure, and to apportion the common property and the common burdens in such manner as to it may seem reasonable and equitable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 64; Dec. Dig. § 27.*]

Certiorari, on the application of the Board of Education of the Borough of Flemington, to the State Board of Education and others. Judgment of the State Board of Education set aside.

Argued February term, 1911, before SWAYZE, BERGEN, and MINTURN, JJ.

George H. Large, for prosecutor. Dungan & Reger, for Board of Education of Raritan Tp. William C. Gebhardt, for Glazer.

SWAYZE, J. On April 7, 1910, the board of education of the township of Raritan and Marcus L. Glazer entered into a written contract, by which the board employed Glazer "to teach in the Flemington public school No. 1, under the control of said board of Education, for the term of one year from July 1, 1910," and Glazer accepted the employment, and undertook to faithfully perform his duty thereunder, and to observe and enforce the rules prescribed for the government of the school by the board of education. The contract was made in pursuance of a resolution of the board of education adopted on April 4th. At that time a bill was pending in the Legislature and about to pass, which became a law April 7th, by which a portion of the township of Raritan was incorporated as the borough of Flemington, subject to the acceptance of the act by a vote of

a majority of the legal voters of the territory to be included within the borough. The act was accepted at a special election on April 26th, and the certificate of the result of the election filed according to law on May 2d. By this action the borough of Flemington became a separate school district, under section 32 of the school law. Immediately thereafter, on May 5th, the board of education of Flemington submitted to the state superintendent of public instruction the question of its liability under the contract made with Glazer by Raritan. The state superintendent held that the contract was not binding upon Flemington. His decision was reversed by the state board of education. This action is now before us for review.

[1] We entertain no doubt of our power to review the action of the state board. What was said by the court in *Draper v. Commissioners of Public Instruction*, 66 N. J. Law, 54, 48 Atl. 556, was based upon the fact that the plaintiff in that case had accepted an appointment as a teacher under the school law, and was bound by all of its provisions, and had therefore barred himself from having the propriety of his dismissal by the local school board reviewed in any tribunal except those specially created by the Legislature for the purpose. That this case did not decide that the Supreme Court was deprived of its constitutional function to review the action of inferior tribunals by certiorari is sufficiently indicated by what was subsequently said in *Stockton v. Board of Education of Burlington*, 72 N. J. Law, 80, 59 Atl. 1061. The only effect of the decision in the *Draper Case* was to hold that the court would not review the action of the local board of education until redress had first been sought in the special tribunals provided by the school law.

[2] It is important in considering the merits of the case to observe the exact language of the contract, and to interpret it in view of the situation that existed when it was made. At that time the board of education of Raritan must have known that the creation of the new borough and the consequent severance of the school district under its charge was probable, if not imminent. Unless we are to attribute to them an intent to impose an onerous obligation upon the school district of Flemington by hasty action in anticipation of the change, we must assume that they intended to safeguard the rights of the new school district by the terms of the contract. This they have done. The contract is not a general contract by which Glazer is employed to teach in the Flemington public school No. 1. It is expressly limited by the addition of the words, "under the control of said board of education." Glazer on his part did not undertake generally to perform his duty as a teacher in Flemington public school No. 1, but undertook to perform his duty un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

der rules prescribed by the board of education, which must have meant the Raritan board of education, since the Flemington board of education was not then in existence. The contract was, as it ought to have been, a contract where the personal element was considered, and Glazer could not be held under such a contract to obey the orders of another corporation. The words "under the control of said board of education" may have either one of two meanings attributed to them. They may mean, as seems more natural, that Glazer was to be under the control of the said board of education—that is, the Raritan board—and this would harmonize the contract of the board for the personal services of Glazer with Glazer's contract to obey its orders. It may, however, be that the words, "under the control of said board of education," should be construed as descriptive of the school, and in that view the contract would be one to teach in the Flemington public school while it answered that description. Whichever view is taken, the result is that Glazer's contract ended when the condition upon which it depended ceased. In view of the fact that at the time this contract was made Glazer came within the description of persons protected by the so-called tenure of office act (P. L. 1909, p. 398), and became entitled under the provision of the pension act of 1907 (P. L. 1907, p. 286) to apply for a pension after a few years further service, it was a wise precaution on the part of the board of education of Raritan to limit his contract, especially in view of the obligation it imposed upon the Raritan board on the eve of the dismemberment of that school district.

[3] This consideration is in our judgment enough to dispose of the case. Counsel have, however, argued the matter upon broader grounds, and the case is of sufficient public importance to justify an expression of opinion in the more general aspect. The proposition of the defendants is that a contract made between one public corporation and an individual binds another public corporation subsequently created, embracing a part of the same territory. The right of the Legislature to impose such an obligation cannot be questioned. *Rader v. Southeasterly Road District*, 36 N. J. Law, 273; *Bloomfield v. Glen Ridge*, 54 N. J. Eq. 276, 33 Atl. 925; *Id.*, 55 N. J. Eq. 505, 37 Atl. 63; *McCully v. Board of Education*, 63 N. J. Law, 18, 42 Atl. 776. These cases are authority for the other proposition that, in the absence of legislation to the contrary, the old corporation remains liable for pre-existing obligations. In cases like *Scaine v. Belleville*, 39 N. J. Law, 526, and *Sproul v. Smith*, 40 N. J. Law, 314, the obligation of the new corporation was a necessary inference from the fact that the Legislature destroyed the old corporation, but was without power to impair the obligation of its outstanding contracts. The reason of the cases last cited is not applicable, how-

ever, to a case like the present, where only a portion of the old corporation is taken away from the new, and the old corporation remains as a substantial legal entity. Such was the case of *McCully v. Board of Education*, 63 N. J. Law, 18, 42 Atl. 776, in which the liability of the old board of education still remained and was enforced by suit and judgment at law. In that case the court suggested that it might be possible that under affirmative words in the statute imposing an obligation upon the new board the creditor might maintain an action against it, but that, in the absence of negative words showing clearly a purpose to take away his right and remedy against the old board, that remedy remains. [4] The present case differs from the *McCully Case*, in that there are no affirmative words in the statute imposing an obligation upon the new district on a contract with a teacher. The only section of the school law that is in any way applicable is section 34. It enacts that in any new school district the board of education in its corporate capacity shall become vested with the title to all school property, real and personal, in such district, and if, for the erection, repair, or purchase of any such property, there shall be an indebtedness for which the board of education of the school district to which said property originally belonged shall be liable, the said indebtedness shall be assumed by and become the obligation of the board of education of the school district which shall have become vested with the title to such property. The Legislature was here undertaking to define the obligation of the new school district, and limited it to indebtedness for the erection, repair, or purchase of property, the title to which became vested in the new school district. Counsel for the defendant argued that the contract with Glazer was personal property, which passed to the Flemington board of education.

[5] It is not consistent with the general principles of our law to hold that a contract for personal services is assignable so that the assignee may command the labor of one who has never agreed to serve him. The assignability of another man's labor was permitted in some parts of the country prior to the adoption of the thirteenth amendment to the federal Constitution. This former right conflicts with the views of this subject that have prevailed for nearly 50 years, and with the decision of our Court of Errors and Appeals in the recent case of *Schlessinger v. Forest Products Co.*, 78 N. J. Law, 637, 76 Atl. 1024, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627. If this legal difficulty, however, in the defendant's argument could be overcome, the other language of the section makes it certain that the school property, real and personal, in such district cannot possibly refer to contracts with teachers. It would require some strain of language to hold that such contract had a local situs in the district, but it is quite impossible to hold

that such contracts create indebtedness for erection, repair, or purchase. Those words can refer only to tangible property—real estate or chattels.

[8] It is argued that, unless Flemington is to be held upon this contract, the act of 1910, creating the borough impaired the obligation of the contract with Glazer. This view seems to have troubled the state superintendent, and he escaped the difficulty by holding that the borough was created by the people themselves, and not by the Legislature. This answer is hardly satisfactory. The real answer is that the effect of the creation of the borough was to leave the contract between Glazer and the Raritan board in full force and unimpaired. The obligation of neither party was affected. Raritan had the same right as before to Glazer's services, and Glazer had the same right as before to claim compensation from Raritan. It may have been this liability that induced the Raritan board to limit the contract as we have already said. It is true that Glazer has lost such security for the performance of his contract as might be found in the liability of the inhabitants of Flemington to contribute to his pay. It does not necessarily follow that a claim against Raritan would be less easily collectible than before. It might well happen that the proportion of the debts of the old corporation that would fall upon Flemington under the provisions of section 34 would be large in proportion to the rateables, a result that would be very probable where a new and expensive schoolhouse had recently been built within the territory of the new board out of the proceeds of bonds, for which, under section 34, the new board would be liable. [7] There is another answer to this constitutional objection. The Supreme Court of the United States is the final authority, and it is there settled that the Legislature of the state possesses the power to divide counties and towns at its pleasure, and to apportion the common property and the common burdens in such manner as to it may seem reasonable and equitable. *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552. This rule has quite recently been applied to legislation changing the boundaries of school districts (*Kies v. Lowrey*, 199 U. S. 233, 26 Sup. Ct. 27, 50 L. Ed. 167), and is approved with abundant citation of authorities in the still more recent case of *Hunter v. Pittsburg*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151. Mr. Justice Moody collected the authorities, and they appear on page 178 of 207 U. S., on page 46 of 28 Sup. Ct., 52 L. Ed. 151. It has the approval also of our Court of Errors and Appeals. *Bloomfield v. Glen Ridge*, 54 N. J. Eq. 276, 33 Atl. 925; *Id.*, 55 N. J. Eq. 505, 37 Atl. 63. The severance of the school district did not impair the obligation of Glazer's contract.

For these reasons, the judgment of the state board of education is set aside, with costs.

FLAHERTY v. LIBBY.

(Supreme Judicial Court of Maine. Oct. 5, 1911.)

1. CONTRACTS (§ 117*)—RESTRAINT OF TRADE—VALIDITY.

An agreement by a seller of a business not to re-engage in a similar business in the same city for five years, if made on a sufficient consideration, is enforceable.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

2. INJUNCTION (§ 61*)—CONTRACTS IN RESTRAINT OF TRADE.

The seller of a trucking business, under an incidental agreement not to re-engage in any similar business in the city or vicinity for five years, will be enjoined from violating the agreement directly, or as agent or employé of a competitor.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 120-123; Dec. Dig. § 61.*]

Report from Supreme Judicial Court, Cumberland County.

Bill by Patrick J. Flaherty against Charles E. Libby. On report. Decree for plaintiff.

Bill in equity brought by the plaintiff, praying that the defendant be enjoined from engaging, either directly or indirectly, in the trucking business in the city of Portland for five years. The defendant had previously sold his trucking business in said city to the plaintiff, and had agreed in writing that he would not engage in "any similar business in Portland, or vicinity," for the term of five years from the date of the agreement. An agreed statement of facts was filed, and the cause reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Connellan & Connellan, for plaintiff. Percy M. Andrews, for defendant.

HALEY, J. This is a bill in equity, reported to this court upon an agreed statement of facts.

On the 1st day of August, 1910, and for several years prior thereto, the defendant, Charles E. Libby, was the owner of a trucking business in the city of Portland, and on that day sold, transferred, and delivered to the plaintiff said business; the bill of sale being in the ordinary form, with a full description of the property sold, and containing the following agreement:

"I also, in consideration of above, and other considerations named in the mortgage which is a part of this transaction, agree not to engage in any similar business in Portland, or vicinity, for the term of five years from the day of the date hereof."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first week in May, 1911, the defendant entered into the employment of one Joseph F. Stephenson, who was engaged in the trucking business in Portland, being a business similar to that sold by the defendant to the plaintiff. The defendant was employed as a lumber, assisting teamsters of Stephenson in loading and unloading the teams engaged in the trucking business. He had been so employed for about two weeks, when the plaintiff brought this bill in equity, asking that he be "enjoined and restrained, during the pendency of the suit and during the remainder of the term of five years yet to elapse, as specified in said agreement, from carrying on, either alone or jointly with or as agent or servant of any person or persons, or agent, director, or servant of any other company, or otherwise, directly or indirectly, to assist in carrying on any business of a similar nature to the business transferred by him to the plaintiff at said Portland."

[1] It is customary and oftentimes necessary that a person purchasing the business of another, with the good will that should follow the transaction, enters into an agreement with the seller, whereby the seller is restricted from engaging in a similar business within specified districts. If these agreements are not made, the seller, if he sees fit, can immediately begin business upon his own account, or in the employment of a rival of the purchaser, and completely destroy the good will which he has sold, and for which he has received a valuable consideration. When an agreement of this kind is made for a sufficient consideration (which is not questioned in this case), the parties are bound by it, and cannot do indirectly what they have no right to do directly. As said by this court in *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167, which was a bill in equity asking for an injunction restraining the defendant from remaining in the employment of his son as a photographer, he having previously sold out his photograph business to the plaintiff, and agreed to do no more of that business in the town: "The spirit of the agreement requires that he (defendant) should not compete in the business with the plaintiff, either directly in his own name or indirectly as clerk or agent of some one else." And in the case of *Whitney v. Slayton*, 40 Me. 224, the defendant had sold his business of manufacturing iron castings, and given a bond not to engage in the iron casting business within 60 miles of the place where the business was located, and he afterwards became a stockholder in a corporation engaged in the manufacture of iron castings in the same place. The court held that by becoming a stockholder in the corporation he had violated the conditions of his bond, as he also had by being in the employment of the corporation.

[2] In this case the defendant is employed

as a servant of a business rival of the plaintiff, and by being in the employment of a rival undoubtedly may influence, to a greater or less extent, some of his former customers, who should now be the customers of the plaintiff, to employ the rival of the plaintiff. It is but just that the parties to an agreement of this kind, entered into for a valuable consideration, should not only live up to the letter of the agreement, but also to its spirit. It is so easy for one indirectly, by word or conduct, to utterly destroy the good will of a business which he has sold, and which another in good faith has purchased, adequate damages for which, owing to the rules of law governing the assessment of damages, cannot be awarded, that equity carefully scrutinizes the conduct of the seller, and if, directly or indirectly, he so conducts himself that his agreement not to engage in the business is violated, promptly restrains, with its writ of injunction, further acts that tend to take from the purchaser the rights that he acquired by purchase from the seller. Good faith upon the part of the defendant required that he should not, by word or conduct, directly or indirectly, obtain business for competitors of the plaintiff within the territory named in the agreement, or, directly or indirectly, give the public within that territory to understand that he was still engaged, for himself or in the employment of another, in the same business he had agreed not to engage in for the period mentioned in the agreement. This the defendant has not done, but, according to the agreed statement, he has directly violated, and, at the time this bill was filed, by his conduct and employment, was violating, both the letter and the spirit of his agreement. Equity does not sanction such conduct. The defendant should, neither directly nor indirectly, violate his agreement.

Bill sustained, with cost. Injunction to issue as prayed for.

ANDERSON v. EASTERN COUPLING CO.

(Supreme Judicial Court of Maine. Oct. 5, 1911.)

1. PLEADING (§ 214*)—ADMISSION BY DEMUR- RER.

A demurrer admits all facts well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. PLEADING (§ 205*)—GENERAL DEMURRER— SCOPE.

A general demurrer reaches only matters of substance, and waives all matters of form.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-510; Dec. Dig. § 205.*]

3. PLEADING (§ 204*)—GENERAL DEMURRER— SCOPE.

If a declaration contains one good count, or one good assignment of a breach of an agree-

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ment declared upon, a general demurrer must be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

4. PLEADING (§ 205*)—GENERAL DEMURRER—OBJECTION FOR DUPLICITY.

Objection to a declaration for duplicity can be taken advantage of by special demurrer only.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 508; Dec. Dig. § 205.*]

5. PATENTS (§ 219*)—ROYALTIES—ACTION—PLEADING—SUFFICIENCY.

A declaration, setting out an agreement by defendant to pay, on October 1, 1909, patent royalties on all goods manufactured by or for it during the preceding 90 days, and alleging that plaintiff has performed his undertakings, that defendant has manufactured large quantities of goods mentioned in the agreement, and thereby became liable to plaintiff for the payment of royalties as fixed by the agreement, that defendant, though requested, has neglected and refused to pay, the date of the writ being long after October 1st, sufficiently alleges performance by plaintiff and breach by defendant, as against general demurrer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 219.*]

Exceptions from Supreme Judicial Court, Knox County.

Action by Gustaf A. Anderson against the Eastern Coupling Company. From an order overruling a demurrer to the declaration, defendant brings exceptions. Exceptions overruled, and judgment for plaintiff.

Assumpsit on a written contract to pay royalties for the right to manufacture and sell invented articles under the plaintiff's patent. The defendant filed a general demurrer to the declaration. The demurrer was overruled, and the defendant excepted. It was stipulated in the bill of exceptions that if the exceptions were overruled judgment should be entered for the plaintiff for \$500.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, BIRD, and HALEY, JJ.

M. T. Crawford and Reuel Robinson, for plaintiff. J. H. Montgomery, for defendant.

HALEY, J. This is an action of assumpsit on a contract to pay royalties for the right to manufacture and sell invented articles under plaintiff's patent. The contract between the parties is in writing, and is set out in full in the declaration. The defendant filed a general demurrer to the declaration.

The defendant contends that the allegation in the declaration varies from the terms of the contract as set forth in the declaration:

(1) Because the agreement purports to have been made and entered into on the 1st day of July, 1909, wherein the defendant agreed to pay the plaintiff the royalties for which this action is brought on all hose and nozzle couplings, and on all nozzles manufactured by it or for it, or manufactured by its or for its assigns or legal representatives, during the preceding 90 days; the first pay-

ment of royalties to be made on October 1st. And the declaration avers that the royalties were to be paid at the expiration of 90 days after the date of said agreement, which would be on September 28th, or two days before October 1st.

(2) That the declaration is not definite as to the damages claimed, or cause of damages.

(3) That the declaration also contained two counts in one, and is therefore bad for duplicity.

[1-3] The demurrer admits all facts well pleaded. The demurrer being general, it reaches only matters of substance, and waives all matters of form, for the rule is well established that matters of form and duplicity in pleading can be taken advantage of on special demurrer, but not on general demurrer, and that if the declaration contains one good count, or one good assignment of the breach of the agreement declared upon, that the demurrer must be overruled and the declaration adjudged good.

"It expressly allows several breaches of the same contract or duty to be assigned; for otherwise the plaintiff would be precluded from recovering damages to the full extent of the injury, or the defendant would not be sufficiently apprised by the declaration of the extent of the claim he would have to answer." Chitty, Plead. 228; Oliver's Precedents (4th Ed.) 155.

[4] The demurrer being general, the objection of duplicity cannot prevail, for that can only be taken advantage of on a special demurrer. *Blanchard v. Hoxie*, 34 Me. 376; *Briggs et al. v. Railway Co.*, 54 Me. 375; *Neal v. Hanson*, 60 Me. 84; *Bank v. Abell*, 63 Me. 346; *Concord v. Delaney*, 56 Me. 201; *Dexter Sav. Bank v. Copeland*, 72 Me. 220.

[5] The declaration sets out the agreement, wherein the defendant promised to pay, on October 1, 1909, royalties on all of the goods manufactured by it or for it, as authorized by said agreement, during the preceding 90 days, according to the schedule which is set forth in said declaration. The declaration further avers that the plaintiff has performed each and every undertaking by him to be performed, and that the defendant has manufactured large quantities of the goods mentioned in the schedule, and thereby became liable and indebted to the plaintiff for the payment of royalties as specified and fixed by the terms of said agreement and schedule, with the usual averment that the defendant, although requested, has neglected and refused to pay; the date of the writ being long after October 1, 1909. This is a sufficient allegation of performance by the plaintiff, and a sufficient assignment of one breach by the defendant. If the defendant had desired a more particular statement of what the plaintiff would attempt to prove under the breach, he should have asked for a bill of particulars, or demurred specially. The dec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

laration, containing a sufficient allegation of performance by the plaintiff, and one, at least, sufficient assignment of a breach by the defendant, is good upon general demurrer, and by the stipulation of the parties the plaintiff is entitled to judgment for \$500.

Exceptions overuled. Judgment for plaintiff for \$500, as stipulated.

LORD v. JONES.

(Supreme Judicial Court of Maine. Oct. 9, 1911.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 196*)—TOLLING STATUTE—EVIDENCE.

The defendant, who was the maker of a promissory note dated June 9, 1900, on May 6, 1910, wrote to the plaintiff, who was the holder of the note, a letter which contained the following: "I was at your place Sunday, but you were not there. I have some money due me in a number of places, but I couldn't collect in any. * * * Now, can't I fix it up with you by giving you my note for the amount, and then I will take it up as soon as I can, and I will do it before October 1st." The statute of limitations having been pleaded as a bar to a suit on the note it is held that it was competent for the plaintiff to show that the letter referred to the note, by showing that he had no other claim against the defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 718; Dec. Dig. § 196.*]

2. LIMITATION OF ACTIONS (§ 148*)—TOLLING STATUTE—EVIDENCE.

To take an indebtedness, otherwise barred, out of the statute of limitations by an acknowledgment in writing, it must appear that the acknowledgment was made under such circumstances and in such terms as reasonably and by fair implication to lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597-603; Dec. Dig. § 148.*]

3. LIMITATION OF ACTIONS (§ 148*)—TOLLING STATUTE—NEW PROMISE.

The letter was a sufficient acknowledgment of the indebtedness to take the note out of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597-603; Dec. Dig. § 148.*]

Report from Supreme Judicial Court, York County.

Action by Leroy Lord, as administrator, against John C. Jones on a note. Case reported, and judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and BIRD, JJ.

E. P. Spinney, for plaintiff. Frank Wilson, for defendant.

SAVAGE, J. This is an action upon a promissory note dated June 9, 1900. The action was commenced August 30, 1910. The defense is the statute of limitations. The

case comes up on report. The plaintiff seeks to take the note out of the apparent bar of the statute by proving an acknowledgment or new promise. The plaintiff relies upon a letter dated May 6, 1910, written and signed by the defendant, and sent by him to the plaintiff. The body of the letter, so far as material, is as follows: "I was at your place Sunday, but you were not there. I have some money due me in a number of places, but I couldn't collect in any. I rode Saturday night till 10 o'clock. Now, can't I fix it with you by giving you my note for the amount, and then I will take it up as soon as I can, and I will do it before October 1st. * * * I will be over and see you as soon as I get home."

It is provided by Revised Statutes, c. 83, § 100, that "no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing and signed by the party chargeable thereby."

[1] It is clear enough from the oral testimony in the case that by the expression in the letter, "Can't I fix it," the defendant was referring to the note in suit, and that the defendant was not indebted to the plaintiff for anything else. But the defendant insists that the identity of the subject-matter must appear in the letter itself, and cannot be shown by extrinsic oral evidence. But we think the point cannot avail the defendant. The letter on the face of it evidently refers to some claim or demand which the plaintiff had against the writer, and to a single claim. We think it was competent for the plaintiff to show, as he did, that he had no other claim than the note in suit. And, if so, the word "it," in the phrase "Can't I fix it" necessarily referred to that note. In *Bailey v. Crane*, 21 Pick. (Mass.) 323, a case cited by the defendant, the court, after stating the undoubted rule that an acknowledgment, to take a debt out of the statute, must satisfactorily appear to refer to the very debt in question, said also, with reference to the facts in that case: "As the defendant has not shown that there was any other debt due from him to the plaintiff, his letter must be presumed to apply to the note in suit." And the court in the recent case of *Cotulla v. Urbahn*, 135 S. W. 1159, approved the same doctrine, saying that, "if there is only one transaction, a reference to the debt is sufficient as to its identity."

[2] The defendant also challenges the sufficiency of the acknowledgment. It is sometimes stated, somewhat loosely, that an unqualified acknowledgment of a debt as an existing debt is sufficient. But the rule is more aptly stated in *Krebs v. Olmstead*, 137 Mass. 504, where the court said that the plaintiff may take a case out of the statute "by showing an acknowledgment in writing by the defendant that the debt was

due, made under such circumstances and in such terms as reasonably and by fair implication to lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract." And the court added: "It is not enough to prove an admission of the debt, if it is accompanied by circumstances which repel such inferences, or leave it in doubt whether the debtor intended to make a new promise." See, also, *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419. The same principle was stated by this court in *Johnston v. Hussey*, 89 Me. 488, 36 Atl. 993, in these words, "The acknowledgment must also at least savor of a promise to pay," and, "It must show a recognition of a legal obligation, and an intention, or at least a willingness, to be bound by it." When such an acknowledgment is shown, the law will imply a promise to pay. *Johnston v. Hussey*, supra; *Bailey v. Crane*, supra.

[3] We think the defendant's letter in this case falls within the principle thus stated. It would be drawing altogether too fine a point to say that it was not a distinct recognition of the note as an existing debt, and the defendant expressed a willingness to pay it. He proposed to give a new note for the old one, and expressly promised to pay the new note before a time certain. That would be payment. Accordingly we hold that the statute of limitations is not a bar to this action.

Judgment for the plaintiff.

IN RE OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. Oct. 4, 1911.)

1. STATUTES (§ 286*)—ENACTMENT—VALIDITY.

That an act is found in the Secretary of State's Office, signed by the Speaker, the President of the Senate, and the Governor, is not conclusive of its due enactment, the legislative journals under the Constitution being treated as authentic records of the proceedings; and if they show that the act was not passed by both branches it is invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 386; Dec. Dig. § 286.*]

2. COURTS (§ 208*)—SUPREME COURT—OPINIONS TO GOVERNOR—SCOPE OF REVIEW.

In reaching conclusions in opinions given on application of the Governor and the Council, the Justices of the Supreme Court cannot receive evidence or determine questions of fact.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.*]

3. STATUTES (§ 39*)—ENACTMENT—VALIDITY.

The bill for an act of 1911 (Laws 1911, c. 130), to acquire land for a forest reservation and state park, was amended in the House so as to strike a limitation on the expenditure, but the words were not actually stricken; memorandum of the amendment being attached to bill. The memorandum was overlooked by the Senate and the Governor, and the bill was engrossed as containing the limitation. *Held*, that the clause limiting the expenditure did not

become valid law, and that expenditure, even to the amount of the limitation, is not authorized.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. § 39.*]

4. STATUTES (§ 30*)—ENACTMENT—SIGNATURE BY GOVERNOR—TIME.

The Legislature having adjourned, the bill cannot be re-engrossed and presented to the Governor for signature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. § 30.*]

5. STATUTES (§ 26*)—ENACTMENT—SIGNATURE BY GOVERNOR—NECESSITY.

Under Const. pt. 2, art. 43, requiring presentation of legislative bills to the Governor for approval, his approval, attested by his signature, is as essential to a valid enactment as its passage by the Legislature, excepting acts which may be enacted without his approval.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 28; Dec. Dig. § 26.*]

6. COURTS (§ 208*)—SUPREME COURT—OPINIONS TO GOVERNOR—SCOPE.

Ordinarily the Justices of the Supreme Court will not give an opinion to the Governor and the Council on a question involving private rights; it being properly adjudicated in a suit to which the persons affected are parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 492, 493; Dec. Dig. § 208.*]

Application by the Governor and the Council for an opinion of the Justices concerning an act to acquire land as a forest reservation and state park. Questions answered.

To the Justices of the Supreme Court:

The Governor and the Honorable Council respectfully represent that on March 16, 1911, an act entitled "An act to provide for the acquisition by the state of the Crawford Notch, so called, in Hart's Location and contiguous territory, as a forest reservation and state park," was reported by the committee on appropriations to the House. Section 3 of this bill provided: "For the purpose of carrying out the provisions of this act, such a sum as may be necessary, not to exceed one hundred thousand dollars (\$100,000), is hereby appropriated and shall be provided in the manner following: The state treasurer, under the direction of the Governor and Council, shall issue scrip or certificates of indebtedness to such amounts as may be necessary to pay for the lands, wood, and timber purchased or condemned as aforesaid, not exceeding in the aggregate the amount aforesaid."

The House voted to amend said section by striking out the words "not to exceed one hundred thousand dollars," and to further amend said section by striking out the words "not exceeding in the aggregate the amount aforesaid," and passed the bill. The clerk of the House messaged the bill into the Senate, and, instead of striking out the words above named on the face of the bill, he pasted a printed extract from the House Journal, showing the amendments, to the wrapper of the bill. The bill reached the Senate April 4, 1911, was read twice by its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s indexes

title, and sent to the finance committee. April 6, 1911, that committee reported the bill to the Senate, and it was read a third time by its title, and passed unanimously. In engrossing the bill, the record attached to the wrapper of the bill was not noticed, and it was engrossed as it was when it was reported by the committee on appropriations. The engrossing committee reported to the House and Senate that they found the bill correctly engrossed. The House and Senate accepted this report, the President of the Senate and the Speaker of the House signed this bill, and it was presented to the Governor and signed by him.

The Governor and Council require the opinion of the Justices upon the following questions: (1) Is this act, entitled "An act to provide for the acquisition by the state of the Crawford Notch, so called, in Hart's Location and contiguous territory, as a forest reservation and state park," approved April 12, 1911, a valid law? (2) If in your opinion the bill as engrossed and signed by the Governor is not the one which passed the House and Senate, can the Governor and Council pledge the credit of the state to the extent of \$100,000 to carry the bill into effect? (3) If no part of the act is now the law, may the act be correctly engrossed now and presented to the Governor for his signature? (4) If the record is conclusive that the act as signed by the Governor passed the House and Senate, can the lands specified in said bill be acquired by the exercise of eminent domain, if the owners of said lands ask therefor a sum greatly in excess of the one hundred thousand dollars specified in said bill?

Robert P. Bass,
Governor.
Thomas Entwistle,
Harry T. Lord,
Benjamin F. Greer,
John M. Gile,
George H. Turner,
Councilors.

Concord, N. H., August 4, 1911.

To His Excellency the Governor, and the Honorable Council:

In response to your inquiries relating to the validity of an act entitled "An act to provide for the acquisition by the state of the Crawford Notch, so called, in Hart's Location and contiguous territory, as a forest reservation and state park," approved by the Governor April 12, 1911, and your powers thereunder, the undersigned, the Justices of the Supreme Court, respectfully answer as follows:

[1] Upon three occasions, the first over 50 years ago, the Justices of this court, in performance of their constitutional duty upon the requirement of each branch of the Legislature or the Governor and Council, have joined in expressing the opinion that the fact that an act was found lodged in

the office of the Secretary of the State with other public acts passed at the same session, signed by the Speaker of the House of Representatives and the President of the Senate, with the approval of the Governor attested by his signature thereon, was not conclusive evidence of its due enactment; but that, in view of provisions of the Constitution in reference to them, the journals of the two houses are to be treated as authentic records of the proceedings, and that, if it appears from these records that the act in question was not passed by both branches of the Legislature, the prima facie evidence furnished by the enrolled act would be overcome, and the act held invalid. Opinion of the Justices, 35 N. H. 579; Opinion of the Justices, 45 N. H. 607; Opinion of the Justices, 52 N. H. 622. In view of the entire unanimity of opinion extending over so long a period of time, participated in by so many different members of the court, and apparently accepted and acquiesced in by the bar and the state, we may properly adopt as our own, without further discussion, the views upon this question expressed by our predecessors in 1858, approved by them in 1864, and reaffirmed in 1873.

[2, 3] In reaching the conclusions contained in opinions of this character, the Justices are not authorized to receive evidence or to determine questions of fact. Opinion of the Justices, 70 N. H. 638, 50 Atl. 328; Opinion of the Justices, 45 N. H. 607, 608, 614. Assuming, therefore, that the Journal of the House shows the fact stated in your communication—that certain provisions of the act now published as chapter 130 of the Laws of 1911, found in the act as enrolled and published, were stricken from the act by amendment in the House before its passage by that branch of the Legislature—the provisions so stricken out are not law. Our answer, therefore, to the first question submitted is that, in our opinion, chapter 130 of the Laws of 1911 is not in its entirety, as published, a valid law. We see nothing in the facts stated as to the proceedings in the Senate which would authorize the finding that the act which passed the House did not duly pass the Senate. The Senate are authorized by the Constitution to "determine their own rules of proceedings." Part 2, art. 36 (37). There is nothing in the Constitution prescribing the method which the Senate must adopt to acquaint themselves with the contents of any proposed measure before its passage.

Our attention is called to section 3 of the act, which appears to have been drafted for the purpose of appropriating money to carry out the purposes of the act, and to provide the same by authorizing the State Treasurer, under the direction of the Governor and Council, to issue scrip or certificates of indebtedness therefor. The second question asked, whether the Governor and Council can "pledge the credit of the state

to the extent of \$100,000 to carry the bill into effect," under the facts submitted, presents the inquiry whether upon the facts stated section 3 authorizes the Governor to draw his warrant for such sum, or the State Treasurer to issue scrip or certificates of indebtedness to that amount. The differences between the act as passed by the House and the bill approved by the Governor in this section are stated to be that the bill passed appropriated, for the purpose of carrying out the provisions of the act, "such a sum as may be necessary," and authorized the issue of scrip or certificates of indebtedness "to such amounts as may be necessary to pay for the lands, wood, and timber purchased or condemned," while in the bill as signed the limitation "not to exceed one hundred thousand dollars" is attached to the first clause quoted, and to the second is added, "not exceeding in the aggregate the amount aforesaid"; these being the clauses which were struck out in the House, and which, as stated, are not law. The question is whether, under the circumstances, the remainder of the section is of any validity.

"It will sometimes be found that an act of the Legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the Constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. * * *

The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the first may stand, though the last fall. * * * If they are so mutually connected with and dependent upon each other * * * as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cool. Const. Lim. (6th Ed.) 209-212; *Copp v. Henninger*, 55 N. H. 179, 203, 20 Am. Rep. 194; *East Kingston v. Towle*, 48 N. H. 57, 65, 97 Am. Dec. 575, 2 Am. Rep. 174.

[5] In the absence of evidence of the facts by which, under the Constitution, laws may be enacted without the Governor's approval, his approval, attested by his signature, is as essential to the valid enactment of a law as its passage by each branch of the Legislature. "Every bill which shall have passed

both Houses of the General Court shall * * * be presented to the Governor; if he approve, he shall sign it." Const. pt. 2, art. 43 (44). The section 3 which the Governor approved confers only a limited authority. His approval of an act conferring such an authority cannot be construed as an approval of an act conferring an unlimited one. The authority conferred by the act signed by him is directly dependent upon the limitation. When the limitation is destroyed, the power dependent thereon goes with it. It cannot be said on the evidence furnished by the act that without the limitation the section would have met gubernatorial approval. It may be argued that the act as it passed the General Court discloses an intention to appropriate and to authorize the issuing of scrip or certificates to the amount of \$100,000 at least, if necessary, because the only limitation is "such sum as may be necessary," and, as the Governor's signature to the bill presented evidences his approval of the provisions of the section up to \$100,000, all portions of the law-enacting body have approved action under the section to that amount at least; and hence any acts which do not pledge the credit of the state beyond that sum would be within the intent both of the Governor and the General Court. This may be so; but mere intent of the General Court and the executive will not enact a valid law. That intent must be expressed as the Constitution directs. If the bill as passed had been presented to the Governor, and he had the belief that the limitation should be included in it, he had no power to attach that limitation to his signature, because he is compelled under the Constitution to approve or disapprove the bill as a whole. The only method by which his purposes as to the limitation, if he entertained any, could be enacted into law would be the return of the bill with his objections, their removal by action of the two houses, and the subsequent presentation to and approval of the amended bill by him. These forms prescribed by the Constitution are not supplied by the error in engrossing the bill. Our opinion is that section 3 is all invalid. Authority, therefore, cannot be found therein to draw money from the treasury, or to issue scrip or certificates of indebtedness in payment "for the lands, wood, and timber purchased or condemned" under the act.

[4] The third question submitted is, "If no part of the act is now the law, may the act be correctly engrossed now and presented to the Governor for his signature?" There are a number of conflicting decisions under constitutional provisions substantially similar to our own, in which the question whether the Governor may, after final adjournment of the Legislature, sign a bill duly presented to him before adjournment is considered. Note, 37 L. R. A. 391. Those like *Fowler v. Peirce*, 2 Cal. 165, which hold that the Governor cannot sign a bill after

the adjournment, are of course conclusive of the present question. Although this conclusion is supported by the invariable practice in this state, the question may now be passed. No bill can become a law that is not presented to the Governor. As the Constitution confers no authority upon any person to present bills to the Governor, they must be presented by the Legislature, or by some person by authority derived from the Legislature. The constitutional question whether the Legislature could authorize the presentation of bills to the Governor after its adjournment does not arise, except as an aid to the construction of provisions or rules governing the matter, until it appears attempt has been made to authorize such presentation. Under article 43 (44) of the Constitution, it is the Governor's duty, if he does not approve a bill, to return it to the house in which it originated, with his objections. It is not only his duty, but his right, under the power intrusted to him as part of the lawmaking instrumentality of the Constitution. Although, by adjournment with his consent within less than five days after the presentation of a bill, he may as a practical proposition be deprived of sufficient time to state his objections, it would require very express language to lead to the inference that the Legislature, in providing for the presentation of bills to the executive, intended to authorize their presentation in such manner as to wholly deprive him of the power to aid in shaping legislation by calling the attention of the Legislature to defects in measures adopted by them.

The present statute (Laws 1893, c. 64) requires the Secretary of State to cause all bills and joint resolutions which have passed both branches of the Legislature to be engrossed, and, after they have been engrossed and signed by the Speaker of the House and the President of the Senate, to present them to the Governor for approval. The act does not say when they shall be presented; but there is no evidence of any purpose in the act of 1893, except to substitute the Secretary of State for the engrossing clerk of both houses, and to impose upon him the duty of presentation formerly resting upon the clerk of the Senate. P. S. c. 4, §§ 8, 9. By the latter section, the clerk of the Senate, whose duty it was to present bills to the Governor, was required to make on the bill a certificate of the day and hour of so doing, and to make a corresponding entry upon the records of the Senate. With the adjournment of the Senate, its records were closed, and the entry required thereon seems to us a plain intimation that the act to be recorded must be done before adjournment. In *Laukford v. County*, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491, the court took an opposite view of such a provision, based in part upon the contrary practice in that state, both before and after the statute was passed. Here

we have been able to discover no evidence of a practice of presenting bills after the adjournment of the Legislature. We think it has never been attempted. We are aware of only one instance in which it was suggested that a Governor might after adjournment sign a bill duly presented to him, but which he had declined to sign before adjourning the two houses. In this case the Governor refused to act.

The section of the Public Statutes placing the duty of presentation upon the clerk of the Senate, and requiring him to enter the time of presentation upon the Senate record, was originally adopted in 1864. Laws 1864, c. 4034. It probably resulted from the controversy over the attempted veto by the Governor of chapter 4030, Laws 1864, known as the soldiers' voting bill. Opinion of the Justices, 45 N. H. 607. We have been unable to discover any earlier statute upon the subject. It is to be remarked that the Constitution contains no provision as to the attestation of bills. It does not require them to be engrossed or signed by the presiding officers of the two houses. That matter is left to the Legislature for regulation. The journals in the years immediately following the adoption of the Constitution are not complete enough to furnish an exact history of the procedure; but as early at least as 1824 there was a joint rule, substantially in the language of the sixth joint rule of the last session, providing for a committee for the purpose of engrossing bills and their signature, when by the presiding officers of the two houses. App. Senate Jour. June, 1824, p. 107. From that time until the next session after the passage of the act placing the duty of presentation upon the clerk of the Senate, the journals record that the bills, after signing by the President of the Senate, were delivered to the committee on engrossed bills, to be laid before the Governor for his approval and signature. This committee reports from time to time the performance of its duty, and at the end of the session reports that it has presented to the Governor all engrossed bills, resolutions, and addresses which have been reported engrossed and signed by the presiding officers of the two houses. Senate Jour. July, 1864, p. 127.

It thus appears that when the act of 1864 was passed the presentation of bills to the Governor was understood to be a legislative duty, to be performed by a committee of the General Court, and to be completed before adjournment. That act, as stated, clearly implies that the presentation authorized is to be made before adjournment, and the subsequent alterations in the law furnish no evidence of an intent to authorize a change in this respect. For the reason, therefore, that no authority has been conferred upon the Secretary of State to present bills after the adjournment of the Legislature, without reference to the constitutional question whether

such power could be given, we think the third question must be answered in the negative.

It may, however, be remarked that under the Constitution neither house can adjourn itself for more than two days at a time; that the power of adjourning the Legislature is vested in the Governor, who, with advice of the Council, upon request of both houses, may adjourn the General Court to such time as they agree upon, or, in case of disagreement between the two houses, may adjourn it for such time as he may determine the public good may require, not exceeding in the latter case 90 days at any one time. Const. pt. 2, arts. 18 (19), 35 (36), 42 (43), 49 (50). The practice has been for the two houses, when they have agreed upon adjournment, to inform the Governor of the fact, whereupon he sends a message to each house, adjourning the General Court in accordance therewith. In every instance since 1815, and with only a few exceptions prior thereto since 1800 up to 1911, the Governor in this message has informed the two branches of the Legislature of the disposition of the bills and resolves that have been presented to him. This seems to show that the Constitution for over a hundred years has been understood to mean that upon the adjournment of the General Court by the Governor the business of making law was ended for that session.

Our conclusion that the enrolled act is not conclusive renders the fourth question immaterial.

[8] Whether, under sections of the act to which our attention has not been called, and existing statutory provisions, proceedings in invitum can be maintained for the taking of Crawford Notch involves a question of private right in the landowners, which, if asked, we should ordinarily feel obliged to decline to answer. House Jour. 1911, p. 686; Opinion of the Justices, 70 N. H. 638, 50 Atl. 328; Opinion of the Justices, 62 N. H. 704. That question can be finally determined only in the course of litigation to which the landowners are parties. Our views thereon have not been required, and we have not intended to express any opinion.

FRANK N. PARSONS.
REUBEN E. WALKER.
GEORGE H. BINGHAM.
JOHN E. YOUNG.
ROBERT J. PEASLEE.

ROSCHEN v. PACKARD et al.

(Court of Appeals of Maryland. June 22, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 62*)—DISCHARGE OF TEACHER—LIABILITY.

The board of school commissioners in the trial of charges against and removal of a teacher under Baltimore City Charter (Acts 1898, c. 123) § 90, providing that any teacher may be

removed by it after charges preferred and trial had, exercise quasi judicial powers; so that, unless their acts are done willfully, fraudulently, and corruptly, they are not liable to a teacher for finding against and removing her.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 62.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 62*)—DISCHARGE OF TEACHER—LIABILITY.

Though before the hearing by a board of school commissioners of charges against a teacher on their findings on which they removed her a member of the board had told her that, if after hearing the testimony she desired further time to prepare her defense, she would be given reasonable time after the adjournment, the fact that the board declined to grant a postponement, though she had not brought her attorney with her, does not render the members of the board liable to her in damages; it being presumed, in the absence of explanation, that the board was actuated by honest motives.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 62.*]

3. JUDGMENT (§ 644*)—RES JUDICATA.

The judgment against a teacher in mandamus by her to compel a board of school commissioners to restore her to her position as teacher is conclusive against her on all questions involved in that case, and is a bar to an action by her against the members of the board for damages for having made false statements in their answer, and committed perjury, in the mandamus suit.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 644.*]

Appeal from Superior Court of Baltimore City; James P. Gorten, Judge.

Action by Anna B. Roschen against Joseph Packard and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Anna B. Roschen, in pro. per. Edgar Allan Poe, Sylvan Hayes Lauchheimer, and German H. H. Emory, for appellees.

BURKE, J. In March, 1906, the appellees, together with the late James H. Phillips, constituted the board of school commissioners of Baltimore city. This action was brought against them in the superior court of Baltimore city, and it is stated in the appellant's brief to be a suit "for damages for unlawfully and corruptly defrauding her of her position of teacher of German in any primary or grammar school in the city of Baltimore, to which she was legally elected by the board of school commissioners of Baltimore city, and which she has filled in an intelligent and capable manner for 12 years. Appellees defrauded appellant of her position of teacher without a trial, as prescribed in the Baltimore city charter, and thereby defrauded her of means of her existence, and also defrauded her of receiving an annuity from the Teachers' Mutual Benefit Association, of which she was a member and in which she had contributed for 11 years. She sues them also for making a large number

of false representations in her petition for mandamus in which Mr. Joseph Packard made affidavit in due form of law that they were true before a justice of the peace, also for perjuries committed at the trial of the petition for mandamus, and for influencing the verdict of the jury against her by false representations during the trial of appellant's petition for mandamus for reinstatement." The declaration both in form and substance is a most unusual one. It contains 56 paragraphs, and in them is set out the facts upon which the plaintiff intended to rely at the trial to support her case. The recital of facts covers 11 pages of the printed record. The court sustained a demurrer to the declaration, without leave to amend, and entered a judgment on the demurrer in favor of the defendants for costs; and from this judgment the plaintiff has appealed.

It will not be necessary to set out with much particularity the averments of the declaration, as very few of them have any bearing upon the legal questions presented by the record. The first 10 paragraphs deal with the plaintiff's qualifications, experience, and successful work as teacher. The eleventh, twelfth, thirteenth, and fourteenth paragraphs are devoted to a difficulty, or disagreement, which she had with Dr. Miller, the group principal of school No. 95, in which she was teacher, and she charges that Dr. Miller acted "spitefully and antagonistically and untruthfully" towards her, and falsified the record of the plaintiff in a most dishonorable manner. In the fifteenth paragraph it is averred that the defendants violated the city charter by sending Mr. James H. Van Sickle to her classroom to find out if she was able to impart knowledge in German to the pupils of her class, as Mr. Van Sickle was not qualified by reason of his ignorance of the German language to supervise her work.

It appears by the sixteenth and seventeenth paragraphs that the plaintiff on the 13th of February, 1906, wrote to the school board complaining of the conduct of Dr. Miller, but that her letter was not answered, and it is charged that thereafter "Mr. Van Sickle preferred false charges against the plaintiff, which she can disprove by witnesses."

The eighteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs aver the alleged motive of Mr. Van Sickle in preferring false charges against her, her freedom from apprehension as to the result of the trial, her employment of Mr. George R. Willis to accompany her on March 28, 1906, to the school board meeting, that being the day fixed by the board for the trial of the charges, the demand of Mr. Willis for a bill of particulars, which was refused in a letter from Mr. Joseph Packard to Mr. Willis, in which it was stated that, "if after hearing the testimony she desires further time to prepare her defense, the board of

school commissioners will give her reasonable time after adjournment on March 28, 1906, to enable her to do so."

It appears by the allegations of the twenty-third, twenty-fourth, and twenty-fifth paragraphs that Mr. Willis did not attend the trial on March 28, 1906, and the reason he did not attend was that the plaintiff, "would rather let Mr. Willis accompany her on the date the board of school commissioners would set for her defense than on March 28, 1906"; that Mr. Willis gave her certain letters that had passed between the board and himself; that copies of these letters were made and the originals returned to Mr. Willis, "as he needed them for the record"; that Mr. Willis told her to take her two brothers to the meeting "to take notes and bring those notes to him, and let him know right the next morning after March 28th what date the board of school commissioners had set for her defense in order that he could keep that date free from other engagements"; that she attended the meeting on March 28, 1906, and that after the conclusion of the false testimony of Mr. Van Sickle and his witnesses, when Mr. Packard asked the plaintiff, "What have you got to say, Miss Roschen?" the plaintiff in a distinct voice and loud enough to be heard by anybody who is not afflicted with deafness, said, "I ask for further time to prepare my defense"; that Mr. Packard heard what she said, and that he took advantage of the fact that the plaintiff had left Mr. George R. Willis home, broke the contract upon which she had appeared, and said, "Oh, no; you cannot have that now."

The twenty-seventh, twenty-eighth, and thirty-fourth paragraphs are as follows:

"(27) That not one of the defendants had so much honor in him as to keep this contract, and hear witnesses on the plaintiff's side testify.

"(28) That the board of school commissioners acted improperly in luring the plaintiff under this contract and under the promise of giving her time to prepare her defense to the administration building, and caused her to make an arrangement with her lawyer to accompany her on the date which would be set for her defense, instead of going with her on March 28, 1906, and then going into a secret session and refusing to set a date for her defense."

"(34) That the defendants cruelly removed the plaintiff, who was not guilty of any of the charges, without a trial, contrary to the provision of the Baltimore city charter, from her position as a teacher in the public schools of Baltimore city, which constitutes her vocation in life, and upon which she is dependent for her livelihood."

In the remaining paragraphs, it is averred that the plaintiff instituted a suit for mandamus against the appellees in the court of common pleas, presumably to compel them to reinstate her as a teacher, although this is

not definitely alleged. The appellees answered this petition, and the case was tried before Judge Dobler and a jury, and resulted in a verdict and judgment for the appellees. In the answer and testimony of the witnesses at that trial the allegations of the plaintiff as to what took place at the hearing on March 28, 1906, were denied, and an explanation was given as to why the plaintiff was not given further time to prepare her defense as Mr. Packard in his letter dated March 23, 1906, to Mr. Willis had stated would be done. This is shown by the forty-third, forty-fourth, forty-fifth, and forty-sixth paragraphs of the declaration, which are as follows:

"(43) That in their joint and several answer the defendants made further false representations, to wit, that some five or six witnesses, whom the petitioner had requested the school board to summon, were summoned, and also attended as well as the witnesses in support of the charges against the petitioner. That all the witnesses both those in support of the charges and those summoned in request of the petitioner were examined and testified.

"(44) That in their joint and several answer the defendants made further false representations by stating that each and all of the charges were fully and entirely proved by the testimony of all the witnesses.

"(45) That in their joint and several answer the defendants made further false representations, to wit, that at the conclusion of the hearing the petitioner did not as she alleges ask for any adjournment for the purpose of enabling her to present her defense, but, on the contrary, she departed only after she had been fully informed that said hearing was a final one, after having, with this knowledge, exercised her right to cross-examine and question the witnesses as to their statements, after having heard the testimony of witnesses called by her.

"(46) That in their joint and several answer the defendants made further false representations, to wit: 'Answering the thirteenth (13) paragraph of the petition, these defendants say that the testimony at the said hearing was adduced upon definite charges preferred as already set forth herein.'"

The declaration further alleges that at the trial of the mandamus case some of the defendants, and a number of other witnesses, committed perjury, some "in a vulgar manner" and others "in a vulgar, frivolous manner," and that the defendants "by their false representations in their prayers to the court" influenced Judge Dobler, before whom the case was heard, "in such a detestable way as to grant three out of the four prayers which were granted by him on the school board side under false representations." The fifty-fourth, fifty-fifth, and fifty-sixth paragraphs are as follows:

"(54) That thereby the defendants have robbed the plaintiff a second time in unlaw-

ful manner of the position of teacher in the public schools of Baltimore City, which she has filled in such a faithful, intelligent manner, which constitutes her beloved vocation in life and upon which she is dependent for a livelihood.

"(55) That the unlawful actions of the defendants have interfered with the plaintiff obtaining employment in her profession or otherwise.

"(56) That the unlawful actions of the defendants have also robbed the plaintiff of being provided with a teacher's pension in old age, as their unlawful actions have caused that the plaintiff's name was taken off the list of members of the Teachers' Mutual Benefit Association, also known as the Teachers' Pension Fund, which was organized in 1895, of which the plaintiff is one of the founders, and to which she has contributed for eleven years by monthly payments."

[1] These facts do not constitute a good cause of action. As the suit is brought for the purpose of subjecting the appellees to damages for acts done in their official capacity as members of the board of school commissioners of Baltimore city, it is essential to have alleged that the acts which constituted the cause of action were done willfully, fraudulently, and corruptly. Section 99 of the Baltimore city charter (Act 1898, c. 123) provides that "any teacher may be removed by said board on the recommendation of the superintendent of public instruction after charges preferred and trial had." Charges were preferred against the plaintiff, and the trial of these charges was had by the board after notice to the plaintiff, and she was removed as teacher. In the trial of these charges the board was acting within its jurisdiction, and was exercising quasi judicial powers, and the members of the board cannot be held individually liable, in the absence of malice, fraud, or corruption on their part, and there are no sufficient allegations in the declaration that they were so actuated. In *Bevard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618, the court said "that the nature of our institutions equally demands that public officers, acting faithfully and honestly in the discharge of their duty, and within the limits of their constitutional powers, shall be protected from liability for mistakes, or errors of judgment from which none are exempt; provided they are unmixed with fraud or corruption. * * * In all governments power and trust must be reposed somewhere. All that can be done is to define its limits, and provide means for its proper exercise. When the action in question is that of a judicial officer, all that the law can procure is a guaranty that they shall not with impunity do wrong willfully, fraudulently, or corruptly." To the same effect are the cases of *Friend v. Hammill*, 34 Md. 298; *Knell v. Briscoe*, 49 Md. 414; *State v. Garrick*, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387. The members of the board of school commis-

sioners of Baltimore city are public officials, charged with the exercise of important executive and administrative functions. The discharge of many of these duties involves the exercise of sound discretion and judgment, and some of them, like the trial and removal of teachers, are in their nature judicial, and for acts done in the performance of such duties they are not personally liable in damages, unless the facts bring them within the rule above stated.

[2] The appellees were in no way responsible for the charges preferred by Mr. Van Sickie, nor for the feeling and conduct of Dr. Miller towards the plaintiff, and the mere fact that the board declined under the circumstances stated in the declaration to grant a postponement of the hearing does not render the appellees liable to an action for damages. The court would assume, in the absence of all explanations, that the board was actuated by honest motives in declining to postpone the trial.

[3] The allegations that the appellees made false statements in their answer to the petition for mandamus, and that certain of them committed perjury at the trial of that case, do not state a cause of action. The controverted questions of fact which were in issue in the mandamus case, and which were disposed of there, cannot be again retried. Upon all the questions involved in that case, the judgment therein rendered is conclusive upon the plaintiff, and the findings of the jury in that case cannot be reviewed or inquired into in this suit. There does not appear to be any conflict of authorities on this point. In *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491, the court said: "The averments with respect to the defendants suborning a witness to swear falsely in the criminal prosecution against the plaintiff do not constitute a cause of action for damage. *Smith v. Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; *Homer v. Fish*, 1 Pick. (Mass.) 441, 11 Am. Dec. 218; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320. In *Smith v. Lewis* the court observes that, however just and reasonable it may appear, upon the first view of the proposition, that a man who has by perjury injured another should be answerable, yet on a nearer inspection, when the mischiefs resulting from upholding that proposition are considered, the conclusion must be that it would be dangerous in the extreme to sustain the action. In the case of *Eyres v. Sedgwick*, Cro. Jac. 601, it became a question whether a person who had made a false affidavit in chancery, whereby the plaintiff was imprisoned by the chancellor, was liable for an action for the injury, it was held by all of the judges, except Haughton, that to punish this perjury by an action on the case under the pretense of a false oath should not be suffered, and Haughton admitted that, if the defendant had come in by process of law as a witness, it had been otherwise, for then he would

have been punishable by indictment." In *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625, which was an action on the case, the declaration alleged that Dunlap was the just and lawful owner of a lot of land; that Glidden had sued out a writ of entry for the land against the plaintiff, and in that action had obtained a verdict and judgment for the land; that the verdict was obtained by the fraud of Glidden, and by false testimony of two of the defendants and other witnesses, under a conspiracy among all of the defendants, by fraud and perjury, to deprive and cheat the plaintiff of said land. The court held the declaration bad, saying: "If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy at law. The court which rendered the judgment upon proof of these allegations would be bound to grant a new trial, so that upon a fuller investigation justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who had unlawfully conspired together to deprive the plaintiff of his rights." In *Phelps v. Stearns*, 4 Gray (Mass.) 105, 64 Am. Dec. 61, it was held that an injury caused by perjury is not a legal ground of action. In that case the defendant had been committed to jail upon an execution in favor of the plaintiff, and the declaration alleged that upon his application to take the poor debtor's oath, and knowingly, willfully, and falsely made oath that "he had not any estate, real or personal, to the amount of the execution, except but what was by law exempted from being taken on execution, and by willfully and falsely making oath as aforesaid was discharged from arrest, and the plaintiff thereby deprived of his lawful remedy to collect the debt due him from the defendant." In *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, the court said: "There are no maxims of law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: 'Interest rei publice, ut sit finis litium'; and 'Nemo bis vexari pro una et eadem causa.' If the court has been mistaken in the law, there is a remedy by writ of error. If the jury had been mistaken in the facts, there is the same remedy by motion for a new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground

may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated."

This is especially applicable to that part of the declaration wherein the plaintiff seeks to retry the issue of fact which was involved in the mandamus case.

Judgment affirmed, with costs.

PRESTON v. POE et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. APPEAL AND ERROR (§ 143*)—WHO MAY APPEAL.

Under Code, art. 5, § 26, permitting an appeal by a party from a final decree or order in equity, an applicant for a receiver in one suit is not entitled to appeal from the action of a separate court in a subsequent suit to which he was merely a special intervener to question the jurisdiction of the latter court to entertain a suit for the same purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 921; Dec. Dig. § 143.*]

2. APPEAL AND ERROR (§ 147*)—WHO MAY APPEAL—STOCKHOLDERS.

A stockholder cannot appeal from a judgment against the corporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 920; Dec. Dig. § 147.*]

Stockbridge, J., dissenting.

Appeal from Circuit Court of Baltimore City; Chas. W. Henisler, Judge.

Bill by certain stockholders of the United Surety Company for appointment of receivers to wind up the business of said corporation. From an order dismissing his petition in intervention, and from an order appointing Edwin W. Poe and others as such receivers, James H. Preston appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

S. S. Field, for appellant. Stewart S. Janney and George R. Gaither, for appellees.

URNER, J. The appellant is a stockholder of the United Surety Company, a corporation of this state. On December 24, 1910, he filed a bill in the circuit court No. 2 of Baltimore city for the dissolution of the company, and the appointment of receivers to take charge of its assets, convert them into money, and make distribution among those entitled. This action was sought on the ground that the business of the company was being conducted at a loss, and that it was insolvent. An order was passed requiring the defendant corporation to show cause within a stated time why receivers should not be appointed as prayed. The company demurred to the bill, and also filed an answer denying that it was insolvent. The demurrer was set for hearing on January 16,

1911. Three days prior to that date, other stockholders of the company owning a majority of its capital stock filed a bill in the circuit court for Baltimore city, alleging that, though the corporation was solvent, its capital had become impaired in such manner and to such extent as to incapacitate it for the further prosecution of its business, and to subject the holders of its stock to constant and increasing loss. It was averred that a meeting of the stockholders had been called by the directors in order that resolutions might be adopted looking to a dissolution. It was also stated that on January 11th the insurance commissioner of Maryland had notified the company not to engage in any new transactions until its capital should be restored. The bill then alleged that the continuance of the corporation as a going concern, without revenue from new business, pending action by the stockholders, would not only be a waste of its assets, but would subject it to the necessity of paying in cash all claims presented, while the extent to which it might be liable on other claims not yet matured would remain undetermined, so that justice to those interested required that receivers be at once appointed to take charge of the assets of the company, ascertain its liabilities and protect the rights of all concerned. The specific relief prayed for was that receivers be appointed to take charge of the property of the corporation and wind up its business, that its officers and agents be required to deliver up its assets, books, and papers to the receivers and refrain from interfering with their possession, and that a day be fixed by which claims should be filed. There was also a prayer for general relief. Simultaneously with the filing of this bill the company answered admitting the facts alleged, and consenting to the receivership. An order was thereupon passed appointing the appellees receivers of the company subject to the further order of the court. On the following day the appellant filed a petition in the case just mentioned containing the preliminary statement that he appeared by his solicitors specially and solely for the purpose of objecting to the jurisdiction of the court to entertain the proceeding. The petitioner alleged the pendency of the prior suit instituted by himself for a receivership in circuit court No. 2 of Baltimore city, a court of concurrent jurisdiction with that to which the petition was addressed, and claimed that the former court had thus acquired exclusive jurisdiction of the entire subject-matter of the suits, and that the circuit court of Baltimore city was therefore without jurisdiction to pass the order of appointment in question. There was a prayer for leave to appear for the purposes of the petition, without subjecting the petitioner to the jurisdiction of the court, and for a rescission

of the order creating the receivership. A copy of the earlier bill and of the order to show cause in that proceeding was exhibited with the petition. The circuit court passed an order permitting the appellant to appear in the second suit specially for the purpose of filing and prosecuting his petition, and the receivers were required to show cause why the order of their appointment should not be rescinded. The latter answered, denying that the circuit court No. 2 had acquired exclusive jurisdiction as to the matters presented in the second proceeding, which was asserted to be based upon a different cause of action and to be properly cognizable by the circuit court notwithstanding the pendency of the prior suit. A general replication was filed to the answer, and evidence was offered in support of the allegations of the petition. After a hearing the petition was dismissed by the circuit court. The present appeal is from its order to that effect, and also from the order appointing the receivers.

The question which the appellant desires to have determined is whether the circuit court of Baltimore city had any jurisdiction to create a receivership for the corporation in which he is interested pending a proceeding for that object in circuit court No. 2. These two courts are possessed of concurrent equity jurisdiction, and the appellant invokes the well-established doctrine that as between co-ordinate courts equally entitled to take cognizance of a particular subject of judicial inquiry the jurisdiction first invoked is exclusive. *Wright v. Williams*, 93 Md. 70, 48 Atl. 397; *Withers v. Denmead*, 22 Md. 145; *Brooks v. Delaplaine*, 1 Md. Ch. 351; *Brown v. Wallace*, 4 Gill & J. 479; *Albert v. Winn*, 7 Gill, 446. "This rule," as was said in *Brooks v. Delaplaine*, supra, "would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons," and "the only course of safety, therefore, is, when one court having jurisdiction over the subject has possession of the case, for all others, with merely co-ordinate powers, to abstain from any interference." In view of the repeated emphasis which has been given to the rule, and the serious complications which it is intended to prevent, we have no reason to doubt that it would have been applied in the present instance by the court below but for its conclusion, as we gather from the argument, that there was a material difference between the theories and purposes of the two suits under consideration. The first was a statutory proceeding directed to the involuntary dissolution of the corporation upon the ground of its insolvency under section 53 of article 23 of the Code of Public General Laws, as amended by chapter 240 of the Acts of 1908, while the second bill appears to have invoked the general equitable aid of the court for the appointment of receivers to prevent loss to the stockholders pending action on their part

looking to the voluntary dissolution of the corporation as a solvent enterprise in a proceeding to be taken in its own name under separate provisions of Code, art. 23, §§ 51, 52; Acts 1908, c. 240.

[1] The question whether under such conditions the rule as to the exclusiveness of the jurisdiction first assumed has controlling effect is one of considerable interest; but a motion to dismiss the appeal requires us to first ascertain whether the question is properly before us for determination. It is provided by section 26 of article 5 of the Code that: "An appeal shall be allowed from any final decree, or order in the nature of a final decree, passed by a court of equity by any one or more of the persons parties to the suit, with or without the assent or joinder of plaintiffs or co-defendants in such appeal." While it has been held that this provision does not restrict the right of appeal to those who are technical parties to a suit, yet it is also well settled that an appellant must be able to show that he has a direct interest in the subject-matter of the litigation. *Hall v. Jack*, 32 Md. 262; *Rau v. Robertson*, 58 Md. 508; *Grabill v. Plummer*, 95 Md. 60, 51 Atl. 823; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Johns v. Caldwell*, 60 Md. 259; *Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646; *Haskie v. James*, 75 Md. 568, 23 Atl. 1030; *Stewart v. Codd*, 58 Md. 86; *Frey v. Shrewsbury Bank*, 58 Md. 151; *Glenn v. Reid*, 74 Md. 238, 24 Atl. 155; 2 Cyc. 628, 629. In the first of the cases just cited, which was relied upon by the appellant in this connection, the decree from which the intervener appealed not only dismissed his petition, but concluded his rights in respect to the fund in controversy. It was held, therefore, that, while not a technical party to the suit, he had such an interest in the subject of the litigation as to entitle him to maintain the appeal. In the present case the appellant has not referred to any interest of his own upon which a right of appeal is predicated. The mere passage of the order permitting his special appearance for the purpose indicated does not give him such an interest. *Knabe v. Johnson*, 107 Md. 619, 69 Atl. 420.

[2] It is well settled that he has no standing as a stockholder to appeal from a judgment against the corporation (*Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *White Brass Castings Co. v. Union Metal Mfg. Co.*, 232 Ill. 165, 83 N. E. 540, 122 Am. St. Rep. 63); and we do not understand that he has intervened in that capacity. Under the special conditions here existing, it is obvious that his interests as a stockholder have been given the precise form of protection he desires. There was consequently no proposal on his part to enter the subsequent suit for the purpose of making a contest on the merits. The only ground of objection relied upon here is the pendency in a court of concurrent jurisdiction of an earlier and similar action in which the objector occupied the

position of plaintiff. We have found no case involving a conflict of jurisdiction in which the question at issue was raised by one in the situation of this appellant. Such questions are usually presented in cases of this character by defendants who are confronted with two or more proceedings on the same cause of action, or by rival receivers claiming under separate appointments. It is, of course, entirely reasonable that the appellant should desire to prosecute the suit he has instituted to a successful conclusion; but the difficulty here is to discover any interest on his part in the second suit which can be recognized as sufficient to justify his intervention for the purpose of an appeal under our statute. Certainly he cannot be regarded as having a vested right to a receivership in the action first pending. It is not to be conclusively presumed that he would succeed in proving the jurisdictional fact of insolvency upon which he relies. His status at present is simply that of an applicant for a receivership which might never be granted upon the merits of the case he has alleged. In fact, it is not contended that his interest as plaintiff in the prior action has been affected in any way by the later proceeding. On the contrary, the appellant's theory that the circuit court was without jurisdiction is apparently inconsistent with the idea that he has been prejudiced by the orders from which he has appealed. In our opinion an applicant for a receivership is not entitled merely because of the pendency of his application to appeal from the action of a separate court for the purpose of questioning its jurisdiction to entertain a suit for the same purpose. The motion to dismiss the appeal must therefore prevail.

Appeal dismissed.

STOCKBRIDGE, J., dissents as to what is said of the conclusion of the court below of a material difference between the two suits.

WILEY v. WILEY.

(Court of Appeals of Maryland. June 22, 1911.)

1. TENANCY IN COMMON (§ 3*)—EVIDENCE.

Evidence in a suit for equitable relief held to show, as to a farm, a written contract for which was taken in defendant's name, and title to which was conveyed to him after it was paid for by the joint labors of the parties, a parol agreement of the parties that they should purchase it for the sum paid for it, that after its purchase they should move onto and jointly operate it, the net profits of their joint labors to be applied to payment of the purchase money, and that after it was so paid for they should each have a half undivided interest therein as tenants in common.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 3.*]

2. FRAUDS, STATUTE OF (§§ 56, 142*)—EQUITABLE RELIEF.

Though the parol agreement of the parties that they should purchase a farm for a certain amount, and after its purchase should move onto and jointly operate it, the net profits of their joint labors to be applied to payment of the purchase money, and they, after it was so paid for, each to have a half interest therein as tenants in common, is within the statute of frauds, so that plaintiff cannot have specific performance or relief on the ground of a trust in the land, defendant having the contract of purchase made in his own name, and the conveyance to him alone, and having refused to convey or to account for the profits of their labors, plaintiff may have relief in equity by compensation to the amount of the profits belonging to him under such agreement, derived from their joint operation and development of the land, which were applied, or received by defendant to be applied, to payment of the purchase money and to the improvement of the property.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138, 343; Dec. Dig. §§ 56, 142.*]

3. PARTNERSHIP (§ 321*)—SUIT FOR DISSOLUTION AND ACCOUNTING—LACHES AND LIMITATIONS.

The partnership between the parties as to land, to be terminated by conveyance to plaintiff of an undivided interest in it, being still existing, defendant, as under the statute of frauds he might, the agreement being in parol, refusing to convey, the defenses of laches and limitations are not available in a suit to dissolve, and for an accounting as to profits from joint operation of the land.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 742-745; Dec. Dig. § 321.*]

Appeal from Circuit Court, Garrett County; Robert R. Henderson, Judge.

Suit by Alexander Wiley against George L. Wiley. Decree for plaintiff. Defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, PATTISON, and URNER, JJ.

D. Lindley Sloan, for appellant. G. S. Hamill and R. T. Semmes, for appellee.

PATTISON, J. The facts, as alleged in the appellee's bill filed in this case, in the circuit court for Garrett county, are substantially as follows: The appellee, plaintiff below, with his son, George Wiley, the appellant, more than 21 years of age and unmarried, in 1881, purchased from William R. Getty a tract of land known as the "Solomon Silbert Farm," situated in Garrett county, containing 300 acres of land, more or less, for the sum of \$3,000, of which no part was to be paid in cash. The father was uneducated, could not write at all, and could read printed matter only, and that with great difficulty. The preparation and execution of the contract of sale was intrusted to the care and attention of the son; the father was not present at its execution. By the written contract with Getty, the appellant became the sole purchaser of the land, and by the deed thereafter executed the land was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

conveyed to the son alone. The sale and conveyance to the appellant was made without the knowledge of the appellee, and against the agreement had with the appellant in respect thereto, and it was not until after the execution of the contract and deed that he learned of the same. The appellant later executed to the grantor, Getty, a mortgage upon the property to secure the payment of the entire sum of \$3,000, to be paid, as provided in the contract of sale, on or before the 23d day of April, 1893; the interest thereon to be paid annually.

At the time of the purchase of this property, Alexander Wiley, the appellee, was living with his family on a farm about $1\frac{1}{2}$ miles from the Sibert farm. His family at that time consisted of his wife and six children, including the appellant, five of them sons and one a daughter. The oldest of the children, not including the appellant, was then 15 or 16 years of age, while the youngest was only about 8 or 9 years old. George, while living with his father, at times worked for others in the neighborhood. The appellee at the time had two horses, a number of cows, 25 or 30 sheep, and wagons, plows, harrows, and other farming implements. George had no property and little or no money.

The Sibert farm being for sale, George and one Hoover considered purchasing it, but before reaching a definite conclusion Hoover decided that he would not undertake it. It was then that George approached his father, and suggested that he join him in buying it. After investigation, the father consented. The farm was purchased by them under the agreement that the entire family (the father and the six children) were to move upon the farm, take possession of, cultivate, and operate it. The stock of the father was to be used thereon, and the labor of himself, his wife, and the five younger children was to be contributed by him as his part of the undertaking. Against this the son was to give his labor. Out of what was produced upon the farm the family was to be supported; and one-half of the net proceeds from the sale of the products was to belong to the father, and one-half to the son, but the whole thereof was to be applied to the payment of the purchase money for the farm, until the whole of the purchase money was paid, at which time the father and son should each hold a one-half interest in the farm.

Pursuant thereto, the family moved upon the farm. The house thereon was small, and would not comfortably accommodate them. Therefore, in the spring of 1883, they built a new house from timber cut from the premises, and in the building of the house they all contributed their labor. They all lived in this house until the marriage of George Wiley some 10 or 12 years thereafter. "During that time, the wife of the plaintiff, Martha Wiley, and his children, boys and girls, helped in the management of the farm, made sugar in the springtime from the sugar

camp, butter from the cows in the summer, and the said Martha made a great deal of money by weaving carpets and other materials to aid in paying the price of the farm." Upon the marriage of George, the second house was built, and when completed it was occupied by him and his wife, the old folks still occupying the first house; but the management and operation of the farm continued as it had been prior to George's marriage. It is in the second house that George and his family still live, and the first is still in the occupancy of the father and mother.

Upon this farm was a sugar camp, which seems to have been quite profitable, producing each year several hundred dollars. They raised upon the farm the usual farm crops, and eggs and butter were sold therefrom. The products were sold by George, and the money therefor was received by him, with the understanding that he was to pay over the proceeds to William R. Getty upon the purchase money for the farm. The appellee did not know the amount of their earnings, or the extent of the payments upon the purchase money made by George, but "he had the utmost confidence in his son, and thought he would act honorably towards him in accordance with the terms of the agreement as originally made between them, and in consequence he never required any account in any way for the money, although he would frequently remind George of his obligations to render an account of what they had jointly produced from their farm and their labors, and always supposed that his son George would see that his rights in the premises were protected; and that when he would go to his son George for some satisfaction in the matter, or to get some statement, George would invariably put him 'off' with some flimsy excuse, and, knowing the easy disposition of his father, the plaintiff, would very often walk off and make no reply to the plaintiff's demands." That, in addition to the money coming into the hands of George from the sale of the farm products, he likewise received a considerable sum of money from the sale of timber from said lands, for which he had never accounted to the plaintiff. Nor has he accounted to the plaintiff for other moneys received by him from the sale of the products of said farm, and he refuses to make any settlement with the plaintiff, although he has repeatedly called upon him in recent years to do so, and although the title to the farm is altogether in the name of the appellant. As a result thereof, the plaintiff and his wife "have been literally stripped of the means of livelihood, while the said George has filled his pockets with the proceeds of said products and timber, and has actually loaned out and bought other property with the money belonging to this plaintiff."

Upon these alleged facts, the plaintiff asked for the passage of "a decree requiring the defendant and his wife to convey to him the

undivided moiety of 300 acres of land, or, falling in that, to pass a decree requiring the defendant to account to him for his share of the sale of timber, etc., from the said premises, and for such other and further relief as the nature of his case may require." At the conclusion of the case, the bill was amended by striking out the name of Margaret Wiley as defendant, and by adding thereto a prayer for the dissolution of the partnership.

The defendant answered, denying that the farm was purchased by him and his father, and also denying the existence of the alleged agreement between him and his father, the plaintiff, in respect to the purchase of said farm, alleging that the same was purchased by him under a written agreement with Getty, dated December 26, 1881, by which he was to be the sole owner of the lands in fee, and that, pursuant to such sale, he took possession of the farm, and has so remained in possession of the same unto this day; that on the 20th day of August, 1882, the said lands were conveyed to him by William R. Getty by deed of that date; that on the 16th day of October following he executed unto the said Getty a mortgage to secure the entire payment of the purchase money therefor, and that in accordance with the terms of said agreement, and in accordance with the terms of said mortgage, he, without the assistance of his father, mother, brothers, and sister, paid off said mortgage debt and all interest due thereon; and further alleging that the alleged agreement was a mere verbal agreement for the sale of lands, or an interest in and concerning lands, and that there was no memorandum or note of said agreement signed by the said George L. Wiley, and that such agreement is void under the fourth section of the statute of frauds, upon which statute the defendants rely and now plead the same in bar of the relief claimed by the plaintiff. He also denied that the plaintiff ever paid any part of the purchase money for said farm, directly or indirectly, or that he was ever in possession of the same, or any part thereof, except as tenant of him (the owner). He admitted the sale of timber from the land, amounting to \$900, which he alleges he had the right to sell; he being the owner of said land. He likewise admitted the sale by him of sugar and other products from the farm, and the application of a large part thereof to the payment of the purchase money for the farm, but alleged that these, too, were his property, and he had the right to do so without accounting to the appellee for any part thereof, as he had no interest therein or claim thereto. He likewise pleaded the statute of limitations. To this answer the general replication was filed, and the learned court below, upon hearing the evidence upon the issues joined, passed an order or decree dissolving the copartnership existing between the plaintiff and defendant,

and decreeing an accounting between them. It is from this order or decree that this appeal is taken.

[1] We have no difficulty in reaching the conclusion, from the evidence in this case, that an agreement was made by and between the appellant and the appellee to purchase the farm at the sum mentioned, and that after its purchase they were to move upon and take possession of the lands, and were to operate and cultivate the same jointly, and the net profits arising from their joint labor were to be applied to the payment of the purchase money for said lands, and when, by the application of the same, the entire purchase money was paid, the appellant and the appellee were each to have one-half undivided interest therein as tenants in common.

The existence of such an agreement is established by the testimony of the appellee, Martha Wiley, his wife, Mrs. Doolittle, his daughter, and his two sons, Harry and Jacob Wiley. And the appellant by his own testimony admits that the purchase of this land jointly with his father was considered and discussed by them on a number of occasions, and not until the day of the consummation of the sale did his father determine not to join him in its purchase. He testified that after several conversations, more particularly with his mother, in relation to the purchase of this farm jointly by himself and father, that he, before going off to work, told her that "the articles of agreement" were to be drawn up inside of a week or ten days from that time. That they could study over it, and if they wanted to take a share in it he would be home the day before the agreement was to be made. That in about a week from that time he returned to his father's home, and said to them that the agreement was to be drawn up the next day (Saturday), and if his father wanted to go along they could go, and they would fix up the paper. "He [the father] spoke up and said he was sick, and not able to go. He said, 'Go and have it fixed up for yourself.'" That he went to Mr. Getty, and told him what his father said. The paper was then drawn up by Mr. Getty, and they each signed it.

But, notwithstanding the father's alleged refusal to join him in the purchase of the farm, we find the appellee a short time thereafter with his family moving to the Sibert farm, carrying with him all his stock and farming implements, and with the appellant, his son, taking possession of the farm. Thereafter, as the record abundantly discloses, not only did he (the appellee) himself work upon the farm, but his wife, sons, and daughter also. The wife and daughter did the entire cooking and washing for the family, as well as for the hired men upon the farm, and at times they worked in the sugar camp and in the fields. The appellee with his younger sons and the appellant cultivated the crops and also worked in the sugar

camp, for which the appellee, his wife, sons, and daughter were paid nothing, more than on a few occasions the appellant gave to his father and mother a few dollars to meet urgent needs. The crops when cultivated, as well as the sugar made at the camp, and the butter made by the wife, were sold by George, and the money received by him, and after paying therefrom the costs and expenses incurred in the cultivation of the crops and the production of the sugar, etc., and after the payment of a part of the same for the purchase of supplies for the family, the balance, representing the net profits arising from their labor, was retained by him, and, as he states, paid over to Getty upon the purchase money for the farm, for which there has never been any accounting by the appellant to the appellee.

The criticism has been made by the appellant "that no two of the witnesses [offered to prove the agreement] agreed about it." It will be borne in mind that the statements were made by the witnesses more than 25 years after the conversation occurred. Thus it is not expected that the statements made by them, each giving the conversation as he or she recalled it, should in no wise have been dissimilar. Under the circumstances, the want of greater similarity adds weight to the testimony.

[2] It is contended, however, by the appellant that the agreement above set forth, although if found to exist, is within the fourth section of the statute of frauds, and as a result thereof the appellee is not entitled to the relief sought by him in this case. In the case of *Green v. Drummond*, 31 Md. 78, 1 Am. Rep. 14, the allegation in the bill was that Green and Drummond agreed to become jointly the purchasers of property; each party to furnish one-half of the purchase money and to hold the same in undivided moieties. The purchase was made in the name of Drummond alone, who was reported by the executors as the sole purchaser, and the sale was ratified as made to him. Green was no party to the contract made with the executors, nor in any manner known to them as a purchaser. His alleged agreement was made with Drummond, and, as stated in the bill, was a mere parol agreement, not evidenced by any writing. This court in that case said: "There can be no doubt that the alleged agreement between Green, the appellant, and Drummond, as set out in the bill of complaint, was an agreement within the fourth section of the statute of frauds." But in that case it was contended that upon the pleadings and proof there was a trust created in favor of the appellant; the effect of the agreement being, as alleged, to charge Drummond, as trustee of Green, to the extent of the moiety of the land. The court, in discussing this contention, said:

"Here we are met by the provisions of the seventh section of the statute of frauds, which declares that 'all declarations or cre-

ations of trust, or confidences of any land, etc., should be manifested and proved by some writing, etc., or else they shall be utterly void, and of none effect.'" It was also argued in that case that the effect of the transaction therein involved was to create a resulting trust in the property in favor of Green, to the extent or in the proportion of the money so paid or furnished by him, thus bringing the case within the provisions of the eighth section of the statute. But the court, after a full discussion of both the seventh and eighth sections of the statute in respect to the rights acquired by Green under his agreement with Drummond, said: "It follows from what has been said: (1) That the appellant is not entitled to claim a specific execution of the agreement, whereby, as alleged in the bill, it was agreed between him and Drummond that he should become a joint purchaser of the property, and hold to the extent of one moiety. Such an agreement, under the statute of frauds, can be proved only by writing. (2) It also follows, for the reasons before stated, that the appellant is not entitled to relief, upon the ground of a resulting or constructive trust in the property, under the eighth section of the statute. It remains to be considered whether, under the pleadings and proofs in the cause, the appellant is entitled to any, and what, relief in a court of equity. A specific execution of the alleged agreement being denied, the question is whether the bill should be retained for the purpose of awarding compensation for the purchase money paid and advanced by him. It has been said to be a general rule of equity that 'no one shall avail himself of a law made for his protection, so as to injure another, and especially not to enrich himself at his expense.' [*Anthony v. Leftwich*] 3 Rand. 258. The statute of frauds was intended to protect parties against feigned or incomplete agreements. But when one party induces another, on the faith of a parol contract, to place himself in a worse situation than he would have been if no agreement existed, and especially if the former derives a benefit therefrom, at the expense of the latter, and avails himself of his legal advantage, he is guilty of a fraud, and uses the statute for a purpose not intended (the injury of another), for his own profit. The fraud does not consist of availing himself of the statute to protect himself, but in using it to appropriate to himself what justly belongs to another. 3 Rand. 259. To prevent such injustice, courts of equity, in cases where the party is not entitled to specific performance, often grant relief by decreeing just compensation; that is, by decreeing the repayment of the money expended on the faith of the contract. 'Such relief,' as stated by Judge Story (2 Eq. J. § 794), 'is ordinarily to be decreed in equity only as incidental to other relief sought by the bill and granted by the court, or where there is no adequate remedy at law, or

where some peculiar equity intervenes.' The money not being advanced as a loan to be repaid, but expended in pursuance of the agreement for the joint purchase of the land, in order to maintain an action at law to recover back the money, it would be necessary to prove the contract under which it was paid which he would be precluded from proving by parol, by reason of the provisions of the statute, and thus his remedy at law might fail and justice be denied. 3 Rand, 259, 260; *White, Adm'r, v. Coombs, Ex'r*, 27 Md. 489. In such case, according to authorities, a court of equity ought to give relief, because there is no remedy at law, or a very inadequate and precarious one. These authorities sufficiently establish the jurisdiction and power of a court of equity to grant relief to the appellant in the present case by decreeing compensation. The measure of compensation to which he will be entitled is a decree for the money paid and expended by him in the purchase of the property, with interest thereon."

This case is very similar to the case of *Green v. Drummond*, supra, and for that reason we have quoted very fully from the opinion of the court in that case, and in our opinion the principles there applied apply with equal force to this case.

In the case of *Morgart v. Smouse*, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, the partnership there created extended to the "purchase, development, and sale, for their joint account," of the lands in question. The partnership in this case extends only to the profits to be derived from the operation and development of the lands by the joint labors and exertion of the appellant and appellee—these profits to be applied to the payment of the purchase money—and upon the payment of the purchase money out of these profits, and conveyance of the land to them, they were to hold the land, not as partners, but as tenants in common; the partnership not continuing after the payment of the purchase money, and not extending to profits to be derived from the sale of the lands.

[3] Under the aforesaid agreement in this case, the partnership would have been dissolved upon the payment of the purchase money in full and a conveyance of the lands so bought from Getty to Alexander and George as tenants in common, or, as the entire interest in said lands was conveyed by Getty to George, a conveyance by George of a moiety therein to Alexander. As it is, however, even though the whole of the purchase money has been paid, the conveyance from Getty to George and Alexander is prevented by the conveyance by Getty to George and the subsequent death of Getty, and, as George refuses to convey a moiety therein to Alexander, the enforcement of the same is prevented by the statute. Therefore no specific performance can be had. But, by ap-

plication of the principles in the case of *Green v. Drummond*, the appellee should be compensated to the amount of the profits belonging to him, under the agreement aforesaid, derived from the joint operation and development of the lands, which were applied, or were received by the appellant to be applied, to the payment of the purchase money and to the improvement of the property. The partnership, however, still exists, to be dissolved by a decree of court, and as it exists the defenses of laches and limitations are not effective.

From what we have said, the learned court below very properly passed its decree, from which this appeal is taken, discovering the copartnership and granting an accounting. We will therefore affirm the decree of the lower court, with costs to the appellee.

Decree affirmed, with costs to the appellee.

WISE v. MARTIN.

(Supreme Court of Pennsylvania. May 23, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 205*)—CLAIMS AGAINST DECEDENT'S ESTATE—CONTRACT.

In an action against a decedent's estate to recover \$25 per week for nursing him during his last illness, she cannot recover, where during that time she was employed at \$2 per week, without evidence of an express contract to pay for the nursing; and loose declarations made by the decedent, indefinite understandings, and anticipated benefactions are insufficient for that purpose.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 732; Dec. Dig. § 205.*]

Appeal from Superior Court.

Action by Jennie Wise against A. F. Martin, administrator. From a judgment of the superior court reversing judgment for plaintiff, she appeals. Affirmed.

The following is the opinion of Morrison, J.:

"The plaintiff brought this action to recover the value of her services nursing Samuel McCloskey, deceased, as she alleged, for about 1½ years of the latter part of his lifetime, and until 12 days before his death. She recovered a verdict and judgment thereon for \$900. During all of the time she did the alleged nursing, she was in the employ of the decedent as a domestic in consideration of \$2 per week, or \$10 per month, and she was paid for her work as a domestic in full. At the trial the defendant's counsel presented a written point, asking for a binding instruction in favor of the defendant. This was refused, and an exception noted for defendant. After verdict, the same counsel moved the court for judgment non obstante veredicto upon the whole record, and this was refused and an exception noted for defendant, and judgment entered on the ver-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dict. Therefore, the question of the sufficiency of the evidence to sustain the verdict is squarely raised by the first and second assignments of error, and also by the third.

"The declaration sets up a right to recover upon a quantum meruit, and an express contract is not averred. This, under the decisions, perhaps, does not necessarily prevent a recovery, provided the evidence clearly raises an implied contract by showing that the plaintiff and McCloskey both understood that the nursing was not embraced in the contract for domestic service, but that it was to be paid for on the basis of its value.

"It will be noted in the present case that the plaintiff and McCloskey were not related, either by consanguinity or affinity. *Smith v. Milligan*, 43 Pa. 107; *Weaver's Estate* (Paul's Appeal) 162 Pa. 349 [38 Atl. 12]; *Harrington v. Hickman*, 148 Pa. 401 [23 Atl. 1071]. But in the latter case it was only held that the services rendered by the plaintiff could, in the absence of any agreement fixing a price upon them, have been recovered for upon a quantum meruit. There was positive testimony of a declaration of the decedent that the plaintiff was to be paid for her services as nurse. The ruling there is that a recovery might be had upon a contract, and that the amount thereof could be fixed as the value of the services.

"In *Pollock v. Ray*, 85 Pa. 428, Mr. Justice Sharswood said: 'Claims of this character against the estates of decedents, resting on mere oral testimony of declarations of admissions, are very dangerous, and ought certainly not to be favored by the courts.' In *Wall's Appeal*, 111 Pa. 460 [471, 5 Atl. 220, 224 (56 Am. Rep. 288)], Mr. Justice Green, in closing his opinion for the court, said: 'Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations, presented generally years after the services in question were rendered, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done. We cannot too often repeat the cautions we have so frequently uttered upon this subject, and we feel that the present occasion is one which demands both their repetition and their application.'

"It may be conceded that under the evidence in the present case the jury could find that \$10 per month was inadequate compensation for the labor which the evidence tends to show was performed by the plaintiff. But, in view of the character of the plaintiff's claim, and the fact that she was steadily under the employment of the decedent, for a long period of time, at \$2 per week, and received her pay in full, and that she also received more than \$100 from the Odd Fellows for her special care of McCloskey, and the further fact that her claim was not presented until after the lips of Samuel McCloskey and his wife were closed in death,

we are not at liberty to permit our sympathies to obscure the legal principles established for the disposition of such cases, by a long line of decisions of the Supreme Court, as well as by numerous decisions of this court.

"The present case bears the earmarks of one of those dangerous cases so often commented upon by the superior court. This plaintiff had been in the employ of the decedent for a long time without any bargain for more than \$2 per week, and we cannot find in the testimony any sufficient evidence to warrant a jury in finding that there was even an implied contract to pay her more than the stipulated sum. It is true that there was considerable loose talk by McCloskey to other persons about her services, and that they never could pay her for the same, and, again, that she would have to be paid at some indefinite time in the future. But there is also evidence on the part of the plaintiff that she was told that they were not able to pay her more than the \$2 per week, or at the most \$10 per month. There is considerable evidence that she was expecting to be rewarded by a legacy from Mrs. McCloskey, and after the death of the latter, and after it was found that the plaintiff was not remembered in her will, the plaintiff quit taking care of McCloskey, and left him about 12 days before his death. There is no evidence of any agreement with the plaintiff that she was to have a legacy. Nor is there any satisfactory evidence that the plaintiff ever agreed with McCloskey that she would nurse and care for him, and receive her compensation therefor in the future.

"It is to be noticed that this plaintiff seems only to have been accustomed to receive \$2 per week for her services; she, not being a trained nurse, was willing soon after the death of Mr. McCloskey and his wife to fix up and present to the administrator a claim of \$25 per week, as a nurse, amounting to \$1,950, upon which she admitted a credit of \$10 from some source and a credit of \$106.74 from the Odd Fellows; and she actually attempted to collect the balance, and succeeded in recovering a verdict and judgment for \$900. In our opinion, this case, as it appears from the evidence in the record, ought not to have been submitted to the jury.

"Counsel for the plaintiff appear to rely especially on *Harrington v. Hickman*, 148 Pa. 401 [23 Atl. 1071], but that case reversed the court below for refusing to submit to the jury the positive evidence of a witness that the decedent said to him: 'I have promised her that she shall be paid by my executors when I am gone for waiting on me.' If a jury believes this evidence, it established an express contract.

"In *Ranninger's Appeal*, 118 Pa. 20 [12 Atl. 511], cited by plaintiff's counsel, the Supreme Court expressed some doubt on the plaintiff's right to recover, but affirmed the decree be-

cause the 'auditor upon an examination of the whole case has found the facts essential to her recovery, and these findings have been approved by the court. The findings of an auditor, when so approved, will not be set aside, except for flagrant error.'

"In *Elchelberger's Estate*, 170 Pa. 242 [32 Atl. 605], cited by plaintiff's counsel, there was proof of an express contract for the payment of the plaintiff for extra services rendered.

"In *Ranck v. Albright*, 36 Pa. 367, the plaintiff was employed at a fixed compensation as housekeeper and domestic servant; but it appears that she was required to perform much more work than was anticipated at the time she was hired. In reversing the judgment of the court below, the Supreme Court said: 'In the absence of any proof of a new contract, the law presumes that the plaintiff continued at service until she left at the same wages at which she commenced. And this presumption is not destroyed by the fact that she was required to do more work than she at first anticipated, in consequence of the defendant's resumption of the active labors of farming. If she was dissatisfied with the original arrangement, she should have demanded additional compensation.'

"In the late case of *Grossman v. Thunder*, 212 Pa. 274 [61 Atl. 904], the Supreme Court, in an opinion by Mr. Justice Elkin, appears to have settled the question that 'a domestic and a nurse in the home of the testatrix, having received fixed wages for her services as such, cannot recover in this action for alleged extra services, in the absence of an express contract to that effect, or an agreement to provide for such compensation by a legacy. The evidence is not sufficient to support either contention. Loose declarations made to outside parties, indefinite understandings, suggested gratuities, anticipated benefactions, and testamentary intentions not carried out, about which there is some vague and unconvincing testimony, are not sufficient to establish an express contract, either to pay for the extra services at the death of the testatrix or to provide for such compensation by a legacy.' That case is substantially the same as the case in hand. In each the plaintiff was paid in full as per contract. The plaintiff here certainly did not agree to remain and nurse McCloskey on the footing of a legacy, although it is quite clear that she anticipated the legacy; nor can we find from the evidence that she agreed to remain and nurse McCloskey on a contract for compensation in addition to the \$10 per month which she received.

"Our own case of *Moore's Estate* (McClure's Appeal) 12 Pa. Super. Ct. 599, is in

harmony with *Grossman v. Thunder*, 212 Pa. 274 [61 Atl. 904]. In that case we said, by Beaver, J.: 'The question recognized on all hands as being the important one is, Was there a distinct contract for the payment of increased compensation different from that originally entered into between the parties? We cannot find anywhere in the case the clear and explicit evidence upon which such a contract should rest.' To the same effect is *Howard v. Drexler*, 14 Pa. Super. Ct. 59, and these cases are followed by *Piersol's Estate*, 27 Pa. Super. Ct. 204, where the same doctrine is reaffirmed.

"We sustain the first, second, and third assignments of error, and the judgment is reversed.

"Rice, P. J. (dissenting). It seems to me that the reasoning of the opinion of the learned trial judge, overruling the motion for judgment non obstante veredicto, and the recital of evidence contained therein, vindicate his conclusion that there was sufficient evidence to warrant submission to the jury of the question whether there was a contract whereby the plaintiff was to receive payment for her services as nurse, as distinguished from her services as a domestic. It is not a case where the plaintiff's demand rests only on the fact that she rendered valuable services, and a bare inference therefrom that it was not intended to be gratuitous, nor does her demand, if the evidence be believed, rest only on the declarations of the decedent in her absence, but has the support also of declarations made in her presence, which she might fairly and justly interpret as expressing his intention that she should be compensated. The evidence of declarations made to others, even if not sufficient standing alone to justify a finding that there was a contract, was competent (*Harrington v. Hickman*, 148 Pa. 401 [23 Atl. 1071], and taken in connection with the evidence as to what was said in her presence, and all the circumstances, was sufficient to carry the question to the jury. I am constrained, therefore, to dissent from the judgment about to be entered.

"Judge Henderson and Judge Head authorize me to say that they join in this dissent."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

A. M. Liveright, for appellant. Roland D. Swope, for appellee.

PER CURIAM. The judgment of the superior court is affirmed on the opinion of a majority of that court, as written by Judge Morrison.

STEGMAIER et al. v. KEYSTONE COAL CO. (SCHMITT, Intervener).

(Supreme Court of Pennsylvania. May 23, 1911.)

1. EQUITY (§ 215*)—PLEADING—DEMURRER.

A defendant can answer to a part of a bill and demur to a part under equity rule 31, but he may not answer and demur also to the whole bill, or to the same part of it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 488; Dec. Dig. § 215.*]

2. APPEAL AND ERROR (§ 78*)—INTERLOCUTORY ORDER.

An order overruling a demurrer is interlocutory, and no appeal lies from it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 465-468; Dec. Dig. § 78.*]

Appeal from Court of Common Pleas, Luzerne County.

Bill by C. E. Stegmaier and others against the Keystone Coal Company and Victoria Schmitt, intervener. From a decree overruling demurrer to the bill, Schmitt appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John McGahren and Edmund G. Butler, for appellant. William S. McLean and George R. McLean, for appellees.

PER CURIAM. This appeal is from an order overruling a demurrer to a bill in equity for the appointment of a trustee to take the place of a deceased trustee, to whom a mortgage was made to secure bonds of a corporation. The appellant answered a part of the bill and demurred to the whole of it. [1, 2] It was said in *Barbey's Appeal*, 119 Pa. 413, 13 Atl. 451, that under equity rule 31 a defendant is permitted to answer a part of a bill and demur to a part, but that he may not answer and demur also to the whole bill, or to the same part of it. Moreover, the order overruling the demurrer was interlocutory, and no appeal lies from it. *Arnold v. Russell Car & Snow Plow Co.*, 212 Pa. 303, 61 Atl. 914.

The appeal is dismissed at the cost of the appellant.

BRADNEY v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

CARRIERS (§ 328*)—INJURY TO PASSENGER—BOARDING MOVING STREET CAR.

Where plaintiff, in attempting to get on the platform of a moving street car, succeeded in getting his feet on the lower step, when he was thrown off by the motion of the car, binding instructions for defendant are proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1369; Dec. Dig. § 328.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Joseph Bradney against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

J. Morris Yeakle, for appellant. Thomas Leaming and Charles Biddle, for appellee.

PER CURIAM. While standing at a street crossing, the plaintiff signaled the motorman of an approaching car to stop. He saw the power turned off, the brakes applied, and the speed reduced, and, as the car reached the crossing and was running slowly, he attempted to get on the front platform. He succeeded in getting his feet on the lower step, and was in the act of raising one of them to the platform, when he was thrown off by the motion of the car, which was accelerated by turning on the power. His reason for not waiting until the car stopped was that he thought it would stop before the back platform came in line with the crossing, and he would be obliged to walk in the snow to reach it. If it be assumed that the motorman was negligent in turning on the power, the plaintiff's right to recover was defeated by his own negligence in attempting to get on a moving trolley car. If he had escaped the consequences of his own negligence and reached a place of safety on the car where he was injured by the subsequent negligence of the motorman, he might have sustained an action. But he did not succeed in getting on, the act was never completed, and he was injured while doing what we have said is negligence per se. The case is on all fours with *Hunterson v. Union Traction Co.*, 205 Pa. 568, 55 Atl. 543.

The judgment is affirmed.

In re STIRK'S ESTATE.

Appeal of WOOD et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. WILLS (§ 153*)—VALIDITY—FRAUD.

A woman by her will gave her residuary estate to a charity. She then at once executed a codicil, in which she stated that, as there might be a question as to the legality of the bequest to charity if she died within 30 days, she revoked that gift, and gave her residuary estate to a trust company. The scrivener who wrote the will and codicil was an assistant trust officer of the company. The testatrix knew nothing of the trust company nor of any of its stockholders or officers, except the scrivener. When the codicil was prepared, the name of the residuary legatee was left blank, and, when the scrivener asked the testatrix to whom she wished her residuary estate to go in case of her death within 30 days, she said to give it to the trust company. Without openly

stating it, it appeared that the gift to the trust company was intended simply to meet the requirements of the law, and carry the bequest to the charity designated in the will. *Held*, that the gift to the trust company cannot be sustained.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 153.*]

2. WILLS (§ 153*)—VALIDITY—FRAUD.

The action of a scrivener who was an officer of a trust company in procuring the execution by testatrix of a codicil giving a bequest absolutely to the trust company which testatrix evidently intended to go to charities designated in her will constituted a constructive fraud which would prevent the trust company from reaping the benefit from it, though the company did not in any way participate in the fraud.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 153.*]

3. FRAUD (§ 30*)—PERSONS LIABLE.

No person can claim an interest under a fraud committed by another, if the taint of the original transaction runs through the derivative interest, no matter how innocent the party claiming it may be.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 35; Dec. Dig. § 30.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Elizabeth Ivins Stirk, deceased. From a decree dismissing exceptions to an adjudication, Oliver D. Wood and others appeal. Reversed and remanded.

Exceptions to adjudication. At the audit it appeared that the residuary estate was claimed by Oliver D. Wood and William B. Wood, the brothers and only next of kin of the testatrix, upon the ground that the bequest of the residuary estate to the Land Title & Trust Company under the codicil to the will was invalid, because of the legal incapacity of the Land Title & Trust Company to take and also because this bequest of the residuary estate was an illegal attempt to violate section 11 of the act of April 26, 1855 (P. L. 332), the testatrix having died four days after the execution of the will and codicil. The auditing judge, Anderson, J., decided in favor of the Land Title & Trust Company. Exceptions filed by Oliver D. Wood and William B. Wood were on October 18, 1910, argued before Judges Dallett, Lamorelle, and Anderson. On December 3, 1910, an opinion was filed by Lamorelle, J., dismissing the exceptions; and at the same time a dissenting opinion was filed by Dallett, J. On December 7, 1910, a formal decree was entered dismissing the exceptions and confirming the adjudication. The facts appear by the opinion of the Supreme Court.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Alfred R. Haig, Henry C. Thompson, Jr., William F. Harrity, Solomon F. Glenn, and Edwin F. Glenn, for appellants. John G. Johnson and Maurice Bower Saul, for appellees.

STEWART, J. [1] The question we have to determine is whether under the evidence submitted a secret trust attaches to an alternative bequest, which by the terms of the will was to become effective in case the testatrix died within 30 days after the execution of her will. The appeal is by the brothers and next of kin of the testatrix from a decree of the orphans' court of Philadelphia county adjudicating the account of the executors and trustees, and awarding the fund absolutely to the residuary legatee named in the will. The claim made on their behalf is that the bequest, though in terms absolute, was made with a tacit understanding that, in case the charitable bequests contained in the will failed by reason of death within 30 days from the date of the execution of the will, the alternative residuary legatee would appropriate the fund received to their payment. The case is an exceptional one on its facts. Fortunately these are not in dispute. The testatrix, Mrs. Elizabeth Ivins Stirk, was a married woman, wife of Dr. James C. Stirk, of Philadelphia. She had been twice married, but was childless, and her nearest kin surviving are two brothers, these appellants. With her surviving husband she had an antenuptial contract limiting and defining his interest in her estate. She made her will in immediate contemplation of a very serious surgical operation upon herself which she apprehended might be attended with fatal results. The will was prepared by Mr. Simpler, assistant trust officer of the Land Title & Trust Company, a corporation appointed one of the executors, and made also the alternative residuary legatee under the will. Mr. Simpler's assistance in the matter was invited in this way. A year or so before he had aided Mrs. Stirk in the settlement of her share in the estate of her first husband. In the course of that business he had suggested to her the importance of herself making a will, and had endeavored, without success, to overcome her objections. So, when the emergency of her illness arose, she sent for him. He visited her on the afternoon of Saturday, January 9, 1909. She then told him of her physical condition and her apprehension as to the result, and requested him to prepare a will for her to execute. She acquainted him fully and exactly with the disposition she desired to make of her estate, devoting it largely to charitable, educational, and religious uses. From the memoranda taken at this interview he prepared the will and codicil thereto the following day (Sunday), and on Monday morning called upon Mrs. Stirk, when both will and codicil as he had prepared them, with the exception hereafter noted, were duly executed. The will proper as prepared by Mr. Simpler was executed without any change whatever. In the thirteenth item it gave to St. Joseph's Hospital in Philadelphia the sum of \$5,000;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the fourteenth, to the Presbyterian Home for Aged Couples and Aged Men, located at Bala, \$25,000; in the sixteenth, to the University of Pennsylvania, \$100,000; in the fifteenth, to her husband, "in pursuance of the antenuptial contract" \$100,000; in the eighteenth, her residuary estate to her executors in trust, to pay annuities for life as follows: \$8,000 annually to her husband, Dr. James C. Stirk; \$3,000 annually to her brother, Oliver D. Wood; \$500 annually to her brother, William B. Wood; a like sum to Oscar Miller; and \$260 annually to her friend, Mrs. William D. Summers. This further provision follows:

"And as to the residue of the said net income, and upon the death of the said annuitants, as to the amount heretofore paid to them respectively, to pay over the same to the University of Pennsylvania for the general purposes of said University.

"And upon the further trust, upon the death of the last survivor of the said annuitants, in trust to pay over, transfer and deliver the whole of my residuary estate as it may then be constituted unto the University of Pennsylvania."

The codicil as prepared by Mr. Simpler was as follows: "Whereas there may be a question as to the legality of the bequests to the University of Pennsylvania and to the charities named as beneficiaries in my said will in case of my death within thirty days after the date of said will, now in case I shall die within thirty days after this date, I hereby revoke the said bequests to St. Joseph's Hospital of five thousand dollars, to the Presbyterian Home for Aged Couples and Aged Men located at Bala, of Twenty five thousand dollars, to the University of Pennsylvania of One hundred thousand dollars, and the residuary bequests to the said University of Pennsylvania, and in lieu thereof, I give, devise and bequeath the sum of One hundred and thirty thousand dollars to ———.

"And as to the rest, residue and remainder of my estate, and after the termination of the annuities as provided in my said will, I give and devise and bequeath the same to ———."

The only change made in the codicil before execution was the insertion of the name, Dr. James C. Stirk, in the first blank appearing above, and the name the Land Title & Trust Company in the second.

This brings us to the material inquiry in the case; and, that our recital of the facts in connection therewith may be entirely accurate, we shall quote from the record the testimony of the several witnesses. Mr. Simpler, the scrivener, having testified that on writing up the will in accordance with the instructions Mrs. Stirk had given him on Saturday night, it occurred to him that, in case the operation contemplated should prove fatal, the charitable bequests would fail, and that he therefore prepared a skeleton of a codicil, and took that with the will;

that the will was entirely satisfactory, and was executed, and that then the codicil was taken up. His further examination proceeded as follows: "Q. Had she [testatrix] given you any instructions about the codicil prior to that? A. She had not. Q. The codicil, then, was your suggestion? A. Was my suggestion, to take care of the possible intestacy, because she had expressed herself to me as having provided for everybody in whom she had any interest under the terms of the will, including the money to go as the residuary clause provided. Q. In preparing the codicil, you prepared it as a skeleton, with the names of the beneficiaries blank? A. Exactly. Q. At the time you received your instructions as to the preparation of the will, was anything said as to the alternative bequests under the codicil? A. Nothing. Q. The codicil was not referred to? A. The codicil was not referred to, because, as I say, the possible fatal termination of the operation did not occur to me until I sat in the quiet of my office on Sunday night and had the will prepared. Q. When you went back with the skeleton of the codicil, what did you say to her in connection with that? A. I told her that, in case of her death within 30 days, the law said that a gift to a charity was void, and that the law also said that a gift to any person in trust to pay to a charity was void; and that, therefore, it became necessary for her to consider to whom should go the amounts which she had given to charities, and the residuary amount which was to have gone to the university without any relation of trust being implied or expressed. Q. Was the codicil prepared and ready for execution before the will had been executed? A. The codicil was all prepared in typewriting, with, as I say, a skeleton. I have had the will brought up from the register's office. Q. Had the blanks been filled in? A. No; they were not filled in prior to the execution of the will. Q. After the will had been executed, what was done with the codicil? A. After the will was executed, I said, 'Now, it is necessary to take up the question of the codicil, as to what, in case of your death within 30 days, you wish done with the charitable bequests of \$130,000, and the ultimate residuary bequests after the annuities fall in.' And at that time, the will having been executed, the witnesses to the will were present. I read over the codicil and came to the first blank, and I said 'To whom do you wish the \$130,000 to go, in case the will shall be null as to that?' 'Oh,' she said, 'give that to Jim.' I said, 'You fill in Dr. Stirk's name,' which she did in her own handwriting. Q. 'Was Dr. Stirk present at that particular moment? A. He was not present at that time. And I also had her initial it. And then the question came as to the residue of the estate after the termination of the annuity, and I read over that clause and asked her to whom she wished that to go, and she said, 'Give that to

the Land Title Company.' Q. Had you made any suggestion to that effect? A. I said 'You write that in,' and she asked if she had to write all that in, and I said I would write it if she initialed it; and that is what was done, and then the codicil was signed by her, and I asked her if she acknowledged it as a codicil to her will, and she did so in the presence of the witnesses, and they signed and left. Q. Now, when the name of the Land Title Company was suggested as the residuary devisee and legatee, was there any conversation as to the character of that bequest, except that it was to be absolute? A. There was none. Q. Were there any instructions given? A. There were not. Q. Had you called her attention, or had you called to her mind any decision of the Supreme Court bearing on a case of that kind? A. I had not. Q. The gift was made, as you say, without any intimation from her as to the object of it and without any suggestion or direction as to the ultimate disposition of that property? A. Absolutely."

Mr. Simpler had brought with him two of his assistants in the trust company to attest the execution of the will. They were not introduced into the room where testatrix was until after the conversation between Mr. Simpler and the testatrix had occurred, and their testimony was confined to the act of execution. John F. Case, one of these, testifies that together they were called in to attest the will; that, having subscribed as witnesses to the will proper, they remained in the room while Mr. Simpler took up the matter of the codicil. This witness was then asked the question, "Now tell us what you heard, so far as you remember?" His answer was: "After the clause in the codicil where the bequest of \$130,000 is revoked, Mrs. Stirk requested Dr. Stirk's name to be inserted, after which she requested Mr. Simpler to run his pen through the words immediately following Dr. Stirk's name, which he did, and Mrs. Stirk put her initials on the margin, and after that she suggested that the residuary estate be left to the Land Title & Trust Company. Q. What was the conversation between Mrs. Stirk and Mr. Simpler—what did each of them say—at the time in your presence in relation to the codicil? A. As I remember, there was not much conversation. I think Mr. Simpler spoke something to this effect—as to whom should this residuary estate be left; and she said, 'The Land Title & Trust Company,' and then he asked her to write the Land Title & Trust Company's name in the codicil, to which she demurred, it being a long name, and Mr. Simpler said he would write the name in if she would put her initials on the margin. Q. Who wrote the name of Dr. Stirk in? A. Mrs. Stirk. Q. Was there any suggestion made by Mr. Simpler leading up to the entering of these names in the codicil? A. None that I heard; no."

The testimony of the other attesting wit-

ness, Mr. Glenn, was to the same effect. Dr. Stirk, the husband, testified that he was present when the name of the Land Title & Trust Company was inserted in the codicil. He was asked: "Q. Can you give us any conversation that took place at that particular time? A. The only conversation that I can recall is when Mr. Simpler said, 'Now, there is a residue, what shall we do with that?' and she says, 'Oh, give that to the Land Title Company.' Q. Just in that way? A. She remarked at the same time that she had made provisions for every one else that she cared anything about, and she would give that to them. Q. Did she give any direction as to how they should dispose of it? A. None whatever; just simply ordered it to be given to the Land Title Company. Q. Did you suggest anything to her? A. Absolutely not. Q. Did you raise any question or make any suggestion as to the propriety of giving this to a corporation for profit? A. I had no reason to. Q. Or a total stranger? A. Absolutely none."

We have been careful to recite all the testimony bearing upon the immediate question with which we have to deal. These additional facts, however, appear in the case, which are to be noticed. The estate which was disposed of under this will the testatrix had derived in most part, if not wholly, from her first husband. She was not a stockholder in the trust company, and, so far as appears, was not even a depositor; and again, so far as appears, she was unacquainted with any one interested in it except Mr. Simpler; and still again the Land Title & Trust Company is neither a religious nor charitable, nor educational institution, but one exclusively for profit. The first question that naturally arises is, why should the testatrix, whose governing desire and evident purpose, as declared in her will, was to devote such a large part of her estate to charitable and educational uses, choose as an alternative recipient of her bounty, in case her original disposition failed by operation of law, a corporation which needed no assistance, whose usefulness as a public convenience could in no way be promoted by private benefactions, and which was incapable at law of engaging in charitable, educational, or religious enterprises, rather than kindred for whom she had affectionate regard, as evidenced by her will? Were this an inquiry as to her testamentary capacity, the circumstance stated would properly call for consideration. It is quite as relevant here, though in a different connection, not as a challenge of the testatrix's *jus disponendi*, but because it is a testamentary disposition not only unusual, but so contradictory to the main purpose expressed in the will proper, and so inexplicable by the ordinary rules which regulate and control human conduct and feeling that, if the entire sanity of the testatrix be conceded, as it must be, it suggests at least a suspicion that the words of

the will leave something of the intention of the testatrix unexpressed. The will, aside from the codicil, disposed of her entire estate, and expressed her governing desire and purpose. The codicil was prepared by the scrivener without consultation with the testatrix to meet a legal contingency which, after preparing the will, had occurred to him, but not to the testatrix, as possible. It is no strained inference from the testimony of Mr. Simpler that the testatrix knew nothing whatever of the requirements of law in the matter of charitable bequests until he submitted to her the codicil for execution. Assuming, as we have a right to do, that she was a person wholly uninformed in this respect, the information she received from him, while it might have been enlightening to one who had some previous knowledge of the law of mortmain, can hardly be said to have been so instructive as to impart to this testatrix an intelligent understanding of legal requirements. What he told her, and all he told her, was that in case of death within 30 days the law said that a gift to a charity was void, and that the law also said that a gift to any person in trust to pay a charity was void; and that, therefore, it became necessary for her to consider to whom should go the amounts which she had given to charities, and the residuary amount which was to have gone to the university without any relation of trust being implied or expressed. While it cannot be said that this was a misdirection in terms, we yet incline strongly to the view that it was so in effect, and produced a testamentary act the legal effect of which was wholly misapprehended by the testatrix. She certainly understood from what was told her that in the event of her death within 30 days following the charities she had provided for in her will would fail, as the will then stood; but we think quite as certainly she understood from what followed that the codicil provision was introduced, not as a substitutionary gift absolute, but as a means of effectuating in any event her intention as expressed in the will proper. There is in the instruction given not a word of warning or caution that failure of the charities in the event of death within the statutory period, would be incurable; that the takers by the alternative gift proposed would take absolutely in their own right, with power to make whatever use of the property they chose, to give it to the charities she sought to promote or withhold according to their own pleasure. The instruction, as one unskilled would most likely understand it, related to matter of form for the accomplishment not of other, but the same ends as those she contemplated in the original will, only in another way. Had Mr. Simpler there stated to her that under the proposed alternative gift, if she did not survive, the Land Title & Trust Company would have the right to take and receive for its own her

entire residuary estate amounting to upwards of \$340,000, and add it to the company's surplus for the enrichment of its stockholders, none of whom she knew so far as appeared, can any one doubt that she would at once have disclaimed any such intention or purpose? The promptitude with which she acted in designating the alternative beneficiary in answer to the scrivener's inquiry, and her entire indifference and want of consideration as expressed in her reply, "Oh, give that to the Land Title Trust Company," strongly indicated an understanding on her part that she was selecting the company, not as a beneficiary, but as a medium through which the charities she had indicated would receive her bounty.

But her understanding and intention, while important, are not decisive of the question. Mere expectation on her part that the trust company, in case the gift to it became effective, would dispose of the property to and among the charities she had designated, would not convert what by its terms is an absolute gift into a trust. The assent of the party to whom the gift is made must appear as well. "If an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly or impliedly, by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the grounds of fraud, and consequently the statute of mortmain will avoid the devise if the trust is in favor of a charity. If the devisee has no part in the devise and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator." *Schultz's Appeal*, 80 Pa. 396.

[2] It follows that however much this testatrix misapprehended the legal effect of her testamentary act, except as her misapprehension was designedly encouraged by another, it is too late to correct the mistake. We turn now to the acts and conduct of the scrivener in connection with the transaction. If it be found that he knew or had reason to believe that the testatrix was executing the codicil he prepared in the belief that the gift to the trust company, though absolute on its face, was but a method adopted to secure in any event her gift to the charities designated in the will, and kept silence, the law will charge him with assent and acquiescence and will imply a trust arising from the gift absolute. The transaction would then take on the aspect of constructive fraud, even though all the gain and advantage resulting therefrom were to accrue to another. So we are not concerned in our inquiry with the Land Title & Trust Company. There is not the slightest evidence of its participation, nor is it necessary that there should be in order to fasten upon it a trust. That company here appears as a

claimant to the fund in its own right; but it stands just where Mr. Simpler would have stood had the gift been to him.

[3] "No person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party claiming under it." This was said by Lord Justice Turner in a case closely resembling this. *Russell v. Jackson*, 10 Hare, 204. We repeat, the vital inquiry in the case is, Did Mr. Simpler know, or have reason to believe, that this testatrix understood from what he had told her that the gift to the trust company was simply to meet the requirements of the law, and carry the bequests to the charities designated in the will? We have in another connection pointed out those features of the case which made it exceptional. The one above all others calculated to surprise is the fact of the gift of upwards of \$340,000 to a trust company whose business is that of making money for the profit of its stockholders too abundantly established to require aid, and in which the testatrix was absolutely without interest, and towards which she stood as an entire stranger. When the testatrix in reply to the question, "To whom do you wish that to go?" said, "Oh, give that to the Land Title & Trust Company," we think we speak for the average or ordinary scrivener when we say that, if he knew the character of the beneficiary proposed, he would have been startled by the reply, and his mind would at once have opened to a suspicion that the testamentary act had been too long delayed and that mental disturbance had intervened. Except as a purpose to use the trust company simply as a trustee was known, the ordinary scrivener would at least have repeated his inquiry to make certain that he had correctly understood what had been said. If so much would naturally have been expected of the ordinary scrivener, how much more would reasonably be expected of one so experienced and qualified as Mr. Simpler, who tells us himself that as assistant trust officer he had long been accustomed to write wills, especially in view of the fact that the gift was to the company with which he was closely connected? Certainly to such a one should have come a quicker and surer apprehension of the actual situation, disclosing more than enough to excite suspicion or misapprehension, either on his own part or on the part of the testatrix; and from such a one we would naturally expect further inquiry and instruction before the testamentary act was committed. Here neither inquiry nor instruction followed, but the writing in the blank space the name of the Land Title & Trust Company followed without question immediately upon the reply. Mr. Simpler is careful to say that he had no communication with the testatrix as to the character of the bequest to the trust com-

pany, except that he told her it was to be absolute, that the gift was made without any intimation as to her object in making it, and without suggestions of directions as to the ultimate disposition of it. It is to be noted that he is no less careful to avoid saying what his own understanding of the purpose of the testatrix in making the bequest absolute was. Although the confidential adviser of the testatrix, and fully competent, he had not given her advice and instruction, with reference to the necessity of the codicil which he had prepared, and the meaning of its provisions, sufficient to prevent a probable or even possible misapprehension on her part. This much we think is clear, and we fail to see why what must be so manifest to others was not apparent to himself. We can only interpret his failure to proceed further with instructions to the testatrix, with words of caution and warning, and his silence when he should have spoken, as studied effort on his part to defeat the true spirit of the law by avoiding all utterance which might thwart his purpose to create a trust, and thereby accomplish by indirection that which the law would otherwise disappoint.

Upon a review of all the testimony, and having in mind the situation and surroundings of the testatrix, the character of the gift to the trust company, which, if absolute, in the language of the learned auditing judge, is "incomprehensible and almost incredible," we are constrained to the conclusion that it was the understanding of both the testatrix and Mr. Simpler, notwithstanding that neither communicated in words such understanding to the other, that the bequest to the Land Title & Trust Company, though by its terms absolute, was with a purpose to secure to the charities designated in the will the bequests therein given them, in any and every event; and that nothing more was intended than that the trust company should be a medium of transmission. It follows that it is as though the bequests were given directly to the charities, and, the testatrix having died within 30 days from the execution of the will, the bequest falls, and so much of the estate is to be distributed under the intestate laws of the state.

We are quite aware that the case upon its facts is without exact parallel. Nevertheless its main and essential features bring it within the operation of established and familiar principles, and these we have applied. With the statute out of the way we would hold without question that the absolute bequest to the trust company was impressed with a trust for the charities.

For the reasons given, the decree in this case awarding the fund to the Land Title & Trust Company is reversed, and the record is remitted for distribution of that fund in accordance with the views here expressed.

FLETCHER v. BOARD OF ALDERMEN OF CITY OF NEWPORT.

(Supreme Court of Rhode Island. Oct. 30, 1911.)

1. APPEAL AND ERROR (§ 308*)—CERTIFICATION OF CASE OR QUESTION—PRESENTATION IN LOWER COURT.

Under Gen. Laws 1909, c. 298, § 5, which provides that where, in any civil or criminal proceeding in a superior court, prior to the trial thereof on its merits, any question of law arises which, in the opinion of the court, is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court may certify such questions to the Supreme Court, a certification of questions may be made only after the question has been formally raised on the record and in some appropriate proceeding presented to the trial court, so as to make its ruling thereon requisite.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 308.*]

2. APPEAL AND ERROR (§ 308*)—CASES AND QUESTIONS CERTIFIED—DECISION BY TRIAL COURT.

Under Gen. Laws 1909, c. 50, § 43, which provides that, within 60 days from the date of the determination of an appeal from a decree of a town council, the appellant shall file a copy of the record, together with a specific statement of his reasons of appeal, to which reasons he shall be restricted, unless, for cause shown and with or without terms, the superior court allows amendment thereof and additions thereto, the words "for cause shown" require the court to determine the materiality of the proposed amendment, and the grant of permission to amend is an adjudication by the court, and such question cannot thereafter be by it certified as being a question of doubt requiring the determination of this court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 308.*]

Case certified from Superior Court, Newport County; Darius Baker, Judge.

Appeal by Malene A. Fletcher from a decree of the Board of Aldermen of the City of Newport establishing a street extension. Certified from Superior Court, under Gen. Laws 1909, c. 298, § 5.

Burdick & MacLeod, for appellant. Jeremiah A. Sullivan, City Sol., for appellee.

BLODGETT, J. On July 7, 1910, the respondent board of aldermen of the city of Newport entered a "decree establishing Washington street extension" in said city, from which decree an appeal was seasonably taken to the superior court for Newport county and certain reasons of appeal were duly filed by the appellant. After the time for perfecting said appeal had expired, and before trial on the merits, on motion of the appellant on April 3, 1911, the reasons of appeal were amended by an order of the superior court by adding thereto the following, viz.: "VII. The representative council of the city of Newport had made no appropriation sufficient to meet the expenses of the laying out of said highway"—and thereafterwards on the same day said court certified to this

court, under the provisions of section 5, c. 298, Gen. Laws 1909, the two following questions as being questions "which have been raised" and are of such doubt and importance as to require the determination of this court before further proceedings are had in the superior court. The questions so certified are these:

"1. Did the board of aldermen of the city of Newport have authority to enter a decree declaring the premises in question to be a public highway?

"2. Did the board of aldermen of the city of Newport have authority on the 7th day of July, A. D. 1910, to enter a decree declaring the premises in question to be a public highway; no appropriation having been made by the representative council sufficient to cover the expense and liability of such layout?"

[1] A fatal objection to the certification of both these questions is this: That it nowhere appears on the record that they have been at any time brought before the superior court for judicial determination. Apparently it was considered sufficient for such certification that such questions might be involved somewhere in the action and might possibly be raised at some stage of it. But that is not sufficient to justify such a certification. The certification should be made only after the question has been formally raised on the record, and in some appropriate proceeding it is presented to the trial court, and the ruling of that court thereon is requisite. Then, if the court be of the opinion that the question be of such doubt and importance as to require the determination of this court, a certification under the statute is permissible.

[2] There is a second objection, moreover, to the second question certified. Section 43 of chapter 50, Gen. Laws of 1909, under which the seventh reason of appeal was added on April 3, 1911, by order of the superior court, contains, *inter alia*, the following provision: "Within fifty days from the date of the determination appealed from the appellant shall file a copy of the record of the proceeding appealed from, together with a specific statement of his reasons of appeal, in the clerk's office of the superior court for the county, to which reasons the appellant shall be restricted, *unless for cause shown*, and with or without terms, the superior court allow amendments thereof and additions thereto." It is evident that under this statute there is not an unlimited right of amendment at the pleasure of the appellant, and that the words "for cause shown" require the court to determine among other questions the materiality or the immateriality of the amendment proposed. An appellee is not to be required to meet a reason of appeal which is immaterial, and the superior court should refuse to permit an amendment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

constituting an immaterial reason of appeal to be made. The jurisdiction to permit such an amendment being granted only "for cause shown," the granting of such permission is an adjudication by the court that in its opinion such an amendment constitutes, if sustained, a valid and legal ground of appeal. The judgment of the superior court may be right or it may be wrong in this respect, and is of course subject to exception, if seasonably taken, by the party aggrieved; but it is nevertheless its judgment on that question, and such question cannot thereafter be by it certified as being a question of doubt requiring the determination of this court.

The papers in the cause will be sent back to the superior court for Newport county as improperly certified.

PRESCOTT v. ANGELL

(Supreme Court of Rhode Island. Oct. 25 and 30, 1911.)

JUDGMENT (§ 141*)—VALIDITY—ERRONEOUS WRIT.

Where a judgment had against defendant without trial disclosed on its face that it was based on an original writ dated July, 9, 1910, and made returnable June 25, 1910, it was void on its face, and defendant was not affected thereby, and had no occasion for a trial authorized in case of a default, etc., under Gen. Laws 1909, c. 297, § 1.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 141.*]

Action by Washington R. Prescott against Daniel W. Angell. On defendant's petition for a trial after judgment, as authorized by Gen. Laws 1909, c. 297, § 1, providing that a party or garnishee in an action or proceeding in the superior or the district court wherein no trial has been had, against whom a judgment has been rendered on nonsuit, default, or report of referees, by reason of accident, mistake, or unforeseen cause, may within a year after such judgment petition the Supreme Court for a trial, and the Supreme Court may order a trial in the action or proceeding in the court in which the judgment was rendered on such terms as it shall prescribe. Denied.

Daniel W. Angell, pro se. Washington R. Prescott, for respondent.

PER CURIAM. An examination of the original writ in the case shows that it bears date of July 9, 1910, and was made returnable to the Sixth district court on June 25, 1910, as set forth in the petition for a trial. Inasmuch as the validity of the writ and the judgment thereon by reason of the foregoing were not argued by the parties at the hearing, the court will hear the parties thereon on October 30, 1911.

Additional Opinion.

As the judgment against the petitioner in the Sixth district court has no force or validity, because it is based upon a writ having an impossible return day, to wit, one earlier than its date, we are of the opinion that the petitioner is not injuriously affected thereby, and has no occasion for the relief prayed for.

The petition is therefore denied and dismissed.

WINTERBOTTOM v. BOARD OF LICENSE COM'RS et al.

(Supreme Court of Rhode Island. Oct. 30, 1911.)

Petition for certiorari by William Winterbottom against the Board of License Commissioners and others to review an action of the Board of License Commissioners denying petitioner's application for a liquor license. Order affirmed; restraining order dissolved.

C. J. Farnsworth and Hugh J. Carroll, for petitioner. E. W. Blodgett, for respondents.

PER CURIAM. A full consideration of the record of the board of license commissioners submitted to us in obedience to the writ of certiorari issued in accordance with the prayer of the above-named petitioner discloses no irregularity or illegality in the proceedings of said board complained of, and the same are therefore affirmed, and the restraining order heretofore issued herein is accordingly dissolved.

TREXLER et al. v. REYNOLDS.

(Supreme Court of Pennsylvania. May 23, 1911.)

PARTNERSHIP (§ 262*)—CONTRACT—CONSTRUCTION.

Where defendant and plaintiffs had been members of a general partnership engaged in stock raising and farming, while plaintiffs were also members of a limited partnership which carried on, its business of stave making on the same property under a written agreement with the general partnership, and in pursuance of the desire to dissolve the general partnership an agreement was executed by the plaintiffs and defendant under the general partnership name conveying to the defendant the farm and all their title and interests in the personal property on the land and all other property owned by the firm, and the defendant gave a judgment bond, he is precluded from setting up as a defense pro tanto to the payment of the bond the value of personalty which he admits belongs to the limited partnership which the plaintiffs had removed from the premises; the dissolution agreement being properly construed as relating only to the plaintiffs' interests in the personal property of the general partnership, and not to that of the limited partnership.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 262.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by J. F. Trexler and another against H. P. Reynolds. From a judgment for plaintiffs, defendant appeals. Affirmed.

Issue framed to determine set-off to claim on judgment bond. The facts appear in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

opinion of the Supreme Court, and in the report of the same case in 43 Pa. Super. Ct. 168.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Thomas F. Bailey, Samuel I. Spyker, and Chas. C. Brewster, for appellant. W. M. Henderson and H. H. Waite, for appellees.

MESTREZAT, J. J. F. Trexler and J. L. Trexler, the plaintiffs, owned and managed the "Paradise Furnace Farm" in Todd township, Huntingdon county, containing about 4,700 acres of land, and were trading under the firm name of Trexler Bros. & Co. On May 3, 1904, H. P. Reynolds, the defendant, became a member of the firm under certain terms and conditions set forth in a written article of agreement of that date. The Trexlers owned jointly the one half, and Reynolds the other half, of all the personal property and real estate. The firm carried on the business of farming and dealing in horses and cattle, one half of the profits going to the Trexlers and the other half to Reynolds.

J. F. Trexler, H. J. Trexler, and J. L. Trexler formed a limited partnership in 1898 under the name of the Trexler Stave & Lumber Company, Limited, the business of which, as declared in the articles of association, was "the manufacture and sale of staves, lumber and cooperage stock." By an agreement in writing dated May 3, 1904, Trexler Bros. & Co. leased to the Trexler Stave & Lumber Company, Limited, the right to take from the Paradise Furnace farm "as much timber suitable for staves and lumber as the party of the second part needs to keep their plants in operation." The lumber company agreed to pay a royalty of 25 cents per 1,000 feet for the staves and \$2.50 per 1,000 feet for the lumber cut and removed from the farm.

Differences having arisen between the members of the copartnership of Trexler Bros. & Co., they entered into a written agreement of dissolution dated January 20, 1905. By the terms of the agreement, J. F. Trexler and J. L. Trexler sold to Reynolds all their undivided one-half interest in the Paradise Furnace farm, "and all their right, title and interest in and to all the personal property upon the said lands, and all their right, title and interest in and to all other personal property owned by the said firm of whatever character or wherever situate," except certain moneys therein specified. This provision of the agreement gives rise to the present controversy. As part of the consideration Reynolds agreed to and did give to the Trexlers a judgment bond and mortgage for \$3,000 payable in one year after date, with interest. On January 31, 1906, judgment was entered on the bond and an execution was issued. Reynolds presented his pe-

tition to the common pleas, setting forth, *inter alia*, that the Trexlers had not delivered to him all the personal property upon the premises which he had purchased, but had taken and carried away a considerable part of the property of the value of \$1,865, and obtained a rule to show cause why the judgment entered on the bond should not be opened to permit a defense to that amount. The rule was made absolute, and the judgment was opened. An issue was framed to determine what personal property, if any, was removed by the Trexlers, or either of them, from the real estate, and the value thereof, in violation of the dissolution agreement. The trial of the issue resulted in a verdict for the plaintiffs of \$573.90.

The learned trial court construed the agreement to mean that the Trexlers sold their interest in all the personal property on the farm, whether it belonged to the firm of Trexler Bros. & Co., to the Trexler Stave & Lumber Company, Limited, or to anybody else. The only question submitted to the jury was the value of the personal property removed from the farm by the Trexler brothers. The plaintiffs appealed to the superior court and the judgment was reversed. *Trexler v. Reynolds*, 43 Pa. Super. Ct. 168. That court held there was no doubt or ambiguity in the dissolution agreement and that by its terms the Trexlers had sold to Reynolds only their interest in the personal property of the firm of Trexler Bros. & Co., and did not sell their interest in the personal property of the Trexler Stave & Lumber Company, Limited. The clear and convincing opinion of Judge Head leaves no doubt that the superior court properly interpreted the dissolution agreement. We are therefore relieved from discussing the question, and adopt that interpretation as the proper construction of the agreement.

The case was again tried in the common pleas, and under the instructions of the court the jury returned a verdict for the full amount of the plaintiffs' claim. The defendant contended on the second trial as he did on the first that by the terms of the agreement the Trexlers had sold to him their interest in all the personal property on the farm of the firm of Trexler Bros. & Co. and of the Trexler Stave & Lumber Company, Limited, and that he was entitled to set up as a defense *pro tanto* to the payment of the judgment bond the value of the personal property of the Trexler Stave & Lumber Company, Limited, which the plaintiffs had removed from the premises after the dissolution agreement. This defense was not admissible under the interpretation placed by the superior court on the dissolution agreement, and was therefore properly rejected by the trial court.

The numerous assignments allege error in the refusal of the court to permit the defendant to show that the Trexler Stave & Lumber Company, Limited, was engaged in

selling and raising horses in connection with Trexler Bros. & Co.; that the books of the two partnerships were kept together; that Reynolds was a partner in fact in the Trexler Stave & Lumber Company, Limited; that the money received by Trexler Bros. & Co. for selling horses was turned over to the Trexler Stave & Lumber Company, Limited; that notice to trespassers was posted on the farm by a member of the limited partnership, and the value of the personal property removed from the farm after the agreement. These offers were all properly excluded. The plaintiffs did not object to the defendant showing the value of the personal property removed after the dissolution agreement if it was further shown that it belonged to Trexler Bros. & Co. The defendant, however, did not offer to show such ownership. The effect of the offers was to show business relations between the two partnerships, and to have the jury draw the conclusion that Trexler Bros. & Co. and the Trexler Stave & Lumber Company, Limited, were one and the same partnership. The offers, if admitted, would not have shown that fact. The two firms were separate and distinct. One was the ordinary partnership, and the other was a limited partnership. The father of the Trexler brothers was a member of the limited partnership, but not of the other partnership, while Reynolds was a member of the general partnership, but not a member of the limited partnership. The business of the two firms was different. The general partnership was engaged in farming and dealing in blooded horses and cattle, while the limited partnership was confined to the business declared in its articles of association, viz., the manufacture and sale of staves, lumber, and cooperage stock. Reynolds knew that they were separate and distinct organizations, and that the limited partnership was carrying on its business on the Paradise Furnace farm under a written agreement with Trexler Bros. & Co. The personal property which was removed by the Trexlers and now claimed by the defendant was manufactured by the Trexler Stave & Lumber Company, Limited, and belonged to that firm. As clearly pointed out in the opinion of the superior court, the Trexlers, by the dissolution agreement, did not intend to sell the personal property of the limited company.

The circumstances surrounding the parties at the time they entered into the agreement show that the personal property sold to the defendant was confined to the property which belonged to the firm of Trexler Bros. & Co. The purpose of the agreement was not simply to sell the real and personal estate of the Trexlers to the defendant; on the contrary, the primary purpose was to dissolve the partnership between the Trexlers and Reynolds because of "certain differences having arisen between the members of the copart-

nership." It was executed by the three parties, plaintiffs and defendant in this case, "trading and doing business as Trexler Bros. & Co." The agreement, therefore, manifestly intended to deal with the property of that copartnership, and not with the property of other persons or other partnerships. It is true that the first clause of that part of the agreement out of which this controversy arises is quite comprehensive, and, standing alone, might be sufficient to sustain the defendant's contention. It says: "All their right, title and interest in and to all the personal property upon the said lands." In construing this clause, however, we must read in connection with it and what is a part of it the following: "And all their right, title and interest in and to all other personal property owned by the said firm." The phrase "by the said firm" must be read in connection with both clauses in view of the declared fact that the agreement is between the three parties composing the firm of Trexler Bros. & Co., and that its purpose is to dissolve that firm and dispose of the real and personal estate belonging to it. The Trexler Bros. Company could not sell the personal property of the Trexler Stave & Lumber Company, Limited. That could be done only by the officials authorized by law to make the sale. It is true, the Trexlers might sell their interest in the limited partnership, but that would be quite different from the sale of the personal property of the partnership, and would not give the right to the purchaser to take possession of the property. If the defendant's contention be correct that he purchased the interest of the Trexlers in the limited partnership, he must assert his right to that interest in another and proper proceeding. Under our interpretation of the dissolution agreement, however, we think he did not acquire the interest of the Trexlers in the personal property of the limited partnership.

The judgment is affirmed.

COMMONWEALTH ex rel. TODD, Atty. Gen., v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

RAILROADS (§ 18*)—POWER TO PURCHASE WATER—WATER COMPANIES—"PUBLIC."

An application for a writ of quo warranto challenging the right of a railroad company to purchase water from a water company in a territory within which such company is authorized to supply water to the public will be dismissed; the railroad company being a part of the public.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5771-5772.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Court of Common Pleas, Blair County.

Application by the Commonwealth, on the relation of M. Hampton Todd, Attorney General, for writ of quo warranto against the Pennsylvania Railroad Company. From a decree making absolute rule to quash writ, plaintiff appeals. Affirmed.

The Attorney General filed the following suggestion for a writ of quo warranto:

"Be it remembered that on this 15th day of May, 1909, comes M. Hampton Todd, the Attorney General of the commonwealth of Pennsylvania, and files this suggestion, and gives the court to understand and be informed:

"(1) That the Tipton Water Company, a corporation created and existing under the laws of the state of Pennsylvania, was chartered on the 12th day of February, 1903, for the purpose of 'supplying water to the public in Antis township, Blair county, Pennsylvania, and to such persons, partnerships and corporations residing or located therein, as may desire the same.'

"(2) That the Pennsylvania Railroad Company, a corporation created and existing under the laws of the state of Pennsylvania, has constructed an underground line of 16-inch pipe leading westwardly from a point in said township of Antis from and out of said township, through the borough of Bellwood and the township of Logan to its shops in said township of Logan, and has connected this line of pipe, at a point in Antis township, with a similar line of pipe constructed by the Tipton Water Company leading from its impounding dam on Tipton Run in said township.

"(3) That the said Tipton Water Company is now, and has been for some time past, delivering to the Pennsylvania Railroad Company through the lines of pipe above mentioned about 1,500,000 gallons of water daily for consumption in its shops in Logan township, and that said water is propelled from the point of connection in Antis township to the said shops, which are higher in elevation by about 100 feet, by the pressure generated at Tipton station from the elevation of the impounding dam above that point.

"(4) That the Pennsylvania Railroad Company has constructed an underground line of 12-inch pipe bearing eastwardly from a point in said township of Antis from and out of said township into Snyder township and Tyrone borough, and has connected this line of pipe, at a point in Antis township, with a similar line of pipe constructed by the Tipton Water Company and leading from its impounding dam in said township.

"(5) That the said Tipton Water Company is now and has been for some time past delivering to the Pennsylvania Railroad Company through the lines of pipe last above mentioned large quantities of water daily, which water is transported by gravity out

of Antis township into the township of Snyder and borough of Tyrone, which water is used exclusively by said railroad company out of the township of Antis.

"(6) That prior to the taking of the water as aforesaid by the Pennsylvania Railroad Company for use out of the township of Antis the waters of Tipton Run, and its tributaries, flowed into the Juniata river near Tipton in undiminished volume at all times and were available to the riparian owners along said streams for all lawful purposes to which the same might be applied, but since the taking and use above stated all of the waters of said Tipton Run have been taken, leaving the channel of said stream destitute of water and dry, thus diminishing the volume and power of water in the Little Juniata river and depriving the riparian owners along Tipton Run and the Little Juniata river of its use.

"All of which acts, matters, and things in the premises have been and continue to be to the great loss and damage of the public, and are in excess of the legitimate power of the Pennsylvania Railroad Company, and in the doing of said acts, matters, and things the said Pennsylvania Railroad Company has willfully abused its corporate powers and functions.

"Wherefore, the said commonwealth prays the consideration of the court here in the premises, and that a quo warranto be issued against the said Pennsylvania Railroad Company to show cause by what warrant or authority it claims to do the acts complained of and takes the waters of Tipton Run to be consumed by the said railroad company outside of the township of Antis. And that the court will, after investigation of the several matters herein set forth, if it shall appear that the said acts complained of were and are in excess of the legitimate powers of the said corporation, and in abuse of its corporate powers and functions, decree the same to be so, and that judgment be entered that it be excluded or ousted from the performance of the said acts, to wit: Taking the waters of Tipton Run to be by it consumed and used out of the township of Antis."

The defendant moved to quash the writ for the reason that the facts set forth in the suggestion were not sufficient in law to entitle the commonwealth to the writ. The court made absolute the rule to quash the writ. Commonwealth appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. I. Woodcock and John C. Bell, for appellant. John G. Johnson and Neff, Riley & Hicks, for appellee.

PER CURIAM. This appeal is utterly without merit. It challenges the corporate power of the appellee to purchase water from a water company in a territory within

which it is authorized by its charter to supply water to the public. In that territory the appellee is part of the public (*Bland v. Tipton Water Co.*, 222 Pa. 285, 71 Atl. 101) and it must have water if its cars are to run. Apart from its implied power to purchase water from a water company authorized to sell it, express authority to do so is found in the comprehensive words of the second section of the act incorporating it. Act April 13, 1846 (P. L. 312). Nothing said in *Bland v. Tipton Water Company* justified the application for the writ of quo warranto; on the contrary, that case was authority for refusing it, and the learned judge below correctly so held.

Appeal dismissed.

BENSON v. ALTOONA & L. V. ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

JUDGMENT (§ 392*)—VACATING—PERJURY.

A rule to show cause why judgment in an action for personal injuries should not be set aside as procured by fraud and perjury is properly discharged where defendant's depositions showed that its witnesses entertained opinions inconsistent with its contention, and plaintiff's depositions contradicted the averments of defendant's petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 750-754; Dec. Dig. § 392.*]

Appeal from Court of Common Pleas, Blair County.

Action by Forrest W. Benson against the Altoona & Logan Valley Electric Railway Company. From a decree refusing to vacate judgment, defendant appeals. Affirmed.

The facts appear in the following opinion of Baldrige, P. J., dismissing the rule:

"Plaintiff instituted suit against the defendant to recover damages alleged to have been sustained by him by reason of the negligence of the defendant company. A verdict was recovered by the plaintiff in the sum of \$3,200. A motion for a new trial was made to the trial judge, which was overruled. Thereafter an appeal was taken to the Supreme Court of this state. The Supreme Court overruled all the assignments of error and affirmed the judgment entered on the verdict. (77 Atl. 492.)

"A petition was presented to this court, setting forth that at the trial of the cause the plaintiff and his witnesses testified that he was permanently paralyzed, incapacitated, and disabled from doing or performing any work, which was false and fraudulent, as the alleged paralysis was not due to the result of the injury sustained to his head at the time of the alleged accident, but by reason of a disease which the plaintiff acquired prior to the accident, and in no way connected therewith; that since the affirmance

of the judgment by the Supreme Court the plaintiff has entirely recovered from his paralysis; that he is able to use his right arm, hand and leg as well as he did prior to the accident. At the time this case was tried the defense was that the plaintiff was suffering from paralysis by reason of a disease he had acquired prior to the accident. The trial judge in his charge to the jury instructed them that, if the plaintiff was suffering from the disease as contended for by the defendant, there could be no recovery whatever. The verdict of the jury under the instructions from the court showed conclusively that in their judgment the paralysis of the plaintiff was due to the accident, resulting from the defendant's negligence.

"The depositions taken under the rule granted to show cause why this judgment should not be vacated reveal the fact that the defendant's own witnesses entertain the opinion that the plaintiff has not fully recovered, and that he will continue to be more or less affected by reason of the paralysis, and the depositions taken upon the part of the plaintiff are to the effect that there is no improvement whatever in the physical or mental condition of this plaintiff.

"If this judgment was vacated and a new trial granted, the same facts would be in dispute as at the first trial, and there has been no uncontradicted testimony submitted to us that would justify us in acceding to this extraordinary request to grant a new trial after the affirmance of the judgment by the Supreme Court. The alleged new evidence set up by the defendant now is practically the same evidence that was submitted to the jury. Judge Dean, in the case of *Gazzam v. Reading*, 202 Pa. 231, 51 Atl. 1000, speaking for the Supreme Court, says that equity will rarely open or set aside a judgment at law. The equity of the complainant must be free from doubt.

"Under these circumstances, we are of the opinion that we are not justified in vacating the judgment and granting a new trial. The rule granted at the request of the defendant is therefore discharged."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thos. H. Greevy and E. G. Brotherlin, for appellant. J. Banks Kurtz, for appellee.

PER CURIAM. Shortly after this court had affirmed the judgment obtained by the appellee in the court below, the appellant made application to that court to vacate it for the alleged reason that it had been procured by the fraud, perjury, and deceit of the appellee. The relief sought was extraordinary, and it was denied because in the opinion of the court below the appellant had not made out a case calling for it. We have not been persuaded that this was error. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

reasons for discharging the rule to show cause why the judgment should not be vacated and a new trial awarded are set forth in the court's opinion denying appellant's petition.

In it we concur, and on it the appeal is dismissed, at appellant's costs.

COBB v. BRADFORD TP.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. HIGHWAYS (§ 194*)—GUARD RAILS—NECESSITY.

Township supervisors are required to maintain guard rails as against gullies or declivities only when they become dangerous on account of their proximity to the highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 436; Dec. Dig. § 194.*]

2. HIGHWAYS (§ 211*)—DAMAGES—CONDITION—EVIDENCE.

In an action to recover for personal injuries, where the negligence alleged is that the defendant township failed to maintain a guard rail at a dangerous place in the highway, the evidence should show the exact condition of the ground, that it may be determined whether the situation was so dangerous as to require a guard rail.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 527-532; Dec. Dig. § 211.*]

3. HIGHWAYS (§ 210*)—DAMAGES—CONDITION—EVIDENCE.

In an action for failure to maintain a guard rail at a highway, evidence of the condition of the alleged dangerous point some two years after the accident is inadmissible.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 527-532; Dec. Dig. § 210.*]

4. TRIAL (§ 258*)—INSTRUCTIONS—SPECIAL REQUESTS.

Where points are submitted asking for definite instruction, they should be so framed as to make the law applicable to the particular facts in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646-650; Dec. Dig. § 258.*]

Appeal from Court of Common Pleas, McKean County.

Action by Annie M. Cobb against Bradford Township. Judgment for plaintiff, and defendant appeals. Reversed.

In the charge the trial court stated the facts as follows: "It appears that on the 1st day of August, 1908, A. T. Cobb went from his home in Corydon township to the city of Bradford; that he returned or started from the city of Bradford to return to his home on the evening of that day. There may be a little discrepancy in the opinion of the witnesses as to the exact time he left the city of Bradford; most of the witnesses, however, testifying that before he reached the place where the accident occurred that it was somewhere near 8 o'clock in the evening. From the evidence of the little boy it appears that it was dark, and quite a dark night. He came to the place or near the place where the accident occurred according

to the testimony. The tire came off the wagon, the little boy went back after the tire, and while looking for the tire the horses commenced to back, having been frightened by a dog running across the road in front of him, barking in front of the horses. The dog barked, the horses began to back and backed off the road and over a sidewalk and down, at least they were found down in this gully, the wagon overturned, Mr. Cobb underneath, and he expired in a few minutes after the neighbors had arrived." Verdict for plaintiff, and judgment thereon for \$4,800.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHIZSKER, JJ.

John G. Johnson, D. H. Jack, and W. E. Burdick, for appellant. D. U. Arld and V. B. Bouton, for appellee.

ELKIN, J. The negligence charged in this case is that appellant township failed to erect and maintain a guard rail at an alleged dangerous place in the highway. If appellant is liable at all, it is because it was its duty to maintain a guard rail over the gully at the south end of the tile culvert, and was negligent because of its failure to perform that duty. In cases of this character the first step at the trial should be the introduction of evidence to show the exact conditions on the ground in order that it may be determined whether the situation is so dangerous as to make it the duty of the township to maintain a guard rail as a protection to the traveling public. [1] The law does not impose on supervisors the duty of maintaining a guard rail at every point where a gully starts at the roadside, or where some natural depression, or small declivity on adjacent land, may happen to be. It is only when these gullies, or declivities, become dangerous on account of their proximity to the highway that the duty of maintaining guard rails arises. It is true that whether the situation is so dangerous as to require the performance of the duty is generally a question for the jury. But a jury cannot draw a correct conclusion without an intelligent understanding not only of what the law requires, but what the facts are. In the present case there was a new macadam road built by the state in conjunction with the local authorities. The traveled roadway thus constructed is 16 feet wide, at either side of which there is a grass covered berme 2 feet wide, thus making the highway at the point where the accident occurred 20 feet wide. It was in good condition and free from obstructions. It was a modern highway, and much better than the average country road. To the south of the macadam roadway was a sloping bank covered with grass and other vegetation, and extending southward to a sidewalk for a distance of about 12 feet. In other words, there was

an intervening space of about 12 feet between the traveled highway and the pavement.

[2] The evidence does not satisfactorily show whether this intervening space was a part of the highway, or what its condition was at and before the happening of the accident. In our judgment this is important as directly bearing upon the duty of the township. Again, it was stated at the argument, and seems to be a conceded fact, that the sidewalk which figured very largely in the trial of the case was not constructed or maintained by the township, but by individuals. The record is silent as to the rights and liabilities of the individuals who maintained the sidewalk, and as to the duties, if any, of the township in relation to it, or the condition of the ground upon which it is located. The natural inference is that the township had nothing to do with that portion of the ground upon which the sidewalk was located because no public supervision was exercised over it, and the private individuals did as they pleased about it. The proofs, photographs, and map do not make it plain to us just how this sidewalk bridged over the gully at the end of the tile sewer. The indications are that the sidewalk was elevated several feet above the ground as it crossed over the gully, and, if so, the supervisors might very properly conclude that this was a sufficient barrier to guard against dangers at the point where the gully passed through. In other words, if the sidewalk itself protected the alleged dangerous place, there was no duty resting on the supervisors to provide additional safeguards, and, so far as we are able to discover from this record, no duty rested upon the township in connection with the safeguarding of the sidewalk.

Again, even if a duty did rest upon the township to guard the gully, this does not mean that the guard rail had to be extended to the telephone pole where there was no danger of the character about which complaint is made. As we understand the facts, a considerable part of the distance between the gully and the telephone pole was a smooth, natural surface. If the team backed upon the sidewalk near the telephone pole where there was no danger, and then continued to back along the sidewalk or over it to a place of danger at the south side of the pavement, such a contingency could not have been provided against by the township maintaining a guard rail between the traveled roadway and the pavement. Under these circumstances, the accident would have happened just the same, because the team would have backed over the pavement and south of the guard rail. In that event failure to maintain a guard rail at the side of the highway would not have been the proximate cause of the injuries complained of. Enough has been said to indicate the im-

portance of more fully developing all the facts relating to the construction and maintenance of the sidewalk. Was it a part of the highway? Had the township any duty to perform in connection with its maintenance? Was the sidewalk itself, independently of who maintained it, a barrier or protection to persons traveling on the roadway at the point where the gully crossed? If so, the township had the right to rely upon that protection, and was under no duty to provide additional safeguards.

[3] The first assignment is based on the admission of evidence tending to show the condition at the point alleged to be dangerous some two years after the accident. This was too remote for evidential purposes, and did not throw any light on the exact question before the jury. Standing alone, it might not be deemed sufficient cause for reversal, but, when the case is again tried, this testimony should be excluded. While the instruction complained of in the third assignment may be a correct statement of the law when the facts warrant its application, it did not take into account the many contingencies upon which the right to recover depends in the present case. For this reason it may have misled the jury.

[4] When points are submitted asking for definite instructions, they should be framed so as to make the law applicable to the particular facts of the case being tried. The mere fact that the roadway was of sufficient width for the usual and ordinary travel would not relieve the township from maintaining guard rails at dangerous places, but it has something to do in determining whether under all the circumstances it was necessary to provide additional safeguards in the present case.

As to the question of contributory negligence, the general rule is that it is for the jury, when there is any evidence of this character to be considered. As the case stands, we do not see the evidence of contributory negligence, but, when it is again tried, evidence of this character may be offered if it is desired to rely upon it as a defense. When the case is again tried along the lines indicated in this opinion, all the questions raised by this appeal can be presented and considered upon the facts as they are then developed.

Judgment reversed and a venire facias de novo awarded.

In re FORD'S ESTATE.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. HUSBAND AND WIFE (§ 49½*)—GIRTS—JOINT ESTATE—RIGHTS OF WIDOW.

On distribution of a decedent's estate, his widow is entitled to one-half of the proceeds received from a certain farm, where decedent acquired title by deed to an undivided half inter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

est in it, his wife possessing the other half interest, and where he, eight years later, joined with her in asking for the appointment of viewers in condemnation proceedings and received the amount of the award and the proceeds of a sale of the property; it being found that the widow did not intend that decedent should hold these moneys as a gift from her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 260; Dec. Dig. § 49½.*]

2. EXECUTORS AND ADMINISTRATORS (§ 507*)—EXCEPTIONS TO ADMINISTRATOR'S ACCOUNT—DUTIES OF AUDITOR.

Where an auditor is appointed to pass on specific exceptions to an administrator's account, he cannot surcharge the administrator as to an item not covered by any of the exceptions.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 507.*]

Appeal from Orphans' Court, Blair County.

In the matter of the estate of Albert Ford. From a decree of distribution, Bertha A. Ford appeals. Affirmed.

Albert Ford died on October 22, 1907, intestate, leaving to survive him a widow, Mary E. Ford, and three children, Dr. Frank A. Ford, Charles K. Ford, and Margaret C. Myers. Letters of administration were granted to his widow, Mary E. Ford. Charles K. Ford died on August 23, 1908, leaving to survive him a widow, Bertha A. Ford, to whom by will he left his entire estate. The auditor appointed to make distribution of the estate of Albert Ford found that the balance for distribution belonged to the widow, Mary E. Ford, by reason of the transactions stated in the opinion of the Supreme Court. Exceptions filed to the report on behalf of Bertha A. Ford, executrix of Charles K. Ford, deceased, were dismissed, and the report confirmed. Errors assigned were (1) in awarding the entire estate to Mary E. Ford; (2) in allowing Mary E. Ford's claim to one-half the proceeds of the Westmoreland county farm; (3) in not making a surcharge of \$1,016.12, being proceeds of two notes paid to the administratrix since the death of Albert Ford and not accounted for.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

D. E. North, for appellant. H. F. Walters, for appellee.

PER CURIAM. [1] Upon the death of Jacob Kimmell his farm in Derry township, Westmoreland county, passed to his two children, Edmund B. Kimmell and Mary E. Ford, subject to the dower interest of Barbara E. Kimmell, his widow. By the deed of October 30, 1895, from the son and widow, Albert Ford acquired title to an undivided half interest in the farm, and that he fully understood he was acquiring no more clearly appears from the letter addressed to him by Messrs. Marchand, Gaither & Woods, in which they explained to him that the deed as prepared by them, and subse-

quently executed by the said grantors, would not pass title to his wife's interest in the land. Nearly eight years later he recognized her as the owner of the half interest by joining with her in asking for the appointment of viewers to assess damages they had sustained by the construction of a railroad over their property, and he received the amount awarded by the viewers in a report in which they found that he and his wife were the joint owners of the land. In addition to the amount awarded by the viewers he received the proceeds of sales of the property, and an unchallenged finding of fact by the auditor is that the appellee did not intend that he should hold these moneys as a gift from her. She was, therefore, clearly entitled to recover from his estate one-half of what he had received as the proceeds of the sale of the farm, and the first and second assignments are overruled.

[2] The third, complaining of the failure of the auditor to surcharge the appellee with the sum of \$1,016.12, is also dismissed. He was appointed to pass upon nine exceptions to her administration account; but by no one of them was he asked to surcharge her with that sum, alleged to have been paid to her by Silas Jenkins.

The assignments of error are overruled, and the decree is affirmed, at appellant's costs.

DOUGHERTY v. BRIGGS et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTIONS FOR JURY.

Where the written correspondence between parties to a contract shows that it does not constitute the whole agreement, and the terms must be ascertained from letters and acts of the parties, the construction of the contract is for the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770; Dec. Dig. § 176.*]

2. APPEAL AND ERROR (§ 216*)—OBJECTIONS TO INSTRUCTIONS—NECESSITY OF REQUESTS.

The sufficiency of a charge cannot be questioned on appeal, where no request was made for fuller or more specific instructions.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 628; *Appeal and Error*, Dec. Dig. § 216.*]

3. EVIDENCE (§ 501*)—OPINION EVIDENCE.

Where a contract for a building provided that plaintiff was to receive a certain amount in cash, and for the balance of his compensation equities in the property, the question to a witness, "What were those equities, from your knowledge of the situation?" was not subject to objection, because asking the opinion of a witness upon facts not in evidence, where the testimony elicited fully showed the facts on which his opinion was based.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 501.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank P. Dougherty against Malcolm Briggs, Jr., and the Tradesmen's Trust Company. Judgment for plaintiff, and defendants appeal. Affirmed.

At the trial, while Charles S. Wood was on the stand, the court asked the following questions: The Court: "Q. What were those equities, from your knowledge of the situation? What is your idea as to them?" Objected to by Mr. Scott. Objection overruled. Exception for defendants. "A. The contract that Mr. Dougherty brought to me provided that he was to receive a certain amount of his contract in cash, and all over and beyond that cash. Q. How much did he receive, or was to receive? A. The total amount of his contract was \$8,950. He was to be paid during the progress of the work \$6,350, and then he was to receive \$2,600, in deferred payments of three promissory notes. Those promissory notes were guaranteed. Q. How much were the deferred payments? A. \$2,600, to be paid by three promissory notes. Q. How much was he paid in cash, excluding that \$2,900? A. I don't remember that now. It was either \$2,300 or \$3,300, I forget which; \$2,300 my recollection is. Then he was to have set aside five houses. Q. Wasn't it \$3,300? A. \$3,300 I think it was; something like that. Q. That would leave about \$3,050, and you agreed to do that work for \$2,900, you say, the balance of it, and threw off \$150? A. No; we did not throw off anything. He was simply to finish the work for \$2,900. Q. \$150 dropped out of it, and he did it for \$2,900, and was paid \$2,900? A. Yes, sir. Q. Then that paid the contract in full, didn't it? My question is, what was left over after he completed the work? I want to see where the plaintiff was short. He got his cash in full, and I want to see what was left over which passes under the beautiful generic name of 'equity' here. I want to know for my own instruction your exact view of that which you say was equity? A. He was to have a certain amount of cash as the work went along; then he was to have \$2,600 in notes, for which the five houses were to be collateral. Q. Those were to be Bihlmaier's notes? A. Yes, sir. Q. And he did it? A. Yes, sir. Q. He got his cash? A. Yes, sir. Q. Now, where is the equity? A. The equities were the value in five houses over and above an incumbrance of \$1,700 each, which were set apart to him as collateral security for the payment of the three notes. Q. Why would he want the three notes when he was paid for his work? A. No, sir; he has not been paid. Q. If he was paid those three notes, where would his claim have been? A. Then he would have no right to those houses; the equities in the five houses were set aside as collateral security. Q. And would that be a suit against these defendants for the equities there, or against Bihlmaier? A. Against the defendants. The contract provided that these equities shall be

set aside in escrow with the Tradesmen's Trust Company. Q. There were five houses, and were subject to a first mortgage of what? A. Of \$1,700 each."

The court charged in part as follows: "There you have the history of that contract set out in the letter. The question to be determined, then, is whether there was a waiver upon the part of Mr. Dougherty of any further interest in that claim that he had originally made, when he tendered his offer in reference to the \$2,900, that he would claim his rights from the company, and whether, when the company refused it, he nevertheless proceeded with the \$2,900 completion and got his money? If, of course, there was a waiver—in other words, if he accepted the Tradesmen's Trust Company's construction of this situation, that they were not going to be responsible to him, in other matters, but they would only pay him \$2,900 that they were about to agree to pay—that would be an end of his claim. Bihlmaier agreed to construct 50 houses on Conestoga street. The plaintiff, Dougherty, put in a bid for plumbing work, amounting to \$8,950. \$6,350 of which was to be paid in cash, which for all the purposes of this case he practically did receive, and the balance, \$2,600, was to be paid in notes to Bihlmaier, called 'deferred payments.' For securing the payment of that \$2,600, Bihlmaier entered into an agreement whereby five houses should be set apart to secure the payment of that \$2,600, in notes. That was subsequently transferred, it is alleged, to the Tradesmen's Trust Company; that they took that agreement with knowledge of its contents, and that therefore they are liable here."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Henry J. Scott, for appellants. Stanley Folz and Leon H. Folz, for appellee.

MESTREZAT, J. This is the second time this case has been here this term. The facts are fully stated in the report of the case and the opinion in *Dougherty v. Briggs*, 231 Pa. 68, 79 Atl. 924. The trial of the cause resulted in a verdict for the plaintiff. Subsequently the court entered judgment for the defendants non obstante veredicto, and the plaintiff appealed to this court. We reversed the judgment, holding that whether Dougherty waived his right to the collateral security for the deferred payments was a question of fact on all the evidence submitted, and directed the court below to enter judgment on the verdict. The judgment having been entered, the defendants have taken this appeal, and contend that there was no evidence to support the contract of waiver, that the charge was inadequate, and that improper and incompetent evidence was submitted to the jury.

[1] The single question for determination

by the jury was whether the plaintiff in his subsequent contract with the trust company had waived his "equities" in the five houses reserved under the contract with Bihlmaier to secure the deferred payments of \$2,600. It appeared in the evidence, and was not denied, that in the contract between Dougherty and Bihlmaier the "equities" in the five houses were set aside as collateral for the deferred payments, that the Tradesmen's Trust Company took title to the properties with notice of and assented to the terms of the contract, that the deferred payments were not made to Dougherty by Bihlmaier, and that the five properties were sold by the defendants, and they received the proceeds, which were sufficiently in excess of the prior mortgage to pay Dougherty's claim. These facts were not disputed, but the defendants claim that Dougherty waived or released his "equities" in the five properties in consideration of the defendants paying him \$2,900 to finish the work after Bihlmaier's default. It is manifest that the burden was upon the defendants to show the release or waiver. This they attempted to do by the letters which passed between the parties, and which appear at length in the former report of the case. The defendants introduced no parol testimony in support of their position. We held in the former case that the contract between Dougherty and the trust company was partly in parol and partly in writing, and was, therefore, a question for the jury, and that the evidence was sufficient to submit to the jury. In the opinion it is said: "The parol testimony was ample to justify the jury in finding, as they did, that Dougherty did not waive or intend to waive his claim or lien on the five houses, and that the contract, as disclosed by the letters and the parol testimony, was simply that Dougherty should complete the plumbing work for \$2,900 to be paid to him by the trust company as the work progressed."

[2] The contention that the charge was inadequate cannot be sustained. The trial court submitted the case to the jury on all the testimony, written and parol, to determine whether the plaintiff had waived his rights or "equities" in the five properties. The learned counsel for the appellants excepted to the charge because the court had permitted the jury to determine the contract, and did not construe the letters as a waiver of the plaintiff's "equities" and peremptorily charge the jury to find for the defendants. There was no allegation prior to the present appeal that the charge was inadequate or insufficient. If the appellants desired any specific or fuller instructions on any question involved in the case, they should have made the request by submitting points to the court.

[3] The testimony of Mr. Wood was not opinion evidence. The language used by the

learned judge in the first question put to the witness was unfortunate, and might lead to the conclusion, as maintained by the appellants, that he was asking simply the opinion of the witness upon facts not in evidence. A careful reading of the testimony quoted in the fifth assignment, however, will show that the court was eliciting facts which had a direct bearing upon the question at issue in the case.

The case having been fully considered on the former appeal, we think any further discussion is unnecessary.

The judgment is affirmed.

In re HOYT'S ESTATE.

(Supreme Court of Pennsylvania. May 23, 1911.)

APPEAL AND ERROR (§ 78*)—APPEALABLE ORDER—DISTRIBUTION OF ESTATE.

A decree referring back the report of an auditor, with direction to distribute decedent's estate in accordance with the opinion of the court, is an interlocutory order, from which no appeal lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 464-483; Dec. Dig. § 78.*]

Appeal from Orphans' Court, Clearfield County.

In the matter of the estate of Milo Hoyt. From a decree referring a report back to the auditor, William T. S. Hoyt and others appeal. Appeal quashed.

The opinion of the Supreme Court states the case.

The court sustained certain of the exceptions and referred the report back to the auditor to make distribution in accordance with the opinion.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Frank Fielding and Oscar Mitchell, for appellants. Harry Boulton and W. C. Miller, for appellee.

PER CURIAM. This appeal is from a decree referring the report of an auditor back to him with direction that he make distribution in accordance with the opinion of the court sustaining two exceptions to it. This was but an interlocutory order. There can be no final decree until the schedule of distribution reported by the auditor has been absolutely confirmed by the court.

Appeal quashed.

PUTT et al. v. AFRICA et al.

(Supreme Court of Pennsylvania. May 23, 1911.)

QUIETING TITLE (§ 12*)—POSSESSION BY PLAINTIFF.

A petition for an issue to quiet title, filed under Act June 10, 1893 (P. L. 415), will be dismissed, where the evidence shows that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

allegation that petitioners are in possession is untrue.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 8-12; Dec. Dig. § 12.*]

Appeal from Court of Common Pleas, Huntington County.

Action by H. M. Putt and others against J. Murray Africa and C. E. Benson. From a decree refusing issue to try title, plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

H. H. Waite and Gettig, Bower & Zerby, for appellants. W. M. Henderson and Thomas F. Bailey, for appellees.

PER CURIAM. The petition of the appellants for an issue to quiet the title which they claim to the property in controversy was filed under the provisions of the Act of June 10, 1893 (P. L. 415). That act requires two jurisdictional averments to appear in the petition: Title and right of possession in the petitioner for the issue, and denial thereof by the person or persons on whom the rule to show cause why the issue should not be granted is to be served. Upon the hearing of the rule in this case, the court below found on the testimony of H. M. Putt, one of the petitioners, that they were not in possession of the land. One of the jurisdictional averments in the petition was not true, and, as the court below could have awarded an issue only if it had appeared upon the hearing of the rule that the facts averred in the petition were true, its order refusing the issue is affirmed.

Appeal dismissed at appellants' costs.

Appeal of CENTRAL PENNSYLVANIA LUMBER CO.

(Supreme Court of Pennsylvania. May 23, 1911.)

1. TAXATION (§ 453*)—NATURE OF POWER.

The whole system of taxation being purely statutory, neither the county commissioners nor the courts have any power in the revision of valuation or in the levy of assessment of taxes, except such as has been conferred by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 809; Dec. Dig. § 453.*]

2. TAXATION (§ 470*)—ASSESSMENT—ABATEMENT.

Under Act April 3, 1804 (P. L. 517), providing that all lands held by individuals, companies, or bodies corporate shall, for the purpose of raising county rates and levies, be assessed in the same manner as other properties, and Act April 15, 1834 (P. L. 1833-34, p. 509), requiring the county commissioners to issue their precepts to local assessors in every third year for the purpose of having a return made of all taxable persons in their respective districts, and of all property taxable by law, as amended by Act May 15, 1841 (P. L. 393), providing that the valuation shall continue to the next triennial assessment, when the assessment shall be made by the assessors as prescribed by

this act, provision being made for assessment in the two intervening years by sending transcripts of the triennial assessments to the local assessors, who are required to note and return alterations occasioned by the transfer or division of real estate, or by the destruction of buildings, and Act May 8, 1909 (P. L. 493) § 12, providing for an abatement where coal, ore, or other minerals have been mined out subsequently to the triennial assessment, neither the county commissioners nor the courts on appeal have power to reduce the assessment valuation in intermediate years by allowance for timber removed; that not being one of the causes of abatement named in the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 841; Dec. Dig. § 470.*]

3. TAXATION (§ 495*)—ASSESSMENT—REVIEW.

Where appeals are taken from an assessment, as authorized by Acts April 19, 1899 (P. L. 37) and June 28, 1901 (P. L. 601), the courts have no power to treat the controversy on the broad principles of equity without reference to the requirements of the tax laws, but their decree must be equitable and just in the sense of uniformly and fairly enforcing the law as it is written.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 889; Dec. Dig. § 495.*]

4. CONSTITUTIONAL LAW (§ 283*)—DUE PROCESS OF LAW—TAXATION.

The system of taxation in Pennsylvania is consistent with natural justice, and the enforcement of the tax laws does not deprive the taxpayer of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 891, 892, 904-906; Dec. Dig. § 283.*]

Appeal from Court of Common Pleas, Potter County.

Appeal by the Central Pennsylvania Lumber Company from the decision of the Commissioners of Potter County as to the valuation of property for taxation for the year 1908. From the decree entered by the Court of Common Pleas, the lumber company appeals. Affirmed.

The facts appear by the opinion of the Supreme Court.

The court below reached the following conclusions of law:

"(1) The county commissioners, sitting as a board of revision and appeal, have no right to reduce or change the valuation of timber lands as fixed by the triennial assessment in the intermediate years, when the timber has been removed therefrom.

"(2) This court has no power to make a reduction in the assessed valuation of unseated land by reason of the voluntary cutting and removing of the timber and bark therefrom by the appellant, subsequent to the triennial assessment."

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. I. Lewis, Archibald F. Jones, Calvin H. McCauley, Jr., and R. R. Lewis, for appellant. W. K. Swetland and W. F. Dubois, for appellee.

ELKIN, J. The question for decision in this case is whether the county commissioners in the first instance, or the courts upon appeal, have the power to reduce the assessed valuation of unseated lands in the intermediate years between triennial assessments for causes not expressly authorized by statute. The valuation of the lands in question for taxation purposes was fixed at the triennial assessment of 1907 for a period of three years. No question as to the regularity or validity of that assessment is involved in the case here presented. After the valuation of these several tracts of land had been fixed for the three-year period, appellant company cut and removed the hemlock timber and bark from a large number of acres, and thus depreciated the market value of the lands. All this was done after the valuations had been returned by the local assessors and the county commissioners, sitting as a board of revision, had passed upon and equalized the assessment. In other words, there had been a completed assessment before the timber was removed. No question is raised as to the validity of that assessment for the year 1907. In 1908 representatives of appellant company appeared before the county commissioners, and asked a reduction in the assessed valuation of the tracts of land from which timber had been cut and removed. The county commissioners refused to allow any reduction, and an appeal was taken to the court of common pleas, which, after a careful review of the facts and the law, sustained the action of the county commissioners.

[1] The learned court below based its decision upon the ground that our whole system of taxation is purely statutory, and neither the county commissioners nor the courts have any power in the revision of valuations, or in the levy and assessment of taxes, except such as has been conferred by statute. That such is the law has been said over and over again. No authorities need be cited to sustain this fundamental principle in the administration of tax laws. It is recognized in every jurisdiction and by all text-writers. In several recent cases this court has directed the attention of all taxing authorities to the statutory requirements, as the basis of our system of taxation. We have said that there is no such thing as taxation by implication, and that all authorities having to do with the valuation and assessment of land and the levy and collection of taxes must look to the statutes for their authority to act. *Phila. & Reading Coal & Iron Co. v. County Commissioners*, 229 Pa. 460, 79 Atl. 109. This is settled law, and needs no further discussion.

[2] A brief reference to our acts of assembly will be helpful to a proper understanding of the question raised by this appeal. The act of April 3, 1804 (P. L. 517) provided that all lands held by individuals, companies, or bodies corporate shall, for the purpose of raising county rates and levies, be assessed

in the same manner as other properties. The act of April 15, 1834 (P. L. 1833-34, p. 509), required the county commissioners to issue their precepts to local assessors in every third year, for the purpose of having a return made of all taxable persons residing in their respective districts, "and of all property taxable by law, together with a just valuation of the same to be made in the manner hereinafter directed." Several sections of the act of 1834 were amended by the act of May 15, 1841 (P. L. 393), in which it is provided that, "said valuation to continue until the next triennial assessment; at which time the assessment shall be made by the assessors as prescribed by the provisions of this act." It will thus be seen that triennial assessments have been the fixed policy of our system of taxation for three-quarters of a century. This assessment was intended to and does fix the valuation of lands as the basis of the tax levy for a period of three years. While the valuation of lands is thus fixed in the triennial year, a mode of assessment for each of the two succeeding years is also provided. In the two succeeding years it is made the duty of the county commissioners to send transcripts of such triennial assessments to the local assessors, who are required to note and return such alterations as may have been occasioned "by the transfer or division of real estate, or by the destruction of buildings." By the twelfth section of the act of 1834, it is made the duty of the local assessors in the two succeeding years to give notice to the taxable inhabitants in like manner as after the triennial assessment, but in certain cases only, and these cases are enumerated in the act. As to land valuations, the notice is only required to be given "in the case of real property, where buildings or other improvements have been destroyed since such triennial assessment." When the assessors have made their return, the county commissioners are required to fix a time and place to hear all persons who may apply for redress, and they are authorized to grant such relief as shall appear just and reasonable, but with the express limitation in granting relief that there shall be no allowance "or abatement in the valuation of any real estate in any other year than that in which the triennial assessment is made, excepting where buildings or other improvements have been destroyed subsequent to such triennial assessment." In other words, the Legislature intended that the valuation in the triennial year should remain undisturbed for a period of three years, except where buildings or other improvements had been destroyed after the valuation had been adjusted. This remained the law from 1834 to 1909, when the Legislature added another cause for which deductions may be made in the two succeeding years. This cause is "where coal, ore or other minerals, assessed under the triennial assessment, have been mined out subsequently to

such triennial assessment." Act May 8, 1909 (P. L. 493) § 12. It will thus be seen that the Legislature in dealing with this subject has expressly provided what abatements can be made in the valuation of real estate in the two years succeeding the triennial assessment, and it necessarily follows that no other allowances or abatements can be lawfully made. It is expressly provided in the act of 1834 that the valuation fixed in the year of any triennial assessment shall continue until the next triennial assessment. Of course, this provision of the act must be read in connection with those provisions which allow abatements for specified causes, but, except as reductions may be made for the causes specified, the triennial assessment remains undisturbed for the three-year period. This is the law, and, so far as we are advised, it has always been so understood. What, then, is the situation of the appellant company? The valuation of its lands was fixed at the triennial assessment of 1907. It does not claim an abatement by reason of the destruction of buildings or other improvements. It makes no demand for an abatement on the ground that coal, ore, or other minerals have been mined out since the last triennial assessment. It specifies no cause for abatement authorized by statute. All of these matters being the subject of statutory regulation, we must look to the statutes for our authority to make inquiry, or to review what taxing authorities have done, or to grant relief when demanded. The statutes are as binding upon the courts as upon the direct taxing authorities. The courts have no greater power to grant relief than the county commissioners, or the board of revision.

[3] When appeals are taken under the Acts of April 19, 1889 (P. L. 37) and June 26, 1901 (P. L. 601), the courts sit in review for the purpose of making such order or decree as may seem just and equitable under the facts presented, but what is just and equitable in tax cases must be determined with reference to the requirements of the law. The acts authorizing appeals from the valuations fixed by the county commissioners or the board of revision do not confer upon the courts the power to treat the controversy upon the broad principles of equity without reference to the requirements of the tax laws, but their decrees must be equitable and just in the sense of uniformly and fairly enforcing the law as it is written against all persons. In the present case, if the courts could treat the question involved upon the broad general principles of equity, they would be compelled to say that the valuation fixed at the triennial assessment in 1907 was not a fair value of the lands after the timber was removed in 1908, but there was no new valuation of these lands in 1908, and hence no valuation in that year from which an appeal would lie. The time in which an appeal might be taken from the triennial assessment in 1907

had passed, so that the validity of that valuation could not be inquired into when the present appeal was taken. The only question that could arise in 1908 was whether an allowance or abatement should be made on account of the timber which had been removed since the last triennial assessment. This is purely a question of allowance or abatement, and has nothing to do with the validity of the valuation itself. There is no authority in the law for treating allowances or abatements upon the basis of the equities that may exist in a particular case, but such abatements can only be made as the statutes prescribe. The statutes do not authorize abatements to be made for timber removed in the two years succeeding the triennial assessment, and therefore there is no authority to grant relief on this ground. Hardships may sometimes result from the enforcement of this statutory rule, but substantial benefits are frequently derived. Lands as frequently appreciate as depreciate in value during the three-year period. When they appreciate in value, the taxpayer has the benefit on his side; when they depreciate, the advantage is with the county; but in a series of years the advantages and disadvantages will be substantially equalized. As an illustration, after the timber had been removed in 1908, suppose oil in large quantities had been discovered on these lands, their value would have been increased three, four, five, or maybe ten, fold, but the valuation would have remained the same until the next triennial assessment. In such a case the advantage would be on the side of the taxpayer. Under such circumstances, the county would be as powerless to increase the valuation during the two succeeding years as is the taxpayer to have it reduced, except for statutory causes.

In the discussion of this question, Judge Cooley, in his work on Constitutional Limitations (6th Ed.) p. 631, makes use of the following language: "So the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune, before the taxes become payable, but the tax is nevertheless a charge against him. And when the valuation is made but once in a series of years, the occasional hardships and inequalities in consequence of relative changes in the valuation of property from various causes become sometimes very glaring. Nevertheless, no question of constitutional law is raised by these inequalities and hardships, and the legislative control is complete." These observations of the learned jurist are a complete answer to the contentions of appellant in the present case. The hardships complained of and the equities insisted upon grow out of conditions over which the taxing authorities have no control. The Legislature, and not the courts, must authorize the relief to be granted, if it be deemed expedient to do so.

[4] We do not see that the Bill of Rights of our own Constitution, or the fourteenth amendment to the Constitution of the United States, has any application to the facts of the case at bar. Our system of taxation is consistent with natural justice, and the enforcement of our tax laws does not deprive a taxpayer of his property without due process of law.

Decree affirmed at cost of appellant.

ERB v. COMMERCIAL MUT. ACCIDENT CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

INSURANCE (§ 455*)—CAUSE OF LOSS—ACCIDENT.

In an action on an accident policy providing an indemnity against bodily injuries, effected directly and independently of all other causes, through external, violent, and accidental means, a recovery can be had where it appears that insured was killed by a shot from a pistol in the hands of a sister-in-law, upon whom he had made an attack with a revolver in his hand, and which revolver was seized by his sister-in-law, and pending the struggle was discharged, killing insured; insured having no occasion to anticipate danger when he began the assault, and continuing the struggle to prevent the use of the pistol against himself, and having withdrawn from the conflict when he received the fatal wound.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Kate Lilla Erb against the Commercial Mutual Accident Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Chester N. Farr, Jr., and William A. Glasgow, Jr., for appellant. George Quintard Horwitz and Layton Martin Schoch, for appellee.

PER CURIAM. This action was on a policy of accident insurance that provided an indemnity "against bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means." The insured was killed by shots from a pistol in the hand of Mrs. Beisel, his wife's sister. His relations with his wife and with Mrs. Beisel were hostile, and the latter had been forbidden his house. Early in the evening he had a quarrel with his wife, in which both resorted to violence. She summoned Mrs. Beisel to the house. Later in the evening, when his wife was in the hall of the second story of their dwelling, he came from his bedroom and pointed a revolver at her. She ran into a bathroom and closed the door. He then saw Mrs.

Beisel in the hall, and advanced towards her, pointing the pistol in a threatening manner. She seized his arm and got possession of the pistol, and when he attempted to regain possession of it she struck him with it on the head. She continued to strike at him, and the shots were fired as she struck and when the pistol was in motion. The findings of fact by the learned referee, whose ability and long professional and judicial experience entitled them to great weight, were that the insured did not point the pistol at Mrs. Beisel with the intention to injure her, but to force her to leave the house; that in the struggle with her for the possession of the pistol, each was trying to prevent the other from using it; that in advancing towards her, when she had the pistol, his purpose was to gain possession of it, not to continue the assault; that when the fatal shot was fired he had retreated from the place where the struggle occurred and was near his bedroom door; that Mrs. Beisel did not intend to kill the insured, and was not conscious of pulling the trigger, and did not aim, and that "the shooting was wild and purposeless."

The correctness of the referee's findings of fact is not questioned. His conclusion of law, approved by the court, that under all the facts the death of the insured was accidental, within the meaning of the policy, is assigned as error. Under the words of the policy the death of an insured would not be effected by accidental means if it were the natural and probable consequence of his own act, and should have been foreseen. It would not be accidental if the result of a duel or of a deadly assault commenced by him, where he had reason to expect a deadly defense and generally where by his conduct he had invited violence, the reasonable consequence of which he should have anticipated. But under the facts of this case the insured had no occasion to anticipate danger when he began the assault. He continued the struggle after he had lost the pistol to prevent its use against himself, and had withdrawn from the conflict when he received the fatal wound.

The judgment is affirmed.

In re STINSON'S ESTATE.

Appeal of SOWER et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WILLS (§ 467*)—CONSTRUCTION—PRECATORY WORDS.

Precatory words in a will, simply expressing a wish that the devisee make a certain use of testator's bounty, are not obligatory, but, when used to express his manifest intent to direct, they are mandatory.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 954, 986; Dec. Dig. § 467.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. WILLS (§ 467*)—CONSTRUCTION—PRECATORY WORDS.

Testatrix, by her will, gave certain property to start a Women's Christian Association, and desired the institution to be carried out under the plan of the Women's Christian Association of Philadelphia; "I would like the executive committee to consist of the following ladies" (naming them). *Held*, that the words designating who should form the executive committee expressed the intent of the testatrix as to the composition of the committee, and are mandatory.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 954, 986; Dec. Dig. § 467.*]

3. WILLS (§ 116*)—WITNESSES—DISQUALIFYING "INTEREST."

The "interest" which will disqualify a witness to the execution of a will, within Act April 26, 1855 (P. L. 328), is an interest in the existing charity for which a bequest is made by the will, or in a charity created by the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

4. WILLS (§ 116*)—DISINTERESTED WITNESSES.

A will establishing a charity is not attested by two disinterested witnesses, as required by Act April 26, 1855 (P. L. 328), where one is named in the will as a member of an executive committee of the charity, and the duties of the committee were to be of a material character in the management and government of the proposed charity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

Stewart, J., dissenting.

Appeal from Orphans' Court, Montgomery County.

From a decree awarding distribution in the Estate of Agnes J. Stinson, Isabella B. Sower and others appeal. *Affirmed*.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Montgomery Evans, Wanger & Knipe, and N. H. Larzelere, for appellants. James Gay Gordon and J. Morris Yeakle, for appellees.

BROWN, J. By a will in her own handwriting, and signed by her more than one calendar month before her death, the testatrix devoted nearly all of her estate to the establishment of a charity, but, under the decree of the court below, her intention cannot be given effect, and her next of kin will take what she wished to go elsewhere, because of her failure to have her will attested by two disinterested witnesses, as required by the act of April 26, 1855 (P. L. 328). That portion of her will by which she intended to found a charity is as follows: "I give and bequeath my property at the corner of Airy and Church streets in the borough of Norristown to start and use for a Women's Christian Association. I give and bequeath my furniture, organ, carpets, piano, bedding, linen, silverware, sewing machines to be used with care in the Women's Christian Association. I, give and bequeath the residue of my

estate to the Women's Christian Association and the interest thereon arising for an endowment fund for said institution. Hereby revoking all former wills. I, hereby appoint or wish the institution to be carried out upon the plan of the Women's Christian Association of Philadelphia, 18th and Arch Sts. with the exception that this institution is for Protestants only. I would like the executive committee to consist of the following ladies, Mrs. F. D. Sower, Mrs. Robert N. Wood, 531 Cherry St., Mrs. John K. Ralston, Mrs. H. M. Bunting, Mrs. Ella R. Wright, all of the borough of Norristown, executive committee being empowered to select other ladies, who are willing to work faithfully for the institution."

The two attesting witnesses to the execution of the will were John K. Ralston and his wife, Anna M. F. Ralston, called by the testatrix "Mrs. John K. Ralston" when she named those whom she wished to compose the executive committee of the Women's Christian Association, and from the finding of the court below that Mrs. Ralston was not a disinterested witness at the time she attested the execution of the will there followed a decree of distribution, from which we have this appeal.

[1] Though the testatrix used words precatory in form in saying who should compose the executive committee of the charity which she intended to establish, she used them to express her will and intention as to the composition of that committee, and they are therefore to be regarded as mandatory. The rule as to this is that, when precatory words are used merely for the purpose of advising or influencing, or as expressive of a wish or desire that the legatee or devisees make a certain use of the testator's bounty, they are not obligatory upon those to whom they are addressed; but, when used to express his manifest intention to control or direct, they are mandatory, and will be so construed in saying what effect is to be given to them. *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718; *Burt v. Herron*, 66 Pa. 400; *Presbyterian Board of Foreign Missions v. Culp*, 151 Pa. 467, 25 Atl. 117; *Dickinson's Estate*, 209 Pa. 59, 58 Atl. 120; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Warner v. Bates*, 98 Mass. 274; *Phillips v. Phillips et al.*, 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737; 1 *Jarman on Wills*, 680. "All the cases upon a subject like this," said Lord Chancellor Cottenham, in *Shaw v. Lawless*, 5 Cl. & Finn. 129, 153, "must proceed on a consideration of what was the intention of the testator." In *Williams v. Williams*, 1 Simons (N. S.) 358, 369, Vice Chancellor Cranworth said: "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his legatee to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion. I doubt if there can exist any formula for bringing to a direct test the question whether words of request, or hope, or recommendation are or are not to be construed as obligatory."

[2] The Women's Christian Association of Norristown was to be the sole creation of the testatrix, and when she said, "I, hereby appoint or wish the institution to be carried out upon the plan of the Women's Christian Association of Philadelphia," she meant that she ordained and directed that the institution should be carried out upon that plan. That the words she thus used are to be regarded as mandatory cannot be questioned. Remembering, however, that the executive committee of that association was to be composed of its officers, together with the chairmen of the standing committees, and being unwilling that the executive committee of her charity should be so made up, she proceeded, in immediate connection with her concededly mandatory words, to say, "I would like the executive committee to consist of the following ladies," whom she named. This was but a continuance of her expressed intention as to how her intended charity was to be "carried out," and to that intention effect must be given under all the authorities. The word "like," as the court below properly held, expressed the intention of the testatrix, and, though precatory in form, it none the less declared the state of her mind and showed that one of the essential elements of the scheme which she prescribed for her proposed charity was an executive committee to consist in part of Mrs. Ralston. The sole question before us on this appeal is as to the interest of Mrs. Ralston at the time she attested the execution of the will.

The expressed intention of the testatrix that Mrs. Ralston should be one of the executive committee of the Women's Christian Association would be given effect if the charity which she intended to establish had been created and endowed in accordance with the requirements of the act of 1855. If her will had been attested by two disinterested witnesses, the charity would have come into existence upon her death, and, under her expressed intention that it should be conducted upon the plan of the Women's Christian Association of Philadelphia, at Eighteenth and Arch streets, the general plan of that association would be its general plan; but its first executive committee would consist of the persons whom she named. The Women's Christian Association of Philadelphia was established for the temporal, moral, and religious welfare of women, especially young women, who are dependent upon their own exertions for support. The general management of this association is controlled by a

board of managers, with large general powers, among which are those specially given by the ninth by-law. It is as follows: "The board of managers shall have full power and authority to enter into any contract or agreement that they may deem best for the interests of the association, for the lease or purchase of any real estate or property needful or necessary for the use or enjoyment of the said association. The said board of managers shall also have full power and authority to sell, mortgage, or lease any real estate or property held by or belonging to said association, and to extinguish any ground rent or rents issuing thereout or owned by said association. They shall also have full power and authority to authorize the due execution and delivery of any and all such deed, deeds, conveyances, mortgages, agreements, contracts or other assurances in the law needful and necessary to effectuate the same." By the seventh by-law, it is made the duty of the executive committee "to act for the board, and suggest such measures as they may deem expedient"; their proceedings being subject to the approval of the board. It is to be presumed that the testatrix had these provisions in her mind when she wrote and signed her will. She directed that the general plan of this association should be the model upon which her charity was to be conducted, except as to the composition of its first executive committee. The functions of that committee, however, in the absence of any direction by the testatrix to the contrary, were to be those of the executive committee of the Women's Christian Association of Philadelphia, and, in view of the provisions of the by-laws of that institution, the court below properly found: "The functions, powers, and duties of the 'executive committee' mentioned in the will of Agnes J. Stinson, of which committee she appointed said Anna M. F. Ralston a member, are of a most comprehensive, important, and material character in the maintenance, direction, management, and government of the charity which said Agnes J. Stinson intended to establish under the name of the 'Women's Christian Association.'"

[3] The disqualifying interest of a witness to the execution of a deed or will, within the meaning of the act of 1855, is an interest in an existing charity for which a grant is made by a deed, or a bequest or devise is given by a will, or it is one in a charity created by the grantor or testator, but the rule as to disqualification is the same in each case. In testing the qualification of witnesses to the execution of a deed or will by which a charity is created, the situation is just the same as if the charity was in existence, and the grantor or testator would make additional provision for it. Many charities are originally established by testators just as this testatrix wished to establish one, and the purpose of the act of

1855 is to exclude from witnesses qualified to attest the execution of such a will any one who may by its terms be interested in the intended charity. "The interest which disqualifies a witness under the act is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself or by reason of the attesting witness being then interested in the religious or charitable institutions for which provision is made by the testator, or both, or either, as the case may be." *Kessler's Estate*, 221 Pa. 314, 70 Atl. 770, 128 Am. St. Rep. 741. The disqualifying interest of Mrs. Ralston as a witness appears from the will itself, and to say that it is an uncertain, remote, or contingent one, not within the contemplation of the act of 1855, because the charity was to come into existence only upon the death of the testatrix, provided she had not revoked her will, and provided further, that Mrs. Ralston would, if she had lived, have consented to act as a member of the executive committee, would be to strike down the act in every case in which one of the attesting witnesses to a will is, by its terms, made interested in a charity created by it. The act is intended as much for such a case as if the bequest or devise is to a charity in existence at the time of the execution of the will, in which the testator would make it the object, or one of the objects, of his bounty.

[4] The learned judge below aptly says of the appointment of Mrs. Ralston by the testatrix as a member of the executive committee of the association which she would have established that by such appointment she built Mrs. Ralston into the very structure of the official organization of the proposed charity, and, for the purpose of passing upon the question of her interest as a witness to the will, she is inseparable from it. Proceeding, he further says: "The testatrix has made the 'executive committee' the very nucleus of the organization of the proposed institution; and of that nucleus the challenged witness is a component part. It is quite evident that the testatrix appointed the 'executive committee,' with the expectation that they, as persons directly interested, would organize the charity, and that the finished product should be the fruit of their deliberations. If that was not her expectation, why did she stop there? What interest, then, could be more vital than that of the members of the 'executive committee' at this point, to say nothing of the functions, powers, and duties vested in and imposed upon them by the seventh section of the by-laws of the Philadelphia institution, adopted as a model by the testatrix?" The foregoing correctly states the situation, and, under *Kessler's Estate*, supra, and *Fetterhoff's Estate*, 228 Pa. 535, 77 Atl. 826, the conclusion reached by the learned court below, that the decedent's proposed charity must fail, could not be avoided.

Appeal dismissed and decree affirmed, at the costs of the appellants.

STEWART, J. (dissenting). As I view it, this decision not only contravenes a settled rule of construction which, since *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718, has been uniformly applied, but it extends the disqualification of witnesses to a testamentary act to cases not falling within the mischief which the statute of April 26, 1855, was intended to prevent. *Pennock's Estate* was a case most carefully considered, and the deliverance there was the final expression of the court with respect to a question which theretofore had been much discussed, but until then never settled. The uncertainty in which it had been left required the adoption of a fixed rule of construction, and this was expressed in one of the conclusions reached by the court in that case. It is as follows: "Words in a will expressive of desire, recommendation, and confidence are not words of technical, but of common, parlance, and are not, *prima facie*, sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania." The rationale of the rule is that, an absolute estate having been given, it may not be derogated from by mere precatory words. It would burden this dissent if I were to cite all the cases in which the rule has been followed. One or two will suffice.

In *Burt v. Herron*, 66 Pa. 400, Mr. Justice Sharswood says: "It is undoubtedly true that, where a testator makes an absolute devise or bequest, mere precatory words of desire or recommendation annexed will not in general convert the devise or legatee into a trustee, unless indeed it appear affirmatively that they were intended to be imperative. The authorities, which are somewhat discordant, were fully examined in *Pennock's Estate*, 20 Pa. 268 [59 Am. Dec. 718], and the rule of construction settled upon what seems to be the most reasonable foundation." What subsequently occurs in the opinion, and is supposed to qualify that which precedes, in no sense qualifies, but reaffirms. The reference in the opinion is to precatory words which stand alone, and are the only direct disposition of the estate, as will be seen from the following quotation: "Should a testator say merely, 'I desire A. B. to have a thousand dollars,' it would be as effectual a legacy as if he was expressly to direct or will it, or were to add, 'out of my estate.' or that it should be paid by his executor. The reason is obvious. A will, in its very nature, is the disposition which the testator desires to have made of his estate after his death. All the expressions in it indicative of his wish or will are commands. It is different when, having made a disposition, he expresses a desire that the legatee or devisee should make a certain use of his bounty." The case was cited and relied upon in *Hopkins*

v. Glunt, 111 Pa. 287, 2 Atl. 183, where Chief Justice Mercur uses this language: "In this state the rule is well settled that words in a will, merely expressive of desire, recommendation, and confidence, are not sufficient to convert a devise or bequest into a trust. Pennock's Estate, 20 Pa. 268 [59 Am. Dec. 718]; Jauretche v. Proctor, 48 Pa. 466; Second Reformed Presbyterian Church v. Disbrow, 52 Pa. 219; Bowlby v. Thunder, 105 Pa. 173. Expression of a desire or a wish of the testator as to a specific disposition of his property, standing by themselves alone, may constitute a valid devise or bequest thereof. The rule is different when such expressions are used after an absolute disposition of the property has been made. After an unqualified devise by the testator of his property, no precatory words to his devisee can defeat the estate previously granted. Burt v. Herron [63 Pa.] 400." If there is a case in Pennsylvania since Pennock's Estate in which this rule has ever been questioned, much less departed from, my attention has not been directed to it.

In the present case the devise was of an absolute estate to the Women's Christian Association, as was also the bequest. Immediately following, the testatrix employs apt words of direct disposition. She not only wishes, but she "appoints," that the institution she proposes to have established "shall be carried out upon the plan of the Women's Christian Association of Philadelphia, Eighteenth and Arch streets, with the exception that the institution is for Protestants only." This was a direct and positive definition of the charity, and a substantive part of the gift itself. It will be observed that she does not attempt to appoint an executive committee, but, having disposed of her estate absolutely to the institution which she creates and endows, she simply expresses a preference that certain individuals named shall compose that committee. Her language is, "I would like the executive committee to consist of the following ladies," naming them, and including one who became a witness to the execution of the will, and who is now adjudged to have been disqualified. The distinction between the two clauses of the will is too obvious to be overlooked. The difference of expression is convincing to me that the distinction must have been in the mind of the testatrix. Any other interpretation leaves unexplained the use of the word "appoint" in the one and the omission of it in the other. The earlier one was a positive direction accompanying the gift; the later was simply the expression of a preference; the gift in no wise depending upon its observance. I would adhere to the rule in Pennock's Estate, which, as Mr. Justice Sharswood says in Burt v. Herron, supra, "is settled on what seems to be a most reasonable foundation."

But more than this, the decision here disqualifies where there can be no reason for

the disqualification. Not only was it not shown that Mrs. Ralston was a member of any Women's Christian Association, but this particular association which testatrix was providing for had no existence when the will was made; and whether Mrs. Ralston was ever to become identified with it when created rested, other conditions being favorable, on her own pleasure. Upon the death of the testatrix, what possible interest in the estate could Mrs. Ralston have asserted, and in what tribunal could she have been heard? In Kessler's Estate, 221 Pa. 314, 70 Atl. 770, 128 Am. St. Rep. 741, we advanced beyond anything we had ever decided with respect to disqualification arising under the act of 1855. This decision marks a still further advance, and Kessler's Estate therefore furnishes no warrant for it. In that case it is said: "The words 'disinterested witnesses,' used in this act, must be read and understood in connection with the subject-matter of the statute, the evils to be avoided, the requirements intended to safeguard the rights and property of persons approaching death, and the remedy to be provided in such cases. When so read and understood, the interest which disqualifies a witness under the act is such an interest as appears to exist at the time of the execution of the will, either by the terms of the will itself or by reason of the attesting witness being then interested in the religious or charitable institutions for which provision is made by the testator, or both, or either, as the case may be." At the time of the attestation of this will, Mrs. Ralston was not interested "by the terms of the will." The will gave her nothing; nor was she interested in the charity that the will provided for. The will did not make her a member of the executive committee of the institution to be erected. Whether she was ever to become a member depended, first of all, upon the action of the proper authorities, and quite as much upon her own pleasure. Both would have to concur. Her membership at most was a mere possibility. If we are to place a construction on the act of 1855 that will disqualify an attesting witness because some time in the future he or she may become a manager or other officer of the charitable institution to be founded, the enforcement of the act in accordance with such construction becomes absolutely impracticable. Under the doctrine in Kessler's Estate, the interest that disqualifies must be a then present interest at the time of the attestation. In that case the attesting witness who was adjudged disqualified was a trustee or officer of the church that was legatee under the will; he was one of two trustees to whom the stock in a private corporation of which he was a member and officer was given in trust to vote at corporate elections, and whose duties required the dividends received by them were to be paid over by the charities named in the will; and, further, he was given an option

to purchase at a price agreed upon by three disinterested persons. It was held that not only was the witness interested by the terms of the will, but was interested at the time of the attestation, because of his then association with the established charities which it was the purpose of the will to assist. It is readily seen how the present decision advances upon that. To the extent it advances, it finds no support in either Kessler's Estate or any of our own authorities. I would not qualify in any way Kessler's Estate, but I would hold that the interest which disqualifies must be something more than an appointment to an office created by the will, which may be accepted or declined by the party so appointed at his or her pleasure or convenience; that the interest in any event must be more than a merely contingent one. It is upon this ground that we have held that executors are not disqualified, and I would apply the same rule here.

I would sustain the appeal.

In re STINSON'S ESTATE. Appeal of SHICK.

(Supreme Court of Pennsylvania. July 6, 1911.)
WILLS (§ 125*)—CODICIL—EXECUTION.

An alleged codicil to a will cannot be probated when not signed anywhere by the testatrix, as required by Act April 8, 1833 (P. L. 249).

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 260; Dec. Dig. § 125.*]

Appeal from Orphans' Court, Montgomery County.

In the matter of the Estate of Agnes J. Stinson. From a decree dismissing an appeal from the Register of Wills, Robert P. Shick appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

James Gay Gordon and J. Morris Yeakle, for appellant. Nicholas H. Larzelere, I. P. Knipe, and Montgomery Evans, for appellee.

PER CURIAM. Immediately below the signature of Agnes J. Stinson to her will, which is the subject of the preceding appeal, appears the following: "Codicil to will. Whereas I, Agnes J. Stinson, have made my last will and testament in writing bearing date Dec. 15, 1894. Now I do by this my writing which I hereby declare to be a codicil to my said will, to be taken as a part thereof, will and direct that the price of 'The Aged Woman's Home, Norristown, Pa., be added to the estate of Stephen P. Stinson, out of Agnes J. Stinson estate.' The register of wills refused to admit this to probate for the reason that it had not been signed at the end by the testatrix, as

required by the act of April 8, 1833 (P. L. 249). On appeal to the orphans' court, the action of the register was sustained. The contention of the appellant from the refusal of the register to admit the paper to probate was that the testatrix had signed her name at the end of it when she wrote the words "out of Agnes J. Stinson estate," and of this the learned judge, specially presiding, said it was "a notion born of the wildest form of conjecture." Perhaps it would have been better if he had said that the register properly refused the probate of the alleged codicil because it had not been signed anywhere by the testatrix. It is for this reason that we dismiss the appeal at appellant's costs.

Appeal dismissed.

PRIMROSE v. CASUALTY CO. OF AMERICA.

(Supreme Court of Pennsylvania. July 6, 1911.)
INSURANCE (§ 452*)—ACCIDENT INSURANCE—"PUBLIC CONVEYANCES."

A clause in an accident insurance policy, giving double indemnity if injuries are received while riding as a passenger in a "public conveyance" propelled by gasoline, covers injuries received while riding in an automobile hired from a taximeter cab company, engaged in hiring automobiles for public use, and driven by a chauffeur of the company.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 452.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5780, 5781.]

Mestrezat and Stewart, JJ., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Annie E. Primrose against the Casualty Company of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Thomas Leaming, for appellant. Ira Jewell Williams, Alex. Simpson, Jr., and Francis Shunk Brown, for appellee.

BROWN, J. The defendant company issued an accident insurance policy to Frank J. Primrose, the husband of the plaintiff, by the terms of which it covenanted to pay her \$10,500 in the event of his sustaining bodily injuries which should result in his death. In addition to this, there was the following clause: "B. Double Indemnity.—If those injuries are received while riding as a passenger in or on a public conveyance, provided for passenger service, and propelled by steam, compressed air, gasoline, naphtha, electricity or cable, including passenger elevators, or while in a burning building, the amounts otherwise payable under clause A

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shall be doubled." While the policy was in force, the insured and several friends were riding in an automobile hired by them from the Pennsylvania Taximeter Cab Company. It was in the charge of and driven by a chauffeur in the employ of that company. The night was dark and foggy, and the machine left the road, striking a telegraph pole with such violence that all of the occupants were thrown out of it. Primrose sustained injuries from which he subsequently died. The appellant paid to the appellee the amount of the single indemnity, and in this action she recovered a judgment in the court below for the additional sum of \$10,500, with interest; the trial judge having held that the injuries to the deceased were "received while riding as a passenger in a public conveyance provided for passenger service, and propelled by gasoline." From that judgment, we have this appeal, to be disposed of under undisputed facts. No testimony was offered by the defendant, and there is no assignment of error complaining of anything proven by the plaintiff.

That the automobile in which the insured was riding was a conveyance is not questioned; that it was propelled by gasoline is conceded, and, if it was "a public conveyance, provided for passenger service," the deceased was a passenger in it, within the terms of the double indemnity clause of the policy. The only question, then, is whether the conveyance was one embraced within that clause.

The contention of the learned counsel for the appellant is that the double indemnity clause is applicable only to the case of a person occupying a place for which he pays a fare in a railway car or conveyance operated for the common use of himself and of such promiscuous persons as may happen to take passage en route, over which conveyance he exercises no control. It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and, if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured (*Hughes v. Central Accident Insurance Co.*, 222 Pa. 462, 71 Atl. 923; *May on Insurance*, § 175); and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured. *Bole v. New Hampshire Fire Insurance Co.*, 159 Pa. 53, 28 Atl. 205; *McKeesport Machine Co. v. Ben Franklin Insurance Co.*, 173 Pa. 53, 34 Atl. 16. "If the language of the policy is doubtful or obscure, it will be construed most unfav-

orably to the insurer. *Merrick v. Germania Fire Insurance Co.*, 54 Pa. 277. A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and, when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred. *Humphreys v. National Benefit Association*, 139 Pa. 214 [20 Atl. 1047, 11 L. R. A. 564]." *Frick v. United Fire Insurance Company*, 218 Pa. 409, 67 Atl. 743. As applied to the admitted facts in the present case, we regard the double indemnity clause as having but one meaning.

The Pennsylvania Taximeter Cab Company was engaged in the business of hiring automobiles to the public—"to the public generally," is the language of the witnesses describing its business. "Anybody at all," who was financially responsible, could hire one. The secretary and treasurer of the company testified: "They would be hired to any one for rides, or for other personal transportation as passengers, from wherever they might get them to wherever they might want to go." The machines, however, were never turned over to the control and management of those who hired them, but were always operated by a chauffeur or driver in the employ of the company. All that those who rode in them did was to direct where they were to go. They were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company, from which all but themselves were excluded; the only difference being that, as automobiles do not run on rails, the occupants could select their own traveling route; and it is not to be pretended that the double indemnity clause does not include passengers riding on a specially chartered railroad car.

The words "public conveyance, provided for passenger service, and propelled by gasoline," are to receive a reasonable meaning. All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but any one able to pay the price for the privilege of riding in it, while it was under the control of and being operated by one of the company's employes, could do so. In some cases a fare per head was charged for the use of the machine for a stipulated time, or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and, under this arrangement, the deceased and his friends hired the car in which they were riding.

Counsel for appellee have submitted most elaborate briefs in an effort to sustain the

judgment of the court below, but no parallel case is found in the innumerable authorities cited by them, and the general principles upon which they rely are not questioned. We affirm the judgment, because the conditions contemplated by the double indemnity clause existed at the time the automobile struck the telegraph pole, and concur with the learned court below in its opinion that "the injuries to the deceased were 'received while riding as a passenger in a public conveyance provided for passenger service, and propelled by gasoline,' within the reasonable meaning of, and the proper construction to be put upon, the policy."

Judgment affirmed.

MESTREZAT and STEWART, JJ., dissent.

WHITING et al. v. FARNSWORTH.

(Supreme Judicial Court of Maine. Oct. 9, 1911.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 76*)—SURVIVING HUSBAND—RIGHTS IN WIFE'S PROPERTY.

Shortly before her death, without issue and intestate, a wife delivered to her husband certain bags containing money, jewelry, and other property of her own, also property that belonged to him. After her death, the husband delivered the bags and all of the contents to one of the plaintiffs. Assuming, as is claimed, that he intended thereby to make a gift of the property, it is held:

That the husband had neither legal nor equitable title to the property which had belonged to the wife, but only a statutory right to have one-half of the net avails of it, after administration, distributed to him.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 252-259; Dec. Dig. § 76.*]

2. DESCENT AND DISTRIBUTION (§ 87*) — RIGHTS OF SURVIVING HUSBAND.

That the attempted gift transferred neither legal nor equitable title, and was inoperative and void, and that, being void, equity cannot interpose to make it good, or enforce it.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 330-336; Dec. Dig. § 87.*]

(Additional Syllabus by Editorial Staff.)

3. EXECUTORS AND ADMINISTRATORS (§ 3*)—NECESSITY OF ADMINISTRATION.

Under Rev. St. c. 8, § 69 (Laws 1905, c. 124, §§ 86, 87), where collateral heirs are entitled to distribution, the statute providing for collateral inheritance taxes contemplates that the estate must be duly administered, whether there are any debts owing by the estate or not.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 3-14; Dec. Dig. § 3.*]

Report from Supreme Judicial Court, Knox County, in Equity.

Bill in equity, brought by "George F. Whiting, of Malden, in the commonwealth of Massachusetts, Nancy T. Sleeper of Rockland, Knox county, Maine, ancillary admin-

istratrix on the estate of Isabella A. Martin, deceased, late of Minneapolis, in the state of Minnesota, and David N. Mortland, of said Rockland, administrator on the estate of Helen A. Farnsworth, late of said Rockland, deceased, against Lucy C. Farnsworth, of said Rockland, administratrix with the will annexed on the estate of James R. Farnsworth, late of said Rockland, and now sole heir of said James R. Farnsworth, and Mary C. Farnsworth and Josephine L. Rollins," and relating to the estates of the said Helen A. Farnsworth and James R. Farnsworth. An answer was filed by the said Lucy C. Farnsworth, administratrix, and the plaintiffs filed a replication. At the conclusion of the evidence, the case was reported to the law court for determination. Bill dismissed.

See, also, Farnsworth v. Whiting, 104 Me. 488, 72 Atl. 314; Farnsworth v. Whiting, 106 Me. 430, 76 Atl. 909; and Farnsworth v. Whiting, 106 Me. 543, 76 Atl. 942.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

David N. Mortland and Rodney I. Thompson, for plaintiffs. Heath & Andrews, J. H. Montgomery, and L. F. Starrett, for defendant.

SAVAGE, J. James R. Farnsworth and Helen A. Farnsworth were husband and wife. Mrs. Farnsworth died May 5, 1905, without issue, intestate. Shortly before her death, she delivered to her husband certain bags, containing money, jewelry, bonds, and corporate stock of her own, of the value of about \$16,000, with which were intermingled bonds and other personal property which belonged to Mr. Farnsworth. On the day after her death, Mr. Farnsworth delivered the bags and all the contents to the plaintiff Whiting, and it is claimed that he thereby intended to make a gift of the same, to be divided equally between Whiting and a Mrs. Martin. Whiting and Mrs. Martin were the brother and sister and only heirs of Mrs. Farnsworth. Mr. Farnsworth died two or three days later.

The plaintiffs are the donee, Whiting, and the administrator of the estate of Mrs. Martin, with whom is joined the administrator of the estate of Mrs. Farnsworth. The defendant is the administratrix of the estate of Mr. Farnsworth.

Mr. Whiting and Mrs. Martin retained the property until after Mr. Farnsworth died, and when the administrator of Mrs. Farnsworth's estate was appointed, it was intrusted to his custody and keeping, and, so far as appears, he still retains it. Being "uninformed and unaware of the gift and delivery of said personal property, or of the validity thereof, or that Mr. Farnsworth had given away his heirship and interest in the prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erty aforesaid," as is alleged in the bill and admitted by the answer, the administrator caused the property to be inventoried and appraised as a part of Mrs. Farnsworth's estate, and settled an account. Partial distribution was ordered, one-half to the plaintiffs Whiting and Martin, and one-half to the heirs of Mr. Farnsworth.

The bill alleges that the decree of distribution was erroneous, in that distribution should have been ordered to the administratrix of Mr. Farnsworth's estate, instead of to his heirs, and also that "It should have taken into account the property so given as aforesaid, and distinguished the particular property from which distribution was made, and have designated the real owners thereof." It is further alleged and admitted that the administrator filed a petition in the probate court, reciting the foregoing facts, and praying that the former order of distribution be revoked, and that a new order of distribution be made "in accordance with the facts and law, so as to protect the rights and interest of the real owners of said property and all parties interested therein." Upon this petition, after notice and hearing, the former decree was annulled, but no further order was made.

The prayer of the bill is (1) that the court will determine the title to the personal property, and decree that it belonged to Mr. Whiting and Mrs. Martin by reason of a gift, and that Mr. Farnsworth had no interest therein after the gift; and (2) that the court will order the said probate court to order and decree the payment and distribution of said personal property as set forth in the petition to the probate court.

We have set forth the history of the proceedings at greater length than would otherwise be necessary, for the purpose of avoiding any misconstruction in regard to the remedy which the plaintiff seeks. Since the property is in the possession of the plaintiffs, or some of them, and since this court has no jurisdiction in a proceeding like this over the probate court, and cannot here determine whether the probate decree asked for is the appropriate one to straighten out the alleged erroneous account, it may well be doubted whether the plaintiffs have any remedy in equity upon the allegations of the bill.

But, since the case comes up on report, and no point has been made of want of sufficient allegations or appropriate prayer, we will examine the merit of the plaintiffs' contention, which, as we understand it, is this: Conceding that Mr. Farnsworth did not have a legal title to the personal property which had belonged to his wife, and could not transfer a legal title by gift, yet the plaintiffs claim, to put it as strongly as we can, that if Mr. Farnsworth in form made a gift of his wife's property to them (that is, delivered it to them with the intention of giv-

ing it) he vested in them an equitable interest in the property itself, an interest which equity will take cognizance of and protect. And the argument is this: That Mr. Farnsworth had an interest in the things given, because out of them, after administration, would come his distributive share in his wife's estate; that he could give away that interest; and that by giving the things themselves, while he transferred no legal title or interest, he did create an equitable title and interest in the donees. Hence equity should afford a remedy.

For the purposes of our examination, we assume, as the plaintiffs claim, that Mr. Farnsworth delivered to the supposed donees the property that had belonged to Mrs. Farnsworth with the intention to make a gift of it, just as we held in *Farnsworth v. Whiting*, 106 Me. 430, 76 Atl. 909, that he gave away his own property contained in the same bags.

We are not now concerned with Mr. Farnsworth's power to assign his distributive share, by way of gift or otherwise; nor with the fact that, in the course of administration, these specific things, or some of them, might have been distributed to him (R. S. c. 67, § 21); nor, for reasons stated later, with the fact that those who were entitled to distribution might have distributed it among themselves by mutual agreement, without administration, as is sometimes done, so that the specific things might have come to him, with a title good, at least, by waiver or estoppel, against the others. Nor is it relevant that if he were the sole distributee the court would not take the things from him for the purpose of administration, unless there was a necessity for administration.

[1] The naked question is, Did Mr. Farnsworth have any interest, legal or equitable, in the property itself, which he could transfer by gift of the property? As we have already said, it is conceded in argument that he did not have any legal title, and could not transfer a legal title. And such is the law. Upon the death of an intestate, the title to his real estate passes directly to his heirs, subject to being taken for the payment of debts. The title to his personal property vests in his administrator, when appointed, and the vesting relates back to the time of his death. His widow and heirs have, as distributees, merely a vested right to the distribution of so much of the personal estate as remains after administration. *Dalton v. Dalton*, 51 Me. 170; *Grant v. Bodwell*, 78 Me. 460, 7 Atl. 12.

[2] Mr. Farnsworth, therefore, did not have the legal title to the things which he attempted to give away, and, having no legal title, he could transfer none. All that he had was a statutory right to have one-half of the net avails of it, after administration, distributed to him. That right he might

have assigned, but did not. Moreover, to constitute a gift, delivery is necessary, and delivery by one who has a right to deliver. To be sure, Mr. Farnsworth had the possession of the property; but his only legal possession was no more than that of a mere depository, to hold until an administrator should be appointed. He had no other right of possession. He had no other right of dominion or control. And he could transfer by delivery no greater right than he himself had. A gift involves the transfer of the absolute right of possession and dominion to the donee. In attempting to give away his wife's estate, Mr. Farnsworth attempted to do what he had no power to do. He had no power to make such a transfer of possession as is essential to a gift. His was not merely the imperfect execution of a personal power or right; it was an act in excess of power, and without power. Therefore it was inoperative and void. It transferred neither legal nor equitable title. Not having a legal nor an equitable title, Mr. Farnsworth could not by an attempted gift create an equitable title in the donees. There was nothing in it which equity could aid. Being void in law, equity cannot interpose to make it good or enforce it. *Baltimore, etc., Brick Co. v. Mall*, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304. See note to *Re Crawford et al.*, 5 L. R. A. 72.

[3] It is necessary to notice one other point. It is admitted that Mr. Farnsworth left no debts. Hence it is contended that there was no necessity for administration, and that when all the distributees have agreed upon a distribution without administration the court will not disturb their arrangement for the mere purpose of a formal administration. And there is much authority for this position. And, if a division in such case among distributees is to be upheld, there seems to be no good reason why an agreement that one or more should have all the personal property, accompanied by delivery, should not be equally effective.

However, there are two answers to the plaintiffs' contention. One is that it states no ground for equitable cognizance, and therefore does not help to sustain this bill. The other answer is that, whatever the rule may be as to the necessity of administration under other conditions, in this state, in cases of estates such as Mrs. Farnsworth's estate is, where collateral heirs are entitled to distribution, the statutes relating to collateral inheritance taxation contemplate that they must and will be duly administered. R. S. c. 8, § 69; Laws of 1905, c. 124, §§ 86, 87. In case of such estates, administration is a necessity.

We are unable to discover any ground upon which the plaintiffs are entitled to equitable relief. Therefore the certificate will be:

Bill dismissed, with costs.

TATRO v. MAINE CENT. R. CO. et al.
(Supreme Judicial Court of Maine. Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 861*)—REPORT—REVIEW.

On report of a cause by agreement on the presiding justice ordering nonsuit, the Supreme Judicial Court will inquire, not whether there was sufficient evidence for the jury, as in the case of exceptions, but whether, on all the evidence, giving it the weight that a jury ought to give it, plaintiff is entitled to recover.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 861.*]

2. MASTER AND SERVANT (§ 265*)—DEATH OF EMPLOYÉ—BURDEN OF PROOF—FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

In an action for death of a railway employé, the burden was on plaintiff to show that decedent's own negligence did not contribute to the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 278*)—DEATH OF EMPLOYÉ—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action for death of a railway employé, evidence held insufficient to show negligence of the company in delaying medical treatment, etc., after the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 265*)—DEATH OF EMPLOYÉ—NEGLIGENCE—BURDEN OF PROOF.

In an action for death of a railway employé, assuming defendant's duty to furnish prompt treatment, the burden was on plaintiff to show negligence in delaying it after the accident.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 894-905; Dec. Dig. § 265.*]

Report from Supreme Judicial Court, Penobscot County.

Action by John B. Tatro, administrator, against Maine Central Railroad Company and another. On report. Judgment for defendant.

Action on the case to recover damages for personal injuries sustained by the plaintiff's intestate, Alfred Tatro, while in the employ of the defendant railroad, and caused by the alleged negligence of the defendant. The record shows that Alfred Tatro was 17 years and 10 months old at the time of the injury.

Plea, the general issue. At the conclusion of the plaintiff's evidence, the presiding justice ordered a nonsuit, and the plaintiff excepted. Thereupon it was agreed that the case should be reported to the law court for decision upon so much of the evidence as was competent and legally admissible.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

John E. Nelson, for plaintiff. Forrest Goodwin and White & Carter, for defendant Maine Central R. Co. Hugh R. Chaplin, for defendant trustee.

SAVAGE, J. [1] This is an action on the case for personal injuries. At the conclusion of the plaintiff's evidence the presiding justice ordered a nonsuit, to which order exceptions were taken and allowed. Thereupon by agreement of the parties the case was reported to the law court for decision upon the evidence. We are therefore to inquire, not whether there was sufficient evidence to require the case to be submitted to a jury, as we should have to do if the case were heard upon the exceptions, but whether, upon all the evidence, giving it the weight and effect that a jury ought to give it, the plaintiff is entitled to a verdict.

The plaintiff's intestate, Alfred Tatro, was in the employment of the defendant, and at the time he received his injuries was working in the defendant's freight yard at the Northern Maine Junction. He was assisting in shifting cars. A locomotive was attached to a train of six or seven cars. It was desired to take out the first one back of the locomotive. It was undertaken to do this by "kicking" back all the cars in the rear of the first car onto one track, and then switching the first car onto another track. By this process, after the locomotive had set the train in motion backwards, and while it was in motion, it was the duty of Tatro to uncouple the first from the second car by lifting or operating a lever rod on the second car. If everything worked as it should, this would pull the pin in the drawbar between the cars, the cars would thereby become uncoupled, and the cars behind the first one (or in front of it as they were going) would proceed along the track by their acquired momentum. Thus they would be "kicked back."

This accident occurred in the night. It was very dark. Tatro was on the ground and had a lantern. He gave the signal to the engineer to back the train. That was the last seen of him until after he was hurt. It is probable that he undertook to uncouple the cars, and in some way slipped or fell under them. No part of the accident was seen by anybody, and no one knows what Tatro was doing when he got hurt. But when the locomotive got back to where he was, it was found that he had been run over, and his left thigh crushed, but not entirely cut off. Examination showed that the coupling pin which Tatro is supposed to have been trying to lift by means of the lever stuck fast, so that the lever could not lift it. It was found in that condition after the accident.

[2] In the first count in his writ the plaintiff alleges that the coupling was defective, that the defendant negligently allowed it to be so, and that Tatro was injured by reason of the defect so negligently allowed to exist. In the second count it is alleged that Tatro was young and inexperienced, and that it was the duty of the defendant, not only to furnish him with reasonably safe appliances

with which to work, but also to warn and instruct him with regard to the perils of the work, which it negligently failed to do. In argument the plaintiff does not rely strongly upon either of these counts. It is not necessary to consider now whether the defendant was negligent as charged in these counts; for in any event, so far as they are concerned, the plaintiff must fail upon another ground. The rule is well settled in this state that, when a plaintiff seeks to recover for injuries caused by the defendant's negligence, the burden is on him to show affirmatively that no want of due care on his own part contributed to the injuries. *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; *Day v. Boston & Maine R. R.*, 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335. If there is no proof either way, the plaintiff cannot recover. It is incumbent on the plaintiff in this case to show that Tatro's own negligence did not contribute to his injury. That he has not done, and, unfortunate as it may be, cannot do. No one saw the accident, and there is nothing in the case which indicates in any way, in what manner, or by what cause, Tatro got under the car wheels; and, that being so, it is useless to speculate as to how it might have happened. Therefore the suit is not maintainable under either of the first two counts.

But in a third count the plaintiff alleges that Tatro at the time of the accident was far from medical aid, and that by reason of the accident he was in imminent danger of bleeding to death; "that the exigency made immediate action imperiously necessary; that it thereby became the obvious and imperative duty of the defendant to procure medical aid for him at the earliest possible moment; that the defendant assumed said duty and undertook its fulfillment; but having undertaken it, that it failed to use due care and diligence in the discharge of the duty which it owed, and which humanity dictated, but so negligently and wantonly performed said duty that Tatro lost his life thereby, and suffered great anguish of body and mind."

Under these allegations, and upon the proof, the plaintiff contends, first, that "the strict necessity and urgent exigency of this case placed upon the defendant the duty of caring for Tatro after his injury with a proper regard for his safety and the laws of humanity"; and, secondly, that "whether or not the law imposed upon the defendant the duty of so caring for him, the duty was assumed by the defendant, and having been assumed, and its performance actually entered upon, the defendant was obliged to discharge the duty with reasonable care"; that it performed the duty negligently, to the injury of Tatro, and hence is liable in this action.

[3] We do not find it necessary to consider or determine the correctness of the plaintiff's propositions of law; for, assuming, but

not deciding, that the law is as claimed by him, we think the action cannot be sustained upon the facts.

The facts bearing upon this branch of the case, as we gather them from the evidence, are these: The accident occurred at about 11:25 o'clock at night, and at a place in the yard nearly half a mile from the defendant's station at Northern Maine Junction. The engineer of the shifting locomotive at once sent his fireman and a brakeman on the locomotive to the station. They reached the station and notified the yardmaster at about 11:28 o'clock that Tatro had had his leg cut off. The yardmaster notified the train dispatcher at Waterville, who had charge of the running of trains upon that division, and asked for orders to take Tatro from Northern Maine Junction to Bangor, a distance of about five miles. Instead of ordering the yardmaster to take him in, the train dispatcher ordered him to send Tatro in to Bangor on a freight train which was just then arriving at Northern Maine Junction from the west, and which had the right of way as far as the Bangor yard. This freight train took Tatro in the caboose, and left the Northern Maine Junction yard for Bangor at 11:45 o'clock, or about 20 minutes after the accident. A brakeman was sent with Tatro. The train was running extra from Northern Maine Junction, and consequently had to flag through the Bangor yard. This meant, of course, that it had to go slowly through the yard. How long it took to make the run to the Bangor yard, and how long to run through the yard to the station, is not clearly shown. The brakeman estimates that it took 10 minutes to run to the yard, and that they were delayed at the semaphore about 20 minutes, before proceeding through the yard. At the same time he testified that they reached the Bangor station about 12 o'clock. We think it was probably as late as 12:05 or 12:10. We think so, because Dr. Robinson testifies that he was telephoned to from the hospital, as we understand his testimony, "at midnight or a little after," and asked to go to the hospital to attend upon Tatro. Also, the driver of the hospital ambulance testified that he was telephoned to, presumably from the hospital, to go to the station for Tatro; that he got the call "right around a little after 12 o'clock"; that he took 10 to 15 minutes to harness and get started, and 3 minutes to drive from the stable to the station; and that he arrived at the station at 12:25. Necessarily the hospital authorities had been communicated with before they telephoned to the doctor and the ambulance driver; and, taking the whole situation into account, we think it is fair to assume that the hospital was notified after Tatro reached the Bangor station. Meanwhile Tatro had been placed in the baggage room. Although the engineer at the Northern Maine Junction yard had bound a bell cord around his leg as tightly as he could to prevent hemorrhage, he was

losing blood and growing weaker. Dr. Holt had been sent for, but by whom it does not appear. He arrived at the station about 20 or 25 minutes after Tatro did, but not until after the ambulance arrived. For some reason, not explained in the testimony, Tatro was not put into the ambulance until 20 or 25 minutes later. But finally, after he had lain in the baggage room from between three-quarters of an hour to an hour, he was taken to the hospital. There his leg was amputated. He died at 4:45 that morning, from "shock and hemorrhage."

This is an unsatisfactory account of what happened after Tatro reached Bangor—unsatisfactory, because as to most of the points of time we have to rely upon the mere estimates of witnesses, and estimates not entirely harmonious. But the foregoing statement, made after a close scrutiny of such evidence as we have, represents our conclusions.

It appears, then, that about 20 or 25 minutes after Tatro reached the Bangor station a reputable surgeon and an ambulance procured by some one were in attendance, and there seems to be no ground for charging negligence upon the defendant after that. Nor do we think that the defendant is chargeable with negligence after the train reached the station, if within 20 or 25 minutes, at the midnight hour, a surgeon and an ambulance had been procured. That would seem to indicate reasonable diligence, especially if, as appears to be probably true, the hospital authorities were set to work immediately after the arrival of the train. The hospital had surgeons, and it had an ambulance; and if, upon call, the hospital authorities undertook to care for Tatro, and their acts indicate that they did, we think the defendant was justified in relying upon such an undertaking, and would not be liable for any such delays in reaching Tatro as are shown in this case. And in point of fact we are impressed with the belief that, if there was any unreasonable delay in Bangor, the delay was that of the ambulance driver, for which the defendant is not responsible.

So much relates to negligence after the train reached the Bangor station. But the plaintiff contends that reasonable care and diligence required the defendant to send Tatro immediately to Bangor, where he could receive surgical and hospital treatment, and particularly so to arrange the use of its tracks that there should be no delay in running through the Bangor yard. It is also contended that the defendant should have telegraphed from Northern Maine Junction to Bangor and had a surgeon and an ambulance in attendance when Tatro arrived there. It is doubtless true that, if the train which bore Tatro could have run through the Bangor yard without delay, it would have reached the Bangor station at about 12 o'clock; and if a surgeon and ambulance had then been in attendance he might have been saved about a half hour of suffering. Since

there can be no recovery for loss of life, that is the extent of the defendant's liability in any event.

[4] It is shown that the extra freight which took Tatro could reach Bangor in less time than it would take to make up a special and send it in, so no fault can be attributed to the defendant for sending him in on the freight. It is not shown what other efforts, if any, the defendant made to get him into Bangor station quickly, nor whether, in the limited time, it was possible to get a clear track through the Bangor yard. The burden of showing a negligent lack of effort, and the consequent injury to Tatro, is upon the plaintiff. That burden is not sustained. From the mere fact that the train was delayed probably from 10 to 20 minutes in passing through the yard, we do not think it can properly be inferred that the delay was due to the negligence of the defendant. Even a slight familiarity with a large railroad freight yard at night, with making up trains, shifting trains, dispatching trains, shows that such an inference would be mere guesswork, a choice among possibilities.

Lastly, did due care and diligence require the defendant to telegraph ahead to Bangor for a surgeon and ambulance? We feel constrained to answer the question in the negative. Bangor was only about 5 miles distant. A train started to carry Tatro there within 20 minutes after he was hurt. The hospital ambulance was, it seems within 3 minutes' drive from the station. The case does not show that the presence of a surgeon at the station was necessary, though it may have been useful. So far as appears, Tatro might have been taken to the hospital as soon as the ambulance arrived. With such expectations of obtaining speedy surgical help as the defendant's servants might reasonably have in such a city as Bangor, under the conditions which existed there, we do not think that failure to telegraph should be regarded as want of reasonable care. Nor, in saying this, do we overlook the urgency of the situation. The defendant, indeed, in argument contends that it is not shown by the evidence that its servants did not telegraph, and therefore that the plaintiff must fail on this ground from lack of proof. But we have assumed that they did not telegraph.

We do not discover any valid ground upon which the plaintiff can recover.

Judgment for the defendant.

TONNS et al. v. COLLINS.

(Court of Appeals of Maryland. June 23, 1911.)

1. ATTACHMENT (§ 206*)—PROCEEDINGS TO ENFORCE—SUMMONS.

Under Code Pub. Gen. Laws 1904, art. 9, § 38, relating to attachments on original process for fraud, providing for a writ of summons, that the action shall be instituted either

in the county where defendant resides, or where the property to be attached may be found, but, if the action be instituted in any county other than that wherein the defendant resides, the writ of summons against defendant shall be directed to the sheriff of the county wherein he resides, the failure to issue the writ to the county where defendant resides is not fatal to the court's jurisdiction of the attachment proceedings, where defendant was actually served in the county in which the property was situated, on a writ directed to the sheriff of that county.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 664-670; Dec. Dig. § 206.*]

2. ATTACHMENT (§ 89*)—PROCEEDINGS TO PRODUCE—AFFIDAVITS—TIME OF MAKING.

That the affidavit on which an attachment is based had been filed in an attachment suit between the same parties a year previously, and withdrawn from that case for use in the present proceeding, does not affect the validity of the present attachment, though the better practice would have been to file a new affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 208; Dec. Dig. § 89.*]

Appeal from Circuit Court, Wicomico County.

Action by Paul M. Tonns and another against William H. Collins. From a judgment for defendant, plaintiffs appeal. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

A. P. Barnes and Joseph L. Bailey, for appellants. John H. Handy and Wm. G. Kerbin, for appellee.

URNER, J. An attachment on original process for fraud was issued out of the circuit court for Wicomico county at the suit of the appellants, and was levied upon certain personal property of the appellee in that county. After special appearance for the purpose, the appellee moved to quash the attachment, upon the grounds, first, that no writ of summons against him was directed to the sheriff of Worcester county, where he actually resides, and, secondly, that the affidavit upon which the attachment issued was invalid because of having been made a long time before it was used in the suit. The motion was supported by affidavit, but no evidence appears to have been adduced. It may be gathered, however, from the record that the fact of the defendant's nonresidence in Wicomico county was practically conceded. The attachment was quashed, and judgment entered for the defendant. It is the action thus taken by the court below that is presented for our review upon this appeal.

[1] It appears that at the institution of the attachment proceeding a direction in writing was given to the clerk of the circuit court for Wicomico county to issue "summons to be served on the defendant, and to send a copy of the short note to be set up at the courthouse door." Upon the approval of the bond, the writs of attachment and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

summons were issued by the clerk to the sheriff of the same county. The former writ was levied upon the property already referred to, and the latter was served upon the defendant, who was in Wicomico county at the time. The contention is that, although the defendant was actually summoned to appear to the plaintiff's suit, yet, inasmuch as the writ of summons was not directed to the county of the defendant's residence, the court was without jurisdiction to entertain the proceeding.

Section 38 of article 9 of the Code of Public General Laws, relating to attachments of this character, provides that: "There shall be issued with every attachment issued under the provisions of the two preceding sections, a writ of summons against the defendant, as is usual in actions at law. The action shall be instituted either in the county where the defendant resides or where the property proposed to be attached may be located or found, or where the proposed garnishee resides; but if the action be instituted in any county other than that wherein the defendant resides the writ of summons against the defendant shall be directed to the sheriff of the county wherein the defendant resides, returnable to the court in which the action shall be brought."

It has been held by this court that: "The object of an attachment is to secure the appearance of the defendant by the seizure of his property (*Barney v. Patterson*, 6 Har. & J. 182), and to subject that property to the payment of the debt." *Johnson v. Stockham*, 89 Md. 376, 43 Atl. 948. The proceeding is in rem, so far as the property is concerned. Until jurisdiction of the defendant is obtained by summons or voluntary appearance, there can be no judgment in personam, but the action, if validly instituted, may nevertheless proceed against the property attached. *Coward v. Dillinger*, 56 Md. 59; *Johnson v. Stockham*, supra. In the case before us, if the summons had been sent to the sheriff of Worcester county, and had failed of service because of the absence of the defendant in Wicomico county, it is clear, under the authorities cited, that this would not have affected the jurisdiction of the court in which the attachment was issued to entertain the writ, and to proceed to a judgment of condemnation.

The practical question to be determined here is whether a summons and actual service in the county in which the suit is brought shall be held less effective to support jurisdiction than a futile summons directed to the county of the defendant's residence. In our judgment, to sustain as jurisdictional the objection we are considering, under the circumstances of this case, would require an unnecessarily strict construction of the statutory provisions on the subject, and would produce a result opposed to their manifest spirit and purpose. When a defendant in such a proceeding can be reached, and is in

fact served, with process in the county in which the attachment is issued, and to which the writ of summons is to be returned, there is no possible prejudice that he can sustain from the mere omission to send a subpoena to the county of his domicile. The statute does not make it necessary that the suit should be brought in the defendant's home county. But, where the proceeding is instituted in a county in which he has property, but does not reside, provision is made for the issuance of a summons in the way most likely to accomplish the ordinary purpose of such a writ. When the whole object of this requirement has been gratified by the actual and regular service of a formal subpoena, granted by the court whose jurisdiction is invoked, it would seem unduly technical to quash the attachment simply on the ground that the summons was not sent to a different county. It has been held that a substantial compliance with the terms of the statute is sufficient to give the court jurisdiction (*Gunby v. Porter*, 80 Md. 402, 31 Atl. 324; *Eveson v. Selby*, 32 Md. 346); and the general policy of the law is indicated in a liberal provision for amendments, "so that all attachment cases may be tried on their real merits and the purposes of justice subserved," and in the declaration that no such proceeding shall "be quashed or set aside for any defect in mere matter of form." Code, art. 9, § 28. We are clearly of the opinion that the jurisdiction of the court in this case should be sustained, as against the objection we have discussed.

This conclusion is not at all in conflict with the principle of the decisions of this court, enforcing the due observance of the requirement of the issuance of a capias for the defendant, and a copy of the short note, to be set up at the courthouse door, in attachment suits against nonresident and absconding debtors. *Stone v. Magruder*, 10 Gill & J. 383, 32 Am. Dec. 177; *Campbell v. Webb*, 11 Md. 481. There is a material distinction between an actual service of the writ of summons in the manner shown by this record, and the failure to issue any writ at all.

[2] The second ground of objection may be disposed of briefly. It is covered by the case of *Hadden v. Linville*, 86 Md. 234, 38 Atl. 37, 900. In that case a motion was filed to quash the attachment, because the affidavit appeared to have been made several months prior to the time of suing out the writ. The attachment was against a nonresident, and the court held that the act did not intend that the affidavit must necessarily be made at or near the time of the institution of the suit, and did not direct that it should be made within a reasonable time. It is provided by section 4 of article 9 of the Code that an attachment of that kind shall not issue, "unless there be an affidavit," etc.; while with respect to a case like the present the provision is that, "before any such writ

of attachment shall be issued," an affidavit shall be filed in form and effect as prescribed. Article 9, § 36. The conclusion of the court in the case cited was that the divergence of dates between the affidavit and the attachment did not in itself affect the question of jurisdiction. It was said, in reference to the suggestion that the affidavit should be made within a reasonable time: "If this construction of the statute be insisted on, it may be asked by what facts and circumstances is the reasonableness of the time to be determined? Is it to depend on distance, facility of intercommunication, diligence, or the vicissitudes of the weather?" "A jurisdictional question, above all others," said the court, quoting with approval from *Wilson v. Arnold*, 5 Mich. 104, "should not be left in so much uncertainty."

In the case at bar, it is stated by both the appellant and appellee in their briefs that the affidavit in question had been filed in an attachment suit between the same parties, brought about a year previously, in Worcester county. It was withdrawn from that case for use in the present proceeding. While the period intervening between the making of the affidavit and the institution of the pending suit was considerable, and while the proper practice would have been to file a new affidavit, the irregularity is not jurisdictional, and we must overrule the objection which has been interposed on this ground.

The learned court below erred in granting the motion to quash and giving judgment for the defendant, and its action will therefore be reversed, and the cause remanded, to the end that there may be a trial on the merits.

Judgment reversed, with costs to the appellant, and cause remanded.

PALMENBERG et al. v. TURK.

(Court of Appeals of Maryland. June 22, 1911.)

APPEAL AND ERROR (§ 361*)—MODE OF APPEAL.

An appeal from an order striking out a judgment of fiat, in scire facias proceedings to revive a prior judgment, taken merely by an order to the clerk to "enter an appeal in this case," was unsustainable, as not taken by formal exception or by petition addressed to the court, designating the points or questions of law by which the party feels himself aggrieved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Action by Raymond P. Palmenberg and another, trading as J. R. Palmenberg's Sons, against Simon Turk. From an order granting a motion to strike out a judgment of fiat, plaintiffs appeal. Dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

R. Howard Bland, for appellants. James McEvoy, Jr., for appellee.

STOCKBRIDGE, J. The appellants, plaintiffs below, recovered a judgment against the defendant in November, 1893, and in October, 1905, caused a writ of scire facias to be issued upon it. After two returns of nihil, a judgment of fiat was entered in course in January, 1906. In December, 1909, a motion was filed to strike out the judgment of fiat, upon the grounds of surprise, lack of notice of the scire facias proceeding, and the discharge of the defendant in April, 1900, under proceedings in the bankrupt court. This motion was granted and the judgment of fiat stricken out on December 12, 1910. Upon the following day, this order was filed: "Mr. Clerk: Enter an appeal in this case."

A motion has been made to dismiss the appeal upon two grounds: That it was not taken in the mode required by the rules of this court, and because the record fails to show what points or questions were decided by the court below.

The record filed here consists only of the docket entries, the petition to strike out the judgment, the order of court on the petition, and the order for appeal already quoted. The rules of this court point out two methods by which appeals may be taken in cases at law; one by formal exception, the other by a "petition addressed to the court in which the case was tried, plainly designating the points or questions of law by which" the party appealing feels aggrieved; and the rule further provides that "no point not thus designated shall be heard or determined" by this court. Rule 1, 80 Atl. viii. Neither of the methods specified in the rules were adopted in this case.

The petition to strike out the judgment contained certain allegations of facts, and therefore the present appeal comes directly within the decision in *Baltimore City v. Austin*, 95 Md. 94, 51 Atl. 826, where it was said: "It is quite manifest that whether the judgment of the court below was correct depends upon facts which must have been in evidence before that court. * * * In the absence of this evidence from the record here, this court, if it undertook to review the action of the court below as respects the merits of the proposition of law that court had before it would be proceeding upon grounds altogether conjectural or hypothetical. In such a state of case, this court cannot review the action of the lower court upon the merits of the case here on appeal; nor is there any other question of law appearing from the record for this court to

decide." To the same effect are the cases of *Hollowell v. Miller*, 17 Md. 308, and *Cockey v. Ensor*, 43 Md. 286.

The motion to dismiss this appeal will therefore be granted, costs to be paid by the appellants.

Appeal dismissed, with costs.

DE BEARN et al. v. DE GALARD DE BRASSAC DE BEARN, Count and Prince of Bearn and Chalais.

(Court of Appeals of Maryland. June 22, 1911.)

ATTACHMENT (§ 62*) — JURISDICTION — AIDING ATTACHMENT.

Where bonds may not be reached by attachment against a debtor because they are registered in the names of others, equity has no power to change the registration at the instance of attaching creditors merely to make the bonds subject to attachment, in the absence of fraud or some ground of equity jurisdiction.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 62.*]

Cross-Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

Action by Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais against Ross R. Winans and others, in which Francois de Bearn and others filed a cross-petition. From an order sustaining a demurrer to the cross-petition, the cross-petitioners appeal. Affirmed.

See, also, 81 Atl. 223.

Argued before **BOYD, C. J.**, and **BRISCOE, PEARCE, BURKE, PATTISON**, and **URNER, JJ.**

J. Kemp Bartlett, for appellants. **Maurice Leon** and **Arthur George Brown**, for appellee.

BURKE, J. This is an appeal from an order of circuit court No. 2 of Baltimore city, passed on the 9th day of December, 1910, sustaining a demurrer to the cross-petition of the appellant, filed in the cause on October 27, 1910.

The circumstances under which the cross-petition was filed are fully stated in the opinion of Chief Judge Boyd, filed April 5, 1911, in the case of *Prince de Bearn v. Winans et al.*, 80 Atl. 1071. After referring at some length to the prior controversies over the bonds involved in this case, and to the pending attachments, and also to the petition of the Prince, filed October 21, 1910, the opinion proceeds as follows: "The attaching creditors filed an answer and a cross-petition, in which they alleged that the appellant had filed in the Court of Appeals a petition praying that the lower court should be directed to forthwith sign an order turning over to him or his solicitor and attorney in fact the bonds referred to, but that said petition was dismissed by this court, and that

he then took an appeal to this court from the decree of June 6th. They also alleged that the attachments were still pending. A demurrer to the cross-petition was sustained; and hence it will be unnecessary to discuss that at length, further than to say that the learned judge who sustained the demurrer, but also dismissed the petition of the appellant, filed an opinion in which, as well as in the orders passed by him, he gave the reasons which induced him to adopt the course pursued by him.

As to the demurrer, he took the position that, if the effect of the decision of this court in 111 Md. 434, 74 Atl. 626, was to make the bonds subject to attachment, there was no occasion for a court of equity granting the relief sought in the cross-petition; and, if, on the other hand, they were not in such condition as to be subject to attachment, and in order to make them so it was necessary for a court of equity to change or modify them, then, in his opinion, that court had no power to change the form of property, so as to make it subject to attachment, when it was not subject to attachment in its present form, and should not aid the statutory remedy of attachment by altering the form of property. In the cross-petition, the attaching creditors had asked the court to pass an order declaring the distribution and registration of the bonds in the names of the infant children to be illegal, invalid, and of no effect; that the bonds be brought into that court by the American Bonding Company and Alexander Brown & Sons, but that they should not be taken from the custody of said American Bonding Company and Alexander Brown & Sons pending the determination of the attachment suit, and that when they were brought into that court that the clerk make upon each of them an indorsement as follows: "Registration in name of Henry Ross Joseph Gaston de Galard de Bearn or Beatrice Neva Marie Cecile de Galard de Bearn, as the case may be, is hereby canceled by order of the circuit court No. 2 of Baltimore city, bearing date the — day of —, 1910, in the cause of *de Bearn v. Winans et al.*"

The cross-petition clearly showed that the object of the petitioners in having such an order passed was to enable them to reach the bonds by the attachments, or at least to remove what was supposed to be an obstacle in their way of so reaching them. The only possible standing they have in a court of equity is as interveners for the benefit of their attachments, as they have no interest in the bonds, excepting as they claim to have as attaching creditors. Under such circumstances, we think the court was right in refusing to take the action prayed for in that cross-petition, merely for the purpose of aiding the attachment. The cases of *Harper v. Clayton*, 84 Md. 346, 35 Atl. 1083, 35 L. R. A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

211, 57 Am. St. Rep. 407, and *Frederick County Bank v. Shafer*, 87 Md. 54, 39 Atl. 320, together with Judge Pearce's opinion in the other case, sufficiently show the position this court has taken on such questions to avoid the necessity of citing others. As was said in *Harper v. Clayton*, "a court of equity, however broad and far reaching its powers are, cannot create rights, not before existing at law, and then take jurisdiction to pass upon and enforce them because the law affords no remedy." In other words, if these bonds could not be reached by the attachments, by reason of the fact that they were registered in the names of the children, then, in the absence of fraud or some ground of equity jurisdiction, a court of equity has no power to change or strike out the registration of them, at the instance of the attaching creditors, simply for the purpose of making them subject to attachment; and, if they are already subject to attachment, then, as Judge Gorter well said, "there is no occasion for such relief."

In view of what was said in that part of the opinion above quoted, we see no necessity for any further discussion of the questions presented by this appeal, and, for the reasons stated by Judge Boyd, the order appealed from will be affirmed.

Order affirmed, with costs.

DE BEARN et al. v. DE GALARD DE BRASSAC DE BEARN, Count and Prince of Bearn and Chalais.

Court of Appeals of Maryland. June 22, 1911.)

1. ATTACHMENT (§ 227*)—VALIDITY—OBJECTIONS.

A father, in contemplation of the marriage of his daughter, executed a deed conveying railroad mortgage bonds in trust to apply the income to the daughter for life, and to dispose of the fund, on the daughter's death, as directed by her will. The daughter executed a will, leaving all her property to her husband. The will was admitted to probate, and the lower court erroneously awarded to the husband one-third of the bonds in his own right and two-thirds as guardian of his two infant children, instead of giving the husband absolute title to all the bonds, and the bonds were registered in the name of the children and placed in the custody of a third person. *Held*, that the bonds, attached by creditors of the husband, should not be released from attachment on the ground that the court could not render a judgment under which the bonds could be sold under execution with safety to the third person, and the action of the court in giving the husband absolute title should be without prejudice to the rights of the attaching creditors.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 227.*]

2. ATTACHMENT (§ 232*)—PROPERTY SUBJECT TO—STATUTES.

Code Pub. Gen. Laws 1904, art. 9, § 18, provides that attachment may be laid on any interest which defendant has in the debts of any corporation, and that the officer in laying the attachment must comply with article 23, sections 391-401 of which are applicable

only to domestic corporations, and were repealed by Laws 1906, c. 240, which makes provision for the attachment of shares of domestic corporations, but is silent on the subject of debts of corporations. *Held*, that article 9, § 18, does not justify the release of an attachment of registered railroad mortgage bonds of foreign railroad corporations, on the ground that the officer holding the attachment failed to comply with article 23 in laying it.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 232.*]

3. ATTACHMENT (§ 62*)—"PROPERTY" SUBJECT TO—STATUTES.

Railroad mortgage bonds, constituting the absolute property of a debtor, but registered in the names of his infant children and deposited with a third person, were attached by creditors. The court had jurisdiction over the debtor and his infant children, and could at any time acquire jurisdiction over the third person. The bonds were payable outside the state by foreign corporations. *Held*, that the bonds were "property," within Code Pub. Gen. Laws 1904, art. 9, § 10, declaring that any kind of property belonging to defendant may be attached.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 166; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768, 7770.]

4. ATTACHMENT (§ 217*)—EXECUTION (§ 48*)—JUDGMENT—ENFORCEMENT.

Where railroad mortgage bonds of foreign corporations, in the custody of a third person for the owner and registered in the names of the infant children of the owner, are attached by creditors of the owner, the judgment for the creditors must be a judgment of condemnation against the bonds, and not in personam against the custodian; and on such a judgment a writ of fieri facias may be issued, and the bonds sold after the cancellation of their registration.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 217; Execution, Dec. Dig. § 48.*]

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by attachment by Francois de Bearn and others against Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais. From an order releasing property from the attachment, plaintiffs appeal. Reversed and remanded.

See, also, 81 Atl. 222.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

J. Kemp Bartlett, for appellants. Maurice Leon and Arthur George Brown, for appellee.

BURKE, J. On June 19, 1905, Ross R. Winans, a citizen of Maryland, executed in Paris, where he was then temporarily residing, a deed of trust to himself and Ferdinand C. Latrobe, conveying to them railway mortgage bonds of the par value of \$284,000 upon trust, first, "to receive the interest and income thereof, and apply the same to the use of Beatrice Winans, the grantor's daughter, during her life, free from the disposal or incumbrance or contract of any husband, and as her separate estate; and secondly,

upon further trust, upon the death of the said Beatrice Winans to dispose of the capital of the fund hereby created in such manner and to and among such person or persons and in such amounts as the said Beatrice Winans may by a valid will and testament duly executed appoint, etc." This deed of trust was executed in contemplation of the marriage of Miss Winans to the Prince de Bearn, which occurred in Paris a few days after its execution. Shortly after the marriage, the Princess executed a will in Paris, by which she bequeathed her entire estate to her husband, the Prince. This will, under circumstances which are not necessary to be here stated, was admitted to probate in the orphans' court of Baltimore city, and letters of administration c. t. a. were granted upon the estate of the Princess to Ross R. Winans and Ferdinand C. Latrobe. The administrators in settling the estate treated the railway mortgage bonds conveyed by the deed of trust as the personal estate of the Princess, and her whole estate, including these bonds, was distributed "under the laws of France," as recited in the account, one-third to the Prince in his own right, and the remaining two-thirds to him as guardian of his two infant children, Henry Ross Joseph Gaston de Galard de Bearn, and Beatrice Neva Cicile de Galard de Bearn.

The property distributed to the Prince as guardian by the orphans' court consisted of \$15,000 New York Central & Hudson River Railroad $3\frac{1}{2}$ per cent. bonds, due 1907, registered as to principal only in the name of his infant son; \$14,000 New York & Hudson River Railroad Company $3\frac{1}{2}$ per cent. bonds, due in 1907, registered as to principal only in the name of his infant daughter; \$78,000 Chicago, St. Paul, Minneapolis & Omaha Railroad 6 per cent. bonds, due 1930, registered as to principal only in the name of his infant son; \$78,000 Chicago, St. Paul, Minneapolis & Omaha Railroad 6 per cent. bonds, due 1930, registered as to principal only in the name of his infant daughter. These bonds were placed in a safe deposit box in the Safe Deposit & Trust Company, Baltimore, under the following circumstances, and were subject to the joint control of the American Bonding Company and Alexander Brown & Sons: The American Bonding Company was on the bond of the Prince as the guardian of his children, and it was agreed that he should deposit these bonds in a box in the vault of the Safe Deposit & Trust Company, Baltimore, registered in the names of the infants. It was further agreed that the box was to be opened only in the joint presence of an officer of the bonding company and a member of the firm of Alexander Brown & Sons, which firm was to cut the coupons from the bonds, retain a commission, and pay the premium on the bonds, and hold the balance subject to the check of the Prince, as guardian.

In the case of the Prince de Bearn v. Wi-

nans and Latrobe, Trustees, 111 Md. 434, 74 Atl. 626, this court reversed the decree of circuit court No. 2 of Baltimore city, and decided that the Prince was entitled to a decree setting aside the settlement and distribution made by the orphans' court of Baltimore city, and canceling the releases given by him in his own right, and as guardian to the trustees and administrators, and that he is further entitled to have the two-thirds of the trust fund which were distributed to his two children awarded and paid over to him absolutely, and to hold the same in his own right.

The appellants on this record, claiming to be creditors of the Prince in large sums of money, sued out an attachment against him in the superior court of Baltimore city, as a nonresident of this state, by which they seek to subject the bonds above mentioned to condemnation and sale. The writ was laid in the hands of Alexander Brown & Sons and the American Bonding Company as garnishees. Attachments were also sued out of that court against the Prince by Francols de Bearn, Odon de Bearn, Pierre de Bearn, and Jean Baptiste Chaumet, and each writ was laid in the hands of the above-named garnishees. The notice served upon the garnishees was identical in each case, and was as follows: "The attachment caused by said plaintiff to be sued out in the superior court of Baltimore city heretofore, to wit, upon said plaintiff's claim against Prince Henry de Bearn, a nonresident of the state of Maryland, and laid generally in your hands, *was intended to bind \$29,000.00 of New York Central & Hudson River R. R. $3\frac{1}{2}$ per cent. bonds with the unclipped coupons thereto, and \$156,000.00 of Chicago, St. Paul, Minneapolis & Omaha R. R. 6 per cent. bonds with the unclipped coupons thereto, now held by you and the American Bonding Company in joint custody and control, the ownership of said bonds having been recently finally adjudicated and determined by the Court of Appeals of Maryland*, and by which adjudication and determination said bonds are decreed to be the absolute property of the said Prince Henry de Bearn."

On September 14, 1910, the Prince filed a motion in the superior court, in which he asked the court to release and discharge the bonds from the operation of the attachments, because the bonds and coupons are not legally liable to be taken and condemned under the laws of Maryland, relating to attachments, for the reasons that the bonds are all evidences of indebtedness, payable only outside of the state of Maryland, to the registered owner thereof, by nonresident corporations, and that therefore said bonds for the purposes of attachment are not amenable or subject to the process of this court in attachment proceedings.

[1] On September 17, 1910, the court passed an order releasing and discharging the bonds from the operation of the writ of at-

tachment and from any levy or garnishment thereunder. A like order was passed in each of the other attachment cases, and from these orders the appeal in this case, and those in Nos. 7, 8, 9, and 10 were taken. As precisely the same questions, viz., the liability of these bonds to attachment, upon the special facts appearing in these records, is presented in each case, all the appeals will be disposed of by this opinion.

The reasons which induced the learned judge of the superior court of Baltimore city to release the bonds from the operation of the attachment are thus stated in this opinion: "It seems to me, where the writ affects in the hands of the garnishee anything but credits, the only thing upon which it can operate, the sole property liable, is property upon the sale of which the title would vest in the purchaser, or the title to which the court could, under the proceedings, vest in the purchaser. In this case, we have the writ operating upon certain registered coupon bonds. If judgment in personam were to be rendered against the custodians of those bonds for the market value of the bonds, I fail to see how it would be possible for him to save himself harmless against that judgment, because of the absence of power in him to sell and transfer the title. If the custodian could not transfer, and there is no person before the court with power to transfer, the title, I do not see how the court could render a judgment of condemnation under which the bonds could be sold on execution." It was upon this distinct and sole ground that the bonds and attached coupons were released.

In the recent case of the Prince v. Winans and Latrobe, Trustees, 80 Atl. 730, decided February 23, 1911, the court, speaking through Judge Pearce, said: "But we are of opinion that there was error in directing, as the decree did, that these bonds should remain not only '*where*,' but '*as, they now are*,' and in failing to direct that, in some proper manner, the registration of said bonds in the names of said infant children should be canceled. The Prince was entitled, under the opinion of this court in 111 Md., 74 Atl., to a clear and unfettered title to these bonds *whenever* they should be delivered, or should become deliverable, to him, and this was an essential part of any decree made in conformity with said opinion." The failure so to provide in the decree appealed from will require its reversal, but, as we have said above, it correctly required said bonds to remain "*where they now are*," and properly provided that such action of the court should be without prejudice to the rights of either the attaching creditors or of the complainants in this case.

When the case is remanded, the decree then to be passed should provide for cancellation of the registration of said bonds in the names of the infant children of the Prince, in such manner as the circuit court

may deem proper (including making the Safe Deposit & Trust Company, Baltimore, the American Bonding Company, and Alexander Brown & Sons parties, if deemed necessary), and should also provide that such cancellation shall in no wise affect the rights of any of the parties to the attachments pending at the date of the decree of June 6, 1910, or to any other attachments that any of said attaching creditors may have since caused to be issued, or may hereafter cause to be issued, pending the ultimate delivery of said bonds, or any of them, to said Prince to be held in his own absolute right, as he was declared by this court, in the opinion in 111 Md., 74 Atl., *supra*, to be entitled to hold them.

And in the case of the Prince de Bearn v. Winans et al., 80 Atl. 1071, decided April 5, 1911, Judge Boyd, speaking of the bonds involved in these attachment cases, said: "It is true the bonds were registered, but if in the attachment cases it be held that they can be made subject to the operation of the attachment, and are condemned in the hands of the garnishee, or any of them, then undoubtedly a court of equity would be authorized, by proper proceedings, to have them transferred in such way as would make the judgments effective. There is no longer any doubt about their belonging to the appellant, and if they can be condemned, what we have said about a court of equity not giving its aid would not apply, if it becomes necessary to have its aid in enforcing judgments, if such be obtained." It is therefore obvious that the bonds should not have been released, for the reasons stated in the opinion of the lower court.

In the brief of the appellee, that portion of the opinion of the lower court quoted above is transcribed and relied upon, and it is declared "that upon the uncontroverted evidence before the court the learned judge could have reached no other conclusion." This contention was fully answered in the opinion in the two recent cases referred to above.

[2] The only other ground upon which it is insisted that the bonds were properly discharged is that the only lawful process whereby the registered corporate debts may be attached is under section 18, art. 9, and section 392, art. 23, of the Code, and, since the records show that these sections were not, and could not be, complied with, the bonds are not attachable, and were properly released. Section 18, art. 9, of the Code of 1904, provides that: "An attachment may be laid on any interest which the defendant has or may be entitled to in the stock of any corporation, or in the debts of any corporation, transferable upon the books of such corporation; and it shall be the duty of the sheriff or other officer, in laying said attachment, to comply with the requirements contained in article 23, title 'Corporations' of this Code, in relation thereto." Section 392,

art. 23, of the Code reads as follows: "The sheriff or other officer, upon being instructed to levy such writ on any such stock or debt, shall deliver to the president or chief officer, or leave at the place of business of such corporation, a notice in writing, stating that he has seized the stock or debt of the defendant (naming him), and the purpose for which he has seized the same, and shall retain a copy of such notice, and return it with the writ."

The argument of the appellee is thus stated in his brief: "While section 18, art. 9, declares it to be 'the duty of the sheriff or other officer in laying said attachment to comply with the requirements contained in article 23, title "Corporations," of this Code, in relation thereto,' the sheriff, for whom it would have been impossible to deliver any notice to the president or chief officer of either of the respective debtor corporations, or leaving at the place of business of such corporation respectively the notice prescribed by section 392 of article 23, obeyed the appellants' instructions, and delivered to persons alleged to have 'joint custody and control' of written certificates of corporate debt registered outside of the state certain notices, subscribed and subsequently filed in behalf of the appellants, stating that the respective attachments were intended to bind such debt. To uphold such means of attachment would amount to reading into the statute a provision substantially to the effect that an attachment may be laid on any interest which the defendant has or may be entitled to in the debt of any corporation transferable upon the books of such corporation, by leaving notices with such persons as may have custody or control of the written evidences of such debt issued by debt of corporations outside of the state."

The sections of article 23 of the Code of 1904, referred to in section 18, art. 9, of the Code of 1904, are sections 391 to 401, inclusive, under the subtitle "Execution against the stock of corporations"; but it is evident from section 417 of article 23 that these sections are applicable *only to corporations formed under the general laws of this state*. These sections were all repealed by the act of 1908, c. 240, which substituted certain new sections in lieu of those repealed. Section 43 of the act of 1908, c. 240, makes provision for the execution or attachment of shares of stock of *corporations of this state*, provides the duties of the sheriff and of the officers of the corporations, but is silent upon the subject of the registered debt of corporations. It is therefore, we think, quite apparent that the order appealed from cannot be sustained by virtue of the sections of the Code of 1904 relied upon by the appellee.

[3] Section 10 of article 9 of the Code provides that "any kind of property or credits

belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." The bonds attached in this case are within the jurisdiction of the court, and the circuit court No. 2 has jurisdiction over the appellee and his infant children, and may acquire at any time jurisdiction over the custodians of the bonds, and in the event of the condemnation of the bonds in the hands of the garnishees, or any of them, it would have the undoubted power "by proper proceedings to have them transferred in such way as would make the judgment effective." The bonds attached are the absolute property of the defendant in the attachments. Their registration in the names of his infant children is a mere shadow upon the title, which the court has power, and which it is its duty, to remove. It is its duty to cancel the registration of the bonds in the names of the infant children, and it may appoint a trustee with authority to authorize the cancellation of the bonds upon the books of the railroad companies. There is no reason to suppose that these companies would ignore the decree of a court having full power and jurisdiction over the parties and the subject-matter. On the contrary, there is every reason to think that they would give full faith and credit to the decree. But, if such an improbable thing should happen that they should refuse to recognize the validity of the decree, it cannot be doubted that the Prince, or any one succeeding to his title, would have the right in the proper forum to compel the cancellation of the registration of the bonds in the names of the infants.

It is not necessary to determine in these appeals the general question as to whether or not registered coupon bonds of foreign corporations are in all cases liable to attachment, when located in this state. What we do decide is that these particular bonds are property, within the meaning of section 10, art. 9, of the Code of 1904, and that under the special facts appearing in the records, and under the principles announced in the prior cases referred to in this opinion, these bonds are liable to attachment, and in the event of the appellants succeeding in the attachment suits the bonds may be condemned and sold.

[4] As to the bonds attached, the final judgment to be entered must be a judgment of condemnation against the specific bonds, and not a judgment in personam for their value against the garnishees, or any of them. Upon such a judgment, a writ of fieri facias may be issued and the bonds sold, after the cancellation of their registration shall have been made conformably to the previous decisions of this court referred to in this opinion.

Order reversed, and case remanded, with costs to the appellants above and below.

DE BEARN v. DE GALARD DE BRASSAC
DE BEARN, Count and Prince
of Bearn and Chalais.

(Court of Appeals of Maryland. June 22, 1911.)

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by Francois de Bearn against Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais. From an adverse order, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

J. Kemp Bartlett, for appellant. Maurice Leon and Arthur George Brown, for appellee.

BURKE, J. For the reasons stated in the case of Francois de Bearn et al. v. Prince Henry de Bearn (No. 6, General Docket) 81 Atl. 223, the order appealed from will be reversed, and case remanded.

Order reversed, and case remanded, with costs to the appellant above and below.

DE BEARN v. DE GALARD DE BRASSAC
DE BEARN, Count and Prince
of Bearn and Chalais.

(Court of Appeals of Maryland. June 22, 1911.)

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by Odon de Bearn against Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais. From an adverse order, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

J. Kemp Bartlett, for appellant. Maurice Leon and Arthur George Brown, for appellee.

BURKE, J. For the reasons stated in the case of Francois de Bearn et al. v. Prince Henry de Bearn (No. 6, General Docket) 81 Atl. 223, the order appealed from will be reversed, and the case remanded.

Order reversed, and case remanded, with costs to the appellant above and below.

DE BEARN v. DE GALARD DE BRASSAC
DE BEARN, Count and Prince
of Bearn and Chalais.

(Court of Appeals of Maryland. June 22, 1911.)

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by Pierre de Bearn against Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais. From an adverse order, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

J. Kemp Bartlett, for appellant. Maurice Leon and Arthur George Brown, for appellee.

BURKE, J. For the reasons stated in the case of Francois de Bearn et al. v. Prince Henry de Bearn (No. 6, General Docket) 81 Atl. 223, the order appealed from will be reversed, and the case remanded.

Order reversed, and case remanded, with costs to the appellant above and below.

CHAUMET v. DE GALARD DE BRASSAC
DE BEARN, Count and Prince of
Bearn and Chalais.

(Court of Appeals of Maryland. June 22, 1911.)

Appeal from Superior Court of Baltimore City; Henry D. Harlan, Judge.

Action by Jean Baptiste Chaumet against Louis Elie Joseph Henry de Galard de Brassac de Bearn, Count and Prince of Bearn and Chalais. From an adverse order, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

J. Kemp Bartlett, for appellant. Maurice Leon and Arthur George Brown, for appellee.

BURKE, J. For the reasons stated in the case of Francois de Bearn et al. v. Prince Henry de Bearn (No. 6 on the General Docket) 81 Atl. 223, the order appealed from will be reversed, and the case remanded.

Order reversed, and case remanded, with costs to the appellant above and below.

DENTON NAT. BANK v. KENNEY.

(Court of Appeals of Maryland. June 22, 1911.)

1. BILLS AND NOTES (§ 149*)—NEGOTIABILITY—INSTRUMENTS NEGOTIABLE.

Under Code 1904, art. 13, §§ 20, 22, respectively, providing that an instrument to be negotiable must be in writing, signed by the maker, containing an unconditional order to pay a sum in money, and that an unqualified order to pay is unconditional, though coupled with an indication of a particular account to be debited with the amount, a check drawn upon a certain bank to the order of one designated as attorney is a negotiable instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 373; Dec. Dig. § 149.*]

2. BANKS AND BANKING (§ 127*)—DEPOSITS—TITLE—CHECKS—INDORSEMENT IN BLANK.

Where a check drawn to the order of one designated as attorney, with a marginal memorandum, "in full for mortgage," was indorsed by the attorney in blank and deposited at his bank, the title passed to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310; Dec. Dig. § 127.*]

3. BANKS AND BANKING (§ 134*)—DEPOSITS—APPLICATION TO DEBTS OF FUNDS DEPOSITED BY ONE AS TRUSTEE.

Where a check drawn to one designated as attorney, and impressed with a trust in favor of plaintiff, was indorsed by the drawer in blank and deposited in the bank in which he had an individual account and was, by the bank, credited to his individual account, the bank could, without his consent, apply the proceeds of the check to his antecedent indebtedness, provided it had no notice of the trust.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

4. BILLS AND NOTES (§ 330*)—TRANSFER—BONA FIDE HOLDER.

Where a negotiable instrument, payable to order, is indorsed by the payee in blank, such indorsement imports property in the holder, and the transferee may treat him as a bona fide owner, without making inquiries whether he holds it as agent or otherwise.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794-800; Dec. Dig. § 330.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. BANKS AND BANKING (§ 130*)—DEPOSITS—TRUST FUNDS—NOTICE—ATTORNEY."

The name of the drawee in a check was followed by the abbreviation "Atty.," and there was a marginal note, "in full for A. J. K. mortgage." *Held*, that the abbreviation did not give notice to the bank in which the check was deposited that it was impressed with a trust, for "attorney" may mean "assignee," "agent," or "attorney at law," and the marginal memorandum did not broaden that meaning; for banks are not required to notice marginal memoranda.

[*Ed. Note.*—For other cases, see *Banks and Banking*, Cent. Dig. §§ 319-327; Dec. Dig. § 130.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 630-632, vol. 8, p. 7586.]

6. BANKS AND BANKING (§ 116*)—NOTICE TO VICE PRESIDENT AS AFFECTING BANK.

Where the vice president of a bank in his private capacity, while not acting in behalf of the bank, learned that a check was impressed with a trust, but did not communicate that fact to the bank directors or officials, the knowledge of the vice president was not notice to the bank.

[*Ed. Note.*—For other cases, see *Banks and Banking*, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

Appeal from Circuit Court, Caroline County; Philemon B. Hopper and Wm. H. Adkins, Judges.

Suit by Arthur J. Kenney against the Denton National Bank and others. From a judgment for plaintiff, the first-named defendant appeals. Reversed as to that defendant.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCK-BRIDGE, JJ.

Joseph C. France and Henry R. Lewis, for appellant. T. Alan Goldsborough, for appellee.

BURKE, J. The appellee on this record held a mortgage upon the property of Joseph E. Hammel and wife amounting, with interest, to the sum of \$1,150.76. By the directions of the appellee, this sum, in payment of the mortgage, was paid by a check of Oscar Clark, drawn on the Denton National Bank, to the order of William H. Deweese, the attorney of the appellee. This check is in these words:

"Denton, Md. October 4, 1906.

"Pay to the order of Wm. H. Deweese, Atty. \$1,150.76 eleven hundred and fifty and 76/100 in full for A. J. Kenney mortgage.

"To Denton National Bank, Denton, Maryland. Oscar Clark."

At that time Mr. Deweese was sick, and he died in February, 1907, insolvent. On the 8th of October, 1906, being too helpless to write his name, the check was indorsed as follows and sent to the bank for deposit:

"Test: May Gootee.

his

"Wm. H. X Deweese, Atty."

mark

The bank returned the check to Mr. Deweese, and informed him that it would not deposit the same to his credit under this in-

dorsement. The check was then indorsed in these words and returned to the bank, and the proceeds were credited to his individual account:

"Test: May Gootee.

his

"Wm. H. X Deweese."

mark

On the day the check was deposited, William H. Deweese was indebted to the bank, on overdraft, in the sum of \$32.18. On November 26, 1906, an overdue promissory note for the sum of \$800, payable to the Denton National Bank and signed by William H. Deweese and Harvey L. Cooper, as joint makers, was, by direction of Harvey L. Cooper, a comaker of the note, and who was also the president of the Denton National Bank, charged to the account of Mr. Deweese. The whole amount standing to the credit of Mr. Deweese on the books of the bank at that time, and against which the note was charged, was then represented by the proceeds of the check of Oscar Clark mentioned above. The bank also charged against the account the overdue draft of \$32.18. Frederick R. Owens was appointed and qualified as administrator of the personal estate of William H. Deweese, and the bank paid over to him as administrator the sum of \$80.19; the amount remaining to the credit of Deweese upon its books at the time of his death.

This suit was brought by the appellee against Harvey L. Cooper, Frederick R. Owens, administrator of William H. Deweese, and the Denton National Bank, to recover the money which the bank charged, under the circumstances mentioned, to the account of Deweese.

The seventh paragraph of the bill charges that, "in addition to the information furnished the officers and directors of the said the Denton National Bank and to the said Harvey L. Cooper, by the wording of the check aforesaid, the said officers and directors of the said the Denton National Bank and the said Harvey L. Cooper, surety on the said note and president of the Denton National Bank, had actual knowledge of the fiduciary relation which the said William H. Deweese bore to the entire account to which this said note was charged up."

The prayers of the bill are, first, for a decree declaring the Denton National Bank to be indebted to the plaintiff in the sum of \$806.67, the amount of said note charged up to said account, with interest from November 26, 1906, until paid; second, that a decree be passed, directing Frederick R. Owens, administrator of the said William H. Deweese, to pay to the plaintiff the sum of \$80.00, the portion of the above account paid to him by the bank, and for further relief.

The bank, in its answer to the bill of complaint, admitted that it received for deposit from William H. Deweese, on the 8th day

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of October, 1906, a properly indorsed check of Oscar Clark for \$1,150.76, and averred that it had received this check in the usual course of business, and that at the time of the deposit of that check the account of Deweese was overdrawn to the extent of \$32.18. It admitted the execution of the note by Deweese and Cooper for the sum of \$800, as stated in the bill, and that the note, with interest, was charged as alleged to the account of William H. Deweese. It denied that it had any knowledge or information at the time the check was deposited that Deweese was insolvent, or that it had any knowledge of any fiduciary relation existing between Deweese and the appellee, or any other person, so far as this deposit or account was concerned, but that it believed and treated the account, as it actually was, the individual account of William H. Deweese. It admitted that it charged to his account the \$32.18 referred to, and that it paid to Frederick R. Owens, the administrator of William H. Deweese, the sum of \$80.09, the balance remaining to the account of the deceased. The answer further avers that, so far as the bank "had any knowledge or had any reason to believe, at the time of the charging of the said note and overdraft, the money standing to the credit of the said William H. Deweese was his private account, subject to his check, and liable for any overdue indebtedness to said defendant, and the charging up of said note and said shortage was done in good faith, and in the regular course of business, with the consent of said William H. Deweese and ratified by him."

The material averments of the answer of Harvey L. Cooper appear in the fifth and seventh paragraphs, wherein it is denied that the note was charged to the account of William H. Deweese by his direction, either as surety or as president of the Denton National Bank; and he avers that he had no knowledge that the note was charged against the account of said Deweese until some time subsequent to the time when that was done; and he further denies that he had any knowledge of any fiduciary relation existing between Deweese and the plaintiff.

The answer of Frederick R. Owens, the administrator, need not be particularly examined. It admits the receipt from the bank of the sum of \$80.09, and states that this amount is deposited to his credit as administrator in the defendant bank. The general replication was filed, and the testimony was taken in open court.

The case was heard upon the bill, answers, and testimony. The court dismissed the bill as to Harvey L. Cooper; but as to the Denton National Bank and Frederick R. Owens, the administrator, it ordered and decreed, first, "that the defendant, the Denton National Bank, pay to the plaintiff the sum of eight hundred and six dollars and sixty-seven cents (\$806.67), the amount of the note in controversy in this suit charged up

to said account, and also that the said the Denton National Bank pay to the plaintiff the sum of thirty-two dollars and eighteen cents (\$32.18), the amount of the overdraft mentioned in said cause charged to the said account, represented by the check of eleven hundred and fifty dollars and seventy-six cents (\$1,150.76), mentioned in this cause; secondly, "that Frederick R. Owens, the administrator of the personal estate of William H. Deweese, deceased, pay to the plaintiff eighty dollars and nine cents (\$80.09), the amount of the plaintiff's money, as represented by the aforesaid check of eleven hundred and fifty dollars and seventy-six cents, paid over to the said Fred R. Owens, administrator, by the defendant, the Denton National Bank." The bank was ordered to pay the costs of the proceeding. The appeal before us is taken from this decree by the bank alone.

[1, 2] William H. Deweese had been a depositor of the bank prior to the date of the check in question. This check was a negotiable instrument under article 13, §§ 20 and 22, of the Code of 1904. It was drawn on the Denton National Bank, and was made payable to William H. Deweese, Atty. It was indorsed by him in blank, and the amount of the check credited to his individual account. This credit was given upon the faith of the check, the title to which passed to the bank under the indorsements.

It is said in *Tyson & Rawls v. Western National Bank*, 77 Md. 416, 26 Atl. 521, 23 L. R. A. 161, that "it is well settled that when a customer of a bank deposits money to the credit of his account the money becomes the property of the bank. The customer is creditor and the bank is debtor, with all the ordinary incidents belonging to that legal relation. There is no fiduciary connection between them. The depositor departs with his money, and the bank contracts an obligation to pay such checks as he may draw to an amount not exceeding the sum deposited. The consideration which the depositor receives for his money is the absolute and unconditional contract by the bank to pay his checks to the extent of his deposits. And the same rule obtains in the case of checks, drafts, and promissory notes, wherever, under the circumstances of the case, it is applicable; that is to say, wherever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement. And, in case it is not paid at maturity, it has the ordinary remedies which belong to the indorsee of instruments of this character which have been dishonored."

[3] If this were a suit between the appellee and William H. Deweese, or his admin-

istrator, there could be no difficulty as to the right of the plaintiff to recover the proceeds of the check; but quite a different question is here presented. Assuming that the check is in the hands of Deweese was impressed with a trust in favor of the appellee, as he contends, it would seem clear upon the settled law of this state, which is in accord with the weight of authority in other jurisdictions, that there could be no recovery in this case, unless it is shown that the bank is chargeable with notice of the trust. Unless it had this knowledge, the bank acted entirely within its rights in charging up against the account of Deweese his indebtedness to it. The general rule is well settled that when a depositor is indebted to a bank, the bank may apply his deposits, or such portion thereof as may be necessary, to the payment of his indebtedness, unless there be an agreement to the contrary; or unless the deposit be specially applicable to some other particular purpose; or unless the bank has notice that the funds do not belong to the customer. This right to apply the deposit to the customer's indebtedness is called the banker's lien, or right of set-off, and does not depend upon the customer's assent. Instances of its application are most frequently found in the case of antecedent debts. We have found no case holding that the consent of the customer was a prerequisite of the bank's right to assert its lien, although the circumstance that the customer had consented is mentioned in some of the cases.

In *Maitland v. Citizens' National Bank*, 40 Md. 540, 17 Am. Rep. 620, Judge Alvey, referred to *Miller v. Farmers' Bank*, 30 Md. 392, and said that that "was the ordinary case of a bank asserting its lien upon securities in its hands for the payment of balances due from its customers. According to the law of the land, the bank, a kind of factor in pecuniary transactions, was entitled to a lien upon all securities for money of customers in its hands for its advances to such customers in the ordinary course of business, without reference to the true ownership of such securities, if the bank was without knowledge upon the subject."

[4] It is equally well settled that, where a negotiable instrument, payable to order, is indorsed by the payee in blank, that such indorsement imparts property in the holder, and that a person, without notice to the contrary, who receives it from such holder, has a right to treat him as the bona fide owner, and is not bound to make inquiry whether he holds it as agent or otherwise. *Miller v. Farmers' Bank*, supra.

That case throws much light upon the question presented by this appeal. Certain negotiable promissory notes, the property of Daniel Miller & Co., were indorsed by that firm and delivered to Lee & Co., bankers and brokers in Baltimore, for collection. The indorsements were absolute and unqualified. Lee & Co., who were indebted to the

bank, growing out of a long course of dealing, sent these notes to the bank, *specially indorsed for collection*. Under this form of indorsement, the bank took no title to the notes. The notes were paid and placed to the credit of Lee & Co. in an account current, which had been running between the bank and that company for several years. At the time the notes were paid and credited to Lee & Co., the bank had no knowledge that that company did not own the notes, and did not become aware of that fact until after the failure of the company, when it was notified that the notes belonged to Miller & Co. At the time of the failure, Lee & Co. owed the bank on antecedent debts considerably more than the proceeds of the notes. The bank was sued by Miller & Co. to recover the proceeds of the notes, and, not claiming title under the form of the indorsement to be a bona fide holder for value without notice, as of course it could not do, asserted its right to retain the money received on the notes and apply it to the indebtedness of Lee & Co. In passing upon this claim, Judge Alvey said: "But it is contended, on the part of the defendant, that by the course of dealings between Lee & Co. and the defendant the latter has the right to retain the proceeds of the note in its hands to be applied in part extinguishment of the general balance still remaining due on account of Lee & Co. And whether the defendant has the right so to retain the money received on the notes depends upon a question of fact, and that it was credit really given to Lee & Co. on the faith of these notes, indorsed to the defendant, before the receipt of knowledge that they belonged to the plaintiff. If such credit was in fact given, it can make no manner of difference whether it was in the form of advances of money, or balances on account of mutual dealings between the parties, suffered to remain undrawn for. In case the credit was extended in either form, the right of the defendant is clear, and the plaintiff must pay it."

We have therefore no difficulty in holding that the right of the bank to retain the funds is not affected by the failure of the depositor to assent to its application to the payment of his debt to the bank, or by the fact that the debt was an antecedent one. Nor do we think that the well-recognized doctrine of tracing trust funds, announced in *Swift v. Williams*, 68 Md. 236, 11 Atl. 835, controls the case, unless it appear that the bank had knowledge of the ownership of the funds. In that case the question of the bankers' lien was not involved, and the bank was held liable upon the ground of participation in a breach of trust by I. Parker Veasey.

In this case the title to the check passed to the bank; a credit for the proceeds was extended by the bank to William H. Deweese upon the faith of a check; he was indebted to the bank in the sum stated in its answer at the time it applied the amount standing

to his credit to that indebtedness. Upon the facts contained in the record, the ultimate and sole question is whether the bank, at the time it took the check and placed the proceeds to the individual account of Deweese, had notice of the true ownership of the check, or that it was impressed with a trust. This is a question of fact, which must be determined by the evidence. After an examination of the testimony contained in the record, we fully concur in the conclusions reached by Judge Hopper on this question in the carefully prepared opinion filed by him in the lower court. "The fund," he said, "is not now on deposit, having been applied by the bank to debts due it, as to the larger part, and the residue paid over to the administrator." In this aspect of the case, the first question that arises is, "Did the bank, at any time before applying the funds to pay the depositor's debts to it, have notice of the trust character of the fund?"

We do not find anything in the testimony that satisfies us that it had. It was sought to bring home to the bank this knowledge through Mr. C. W. Hobbs, vice president and a director of the bank. He testified that he saw the check when it was presented at the bank by Miss Gootee, and knew what it had been given for; but he said he did not know whether it was paid at the counter or deposited. He did not communicate his knowledge to Mr. Downes, receiving teller, nor to the directors of the bank, although he might have suggested to the president of the bank, at a later date at board meeting, that the overdue note of Deweese be charged up. The president and other directors deny that such suggestion was made. And so we think this effort failed.

[5] Nor do we think the check itself gave notice of the trust character of this fund. The abbreviation "Atty.," written in the check, after the payee's name, does not necessarily import a trust. "Attorney" may mean "assignee," "agent," or "attorney at law," and, when it is not coupled with other words of significance, we think the usual and proper meaning given to it is "attorney at law." *Eichelberger v. Sifford*, 27 Md. 320; 4 Cyc. 897. In our opinion, the marginal memorandum on the check, "in full of A. J. Kenney mortgage," does not broaden the meaning of the abbreviation "Atty." It has been held that a bank is not bound to notice "marks" or "memoranda" on checks. In the case of *Duckett v. Mechanics' Bank*, 86 Md. 402, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, the court, discussing a check reading, "Pay to the order of James Scott, Cashier, \$2,000, two thousand dollars, for deposit to credit of Henry W. Claggett, being the balance of purchase money due him as trustee from John R. Coale," said: "The memoranda descriptive of what the funds were or

the source from whence they came" was not "a notification to the Mechanics' Bank that the fund was impressed with a trust that would be invaded by their being carried to Claggett's individual credit."

[6] If Mr. Hobbs had any knowledge or information as to why and for what purpose the check had been given by Mr. Clark to Deweese, it was knowledge acquired in his private capacity, and not while acting for or on behalf of the bank, and which he never communicated to any officer or official of the bank, and therefore any knowledge which he may have thus acquired was not notice to the bank. *Md. Trust Company v. Mechanics' Bank*, 102 Md. 629, 63 Atl. 70; *Zane on Banks and Banking*, 173.

Our conclusion is that the appellant had a right to apply the deposit to the extinguishment of the debt due it by Mr. Deweese, as it did do, and therefore the decree of the lower court must be reversed.

If loss must be sustained by the appellee, it is apparent that it will result from the way in which he permitted Mr. Deweese to handle the negotiable paper of which he was the true owner; but it is not equitable that this loss should be borne by the bank, which has been guilty of no fault in the matter.

Decree reversed with costs as to the Denton National Bank.

GRAMTON v. CHAPMAN.

(Supreme Court of Vermont. Rutland.

Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 215*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED BELOW.

An objection to an instruction not raised below will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

2. REPLEVIN (§ 8*)—TITLE OF PLAINTIFF—EVIDENCE—BURDEN OF PROOF.

Where one in possession of a horse claiming it as owner under a gift temporarily loaned it to another from whose custody a third person took it, the possession of the former was presumptively legal, and was sufficient to support replevin against the third person, who, to prevail, must show that he is entitled to a return of the horse by showing that his right is superior.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 45-68; Dec. Dig. § 8.*]

Exceptions from Rutland County Court, Fred M. Buttler, Judge.

Replevin for a horse by Frank H. Cramton against Leon B. Chapman. There was a judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Lawrence, Lawrence & Stafford, for plaintiff. Wm. T. Foley and T. W. Moloney, for defendant.

POWERS, J. Joseph Chapman, the father of this defendant, let the plaintiff have a horse. The plaintiff claims, and his evidence tended to show, that this transaction was an absolute gift of the animal; while the defendant claims, and his evidence tended to show, that the arrangement was subject to certain conditions regarding the use of the animal, which conditions had been violated by the plaintiff, whereby he had forfeited all right to it. Soon after the horse was delivered to the plaintiff, Joseph Chapman died, and his widow succeeded to all his rights in the horse, if any he had. The plaintiff loaned the horse to a neighbor, and the defendant, acting by authority of his mother, seized the animal, and took it into his possession. Whereupon this action of replevin was brought.

The only exception relied upon is to that part of the charge wherein the jury was instructed that, to defeat the action, the defendant must make out by a fair balance of evidence that "this gift or loan of the horse to the plaintiff was subject to those conditions, and that the plaintiff has violated those conditions." The defendant now insists that this instruction required him to prove, not only that the transaction was a loan, but that it was a loan on conditions, and that the conditions were broken; whereas he would be entitled to hold the horse if the transaction was a loan, and not a gift, regardless of conditions and breaches thereof. He also argues that the instruction was inconsistent with other instructions given and conflicted therewith.

[1] But these claims were not made below, and consequently will not be considered here. The only fault which the defendant found below with this instruction was that it put the burden of proof upon the defendant, when it should have been put upon the plaintiff. So this is the only point raised by the exception, and the only one requiring consideration.

[2] That the horse was, when seized, temporarily in the actual custody of another to whom the plaintiff had loaned it does not affect the rights of the parties here. The possession of the neighbor was the plaintiff's possession, and the situation thereby presented is just the same, so far as this litigation is concerned, as it would be had the horse been taken from the plaintiff himself. It sufficiently appears, then, that the plaintiff was at the time the defendant took the horse in possession of it, claiming to be its owner. Possession alone is better than no title at all. It is presumed to be rightful and is some evidence of title, and is sufficient to support an action of replevin against a mere wrongdoer. It was said by this court in *Sprague v. Clark*, 41 Vt. 6, that a person who is in the possession, claiming the property or an interest in it or a legal right

to the possession, may maintain replevin against any person taking the property from him who cannot show a better right to it. The defendant in the action of replevin can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that of the plaintiff. This doctrine has been repeatedly approved in subsequent cases, and must be accepted as the settled law of this jurisdiction. *Cox v. Fay*, 54 Vt. 446; *Tittmore v. Labounty*, 60 Vt. 624, 15 Atl. 196; *Chaffee v. Harrington*, 60 Vt. 718, 15 Atl. 350.

The plaintiff in the case before us by proof of his prior possession established *prima facie* a right to maintain his action, and the instruction excepted to was free from error.

Affirmed.

SLAYTON v. DAVIS et al.

(Supreme Court of Vermont. Orleans.

Oct. 9, 1911.)

1. ACTION (§ 41*)—JOINDER OF COUNTS—SAME "CAUSE OF ACTION."

Under P. S. 1503, which provides that counts in trespass may be joined with counts in trespass on the case, if for the same cause of action, counts for malicious prosecution and for abuse of process, while distinguishable, stand alike, where joined with a count in trespass and met by demurrer for misjoinder, and a count which alleges in substance that the defendant, without cause, maliciously sued out a body writ against the plaintiff, and caused him to be arrested thereon and imprisoned, may be joined with a count in trespass for imprisonment, where the injury complained of in each count is the same imprisonment; the "cause of action" referred to in the statute being the fact or facts which give rise to a right of action—the matter for which an action may be brought; and a joinder of counts is not to be tested by the gist of the respective counts joined, but by the gravamen thereof, and, where the substance of the claim made under different counts is the same, identity is sufficiently established, though not alleged, and though the gist of one differs from that of the others.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 328-359; *Dec. Dig.* § 41.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1016-1019; vol. 8, p. 7598.]

2. APPEAL AND ERROR (§ 192*)—OBJECTIONS AND RULINGS—GROUNDS OF DEMURRER.

A ground of demurrer, not specified and not passed upon by the court below, will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1221-1225; *Dec. Dig.* § 192.* *Pleading*, Cent. Dig. §§ 1348-1354.]

Exceptions from Orleans County Court; Zed S. Stanton, Judge.

Action by Luman J. Slayton against Nellie S. Davis and another. Demurrers to the several counts of the declaration were overruled, and defendants excepted. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key No. Series* & *Rep'r Indexes*

Grout & Grout, for plaintiff. J. W. Redmond and Young & Young, for defendants.

POWERS, J. This declaration contains two counts. It is agreed that the first, the substance of which is that the defendants assaulted the plaintiff and seized him and cast him into prison, is in trespass. The form of the second, which alleges, in substance, that the defendants, without cause, maliciously sued out a body writ against the plaintiff, and caused him to be arrested thereon and cast into prison, all for the sole purpose of forcing him to discontinue a certain action of trover which he had brought against the defendants, and which was then pending, is in dispute; the plaintiff claiming that it is case for abuse of process, and the defendants insisting that it is case for malicious prosecution. The parties agree, however, that the second count, whatever it may be in form, cannot be joined with the first, unless the two are for the same cause of action, within the meaning of P. S. 1503, which provides that counts in trespass may be joined with counts in trespass on the case, including trover, if for the same cause of action. The defendants demur to the declaration specifying as cause thereof the alleged misjoinder of the counts, and this raises the only question submitted.

[1] Counts for malicious prosecution and for abuse of process are clearly distinguishable. They are, however, so similar in character that they stand alike, when joined with a count in trespass and met by a demurrer for misjoinder. So we do not deem it necessary to determine which of the parties correctly classifies this second count, in order to decide whether it is for the same cause of action covered by the first. An allegation of identity in such cases is not required (*Templeton v. Clogston*, 59 Vt. 628, 10 Atl. 594), nor is it always controlling. *Sawyer v. Childs*, 83 Vt. 329, 75 Atl. 886. All that is or should be required is that, from the declaration itself, the court shall be satisfied that the several counts are for the same cause of action. *Templeton v. Clogston*, supra. The "cause of action" referred to in the statute is the fact or facts which give rise to a right of action—the matter for which an action may be brought. Joinder of counts under this statute is not to be tested by the gist of the respective counts joined, but by the gravamen thereof. If the substance of the claim made under the different counts is the same, identity is sufficiently established, though the gist of one differs from that of the others. Thus in *Hagar v. Brainerd*, 44 Vt. 294, two counts in trespass qua. clau. were joined with one in case. The court below overruled the defendant's motion to dismiss the third count for a misjoinder. This ruling was approved by this court, on the ground that all the counts were to recover for the removal of the same dwelling house and underpinning stones, and consequently

were for the same cause of action. In *Black v. Howard*, 50 Vt. 27, the declaration contained two counts in trespass qua. clau. and one in case. The former alleged in substance that the defendant broke and entered the plaintiff's close, tore down the division fence between the parties, and with his cattle trod down, ate, and destroyed the herbage thereon growing; the latter alleged in substance that the defendant neglected and refused to maintain his part of the division fence between the parties, whereby his cattle escaped and entered upon the plaintiff's land, and ate and destroyed the herbage thereon growing. The court was satisfied that the third count was meant to cover the cause of action embraced in the others, and held in effect that they were well joined.

In *Sawyer v. Childs*, supra, it was held that a count in trespass qua. clau., alleging the carrying away of certain personal property, and trover for the same personal property, were properly joined; but that a count in trespass qua. clau., without such allegation and trover, could not be joined.

The question of identity under this statute does not differ from that involved in the rule that an amended count must be for the same cause of action. In such cases, the rule of this court, as recently announced in *Davis' Adm'x v. Rutland R. R. Co.*, 82 Vt. 24, 71 Atl. 724, is that "the test is whether the proposed amendment is a different matter, or the same matter more fully or differently laid. If the latter, you can amend; if the former, you cannot."

According to the plaintiff's theory of this case, the facts which are set forth in the second count gave him a cause of action which he could assert, either in an action of trespass or an action on the case, at his option. The injury complained of in the first count and the injury complained of in the second count are one and the same injury, namely, the imprisonment. The second count is but another way of stating the plaintiff's claim, another form of declaring for the same thing, namely, damages for such imprisonment.

[2] But the defendants now say that on the facts disclosed by the second count trespass for false imprisonment cannot, in any event, be sustained; that, since it appears by the second count that the plaintiff's arrest and imprisonment was on a writ issued from the county court in due form, an action for false imprisonment on account of that arrest and imprisonment cannot be maintained; and that it must therefore be taken that the first count is predicated upon some arrest and imprisonment, other than the one set up in the second count. We cannot adopt this view, for we think it sufficiently appears that the two counts are predicated upon the same arrest and imprisonment. If the defendants intend to make the further point that these counts are so inconsistent and repugnant to each other that proof of the

grounds alleged for a recovery in the second necessarily disproves the grounds alleged for a recovery in the first, and that this affords a ground of demurrer for misjoinder, the sufficient answer is that this ground is not specified in the demurrer, and does not appear to have been passed upon below. Therefore it will not be considered here.

Affirmed and remanded.

CORLISS v. VILLAGE OF RICHFORD.

(Supreme Court of Vermont. Franklin.
Oct. 9, 1911.)

1. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

A law providing for public improvements with special assessments upon abutting landholders is not unconstitutional in failing to give such landholders an opportunity to be heard upon the question of the necessity of the improvements, as no property is taken by the construction of the improvement, but only a foundation laid for the exercise of a particular right of taxation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

2. MUNICIPAL CORPORATIONS (§ 438*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—"SPECIAL BENEFITS."

Special assessments upon abutting landowners for public improvements are based upon special benefits, which are those that the landowner receives from the improvements in excess of the general public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1062; Dec. Dig. § 438.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6569, 6570.]

3. MUNICIPAL CORPORATIONS (§ 407*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—STATUTES.

An act providing for public improvements, and authorizing special assessments, must fix the legal standard of the assessments; and so an act providing for an assessment for each landowner's "just share of the expense" is invalid, as the words "just share" do not with reasonable certainty limit the assessment to the special benefits conferred.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 407.*]

Exceptions from Franklin County Court; Willard W. Miles, Judge.

Petition by Gilman Corliss against the Village of Richford for the appointment of commissioners to reassess petitioner for the expense of laying a sewer. Upon a hearing of the report of the commissioners, and petitioner's exceptions thereto, the exceptions were overruled, and a pro forma judgment rendered in favor of defendant. The petitioner excepts. Judgment reversed, and assessment vacated.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

W. B. Locklin, for petitioner. A. B. Rowley, for defendant.

POWERS, J. This is a proceeding for a reassessment for benefits conferred by the construction of a sewer on Province street in the defendant village. The only question raised or considered is the constitutionality of the act under which the assessment was made. The petitioner attacks the act on two grounds specified, as follows: (1) That the act does not give the petitioner an opportunity to be heard on the question of the public necessity for the construction of the sewer. (2) That the act does not provide a certain, fixed, and definite standard for assessing the landowners for the expense of construction.

[1] 1. In support of his first proposition, the petitioner relies upon *Stearns v. Barre*, 73 Vt. 281, 50 Atl. 1086, 58 L. R. A. 240, 87 Am. St. Rep. 721. But that was a case involving the law of eminent domain, while this is one involving the law of taxation. The distinction between such cases was recently pointed out in *Durkee v. Barre*, 81 Vt. 530, 71 Atl. 819, wherein it was held, upon a review of the authorities and in harmony with the views expressed in *Woodhouse v. Burlington*, 47 Vt. 300, that due process of law does not require that one liable to assessment for benefits should have an opportunity to be heard on the question whether the public good requires the improvement involved, since no property is thereby taken, but only a foundation laid for the exercise of a particular right of taxation. That case was followed and approved in *Lazelle v. Barre*, 81 Vt. 545, 71 Atl. 824, wherein the improvements were wholly unauthorized when made, but a subsequent amendment to the defendant's charter provided for assessments upon an ex post facto determination of the public character and necessity thereof.

[2, 3] 2. The petitioner's second objection must be sustained, for the law of the subject is with him. All agree that the only legal basis for assessments of this kind is the special benefits conferred by the improvements involved, and that special benefits are such as a landowner receives therefrom in excess of the benefits enjoyed by the general public. That the act authorizing the assessment must itself, either in express terms or by fair implication, fix that legal standard to which the assessment must be made to conform, was established by *Barnes v. Dyer*, 56 Vt. 469. It was therein held that an act providing for an assessment for such part of the expense incurred as the authorities should deem "just and equitable" was insufficient and unconstitutional. The act under consideration provides for an assessment for the landowners "just share" of the expense. These words, like those in *Barnes v. Dyer*, fail to establish a legal standard by which to determine the validity of an assessment. And this is so because they do not import, with reasonable certainty, a limitation to the special benefits conferred. The act falls

short of constitutional requirements in this regard, and affords no basis for an assessment.

Pro forma judgment reversed, assessment vacated, and judgment for the petitioner to recover his costs.

DONOVAN v. SELINAS et al.

(Supreme Court of Vermont. Washington. Oct. 9, 1911.)

1. EVIDENCE (§ 220*) — ADMISSIONS — "SILENCE."

Evidence that, while a witness was living with a married couple, she never had heard the husband claim to own the property in question, and that at one time the husband told the wife that a tenant wanted certain repairs made, and she replied that she would have it done, was not subject to the objection that evidence of the husband's failure to claim ownership was erroneously received because no circumstances were shown calling on him to make such claim, especially when taken with other testimony of the witness that the wife always spoke of the property as hers, collected the rents, and made repairs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

2. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

On an issue as to the ownership of houses as between a widow and the heirs of decedent, testimony of a former tenant that he went to decedent and suggested that he would give a mortgage on his furniture to secure the rent for the approaching winter, and decedent's wife came in while they were talking, and told the tenant that he need not worry, that they did not want a mortgage, that she owned the house, and that he need not let his little ones want for anything, is not objectionable as self-serving; the wife's statements being made in the presence of the husband under circumstances which would naturally call forth a protest or denial, if untrue, and being an exercise of an act of ownership by the wife.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

3. HUSBAND AND WIFE (§ 121*)—SEPARATE PROPERTY OF WIFE—FINDINGS BY MASTER.

On an issue between a widow and heirs of a decedent as to the ownership of property, the finding of a master that decedent bought the property with money belonging to his wife precludes the idea that the husband had any marital interest in it, though the master did not find that she received all the money from her father's estate as she claimed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 121.*]

4. TRUSTS (§ 81*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

Where a husband bought property with his wife's money and took the title to himself, he held that title, so far as he did not convey it to her, for her use and benefit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118; Dec. Dig. § 81.*]

Appeal in Chancery, Washington County; Willard W. Miles, Chancellor.

Bill in equity by Isabel S. Donovan against Charles Selinas and another. Heard on pleadings, master's report, and defendants' exceptions thereto. Exceptions overruled

pro forma, and, from a decree for the orator in accordance with the prayer of the bill, defendants appeal. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

H. C. Shurtleff, for appellants. Senter & Senter, for appellee.

POWERS, J. The oratrix is the widow of John P. Donovan, who died intestate and without issue. The defendant Mary Selinas is a sister of Donovan, and his only next of kin. The other defendant is her husband. In 1889 Donovan bought of one Scribner certain premises in Montpelier, on which were two rented houses called the "Scribner houses," paying therefor the sum of \$3,000, and taking deeds in his own name. Later Donovan conveyed one undivided half of these premises to one Fuller, who on the same day conveyed the same to the oratrix. Donovan died in 1904, and the oratrix and Andrew Howe were appointed administrators of his estate. The probate court granted them a license to sell all the real estate belonging to Donovan's estate, and on February 10, 1906, they deeded to one Emery one undivided half of the premises in question, and he immediately conveyed the same to the oratrix. In July, 1910, these defendants, claiming that the title to one undivided half of these premises was in Donovan when he died, and that a certain part thereof immediately vested in the defendant Mary at his death, brought a petition for partition, which was enjoined when this suit was brought and is now pending. The oratrix asks that these partition proceedings be perpetually enjoined, and that the Scribner property be decreed to her.

One witness for the oratrix testified before the master that she lived in the Donovan family about six years, and that on different occasions Donovan told her that the premises in question belonged to Mrs. Donovan; that he bought them with her money, and that it was money which came to her from her father's estate and some she had before; that Mrs. Donovan kept her account at the Savings Bank, and Donovan his in the National Bank; and that there was money kept by itself in Donovan's safe which he said was Mrs. Donovan's rent money, and to other facts tending to show that Donovan treated the property as belonging to his wife. Another witness for the oratrix testified that she lived with the Donovans over nine years, and that Mrs. Donovan always spoke of the houses as hers, and that she always collected the rents and made the repairs. Another witness, who was employed in Donovan's store for 5 years, and for 19 years occupied a part of the same building, and knew about his business affairs, testified that Donovan told her that he bought these

houses with his wife's money, and that she received the money from her father's estate. All the foregoing testimony was either received without objection, or, if objected to, the exception thereto is waived by not being covered by the brief.

[1] One of the witnesses above referred to was also allowed to testify that during the time she lived with the Donovans she never heard Mr. Donovan claim to own this property, and that at one time Donovan told his wife that Rivers, a tenant in one of the houses, wanted certain repairs made, and that she replied, "All right, I will have it done." This was taken subject to objection and exception, and it is now urged that so much thereof as relates to Donovan's failure to claim ownership was erroneously received, because no circumstances were shown calling upon him to make such claim, citing *Pierce v. Pierce*, 66 Vt. 369, 29 Atl. 364. But when, as here, the question is as to the ownership of property between husband and wife, evidence showing how the matter was understood and treated between them is relevant. *Fletcher v. Wakefield*, 75 Vt. 257, 54 Atl. 1012; *Richardson v. Merrill's Estate*, 32 Vt. 27; *Caldwell v. Renfrew*, 33 Vt. 213. The fact that during the 9½ years that the witness was a member of Donovan's household he was never heard to claim this property, especially when taken with the other testimony of the witness that Mrs. Donovan always spoke of it as hers, and collected the rents and made the repairs, was of at least some probative value on the main question of ownership, and was properly received.

[2] Another witness testified that he was a tenant of one of the houses for 16 or 17 years, and that at one time he was out of work and went to Donovan and told him of his situation, and suggested that he would give a mortgage on his furniture to secure the rent for the approaching winter; that Donovan replied that it would be a long time before spring, and that a mortgage would not keep houses up; that Mrs. Donovan came in while they were talking, and, when she heard what was said, spoke as follows: "Mr. Willard, don't you worry. We don't want no mortgage. I own that house, and don't you let your little ones want for anything. I will let the rent set." To this statement, Donovan made no reply. This testimony was also excepted to, and it is now said to be self-serving. But it was made in the presence of the husband and in circumstances which would naturally call forth some sort of protest or denial if it was untrue. Besides, the wife was not only asserting ownership of the property, she was exercising an act of ownership by declining security for the rent and agreeing to give credit therefor, which the husband had manifested a disposition not to do. The evidence tended to show that Donovan allowed his wife to manage the property

and treated it as belonging to her, and so was, as we have seen, admissible.

[3] The master finds the fact that Donovan bought the property in question with money belonging to his wife. That he is unable to find that she received all of the \$3,000 from her father's estate is unimportant. The money was the money of the wife; and the finding precludes the idea that the husband had any marital interest in it.

[4] Having bought the property with her money and having taken the title to himself, he held that title, so far as he had not conveyed it to her, for her use and benefit. *Dewey v. Long*, 25 Vt. 564; *Williams v. Wager*, 64 Vt. 326, 24 Atl. 765; *Beddow v. Sheppard*, 118 Ala. 474, 23 South. 662; *Black v. Black*, 64 Kan. 689, 68 Pac. 662.

Pro forma decree affirmed and cause remanded.

CHASE v. HOOSAC TUNNEL & W. R. CO.

(Supreme Court of Vermont. Windham.

Oct. 9, 1911.)

1. DAMAGES (§ 1*)—THEORY—COMPENSATION.

Ordinarily damages are awarded on the theory of compensation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. DAMAGES (§ 105*)—INJURIES TO PROPERTY—MEASURE.

Where property wrongfully destroyed may be put to more than one use, and its value for one purpose exceeds that for another, the owner may recover the larger amount.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 266-271; Dec. Dig. § 105.*]

3. DAMAGES (§ 112*)—MEASURE—INJURIES TO LAND—GROWING TIMBER.

The measure of damages for injury to growing timber by fire is the difference between the value of the land immediately before and immediately after the fire; the value before the fire being ascertained in view of the existence of standing timber.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

4. DAMAGES (§ 174*)—EVIDENCE—ADMISSION.

In determining the difference between the value of timbered land immediately before and after a fire which destroyed the timber, the character of the soil, kind, quality, age, and location of the trees, etc., may be considered, so that the owner could show that the hardwood trees were worth more standing, than if cut into firewood, and could also show how much more the land was worth as "sprout" land, than with wood upon it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 462-467; Dec. Dig. § 174.*]

5. WITNESSES (§ 387*)—CROSS-EXAMINATION—DISCRETION OF COURT.

In an action against a railroad company for damages for a fire set by defendant's locomotive, plaintiff asked the engineer and fireman of the engine on cross-examination whether they had not made statements at a former trial contradictory to their evidence just given, which the engineer admitted, and stated that the fact was as testified on the other trial; but the fireman said that he did not remember the statements imputed to him on the other trial. Plaintiff offered no other evidence as to the former

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

statements of such witnesses. *Held*, that it could not be said that there was an abuse of discretion in allowing the questions asked; the extent of cross-examination to test the accuracy and credibility of a witness, or to impeach his testimony, being largely within the trial court's discretion.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1228-1232; Dec. Dig. § 387.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action by Charles S. Chase against the Hoosac Tunnel & Wilmington Railroad Company. Judgment and verdict for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

W. R. Daley and E. W. Gibson, for plaintiff. Haskins & Schwenk, for defendant.

POWERS, J. This is an action on the case to recover damages alleged to have been sustained by reason of a fire negligently communicated to the plaintiff's land by the defendant's locomotive engine. It appeared that the fire in question burned over a large area of the plaintiff's woodland; that the timber on this land had been cut and removed, and that at the time of the fire it was largely covered with a second growth of beech, birch, and maple, with some ash, spruce, and hemlock, ranging in size from twenty inches down to two inches in diameter; that the ground was exceedingly dry, and that in many places the soil was burned to such a depth that its fertility for growing trees was destroyed. Witnesses on both sides testified without objection as to the number of cords of wood and feet of lumber destroyed and injured by the fire, and the value thereof at that time, and gave their estimates of the damage to the soil through which the fire ran. Certain of the witnesses were then allowed, subject to exception, to testify, in effect, that in their opinions the trees destroyed, especially the hardwood, were worth more to stand and grow, than to cut into firewood; and some were allowed to say how much more the land was worth as "sprout" land, than for the wood upon it. The defendant objected that this line of evidence did not relate to a proper element of damage, because the answers were necessarily too speculative and uncertain to be reliable or legitimate. The defendant then insisted, as it does here, that the true rule governing the damages is "the actual damage to the wood and timber trees standing and growing upon the burned premises at the time of the fire, together with such damage to the soil, if any, by reason of the fire, as was shown by the evidence in the case, less the amount the plaintiff realized, or might have realized, from the wood and timber, by the exercise of the care of a prudent man in seasonably cutting, market-

ing, and properly caring for the same; and that the measure of damages as to the wood and timber actually destroyed was its value as wood and timber [its stumpage, as it is commonly called] upon the day of the fire."

[1,2] Ordinarily, damages are judicially awarded on the theory of compensation. The law seeks to make the injured party whole; to restore him, so far as can be done by an award of damages, to his former position. The rule contended for by the defendant would accomplish this result in many cases, but not in all. Where the property wrongfully destroyed is capable of being put to more than one use, and its value for one purpose exceeds that for another, the owner is entitled to recover of the wrongdoer the larger sum. Otherwise he would not be made whole; for the true cash value of any property is represented by the amount it is worth for the most useful purpose for which it is available. So in many cases the "stumpage" value would not be full compensation for trees destroyed. Take young, growing trees, not large enough for wood or timber; these have no "stumpage" value, but they have a present value as growing trees, nevertheless, depending more or less upon their age, size, location, and the conditions surrounding them.

[3,4] It is to be observed that the trial court did not allow the jury to hear evidence as to the future value of these trees, or to indulge in any speculation on that subject. The line was carefully and correctly drawn by the court; the evidence was limited to the value of the trees at the time of the fire, taking into account the fact that they were growing trees; and the charge was correspondingly guarded. In these cases the rule of damages is usually stated to be the difference between the value of the land just before the fire, and its value just after. *Kilby v. Erwin*, 84 Vt. 270, 78 Atl. 1021. This value before the fire is to be established in consideration of the fact that there is standing upon the land wood, timber, and growing trees; and in reaching a conclusion it is proper to consider the character of the soil, the kind, quality, age, and location of the trees. *Louisville, etc., R. Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91. All this is recognized and approved in *Kilby v. Erwin*, supra, wherein it is said: "One whose trees have suffered through the wrongful act or omission of another is entitled to a fair compensation for his actual loss. * * * The elements of damage vary with the kind, condition, location, and use of the trees." The defendant's objection to the evidence was properly overruled, and the charge on this subject was free from error.

[5] The only other exceptions relied upon in the defendant's brief relate to the cross-examination of the witnesses Barre and Harris, who were respectively engineer and fire-

man on the engine which, it was claimed, set out the fire. Subject to exception, the plaintiff was allowed to ask each of these witnesses if he did not, in his testimony at another trial, make certain specified statements which were contradictory of the testimony given on the trial of this case. This was offered and received for the purpose of laying a foundation for an impeachment. The engineer frankly admitted that he did so testify at the other trial, and that the fact was as then stated. The fireman either denied making the former statement, or said he did not remember making it. The plaintiff did not offer any other evidence as to these former statements. It is enough to say in disposing of these exceptions that the extent of cross-examination to test the accuracy, veracity, or credibility of a witness, or to shake his credit by impeaching his character, is, to a large extent, within the discretion of the trial court. *Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835. That the plaintiff did not see fit to pursue the matter by the introduction of evidence of what the former statements, if any, were does not at all change the situation. It is apparent that the court's discretion was not here abused.

Affirmed.

JEWELL v. HOOSAC TUNNEL & W. R. CO.

(Supreme Court of Vermont. Windham.
Oct. 9, 1911.)

1. TRIAL (§ 76*)—RECEPTION OF EVIDENCE—OBJECTIONS — OBJECTIONS TO ANSWER — TIME.

An objection, made after the question was answered, accompanied by a motion to strike the answer, being obviously made to the answer and not to the question, was made in time.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 183-190; Dec. Dig. § 76.*]

2. APPEAL AND ERROR (§ 231*)—PRESENTATION BELOW—SPECIFIC OBJECTION—ADMISSION OF EVIDENCE.

An objection to an answer must point out the exact grounds of objection in order to be available on appeal, unless the grounds of objection are so obvious as not to require statement; and a general objection to the answer was insufficient, where a witness, in an action against a railroad company for damages from fire, being asked to describe how the growth of weeds along the right of way looked, and their height within a distance of two rods from the track, answered that they looked to him like an old pasture that had not been pastured.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 231; * *Trial*, Cent. Dig. § 231.]

3. APPEAL AND ERROR (§ 926*)—PRESUMPTIONS—RULINGS ON EVIDENCE.

Where the admissibility of evidence depends upon a preliminary finding of fact, the Supreme Court will assume, in support of the ruling admitting it, that such fact was found, unless the record shows to the contrary, so that, where the court merely found that plaintiff "had a right to cross-examine" a witness called by him, it will be presumed that the court found that the

witness was in fact hostile; the contrary not appearing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.*]

4. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—CROSS-EXAMINATION.

In an action against a railroad company for damages from fire set by a locomotive, defendant's engineer testified as to the construction and operation of spark arresters and ash pans on defendant's engines, and stated that the coke cinders died quickly. He was asked on cross-examination whether more or less cinders did not drop into the ash box with any kind of fuel, and answered, "Yes," and was also asked whether coals scattered out upon any of the engines on his road, and answered: "Not with coke; I have never seen it;" but that he had seen cinders scatter with coal. Coke was the fuel used on defendant's engine. *Held*, that defendant could not have been prejudiced by the answer given on cross-examination, even if it was broader than was warranted.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1048.*]

5. APPEAL AND ERROR (§ 926*)—PRESUMPTIONS.

In an action against a railroad company for damage by fire, an engineer, who had testified as to the working of ash pans, etc., was asked how long a spark from coke burned after it left the fire box, and answered, "Well, I wouldn't be afraid to pick it up in one of my bare hands after ten minutes," which answer was excluded, on plaintiff's objection, as not responsive. *Held*, that it must be presumed on appeal that the trial court was justified in requiring a more responsive answer, especially as defendant had an opportunity to obtain a direct answer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.*]

6. APPEAL AND ERROR (§ 926*)—PRESUMPTIONS.

In support of a trial court's ruling, permitting certain questions on a cross-examination, it must be presumed, in the absence of a contrary showing, that there was evidence tending to show the conditions implied in the questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.*]

7. APPEAL AND ERROR (§ 1078*)—BRIEFS — WAIVER OF OBJECTION.

Objections to the admission of evidence made below will not be considered, where not relied on in appellant's brief.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

8. APPEAL AND ERROR (§ 232*)—PRESENTATION BELOW—OBJECTIONS TO EVIDENCE.

Where the only objection to a question to an expert on the construction of ash pans and engine spark arresters was that he did not state what fuel was being burned, an objection on appeal that it was not a matter for expert testimony will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 232; * *Trial*, Cent. Dig. §§ 211-222.]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action by Edward K. Jewell against the Hoosac Tunnel & Wilmington Railroad Company. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Chase & Daley and E. W. Gibson, for plaintiff. Haskins & Schwenk, for defendant.

POWERS, J. This action is brought to recover damages caused by a fire set by the defendant's engine. The facts are much like those in *Chase v. H. T. & W. R. R. Co.*, 81 Atl. 236, and the record indicates that the burning here complained of was a part of that fire, or at least was set by the same engine on the same trip over the defendant's road.

[1, 2] Walter Wright was a witness for the plaintiff. He was at the fire, and helped fight it. He traced its course back to the defendant's track, where he observed, on the right of way, a growth of weeds, grass, brakes, and goldenrod. Counsel for the plaintiff then directed him to "describe to the jury how this growth of weeds and grass and brakes and goldenrod looked, and their height, within a distance of two rods of the railroad track, and up next to the burned stretch." The witness replied, "It looked to me like an old pasture that had not been pastured, as near as I could describe it." Thereupon the defendant objected, and asked that the answer be stricken out; but the court allowed it to stand, and noted an exception. The plaintiff insists that this objection was not seasonable, and that the exception is therefore unavailing under the rule in *State v. Powers*, 72 Vt. 168, 47 Atl. 830. But this cannot be, for the objection was not to the question, but to the answer. Obviously, such an objection cannot be interposed in advance. But the objection, as made, was general, while it should have been specific. An objection to an answer, like an objection to a question, must point out the grounds upon which it is predicated, in order to afford the basis of an available exception. To hold otherwise would be to overturn a most salutary rule of practice, and require a trial court to rule on such questions without adequate information as to the nature of the objection. It may well be that cases might arise where the grounds of the objection are too obvious to require statement, but this case cannot be said to belong to that class.

[3] Perley Aubertine, who was a fireman in the defendant's employ at the time of the fire, was called by the plaintiff, and testified that he ran over the defendant's road that day on a freight train, which ran to Wilmington ahead of the excursion train, the engine of which was said to have set the fire, and that he returned over the road after the excursion train had passed over it; that his train arrived back at the "Wheeler Farm Flat," where the fire was said to have started, about 4 o'clock in the afternoon; and

that at that time there was no fire nearer the railroad track than 150 feet. The court, "after finding that the plaintiff had a right to cross-examine," as the exceptions state, allowed counsel for the plaintiff, subject to exception, to ask the witness the following questions: (1) "Did you not tell me that you saw fire and smoke up near the end of the railroad ties?" (2) "Did you not tell me that you heard Superintendent McTeer say that the excursion train set the fire?" Both these questions the witness answered in the negative, and the plaintiff offered no evidence in contradiction. The defendant says it was error to permit this, because of the rule that one cannot impeach his own witness, as laid down in *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583. But since the passage of No. 49, Acts of 1886 (P. S. 1597), one may, by leave of court, prove the contradictory statements of his witness, if the court is of opinion that the witness is adverse. All that appears here is that the court found that the plaintiff had a right to cross-examine the witness. It is unnecessary to consider whether this should be taken to mean that the witness was hostile, for, it not appearing otherwise, this court will presume that the court below found the fact of the witness' hostility; the rule being that when the admissibility of evidence depends upon a preliminary finding of fact this court, in support of the ruling below, will presume that the required fact was found, unless the record shows that it was not. *Bristol Mfg. Co. v. Palmer*, 82 Vt. 438, 74 Atl. 76.

[4] F. W. Crosier, one of the defendant's engineers, testified about the construction and operation of the spark arresters and ash pans on the defendant's engines. He said that coke cinders die out very quickly, and that he never knew of fires being set by coke cinders from his engine. The exceptions state that it was shown that coke was the fuel then being used in defendant's engines. Subject to exception, counsel for the plaintiff was allowed to cross-examine the witness (so far as the defendant now complains) as follows: "Q. It is true that in the running of an engine with any kind of fuel more or less cinders and coals drop down into the ash box? A. Yes, sir. Q. Upon any of the engines on your road, you know that coals scatter out? A. Not with coke; I have never seen it. Q. With any fuel, how is that? A. I have seen it scatter out with coal; yes." Though it appears from the exceptions that the objection to the last question actually followed the answer, it seems from the bill that the court below treated it as seasonable; hence we do the same. It may be, perhaps, that this inquiry was broader than the evidence in the case warranted, but it cannot be possible that the defendant was prejudiced by the answer, and it must be held that the error, if any, was too trifling to be harmful.

[5] Later in the trial, this witness was recalled by the defendant and asked how long, according to his observation, a coal from coke carried fire, or burned after it left the fire box. His answer was, "Well, I wouldn't be afraid to pick up one in my bare hands in ten minutes." At the plaintiff's request, this answer was stricken out, and the defendant excepted. In making this ruling, the court remarked: "We hardly think it is responsive; he doesn't say whether it was carrying fire then or not." It is quite probable that this answer was the witness' way of saying that such a coal would carry fire for ten minutes, and it might be our duty so to construe it, if to do so would sustain the ruling below; but, in the circumstances here presented, we must presume that the trial court was justified in its view and warranted in holding the witness to an answer directly responsive to the question. It is apparent that the opportunity was open to the defendant to get from the witness a direct statement on the subject of the injury, and quite probable that he did so, though the record does not show one way or the other. If the defendant did not avail itself of this opportunity, it was its own fault. The exception cannot be sustained.

[8] Ernest Harris, a witness for the defendant, explained the construction and condition of the ash pan on engine No. 9, which was said to have set the fire, and described the slide which was used in dumping any material which might gather in the ash pan, and the button securing it in place. Subject to exception, he was cross-examined as follows: "Q. But if it [the slide] does play up and down in any way, what is there to hinder the ashes and coal from working out under it? A. Nothing. Q. Now, if that button should get thrown up, then there is nothing to prevent this slide from coming out, is there? A. If it got up, the slide would

come out." The objection to this was that it assumed something that did not exist; that there was nothing to show that the slide or button worked that way. But the exceptions do not show that this was so, and we cannot assume that it was, though counsel claimed it. In support of the ruling, we must presume that there was evidence tending to show the conditions implied in these questions, since the contrary does not appear. *Bristol Mfg. Co. v. Palmer*, supra; *Tenney v. Harvey*, 63 Vt. 520, 22 Atl. 659.

[7, 8] T. W. Pallos, an employé of the Central Vermont Railway Company, was a witness for the plaintiff, and qualified as an expert in the matter of the construction, operation, and efficiency of ash pans and spark arresters. Objections were made and exceptions taken to certain questions and answers in the line of the witness' qualification, but these are not now relied upon. The witness was asked, "Assuming that a locomotive engine passing over a railroad scatters burning material every little ways, and in three places within a distance of about four miles, so that it blazes up, what, in your opinion, is the cause of it?" Subject to the defendant's exception, he replied, "I would say there was either a hole in the ash pan, or the slide was not properly shut." The only objection which the defendant now makes to this question and answer is that the matter covered is not proper for expert evidence. But this point was not made below. There the only objection specified was that the question did not state what was being burned in the engine. The point made below, not being briefed, will not here be considered (*Graves v. Waitsfield*, 81 Vt. 84, 69 Atl. 137), and the one briefed, not having been made below, will not here be considered. *State v. Manley*, 82 Vt. 556, 74 Atl. 231; *State v. Roby*, 83 Vt. 121, 74 Atl. 638.

Judgment affirmed.

COBURN v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut. Nov. 1, 1911.)

1. STREET RAILROADS (§ 81*)—NEGLIGENCE—LIABILITY.

A street railway company owes the same duty to use ordinary care to avoid personal injury to others and is subject to the same liability for failure to do so as other private corporations and individuals, in absence of express or implied statutory limitation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

2. HIGHWAYS (§ 187*)—INJURIES—LIABILITY—NATURE.

The wrongs to be redressed by Gen. St. 1902, § 2020, making parties liable for injuries resulting from their neglect of duty to keep a road, etc., in repair, are public, and not private.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 187.*]

3. STREET RAILROADS (§ 105*)—DEFECTIVE CONDITION OF TRACKS—INJURY—NOTICE—SUFFICIENCY.

Gen. St. 1902, § 1130, prohibits suit against a street railway company for negligence, unless notice of the injury be given within four months. Section 2020 makes parties liable for injury resulting from their neglect of duty to keep a road, etc., in repair if notice of the injury is given within 60 days of the accident. Section 3837 requires street railway companies to keep in repair the parts of the streets occupied by them. *Held*, that one injured through a street railway company's failure to properly maintain part of a street between its tracks is not restricted in his remedy by section 2020, but may sue under the common law, in which case notice of the accident, given under section 1130, more than two but less than four months after the accident, is sufficient.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 105.*]

Appeal from Superior Court, Hartford County; William H. Williams, Judge.

Action by Frank A. Coburn against the Connecticut Company. Judgment for defendant on demurrer to complaint, and plaintiff appeals. Reversed.

The complaint sets up an injury to the plaintiff received while he was riding his bicycle in a Hartford city street, through which the defendant maintains a single track and equipment. It is alleged that the defendant had installed, in connection with the operation of this line, a sewer box or catch-basin extending from rail to rail and about a foot deep and wide, and having a cover; that it was its duty to keep the cover on, or to guard the place if it was removed; that it neglected this duty, and negligently removed the cover and left the box or basin in that condition, wholly unguarded and without warning; that the box or basin thus left was a dangerous pit or hole, and one liable to cause injury to persons and vehicles passing along the highway; and that the plaintiff received his injuries by riding his wheel into it while in the exercise of due care on his part and by reason of the negligence of the defendant in the premises.

The statutory notice was given within four, but not within two, months after the injuries were received.

William F. Henney and Frank A. Hagarty, for appellant. Joseph F. Berry, for appellee.

PRENTICE, J. (after stating the facts as above). The only question presented by the demurrer to this complaint was whether or not a good cause of action was set up by reason of the fact, as it appeared, that statutory notice of the accident was not given to the defendant until more than two, but less than four, months had elapsed. The only error here assigned is the action of the trial court in sustaining of the demurrer.

[1] The law casts upon the defendant, a private corporation, the same duty to exercise ordinary care in the conduct of its affairs, and the same liability for its failure to do so, which rests upon all other persons and private corporations, unless there is some statute expressly or impliedly imposing limitations upon such duty and liability. *Cadwell v. Connecticut Ry. & Ltg. Co.*, 84 Conn. 450, 80 Atl. 285.

[2] The only statute pointed out as imposing such a limitation is section 2020 of the General Statutes of 1902, taken in connection with other statutes which cast a duty of highway repair upon street railways. Gen. St. § 3837. Section 3837 creates a duty where before there was none, and through its operation there exists a liability by force of section 2020 which was not recognized at common law. The liability is not one which rests upon common-law negligence. It rests upon the failure to perform a governmental duty which the Legislature has seen fit to cast upon street railways. It creates an arbitrary standard of duty which is measured by the requirements of this governmental duty, in order that the demands of public travel may be met. Its foundation is entirely unlike that of common-law negligence. Section 2020 is the provision which seeks to accomplish the performance of the imposed duty. It is penal in its character, the liability therein created being in the nature of a penalty for disobedience of the statutory mandate. The wrong of which the statute takes cognizance and aims to redress is in the conception of our law a public, and not a private, one. *Bartram v. Sharon*, 71 Conn. 686, 692, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225.

[3] The defendant contends that by the enactment of the legislation creating this duty and liability the General Assembly by necessary implication provided that wherever and whenever a street railway company or other private corporation, charged with a duty of highway repair, is guilty of conduct such as would, under ordinary circumstances, amount to common-law negligence, and this negligent conduct finds its expression in

a situation which renders defective a highway, or portion of highway, in respect to which it owes the duty of repair, the party injured can have no other redress than that furnished by section 2020. It says that in such case there can be no action founded on negligence apart from the statute, and that the remedy as for a defective highway is exclusive. We cannot agree with this contention, and fail to discover any sound reason why the giving of the statutory remedy as a penalty for the commission of a public wrong and the sanction of a statutory mandate which is concerned with the performance of a governmental duty should, in the absence of express provision, operate to deprive a party of rights of action immemorially recognized, and which grow out of the private relations of man to man. On the contrary, we are of the opinion that in a proper case a party injured may have his election whether he will avail himself of the remedy of the statute or that of the common law. See *Conway v. Waterbury*, 84 Conn. 345, 80 Atl. 83; *Hinckley v. Danbury*, 82 Conn. 241, 242, 70 Atl. 590. In the present case the complaint states a good cause of action at common law. Furthermore, it is apparent from its allegations and those it does not contain that the pleader was studiously attempting to state a cause of action of that character. The two-month limitation as to notice contained in section 2020 is therefore inapplicable, and the pertinent limitation is that of four months, embodied in section 1130.

There is error, and the judgment is set aside and the cause remanded to be proceeded with according to law. All concur.

MULCAHY v. MULCAHY et al.

(Supreme Court of Errors of Connecticut.
Nov. 1, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 70*)—INVENTORY—CORRECTION.

In a proceeding to correct an inventory of an estate by including therein an indebtedness against one of the executors, the burden of proving the omitted debt was on the objector.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 70.*]

2. EXECUTORS AND ADMINISTRATORS (§ 70*)—FINAL ACCOUNT—OMISSION OF ASSETS.

When executors have charged themselves with the amount of the inventory as previously determined for the purposes of the administration, and have made oath to the account, the burden of sustaining correctness of the account is prima facie sustained, and it then devolves on one objecting that the account did not contain an indebtedness against one of the executors to establish the existence of the debt.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 70.*]

3. EVIDENCE (§ 271*)—DECLARATIONS OF PERSONS SINCE DECEASED—"ACTIONS."

Gen. St. 1902, § 705, provides that, in actions by or against the representatives of de-

ceased persons, the entries, memoranda, and declarations of the deceased relevant to the matters in issue may be received in evidence. *Held* that, the statute being remedial, the word "actions" as so used should be construed to include a judicial settlement of executors' accounts, so that, on an objection that one of the executors had not charged in the account as an asset of the estate an indebtedness alleged to be owing by him to the testator, declarations of the testator in his lifetime with reference to the executor's indebtedness to him were admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1094, 1095; Dec. Dig. § 271.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 128-140; vol. 8, p. 7563.]

Appeal from Superior Court, Hartford County; William H. Williams, Judge.

Action by William J. Mulcahy against Thomas F. Mulcahy and others. From certain orders of the probate court in the course of the settlement of a decedent's estate, plaintiff appeals. Reversed, and new trial ordered.

William M. Maltbie, for appellant. Stanley W. Edwards, for appellees.

PRENTICE, J. This appeal was taken from two orders of the court of probate made in the course of the settlement of the testate estate of a decedent—one denying the petition of an heir at law and legatee that the inventory filed by the executors be corrected by including therein a debt claimed to have been owing from one of the executors to the deceased, but not inventoried, or that the executors be required to so correct the inventory, and the other accepting and allowing the final account later filed by the executors, in which said claimed indebtedness did not appear as an asset of the estate. The appeal also complained of the acceptance of this account for another reason, which requires no attention at our hands. No question is made as to the power of the court of probate or of the superior court on appeal to entertain the two petitions under consideration, and to grant the relief asked for in them. The only questions presented here relate to the rulings of the superior court during the progress of its hearing, and in arriving at its decisions and judgment.

In the superior court, upon the hearing on appeal, the appellant claimed that the burden of proof was not upon him to establish the claimed indebtedness, but upon the claimed debtor executor. This claim was correctly overruled. While the appeal to the superior court was single, it involved two orders independently and successively made in the course of the settlement of the estate.

[1] The first related to the correction of the inventory. As related to the petition to secure this correction, the burden of proving the asserted fact, that there were unin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ventoried assets, was clearly upon the appellant, who made the assertion and prayed relief.

[2] Coming to the later order, accepting the final account, it is doubtless true that the ultimate burden of satisfying the court of the correctness of the account was upon the executors. When, however, they made oath to it, as they were required to do, and it appeared that in it they had charged themselves with the amount of the inventory as previously determined for the purpose of the court's action in administering the estate, they had so far discharged their duty in the premises that, until the completeness of the inventory was successfully challenged, the burden of establishing the correctness of their account in a matter concerning which it was the office of the inventory to speak had been sufficiently borne. The challenger in such a case would be in no more favorable position than he would be in a direct attempt to secure a correction of the inventory.

Upon the trial it was further claimed by the appellant that, if there was reasonable doubt as to the existence of the claimed indebtedness, the final account should not be allowed until such doubt could be resolved by due process of law. It is to be noticed that the assignment of error based upon the overruling of this claim necessarily assumes, and without warrant, that the trial court entertained a doubt upon the subject of the existence of the alleged indebtedness. It also concedes that it might act in its discretion. But, these matters aside, it is clear that the court acted properly in proceeding to determine the questions before it.

[3] Upon the trial the appellant called a witness who was asked in regard to what statements, if any, he had heard the decedent make in regard to an indebtedness to him on the part of his son, the claimed debtor in question. Upon objection, the questions were excluded. It is conceded that the line of inquiry forbidden was improper unless authorized by section 705 of the General Statutes, which provides that "in actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased relevant to the matter in issue, may be received as evidence," etc. It was clearly proper, if the proceeding before the court is to be regarded as an action by or against the representatives of a deceased person within the meaning and intent of the statute. Was it such an action? Our answer involves an interpretation of the legislative language. "All statutes, whether remedial or penal, should be construed according to the apparent intention of the Legislature, to be gathered from the entire language used in connection with the subject and purpose of the law." *Bissell v. Beckwith*, 32 Conn. 509, 516. "The mischief which the statute was designed to remedy is an important guide in ascertain-

ing its meaning." *National Fireproofing Co. v. Huntington*, 81 Conn. 632, 633, 71 Atl. 911 (20 L. R. A. [N. S.] 261, 129 Am. St. Rep. 228). "In construing the legislative language, therefore, we are bound as far as we may to give effect to the legislative intent and advance the remedy manifestly sought to be supplied. To this end, adherence to the strict meaning of words and the precise letter of the language is not required." *Stapleberg v. Stapleberg*, 77 Conn. 31, 35, 58 Atl. 233, 234. In giving such construction, "the application of common sense to the language is not to be excluded." *Faulkner v. Solazzi*, 79 Conn. 541, 547, 65 Atl. 947, 949 (9 L. R. A. [N. S.] 607). The statute under consideration is a highly remedial one. Its aim was to take away the great advantage which under pre-existing law living persons had over the representatives of the deceased. *Bissell v. Beckwith*, 32 Conn. 509, 516; *Rowland v. Philadelphia, W. & B. R. Co.*, 63 Conn. 415, 417, 28 Atl. 102. This advantage was one which found its expression in unwarranted inroads upon estates of deceased persons in favor of the living whose mouths were not closed. The object of the statute was to prevent these inroads. The method adopted was one whose purpose was to bring the living and the representatives of the dead upon as equal a footing as possible before the courts by permitting the declarations, entries, and memoranda of the dead to be received and weighed in the evidential balance in connection with the assertion of the living. It is clear that the evil which the statute was intended to remedy is as present in certain probate appeals as in any other judicial proceeding, and that the remedy provided by it would be as effective and beneficent in such appeals as anywhere. This is peculiarly true of those appeals which directly involve the amount of the net estate of a deceased person.

With these considerations in view, let us examine the statute. We find, in the first place, that the remedy is confined to what are designated as "actions." This is a word which has been employed in a strict technical sense, but we have repeatedly said of it when used, as here, in statutes regulating judicial procedure, that it might well be used in a more general and comprehensive sense, embracing all proceedings in a court of justice for the purpose of obtaining such redress as the law provides. *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715, 717, 49 Atl. 198; *O'Brien's Petition*, 79 Conn. 46, 59, 63 Atl. 777. In these two cases it was held that proceedings far removed from actions technically speaking came within the descriptive term of "actions." Concrete application of the same liberal rule of construction has been made where the judicial proceeding was a probate appeal. *Stile's Appeal*, 41 Conn. 329, 330; *Campbell's Appeal*, 76 Conn. 284, 56 Atl. 554. The reasons which

led to the results reached in these cases are equally present here, and lead to the conclusion that the present proceeding was an action within the intent and meaning of the statute.

But was it an action by or against the representatives of the decedent? The appellees were the executors of the will of the deceased, and therefore his legal representatives. The redress which the appellant was seeking at the hands of the court grew out of their conduct in that capacity. Its aim was to compel them to act for the increase of the estate in their keeping as they were unwilling to do. They were in court opposing such action. Their position was adversary to the appellant, and it was so in a matter which directly concerned the quantum of net estate as distinctly as though a claim against it was being pressed for allowance and resisted. The situation is one which comes within the spirit and purpose of the statute, and we are of the opinion that it comes within its language interpreted according to recognized rules.

The appellees rely upon Barber's Appeal, 63 Conn. 393, 412, 27 Atl. 973, 22 L. R. A. 90, as controlling authority for the proposition that the pending proceeding was not an action by or against the representatives of a deceased person within the intention of the statute. It is to be noted that the conclusion announced in that case was a no more comprehensive one than that the then appeal did not come within the provision of the statute. Unfortunately the opinion does not clearly state the court's reasons for reaching this result. As it recognized that probate appeals may be classed as actions, the inference is strong that it found its reasons in the nature of the appeal then under consideration, which was one from the probate of a will, and held that the conditions named in the statute were not in that proceeding complied with, because it was not one against the executors within its meaning. The difference between that appeal and the present, both in respect to their essential character and as touching their adversary nature as related to the executors, is marked. The only matter involved in Barber's Appeal was whether or not the estate of the deceased should be administered under a certain claimed will. In other words, the matter in issue was the status of the estate in settlement and the basis of its division when settled. The result could in no manner increase or diminish the quantum of the net estate. There was no issue as to the validity of a claim, or the right to an asset. The executors were simply proponents. We have already had occasion to notice the strikingly different aspects which the present proceeding presents. Beyond the fact that both were appeals from probate, there

is an entire want of similarity between them. All the pertinent things which we have relied upon to bring the situation presented by the pending case within the spirit and intent of the statute were absent from the Barber Case. The opinion in that case certainly presents no reasons which militate in the least against our conclusion in this, and the result then arrived at, which is the only pertinent matter in the decision, is not one which by analogy possesses any real significance as to the result to be arrived at upon this appeal.

There is error. The judgment is set aside and a new trial ordered. The other Judges concurred.

HARTFORD TRUST CO. et al. v. TOWN OF WEST HARTFORD.

(Supreme Court of Errors of Connecticut. Nov. 1, 1911.)

1. MUNICIPAL CORPORATIONS (§ 652*)—STREETS—BOUNDS—RE-ESTABLISHMENT.

Strict compliance with the statute is a jurisdictional prerequisite to the validity of a proceeding under Gen. St. 1902, § 2083, to re-establish the bounds of a street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 652.*]

2. CONSTITUTIONAL LAW (§ 291*)—DUE PROCESS OF LAW—STREETS—BOUNDS—RE-ESTABLISHMENT.

Rights of abutters can be affected by proceedings to re-establish the bounds of a street only "by due course of law," and after opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 291.*]

3. MUNICIPAL CORPORATIONS (§ 652*)—STREETS—BOUNDS—RE-ESTABLISHMENT—REQUISITES.

Under Gen. St. 1902, § 2083, providing that, in a proceeding to re-establish the bounds of a street, the selectmen "may" cause a map showing existing conditions to be exhibited, and that notice as to when and where the map may be seen "shall" be given, the requirement for its exhibition is mandatory.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 652.*]

4. MUNICIPAL CORPORATIONS (§ 652*)—STREETS—BOUNDS—RE-ESTABLISHMENT—NOTICE—SERVICE.

Notice of proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street, may be given by mail.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 652.*]

5. NOTICE (§ 10*)—SERVICE BY MAIL—PROOF.

Proof of service of notice by mail should show compliance with the conditions of its existence, and show that the notice, properly addressed, with postage prepaid, was duly deposited in the mail.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 22-36; Dec. Dig. § 10.*]

6. MUNICIPAL CORPORATIONS (§ 652*)—STREETS—BOUNDS—RE-ESTABLISHMENT—NOTICE.

Failure to give abutters notice of proceedings under Gen. St. 1902, § 2083, to re-establish

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the bounds of a street, invalidates the proceedings as to them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 652.*]

7. MUNICIPAL CORPORATIONS (§ 652*)—STREETS — BOUNDS — RE-ESTABLISHMENT — NOTICE — SUFFICIENCY.

In a proceeding under Gen. St. 1902, § 2083, to re-establish the bounds of a street, notice of the selectmen's decision given adjoining owners by mailing them marked copies of a newspaper containing an advertisement of the notice is insufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 652.*]

8. NOTICE (§ 11*)—SUFFICIENCY—NEWSPAPER ADVERTISEMENT.

One cannot be charged with notice of what may be contained in the advertising columns of a newspaper, though the copy received by him be a marked copy.

[Ed. Note.—For other cases, see *Notice*, Dec. Dig. § 11.*]

9. MUNICIPAL CORPORATIONS (§ 652*)—STREETS — BOUNDS — RE-ESTABLISHMENT — NOTICE — SUFFICIENCY.

Recording of the decision of selectmen of a town in proceedings, under Gen. St. 1902, § 2083, to re-establish the bounds of a street, was not constructive notice thereof to abutters which would cure failure to give actual notice, especially where the decision itself was void for failure to take the jurisdictional steps prescribed by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 652.*]

10. MUNICIPAL CORPORATIONS (§ 652*)—STREETS — BOUNDS — RE-ESTABLISHMENT — RIGHTS OF ABUTTERS.

Abutters are not estopped to claim equitable relief against proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street on account of jurisdictional defects, where they immediately protested to the selectmen on learning of the decision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 652.*]

11. APPEAL AND ERROR (§ 750*)—SCOPE.

Assignments of error are limited to the claims of law made in the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.*]

12. EQUITY (§ 67*)—LACHES—REQUISITES.

There can be no laches without breach of duty.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

13. MUNICIPAL CORPORATIONS (§ 654*)—STREETS — BOUNDS — RE-ESTABLISHMENT — EVIDENCE.

In a suit to enjoin a street improvement conforming to proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of the street, void as to plaintiffs for want of notice, evidence offered by defendant to show previous establishment of building lines of which plaintiffs had notice was properly excluded as being immaterial and as inviting collateral inquiry; the time in which plaintiffs could have appealed from the decision of the selectmen on the re-establishment of the street line having then long since passed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 654.*]

14. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in permitting a question to be asked a witness was harmless to defendant who

offered to prove, and claims to have proven, facts conforming to the witness' answer.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Superior Court, Hartford County; William L. Bennett, Judge.

Actions by the Hartford Trust Company, administrator, and another, by John R. Fenn, by Caroline F. Roberts, and by Lewis F. Fenn and wife against the Town of West Hartford. Judgment in each case for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs own land on the south side of Farmington avenue in the town of West Hartford. On February 7, 1900, a proprietor of land adjoining this avenue made written application to the selectmen of said town for the establishment of the bounds of said avenue which had become lost and uncertain. Thereupon the selectmen caused to be printed a notice in conformity with the statute (now G. S. 1902, § 2083) of the place and time when and where all parties in interest might be heard. The statute (G. S. 2083) provided that, upon such application, the selectmen "may cause to be made a map of such highway, showing the fences and bounds as actually existing, and the bounds as claimed by adjoining proprietors, and shall also cause to be placed on said map such lines as in their judgment coincide with the lines of the highway as originally laid down." After this application, the selectmen prepared no map, but had at that time in their possession a map of said avenue, including the portion in question, prepared in 1898, without reference to section 2083. This map did not show the fences and bounds as claimed by adjoining proprietors. It contained one line only as the south line of said avenue, with nothing to show how it affected adjoining proprietors. The lines of the highway on the map are those which in the judgment of the selectmen coincided with the lines of the highway as originally laid down, but there was nothing on the map to indicate this. In fact, the true south line of the avenue at this point runs about 2½ feet north of the south line indicated on the map. The selectmen did not send any notice of said hearing to the plaintiffs, nor did they receive notice of the same by publication or otherwise. The hearing was duly held, but none of the plaintiffs were present or represented. The selectmen caused a notice of their decision to be printed in conformity with the statute, but did not send notice of their decision to the plaintiffs, nor had they notice or knowledge of the same. The decision adopted as the lines of the highway the lines on said map, the south line of which varied from the true line by about 2½ feet. The town voted in the spring of 1900 to adopt certain plans for lowering the grade

of the highway in front of plaintiffs' premises. Said plans, if carried out, would lower the grade of the highway and extend the south line about $2\frac{1}{2}$ feet south of the true south line, making it correspond with the south line as attempted to be established by the decision. The plaintiffs learned of the proceedings for the re-establishment of the lines of the highway and of the decision of the selectmen in the spring of 1909. On September 4, 1909, the town and state entered into a contract to change the grade of said avenue in accordance with said plans. On November 5, 1909, this action was begun. If carried out, these plans would take for highway purposes a strip of the plaintiffs' land adjoining the avenue on the south for its entire length, and would greatly disfigure and render unsightly and inaccessible their property, and cause them irreparable damage.

William F. Henney and David Henney, for appellant. George O. Brott and George J. Stoner, for appellees.

WHEELER, J. (after stating the facts as above). The defendant assigns as error the finding of the trial court that the proceedings taken to establish the lost and uncertain bounds of Farmington avenue were not taken in accordance with section 2083, G. S., in that the map of the highway was not prepared and exhibited, and the notice of the hearing and of the decision of the selectmen were not given, within the provisions of this statute.

[1] Strict compliance with each of the enumerated steps of the statute was the condition of the validity of the entire proceeding. Failure to comply with any of the required steps would constitute a jurisdictional defect. *Kiefer v. Bridgeport*, 68 Conn. 405, 411, 412, 38 Atl. 801.

[2] The plaintiffs' rights of property were involved, and could not be injured or destroyed, save by "due course of law," after hearing had and opportunity given to be heard. *Northrop v. Waterbury*, 81 Conn. 305, 309, 70 Atl. 1024; *Nichols v. Bridgeport*, 23 Conn. 189, 208, 60 Am. Dec. 636; *Abbot v. Banfield*, 43 N. H. 152, 155.

[3] The statutory requirement in relation to the exhibition of the map is permissive in terms, but mandatory in effect. It says "may." It means "must," for it recites the selectmen shall cause a notice to be printed and sent to each proprietor, setting forth the time and place when the aforesaid map may be seen. The obvious purpose of the statute was to afford proprietors the opportunity to see from an inspection of the map the relation the bounds claimed by the adjoining proprietors bore to the actual fences and bounds and the lines of the highway as originally laid out. With this knowledge the proprietors could protect their interests by making a suitable presentation of their claims to the selectmen, and by duly taking an ap-

peal from their decision. Procuring the claims of adjoining proprietors preceding the exhibition of the map is indispensable; yet, so far as appears, no attempt was ever made to obtain these. The map exhibited did not conform to the statute. It did not contain the actual fences and bounds, nor the bounds as claimed by the adjoining proprietors. The south line of the highway upon the map, though believed by the selectmen to be as originally laid out, was in fact $2\frac{1}{2}$ feet south of the true south line, and the map itself did not refer to any proceeding to establish lost and uncertain bounds.

[4] The notice of the hearing did not contain a description of the map called for by the statute. Evidence was offered that the notice of the hearing as published was sent to some of the proprietors, but none that any notice properly addressed with postage prepaid was duly mailed to these plaintiffs. The written or printed notice to be sent each known adjoining proprietor might properly be sent by mail.

[5] Proof of service of notice by mail should show compliance with the conditions of its existence, and show that the notice, properly addressed, with postage prepaid, was duly deposited in the mail. 29 Cyc. pp. 1119, 1123.

[6] The failure to send such a notice was fatal to the proceeding as against these plaintiffs.

[7] The notice of the decision of the selectmen was given by mailing to each adjoining proprietor a marked copy of a newspaper containing an advertisement of the notice. This was ineffective as a legal notice.

[8] One cannot be charged with notice of what may be contained in the advertising columns of a newspaper, though the copy received by him be a marked copy. *Clark v. Ricker*, 14 N. H. 44, 48; *Watkins v. Peck*, 13 N. H. 360, 373, 40 Am. Dec. 156; *United States v. Pinover* (D. C.) 3 Fed. 305, 308. Moreover, no evidence was offered that such a paper properly addressed with postage prepaid was duly mailed to any of these plaintiffs. The evidence fully supported the finding as to what the map contained and the sending and receipt of the notices.

[9] We cannot agree with the defendant that the recording of the decision was constructive notice to these plaintiffs. In no event could the recording take the place of the notices required by the statute. Further, the decision as to these plaintiffs was a nullity, for, without compliance with the statutory steps, the selectmen were without jurisdiction to render it. Therefore the recording of the decision did not validate it, or make of it notice to any proprietor who had not been given the notices specified by the statute.

[10] One other of the defendant's contentions remains to be noticed. It urges that "the plaintiffs, having had actual notice of the re-establishment proceedings, and having failed for a period of approximately 10 years

to object thereto by way of appeal or otherwise," are estopped by laches from the equitable relief sought. The finding disposes of this. The plaintiffs never had notice or knowledge of the re-establishment of the lost bounds until after the town had voted to "improve" the highway, and the engineers had driven stakes indicating the line claimed south of the true south line of the highway. Seeing this, the plaintiffs immediately protested to the selectmen. Their opportunity to appeal from the re-establishment decision had been long since lost by lapse of time through no fault of theirs.

[11] Assignments of errors are limited to the claims of law made in the trial court. Hence this defendant cannot avail itself of a claim of laches based upon the failure of the plaintiffs to act from the time they knew of the re-establishment decision in the spring of 1909 until this action was begun on November 5, 1909. If the defendant were in a position to properly make this contention, the finding would conclude it. So far as appears, the plaintiffs did not know of the proposed contract between the selectmen, the state, and the contractor before it was entered into, nor does it appear when such knowledge came to the plaintiffs. As soon as the plaintiffs knew of the proposed invasion of their rights, they protested to the town officials. They could not be expected to anticipate that the town would disregard their protest, and enter into a contract of the character of that disclosed by the record. There was no inexcusable delay in the protection of their interests; nor such a delay as to prejudice the defendant's rights in view of the protest made it. *Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 41, 63 Atl. 658; *Byrne v. Schuyler*, 65 Conn. 336, 355, 31 Atl. 833, 28 L. R. A. 804.

[12] Upon the facts found there was no duty resting on these plaintiffs to have secured an earlier intervention of judicial action; and, without breach of duty, there can be no laches. *Allis v. Hall*, 76 Conn. 322, 334, 56 Atl. 637. The rulings on evidence complained of are not ground for reversible error.

[13] The offer of the defendant to prove the establishment of building lines in 1902-04 was properly excluded. This evidence was offered to show that the south lines of Farmington avenue corresponded with the south line of the re-establishment decision, and that the plaintiffs had notice of these building line proceedings. The time in which the plaintiffs could have appealed from the decision of the selectmen had long since passed, and for this reason the offer, for such a purpose, was immaterial and invited collateral inquiry.

[14] For the purpose of proving the true south boundary of this avenue, a witness 68

years of age, who had been born near the place in question and had lived there during his youth, was asked by the plaintiffs this question: "When you were a boy, how were these trees regarded with relation to the highway?" The witness replied they were generally considered the south boundary of the highway. It would be difficult to support this question, either in its substance or its form, which was not objected to. It is clear that its admission did not harm the defendant, since it subsequently offered evidence to prove, and claimed to have proved, facts in accord with the answer given.

The corrections of the finding should be denied. The evidence amply supports the finding.

There is no error. All concur.

STATE v. TRIPP.

(Supreme Court of Errors of Connecticut.
Nov. 1, 1911.)

1. TRIAL (§ 278*) — INSTRUCTIONS — EXCEPTIONS—SUFFICIENCY.

Exception to instructions is insufficient, if it fails to designate the parts complained of.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 689; Dec. Dig. § 278.*]

2. CRIMINAL LAW (§ 429*) — EVIDENCE — ADMISSIBILITY.

Under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, authorizing issuance of kennel licenses, a certificate issued was not inadmissible in prosecution for killing dogs belonging to the kennel because carelessly drawn by the town clerk; it appearing that application for the license was duly made, that the required fee was paid, and that the certificate was intended to be a kennel license.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 429.*]

3. ANIMALS (§ 4*) — DOGS — "KENNEL" LICENSES—VALIDITY.

A kennel license issued under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, is not vitiated because part of the dogs were kept at the owner's house; the word "kennel" not meaning the house or place in which the dogs are kept, but a pack or collection of dogs usually kept or bred for hunting, or for sale.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 4.*]

4. ANIMALS (§ 4*) — DOGS — KENNEL LICENSES — VALIDITY.

That a kennel license was taken out May 2d, instead of May 1st, as required by Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, does not vitiate it for the remainder of the year.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 4.*]

5. ANIMALS (§ 45*) — REGISTERED DOGS — KILLING—DEFENSES.

In a prosecution under Pub. Acts 1907, c. 167, § 15, for killing registered dogs, it is unnecessary to show that they wore the tag or plate required by Pub. Acts 1909, c. 55, § 2, to be worn by dogs at large.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 45.*]

Appeal from Superior Court, Tolland County; Gardiner Greene, Judge.

Perry G. Tripp was convicted of killing dogs, and he appeals. Affirmed.

Information charging the accused with having, in violation of the statute, unlawfully killed two dogs, duly registered and licensed under a kennel license in the town of Somers, brought to the superior court of Tolland county, and tried to the jury, before Greene, J. Verdict of guilty, and a fine of \$50 imposed. Appeal by the accused. No error.

Samuel A. Herman and John E. Fisk, for appellant. Charles Phelps, for the State.

HALL, C. J. The two counts of the information are based upon chapter 167 of the Public Acts of 1907, as amended by chapter 55 of the Public Acts of 1909.

Section 2 of the act of 1909 provides that "any owner or keeper of a kennel may apply, on or before the first day of May, to the town clerk of the town in which such kennel is located"; that "the town clerk shall issue to such applicant a kennel license for one year from the first day of May, which license shall specify the name of the kennel, the name of the owner and the keeper of the same"; that "every dog kept in such kennel shall, when at large, wear a collar bearing a metal tag or plate upon which shall appear the number of the kennel license, the name of the town issuing such license and the year thereof, which plates or tags shall be furnished by the town clerk. * * *

Section 4 of the act of 1909 provides that the dog warden shall take into his custody any dog found at large without the required tag or plate on its collar, and that after certain notice shall have been given of the capture of the dog, unless within a fixed time it shall be redeemed by its owner by payment of a sum, in no case exceeding three dollars, it shall be killed by such warden.

Section 13 of the act of 1907 provides that: "Any person may kill any dog which he finds pursuing, worrying or wounding any sheep, lambs or other domestic animals. * * *

Section 15 of the act of 1907, the provisions of which are made applicable to dogs belonging to a licensed kennel, provides that: "Every person who shall steal or confine and secrete any registered dog * * * or who shall unlawfully kill or injure any such dog shall be liable to the owner in a civil action, and shall be fined not more than two hundred dollars, or imprisoned not more than six months or both."

The information in this case alleges that the dogs in question, when killed, were duly licensed under a kennel license, and wore collars with metal tags attached, marked, and numbered as required by law.

Upon the trial the accused claimed: That he should be acquitted, first, because the dogs, which were fox hounds, were found

pursuing, worrying, or wounding sheep; second, because it was not shown that the dogs were duly licensed; and, third, because it did not appear that at the time the dogs were killed their collars bore metal tags or plates upon which appeared the number of the kennel license, the name of the town issuing the license, and the year thereof, or that the collars upon the dogs bore any tag or plate.

Whether the dogs were found pursuing, worrying, or wounding sheep was a question of fact which the jury must have decided against the claim of the defendant.

[1] The defendant's exception g, quoting a page of the charge of the trial judge upon this question, and to a large part of which it was clearly not intended to except, fails to properly designate the portions of the charge complained of, and will therefore not be considered.

[2] The finding shows that as bearing upon the second of said claims there was evidence: That a certificate of license was issued to Field & Cooley on the 2d of May, which was Monday; that in making out the certificate the town clerk used a printed form designed for a dog license; that F. & C. was the name of the kennel for which a license was applied for, and of which Field & Cooley were the owners and keepers; and that Field paid to the town clerk \$50 for the license, and \$2.50 for 25 tags. The following is the form of certificate as filled out and delivered to Field by the town clerk:

"Dog License." Kennel License Name F. & C.

This certifies that Field and Cooley have registered in the office of the town clerk of the town of Somers, state of Connecticut, a male dog, owned or kept by h , and described as follows:

Name	Breed.....
Color	Size
Tag No. K. L. 22. Said dog is hereby licensed until the first day of May, 1911, in accordance with acts passed by the General Assembly of the state of Connecticut.	

The license fee of fifty dollars has been paid.
Date: May 2, 1910.

25 Tags, \$2.50.

C. S. Fuller, Town Clerk.

The following words and figures of the certificate were in writing: "Kennel License Name F. & C." on the first line, "Field and Cooley" on the second, "Somers" on the fourth, "No. K. L. 22" on the ninth, the last figures of the two dates, the word "fifty" on the thirteenth line, the date "May 2," the words "25 Tags, \$2.50," and the signature. The remainder of the certificate was printed.

This certificate was certainly very carelessly and inartificially drawn. If it was found necessary to use the blank form adapted to a dog license, the words peculiarly applicable to such a license should have been erased, and it should also have been more clearly stated that Field & Cooley were the owners and keepers of the kennel. Notwithstanding these defects in the certificate, and they have in no way misled the accused, and

are attributable to the town clerk who prepared it, rather than to the owners of the kennel, who were only required to apply for a kennel license and pay the \$50 fee therefor, which they did, we think the license should not be held to be void. The certificate shows on its face that it was intended to be a certificate of a kennel license. It states the name of the kennel, the names of persons who were in fact the owners and keepers of the F. & C. kennel, although not expressly so described in the certificate. That they were the owners and keepers was also indicated by the name of the kennel stated in the certificate. The trial court committed no error in admitting the certificate in evidence, against the defendant's objection.

[3] The fact that a part of the pack of fox hounds which formed the licensed kennel were kept at the house of each of the owners in the same town did not vitiate the license. The word "kennel" as used in the statute does not mean the house or place in which the dogs are kept, but a pack or collection of dogs usually kept or bred for hunting, or for sale.

[4] That the license was issued on the 2d of May did not render it invalid, even if it was not applied for until that day. Although the owner of a dog or kennel may be subjected to a penalty for not having applied for a license on or before May 1st of each year, his failure to do so would not render it illegal for the town clerk to afterwards issue a license, as was done in this case, for the year following the 1st of May, upon payment of the full license fee for that year.

[5] The accused requested the court in substance to charge the jury that in order to convict the state must prove, not only, that the dogs when killed were duly licensed, but also that they wore collars bearing the metal tags or plates required by statute. The court did not so charge, but in substance instructed the jury that, while the state must prove that the dogs were duly licensed, it was not required to further prove that the dogs were duly tagged, and that if the dogs were duly licensed, and were at large without tags, the fact that they were without tags would not justify the accused in killing them. This instruction was correct. The offense described in section 15 is the unlawful killing of a registered dog, not of a dog registered and tagged. The placing of a tag or plate upon the dog's collar is not a part of the registering. A dog, though not at large, is required to be registered. The tag or plate is only required to be worn when the dog is at large. Even the dog warden is not authorized to immediately kill a dog, merely because he finds it at large without the required tags or plates upon its collar. He may take it into his custody, but he can-

not kill it, if the owner appears in due season and pays the sum required to redeem it. The accused did not claim to have shot the dogs because they were not properly tagged, but because they were pursuing and worrying his sheep, and whether they were or not was the decisive question of the case.

There is no error. All concur.

C. H. EDDY & CO. v. FIELD.

(Supreme Court of Vermont. Windham. Oct. 16, 1911.)

1. APPEAL AND ERROR (§ 274*)—EXCEPTIONS—CONSTRUCTION.

Where, in an action for conversion of certain property, the findings of the referee do not show conversion, but the court erroneously found against the evidence for plaintiff, that error is reached by an exception to the rendition of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.*]

2. TROVER AND CONVERSION (§ 1*)—ACTS CONSTITUTING "CONVERSION."

A contract of sale of soda in bottles stipulated that the bottles should remain the property of the seller, and that the buyer at his own expense should return them. The buyer delivered them to a carrier's agent, consigned to the seller, and they were loaded and way-billed. Held, that the buyer was not guilty of conversion, which consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding possession from the owner under a claim of title inconsistent with his title.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

Exceptions from Windham County Court; E. L. Waterman, Judge.

Action by C. H. Eddy & Co. against C. C. Field. There was a judgment for plaintiff, and defendant excepts. Reversed, and judgment for defendant for costs.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Chase & Daley, for plaintiff. F. W. Tuttle, for defendant.

ROWELL, C. J. This is trover for 2,000 and more soda bottles. The case was referred. Judgment for the plaintiffs on the report, to which the defendant excepted. The facts are these, shortly stated: The plaintiffs are bottlers of soda in Brattleboro, and shippers thereof for consumption to various points and places. The defendant is a merchant at Ferrisburg and North Ferrisburg, to whom the plaintiffs sold and shipped during such a time thousands of bottles of their product, the terms of the sales being that the bottles should be and remain the property of the plaintiffs and be returned to them by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant, they paying the freight each way. The plaintiffs kept an account with the defendant for the soda, and a memoranda account for the bottles in which it was shipped, wherein, on receipt of the empty bottles returned, they were to give the defendant credit therefor. At the time this suit was brought, the plaintiffs had not actually received the bottles sued for, but the defendant had delivered them to the station agents at Ferrisburg and North Ferrisburg, consigned to the plaintiffs at Brattleboro, and they were loaded and waybilled. The referee submits whether on the facts found the bottles were delivered to the plaintiffs before suit brought. If they were, he finds for the defendant. The court evidently thought they were not, and so adjudged for the plaintiffs.

[1] This was error, for the report discloses nothing tending to show conversion, and that defect is reached by the exception to the rendition of the judgment, as it was necessarily involved in its rendition.

[2] It is sufficiently accurate and comprehensive for present purposes to say, as is said in the Vermont Digest, c. 2768, pl. 12, that in the sense of the law of trover a conversion consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the owner's right, or in withholding possession from the owner under a claim of title inconsistent with his title. Here the defendant did none of these things.

Judgment reversed, and judgment for the defendant to recover his costs.

DAVIS v. RANDALL

(Supreme Court of Vermont. Windham.
Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION AND SUBSEQUENT ADMISSION OF EVIDENCE.

Defendant may not complain of the exclusion of a question to plaintiff whether he wrote a letter; plaintiff having shortly afterwards admitted writing it, and it having been received in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195-4206; Dec. Dig. § 1058.*]

2. EXCHANGE OF PROPERTY (§ 13*)—EVIDENCE—TERMS OF CONTRACT.

On the question whether the exchange of plaintiff's oxen for defendant's horse was absolute, as contended by defendant, or, as contended by plaintiff, on the condition that if the horse proved to be over a certain age, or failed to get over its lameness, defendant should take it back and pay him \$125 for the oxen, the fact of the oxen being worth much less than \$125 is admissible, as tending to show the contract was not as claimed by plaintiff.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 13.*]

3. TRIAL (§ 125*)—ARGUMENT OF COUNSEL—APPEAL TO SYMPATHY.

The statement in argument of plaintiff's counsel, in an action in which the issue was whether the exchange of plaintiff's oxen for defendant's horse was absolute, as contended by defendant, or, as contended by plaintiff, on the condition that if the horse proved to be over a certain age, or did not get over its lameness, defendant would take it back and pay plaintiff \$125 for the oxen, that a verdict for defendant would take plaintiff's oxen from him, and give him nothing for them, was an unwarranted appeal to the sympathy of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.*]

4. TRIAL (§ 62*)—RECEPTION OF EVIDENCE.

Though a count of the declaration set up a sale of oxen to defendant at a fixed price, yet, there being no evidence thereof, defendant was not entitled to give evidence in contradiction of the allegations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

Exceptions from Windham County Court; Willard W. Miles, Judge.

Assumpsit by Charles L. Davis against Hugh Randall. The plea was the general issue. Verdict and judgment for plaintiff, and defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Gibson & Waterman and O. R. Clayton, for plaintiff. Loren R. Pierce and Charles S. Chase, for defendant.

POWERS, J. The plaintiff exchanged a pair of oxen with the defendant for a horse. This horse was of uncertain age and was lame, and the plaintiff claimed, and gave evidence tending to show, that it was stipulated in the trade that if the horse turned out to be over 12 years old, or failed to get over its lameness, the defendant should take it back and pay \$125 for the oxen. The defendant denied this, and claimed, and gave evidence tending to show, that the transaction was a simple exchange of property, without any conditions or special agreements. When the case was submitted to us, it was orally agreed by counsel that a transcript of the evidence was to be treated as referred to and made to control, though the exceptions did not contain such reference.

[1] During the cross-examination of the plaintiff, he was shown a letter, signed by him and addressed to one Wheeler, wherein it was stated that the horse in question was a "good worker and an extra good walker," and was asked if he wrote or caused to be written a letter containing that statement. This question was excluded, and an exception allowed the defendant. Shortly after this ruling, the witness admitted writing the letter, and it was received in evidence and read to the jury. So the defendant, having received the full benefit of the letter and its

contents, is not in a position to complain, and this exception is unavailing.

[2] As bearing on the probability of his making the special agreement testified to by the plaintiff, the defendant offered to show the condition and value of the oxen at the time of the exchange, expecting, as counsel stated, to show that the cattle were worth much less than \$125. This was excluded, and the defendant excepted. It is true, as suggested by the court, that the value of the property was not put in issue by the pleadings, and the general rule is that the evidence must correspond with the allegations and be confined to the point in issue. But facts affording a reasonable presumption or inference as to the principal fact or matter in issue are not excluded. Any fact, though it be collateral, which renders a material fact more probable or improbable, is proper evidence, and may be considered in determining whether that fact exists. *Tufts v. Chester*, 62 Vt. 353, 19 Atl. 988. So, when the parties to a contract disagree as to its terms, and the evidence thereof is conflicting, it is often permissible to show the value of the property involved. Thus, in *Houghton v. Clough*, 30 Vt. 312, the question was whether the reconveyance of certain land was in settlement of all or only a part of the notes secured thereon, and it was held that it was competent for the plaintiff, who sued on one of the notes, to show that the value of the land at the time of the reconveyance was not equal to the amount of the notes.

In *Kidder v. Smith*, 34 Vt. 294, the question was as to the price agreed upon in the sale of certain personal property, and it was held that it was competent to show the value of the property at the time of the sale, as tending to show what the contract really was. In *Bedell v. Foss*, 50 Vt. 94, the question was whether the defendant agreed to pay the plaintiff's claim on a certain horse in defendant's possession, and it was held that evidence that the value of the horse was less than the amount of the claim was admissible. In *State v. Donovan*, 75 Vt. 308, 55 Atl. 611, it was material and important to show the original terms of the written contract which the respondent was charged with altering, and it was held that evidence of the value of the property involved was admissible. In *Green v. Dodge*, 79 Vt. 73, 64 Atl. 499, the question was as to the amount of rent stipulated for in a lost lease, and it was held that evidence of the rental value of the premises was admissible to show the probable rent agreed upon.

If, as the defendant claimed, the cattle which he acquired by the trade were worth less than \$125, it would be improbable that he would agree to pay that price for them in case the horse failed to recover. For what it was worth, this evidence should have been

received, and the exception to its exclusion must be sustained.

[3] Subject to exception, counsel for the plaintiff was allowed to say in argument, in substance, that a verdict for the defendant would take the plaintiff's oxen from him and give him nothing for them. This argument cannot be approved. As suggested by defendant's counsel when he made his objection, the plaintiff received the horse in the trade, and whether he was entitled to anything more depended upon how the jury found the facts to be. With the consequences of their findings the jury had nothing to do, and a consideration thereof would be improper. The argument was an unwarranted appeal to the sympathy of the jury, and should not have been allowed.

[4] There was no error in rejecting the defendant's offer to show that he did not purchase the oxen. Although the second count of the declaration set up a sale of the oxen at a fixed price, there was no evidence tending to establish these allegations. Consequently the defendant was not entitled to give evidence in contradiction. Besides, he testified fully as to what the trade was, and the evidence offered would have added nothing to his statement.

Reversed and remanded.

RAND v. BORDO.

(Supreme Court of Vermont. Windham.
Oct. 9, 1911.)

1. FRAUD (§ 57*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for deceit in the exchange of horses, where plaintiff's evidence tended to show that the horse he received of defendant, if sound and free from defects, as defendant represented, would have been worth substantially as much as the horse he gave in exchange for it, evidence of the kind and value of the horse he gave defendant was material.

[Ed. Note.—For other cases, see *Fraud*, Dec. Dig. § 57.*]

2. APPEAL AND ERROR (§ 690*)—REVIEW—MATTERS NOT APPARENT OF RECORD.

In an action for deceit in the exchange of horses, the admission of testimony for plaintiff showing the defective condition of the horse he received when being driven by defendant's son, does not show error, where the exception does not show when the occasion was.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2897-2899, 2902-2904; Dec. Dig. § 690.*]

3. APPEAL AND ERROR (§ 241*)—RECORD—EVIDENCE.

A statement in a ground of motion for a verdict that "the plaintiff's testimony is referred to" is insufficient to bring the testimony before the Supreme Court for review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1413-1416; Dec. Dig. § 241.*]

4. APPEAL AND ERROR (§ 706*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where neither the declaration nor a copy thereof is furnished the Supreme Court, an ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ception to the overruling of a motion in arrest of judgment will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 708.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action on the case by Fred C. Rand against Peter Bordo for exchange of horses. Plea, the general issue. Verdict and judgment for plaintiff after trial by jury and defendant excepts. Defendant moves in arrest of judgment and to the overruling of the motion, he excepts. Judgment affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Ryder & Graham, for plaintiff. Bert E. Cole, for defendant.

WATSON, J. The bill of exceptions states that the declaration alleges that the defendant, knowing a certain brown mare to be unsound and infected with a certain disease, by warranting said mare to be sound and free from defects, and by concealing certain defects and unsoundness, fraudulently and deceitfully induced the plaintiff to make the exchange, and thereby deceived and defrauded the plaintiff.

[1] It appeared that it was an even exchange; and the plaintiff's evidence tended to show that the mare he received of the defendant, if sound and free from defects, as defendant represented, would have been worth substantially as much as the horse which the plaintiff gave in exchange for her. Under objection and exception the plaintiff was permitted to show the kind and value of the horse he let the defendant have. In substance the objection was that the evidence was immaterial. But such evidence was material, as bearing on the trade made. If the mare, in consequence of her unsoundness and defective condition, was of much less value than the horse, and if she would have been substantially of the same value as the horse, had she been sound and free from defects, it is more likely that the defendant made representations concerning her as the plaintiff claimed, and as his evidence tended to show. *Bedell v. Foss*, 50 Vt. 94; *State v. Donovan*, 75 Vt. 308, 55 Atl. 611.

[2] Subject to the same objection, a witness for the plaintiff gave testimony showing the defective condition of the mare on an occasion when she was being driven by the defendant's son. The exceptions do not show when this occasion was. Error does not appear.

[3] At the close of the evidence the defendant moved for a verdict on seven different grounds stated, each pertaining to the evidence. As a part of the third and fourth grounds, each, the motion states: "The plaintiff's testimony is referred to." This refer-

ence to the testimony—and none other is shown by the bill of exceptions—is only by the defendant in his motion, and such a reference does not bring the testimony before this court. *Sowles' Adm'r v. Sartwell*, 76 Vt. 70, 56 Atl. 282; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888. The evidence is therefore not before us, and the exception to the overruling of the motion is not considered.

[4] The defendant excepted to the overruling of his motion in arrest of judgment; but, since neither the declaration nor a copy thereof has been furnished us, this exception is not considered.

Judgment affirmed.

STATE v. RUTLAND RY., LIGHT & POWER CO.

(Supreme Court of Vermont. Windsor. Oct. 9, 1911.)

1. CORPORATIONS (§ 585*)—CHARTER FEE—CONSOLIDATION OF CORPORATIONS—"PERSONS."

A charter fee would not accrue to the state upon the consolidation of several existing corporations, so as to form a new corporation by virtue of P. S. 4287, as amended by Acts 1908, No. 103, providing that "three or more persons of age" may form a corporation; the word "persons" not including corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 585.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

2. CORPORATIONS (§ 585*)—CHARTER FEE.

If an attempted consolidation of corporations was without legislative authority, no charter fee would accrue to the state, since there would not even be a de facto corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 585.*]

3. CORPORATIONS (§ 28*)—DE FACTO CORPORATIONS.

A de facto corporation can only exist where there is a law under which a de jure corporation could be created.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 28.*]

4. CORPORATIONS (§ 585*)—CHARTER FEE—"PERSONS."

Acts 1898, No. 19, as originally enacted, referred to "any body or persons" seeking incorporation, etc., but as revised and re-enacted by P. S. 800, provided that "persons" seeking incorporation by a special act of the General Assembly should, before the bill was introduced for that purpose, deposit as provided the fee therein specified. P. S. 26 permits the word "persons" to be applied to bodies corporate and politic. In 1896 the People's Gas Light Company, the Rutland Street Railway Company, the Vermont Internal Improvement Company, and the Chittenden Power Company filed with the Secretary of State an agreement for consolidation, the consolidated company being styled the Rutland Railway, Light & Power Company, and all the property being turned over to it, but it had never paid any charter fee. Acts 1908, No. 303, § 1, legalizes all acts and contracts whereby the Rutland Street Railway Company, the People's Gas Light Company, the Chittenden Power Company, and the Rutland City Electric Company consolidated with the Vermont Internal Improvement Company.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

Section 2 provided that all the charter rights, powers, etc., conferred upon the five companies should be conferred upon the Rutland Railway, Light & Power Company. *Held*, that the word "persons" used in section 800 included previously existing corporations, as well as natural persons; and when Act No. 303 became a law the Rutland Railway, Light & Power Company became a corporation by special act, making the charter fee, which should have been deposited when the bill was introduced, belong to the state, but if it was not deposited when the bill was introduced the state might thereafter collect it by a suit against the consolidated company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 585.*]

5. STIPULATIONS (§ 14*)—CONSTRUCTION.

In an action by the state to recover a charter fee from a corporation, incorporated by a special act of the Legislature by the consolidation of several corporations, the parties stipulated that the state's claim was that there was due to it a charter fee or additional tax from the consolidated corporation, or one of the formerly existing corporations, or both, and that defendants claimed that no additional charter tax is by law due from them to the state. *Held*, that the stipulation covered a claim against the consolidated corporation for a charter fee which should have been paid before the special act of incorporation was introduced in the General Assembly, but which was not in fact then paid.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 14.*]

Exceptions from Windsor County Court; E. L. Waterman, Judge.

Assumpsit on the common money counts by the State of Vermont against the Rutland Railway, Light & Power Company. Heard on an agreed statement of facts. Judgment for plaintiff, and defendant excepts. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John G. Sargent, Atty. Gen., and Homer L. Skeels, State's Atty., for the State. T. W. Moloney, for defendant.

POWERS, J. In 1896, four corporations having their principal offices at Rutland executed and filed with the Secretary of State an agreement for consolidation. The constituent companies were the People's Gas Light Company, the Rutland Street Railway Company, the Vermont Internal Improvement Company, and the Chittenden Power Company, and the consolidated company was styled the Rutland Railway, Light & Power Company. In accordance with the consolidation agreement, the stock of the consolidated company was issued in exchange for that of the constituent companies, and all the property of the latter was turned over to the former. Each of the constituent companies had paid all charter fees and license taxes called for by the law, but the defendant never paid a charter fee, save as herein-after stated. In 1906, a bill, which finally became No. 303, Acts of 1906, was introduced into the Legislature, passed the House and

Senate, and went to the Governor for his approval. While this bill was awaiting the Governor's signature, the treasurer of the state made a claim that the defendant owed the state an unpaid charter tax. This claim was denied by the defendant, but, rather than have the approval of the bill delayed or imperiled by it, the defendant entered into a stipulation with the Attorney General, whereby it was agreed that the defendant should deposit the sum of \$500—the maximum sum for which it could be liable—with the state treasurer to await the result of this friendly suit, to be brought in Windsor county for convenience, and in case the state prevailed therein this deposit was to be used to liquidate the judgment; otherwise it was to be returned. The deposit was made, and thereupon the pending bill was approved by the Governor. This suit was brought July 20, 1909; specification covering a charter fee of \$500 was filed August 13, 1909; defendant's plea and notice were filed January 1, 1910; an agreed statement of facts was filed, and a trial by court had thereon. Judgment was rendered for the plaintiff for \$500 to which the defendant excepted.

The defendant claims that each of the consolidating corporations had been duly authorized by the Legislature to enter into the consolidation agreement, and that the result was a new corporation, legally created, vested with all the rights, privileges, franchises, and property of the old corporations, which were wiped out by the transaction. The state does not challenge the authority of the constituent companies, though an examination of the acts referred to in support of their authority discloses that interesting, if not difficult, questions would be presented, if we were called upon to investigate that subject. But whether this attempted consolidation resulted as the defendant claims or was ineffective for want of legislative authority in some or all of the parties thereto, is a question we are not called upon to decide. The consolidation, if valid, did not alone entitle the state to a charter fee.

[1] No fee would accrue under P. S. 4287, which provides (as amended by Acts 1906, No. 103) that three or more "persons" may by articles of association form a corporation, because it refers to natural persons only, and not to corporations. This is apparent from the requirement that the persons associating shall be "of age," which could not, of course, refer to artificial persons. And, were these qualifying words omitted from the statute, the result would be the same. Thus it was held, in *Factors' etc., Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233, that a corporation was not a "person," within the meaning of a statute authorizing the formation of a corporation by not less than six persons. And in *Denny Hotel Co. v. Schram*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130, it was held that a statute empowering two or more "persons" to form a corporation did not authorize a corporation to become a subscriber to the stock of another corporation, though another statute provided that the term "person" might be construed to include a corporation.

Nor would a fee accrue under P. S. 800, for corporations formed by the consolidation of pre-existing corporations are not therein provided for. While it is true that a corporation so formed becomes a new and distinct corporation—assuming that the consolidation is legally accomplished—and that by means of a contract entered into between its constituent companies, it derives its corporate character from the Legislature, through the act or acts authorizing the consolidation. So it is held that a special act authorizing consolidation contravenes a constitutional provision against the creation of corporations by special act. *Shields v. Ohio*, 95 U. S. 323, 24 L. Ed. 357. Though such a corporation is, in this sense, created by a special act of the Legislature, it is apparent that it is not covered by P. S. 800, for it cannot be known when the legislative authority is granted, or at any other time prior to the consolidation, whether the authority will be made use of and a consolidation effected, or its terms, or the amount of the capital stock of the consolidated company, which is made the basis of the amount of the tax required. And besides the provision for prepayment is wholly inapplicable and impossible in the case of a consolidated corporation so brought into existence.

[2-4] If the attempted consolidation was illegal for want of legislative authority, no fee could accrue to the state, because not even a de facto corporation resulted; such a corporation can exist only when there is a law under which a de jure corporation could be created. *Noyes, Intercorp. Relations*, §§ 17, 92. *American Loan, etc., Co. v. Minnesota, etc., R. Co.*, 157 Ill. 641, 42 N. E. 153. It follows that if the state is entitled to a charter fee from the defendant, it accrued upon the passage of No. 303, Acts of 1908, by force of P. S. 800, which provides that "persons seeking incorporation by special act of the General Assembly" shall deposit, as therein provided, the fee therein specified. Here, again, use is made of the term "persons," but not, we think, in the restricted sense. By P. S. 26, it is provided that the word "persons" may extend and be applied to bodies corporate and politic; and the section under consideration was, we think, intended to cover all who apply, be they natural persons or corporations previously existing. We are confirmed in this opinion by the fact that when this statute was enacted, (No. 19, Acts of 1898), it read, "any body or persons seeking incorporations," etc.; the present reading of the section being the re-

sult of revision. The language of the original act indicates an appreciation of the fact that circumstances might arise which would impel a corporation, through doubt of the legality of its organization, or for some other reason of its own, to seek a special act of the Legislature confirming or declaring, in express terms, its corporate character. An examination of No. 303 discloses that the first section thereof confirms and legalizes all acts and contracts whereby the Rutland Street Railway Company, the People's Gas Light Company, the Chittenden Power Company, and the Rutland City Electric Company consolidated with the Vermont Internal Improvement Company. This is the first time the name of the Rutland City Electric Company appears in any of the proceedings. But it may well be taken that this was an attempt to ratify by legislative action the consolidation hereinbefore discussed. The second section of the act provided that all the charter rights, franchises, powers, and privileges conferred upon the five companies just named are continued in force and conferred upon the defendant company, and that each of the constituent companies should cease to exist. When this bill was introduced into the Legislature, the defendant, or the constituent companies, or both, were "seeking incorporation by special act of the General Assembly," and it made no difference whether the defendant was then a legal corporation or not. When the act became a law, the defendant was a corporation by special act of the Legislature, regardless of what its previous status was. We must assume that a sufficient reason existed for this application; with what that reason was, we have no concern. Previous thereto, the statutory deposit should have been made. When the act became effective, the deposit would have become the money of the state. Not having been made in advance, it can now be collected in this suit. There is no merit in the defendant's contention that the effect of P. S. 800 is not to require a charter fee from all corporations chartered by special act. It is the same as it would be, had the section provided that all such corporations should pay the fee, and then required that it should be paid in advance. The acceptance of a charter specially granted, or of a confirmatory act like the one here involved, carries with it an implied promise to pay the fee.

[5] Nor can we sustain the defendant's claim that the judgment below was based upon a different claim than that covered by the stipulation. The defendant insists that the stipulation only relates to a fee or fees which had become payable to the state before the introduction of the bill which became No. 303, while the judgment was rendered for a fee which accrued to the state upon the passage of that act. The stipulation refers to a claim on the part of the state that there "is due to the state a charter

tax or an additional tax" from the defendant, or the improvement company, or both. It also states that "the said companies claim that no additional charter tax is by law due from them to the state." The specification filed by the plaintiff recites that the plaintiff "seeks to recover the sum of five hundred dollars due the plaintiff from the defendant for defendant's charter fee." The language of the stipulation is broad enough to cover the claim on which the judgment was based, for, as we have seen, the fee was then due the state, since it was entitled to have it paid before the pending act became a law.

Affirmed.

H. P. AGOSTINES & CO. v. C. E. FENN & CO.

(Supreme Court of Vermont. Washington. Oct. 10, 1911.)

SALES (§ 181*)—ACTION FOR PRICE—EVIDENCE.

Where, in an action for the price of a monument purchased by defendants for resale to D., defendants denied an acceptance because certain dark stains afterwards appeared on the monument, evidence that after it had been set up one of the defendants received from D. a complaint that the monument was discolored was admissible to show that there was no unreasonable delay in repudiating the purchase.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 485; Dec. Dig. § 181.*]

Exceptions from Washington County Court; Alfred A. Hall, Judge.

Action by H. P. Agostines & Co. against C. E. Fenn & Co. Judgment for defendants, and plaintiffs bring exceptions. Affirmed.

Argued before MUNSON, WATSON, HAS-ELTON, and POWERS, JJ.

Richard A. Hoar and Earle R. Davis, for plaintiffs. Edwin L. Scott and J. Ward Carver, for defendants.

MUNSON, J. The suit is to recover the price of a monument which was duly delivered. Defendants claimed that certain dark stains afterwards appeared on it, and plaintiff claimed that the stains, if any in fact existed, got into the granite after it was shipped. The court admitted evidence, contained in the deposition of one of the defendants, to the effect that after the monument was set up he received from W. J. Dingle a complaint that it was discolored. This was objected to as being a complaint from a party foreign to the contract, and therefore immaterial; and it was admitted solely for the purpose of showing the basis of the defendants' action. It is evident from the charge, which is referred to generally, that the action of the defendants which the court here referred to was the opening of a correspondence with the plaintiffs about the claimed defect. It appeared on argument, from the statements of both

sides, that Dingle was the person who bought the monument from defendants.

It may be gathered from the papers that the plaintiffs are granite manufacturers in Barre, that the defendants are granite dealers in Chicago, and that Dingle lives in Sandusky, Ohio. The monument was evidently bought by Dingle for a particular customer, for it appears from the contract between the plaintiffs and the defendants that the name letters were cut by the plaintiffs. These facts seem to indicate that the monument was shipped directly from Barre to Sandusky, and was set up without having been seen by the defendants. The monument was erected in the cemetery, and remained standing until after the trial. It appears from the charge that the question of acceptance was one of the matters submitted. The plaintiffs claimed an acceptance on the ground that the purchase was not repudiated within a reasonable time. So the defendants were in the position of denying that there was an acceptance of a monument which was actually erected and still standing. In this situation it was important for them to show that, as soon as they were notified of the existence of a defect which showed that the monument was not what the contract called for, they brought the matter to the attention of the plaintiffs. The defendants' evidence was simply that he received a complaint from the purchaser that the stone was discolored. It is apparent from the charge that this complaint was the basis of the defendants' complaint to the plaintiffs, and that the claimed discoloration was the subject of the ensuing correspondence and the ground of defense on trial. We think the evidence of the initial complaint was admissible as bearing upon the question of acceptance, in that it tended to show that there was no unreasonable delay in repudiating the purchase.

Judgment affirmed.

BIXBY, Collector, v. ROSCOE et al

(Supreme Court of Vermont. Chittenden. Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 241*)—MOTION CONSTRUED AS BY PARTIES AND COURT BELOW.

A motion for a verdict will be considered by the Supreme Court as made on a certain ground, in addition to others, it being open to such construction, and having been in the court below so construed by both parties, and by the court in rendering its decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1416; Dec. Dig. § 241.*]

2. TAXATION (§ 204*)—EXEMPTION—OFFER—ACCEPTANCE—PRACTICAL CONSTRUCTION.

Even if it be the general rule that an offer of a town to exempt property invested in manufacturing, naming no time for acceptance, must be accepted in a reasonable time, yet the offer to exempt five years from commencement of business being treated by both parties as open

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by the manufacturer by removing his establishment to the town and there operating it, and by the town in fact exempting it each of the three years next following, this is to be treated as a practical construction of the acceptance being seasonable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 321, 333; Dec. Dig. § 204.*]

3. TAXATION (§ 204*)—EXEMPTIONS—COMMENCEMENT.

A town being authorized by V. S. 365, to vote exemption from taxation, not exceeding ten years from the commencement of business, of property invested in manufacturing, its vote to exempt for a term not exceeding five years is to be construed as for such time "from the commencement of business."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 332; Dec. Dig. § 204.*]

4. TAXATION (§ 206*)—EXEMPTIONS—ACCEPTANCE OF OFFER—WITHDRAWAL OF EXEMPTION.

One having removed his manufacturing establishment to a town on its vote to exempt it from taxation for five years, the exemption cannot be withdrawn in that time.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 338; Dec. Dig. § 206.*]

5. TAXATION (§ 594*)—SWEARING TO INVENTORY—QUESTION FOR JURY.

It being a material question, in an action to recover taxes assessed against defendant, whether his inventory, purporting to have been sworn to by him before a lister, was sworn to him, the listers having made up his list based on his inventory, whereas, if he willfully omitted to swear to it, it was, under P. S. 561, the listers' duty, performance of which was essential to validity of the list, to ascertain as best they could the amount of his taxable property, appraise it at its true value and double the amount so obtained, the question of its having been sworn to should have been submitted to the jury, the evidence in respect thereto being conflicting, and his tending to show that he refused to swear to it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1217; Dec. Dig. § 594.*]

6. EVIDENCE (§ 471*)—CONCLUSIONS OF FACTS.

The question whereby a town clerk is asked to state whether or not the warning for an annual town meeting was posted in a public place, and, if so, where, objected to as incompetent, is proper.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

7. WITNESSES (§ 236*)—UNRESPONSIVE ANSWER—EFFECT.

A proper question is not made improper by an unresponsive answer.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 822; Dec. Dig. § 236.*]

8. TOWNS (§ 19*)—TOWN MEETING—POSTING OF WARNING—EVIDENCE.

That the annual meeting of the legal voters of a town was held at the time and place specified in a warning thereof 15 days after its recording, and that officers were elected and business was transacted pursuant to the articles therein, is prima facie evidence that the warning was posted as required by law.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 24-27; Dec. Dig. § 19.*]

9. TAXATION (§ 411*)—ABSTRACT OF INDIVIDUAL LIST OF TAXPAYERS.

The statute requiring the listers to make an abstract of the individual list of all the taxpayers, not providing for any distinction in the abstract between the list of an individual based on his inventory and the list of an individual

made up under the provisions of the law because of his willful failure to make a proper inventory, the abstract need not show the specific action of the listers in making up the list of an individual.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 677-681; Dec. Dig. § 411.*]

10. TAXATION (§ 446*)—ABSTRACT OF INDIVIDUAL LIST—ALTERATION.

The listers' abstract of the individual list of all taxpayers cannot be excluded from evidence because of alterations shown on its face; the testimony of the town clerk being that no alterations had been made in it after it was lodged in his office by the listers.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 784-786; Dec. Dig. § 446.*]

11. TAXATION (§ 441*)—LISTS—ERRONEOUS INCLUSION OF PROPERTY.

The inclusion in a tax list of machinery, not only properly as part of the real estate to which it is fixed, but also as personalty, and the assessment of it in both forms, is within P. S. 606, providing that the assessment of a tax on a list made up in part of property erroneously in the list does not invalidate the whole tax, but only such as is assessed on the invalid part of the list.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 773; Dec. Dig. § 441.*]

12. APPEAL AND ERROR (§ 760*)—BRIEF—STATING POINTS RELIED ON.

An exceptor must state in his brief the precise point on which he relies as reversible error; and he having objected to admission of evidence on six grounds, some of which are without force, and in his brief merely stated that the evidence "was incompetent for the reasons given," referring to the transcript, the court will not examine the several grounds named in taking the exception to see if there was error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3095; Dec. Dig. § 760.*]

13. SHERIFFS AND CONSTABLES (§ 10*)—OATH OF OFFICE.

A constable is in authority under the town by the votes of which he is elected, and so is not required to take and subscribe the oath of office required by Const. c. 2, § 29, of officers "in authority under this state."

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 23, 24; Dec. Dig. § 10.*]

Exceptions from Chittenden County Court; Zed S. Stanton, Judge.

Assumpsit by Ira Bixby, collector, against L. H. Roscoe and trustees. Plea the general issue. Verdict was directed for plaintiff, and defendants bring exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Martin & Bailey and Darling & Mower, for plaintiff. C. S. Palmer and V. A. Bullard, for defendants.

WATSON, J. This action is brought under the statute (P. S. 644) to recover by trustee process taxes assessed against the defendant in the town of Essex for the year 1909. At the close of the plaintiff's opening evidence the defendant moved that a verdict be directed in his favor because (1) it does not appear that the taxes sought to be re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

covered are legal, and such as the defendant is bound in law to pay, nor that the plaintiff is legally qualified to collect them; (2) it does appear that said taxes are illegal, that the plaintiff is neither qualified nor authorized by law to collect the same, and (in the language of the bill of exceptions) "that the defendant's printing establishment was exempt from taxation by virtue of the vote of the town of Essex." The motion was overruled, to which an exception was taken. Thereafter evidence was introduced in defense and in rebuttal. At the close of the evidence the defendant renewed his motion for a verdict "on the grounds and for the reasons stated." This was overruled and an exception allowed. The plaintiff then moved for the direction of a verdict in his favor, whereupon the defendant made requests that the case be submitted to the jury. The defendant's requests were overruled and a verdict ordered for the plaintiff to recover the amount of the taxes in question, to which defendant excepted.

[1] It is argued by the plaintiff that defendant in his motion for a verdict cannot stand upon the claim that the property taxed was exempted by vote of the town, because, as shown by the transcript of the complete record of the trial, which is made a part of the bill of exceptions and is to control, this ground is not stated in the motion. It appears from the transcript, however, that in the court below the motion was construed by counsel on both sides, and by the court in rendering its decision thereon, as covering this ground. It being subject to such construction, the consideration of this court will be directed accordingly. The record shows that at the annual town meeting of Essex in March, 1896, pursuant to an article in the warning sufficient for that purpose, it was "voted to exempt from taxation for a term not exceeding five years all property exceeding in amount the sum of one thousand dollars invested in manufacturing purposes agreeably to section 365 of the Vermont Statutes." This action of the town was never rescinded.

It appeared from the uncontradicted evidence on the part of the defendant that he was formerly engaged in the business of conducting a general and mercantile printing plant in the town of Jericho, this state; that while thus engaged his attention was called to the said vote of the town of Essex, and, after conferring (through his agent) with the officers of that town concerning the matter of the exemption of his plant, he removed the same to Essex in the spring of 1904 in acceptance of the proposal contained in its said vote, and commenced business there in September following; that the plant was, in fact, exempted from taxation in that town for the first three years after the removal; that in the quadrennial appraisal of 1906 it was noted as exempt, and although in the list of that year, by mistake, the exemption was not made, on discovering the error the

tax was abated; that in 1908 defendant received notice that the exemption was disallowed, but received it too late and after the time for the hearing of persons aggrieved had passed. In 1909 the plant was taxed, and some of the taxes here in question were assessed thereon. In the course of the discussion on defendant's motion for a verdict at the close of plaintiff's opening case, the court ruled that the defendant's printing plant was a manufacturing establishment within the meaning of the statute. No exception was taken to this ruling, and, as we understand it, a concession to the same effect was made by counsel for the plaintiff in the argument before us. In overruling the motion the court held that the statute does not confer on towns the right to exempt manufacturing establishments by a vote general in terms, like that taken by Essex in 1896. But no such claim is made by the plaintiff in this court, nor could there well be for it was expressly held otherwise in *Caverly-Gould Co. v. Springfield*, 83 Vt. 396, 76 Atl. 39.

[2] The plaintiff contends, however, that the defendant did not accept the offer within a reasonable time, and consequently his property is not within the exemption. Assuming, but not deciding, the general rule of law to be, as claimed, that, when no limitation of time is named within which the offer is to run, the acceptance must be within a reasonable time, yet when, as here, the offer is treated as open by both the town making it and by the acceptor, and is acted upon by both—by the latter in removing his manufacturing establishment to that town and there operating the same, and by the town in exempting such establishment in fact from taxation for the three successive years following the removal—a practical construction of the contract is given and acted upon by the parties, showing the acceptance to have been within the legal limitation of the time of the proposal. In such circumstances the town is not in a position to say the offer came to an end before the time of the acceptance, and the rule applies that, where a person has had the benefit of the consideration for which he bargains in a unilateral contract, he is held bound. *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Wald's Pollock on Cont. by Williston*, 35, and note 40.

[3] Adverting to the proposal shown by the vote, it was "to exempt from taxation for a term not exceeding five years all property * * * invested in manufacturing purposes, agreeably to section 365 of the Vermont Statutes." We construe the offer thus made to be as broad as the statute, except as to the term of the exemption, which was limited to five years; that is, five years from "the commencement of business." The statute does not authorize such exemption to be made from an earlier date.

[4] And, since the defendant removed his

plant to Essex in acceptance of the offer, he was entitled to the exemption thereof, including the real estate, such machinery, appliances, and buildings as were necessary for the prosecution of the business, and all capital and personal property used in such business, for the full term of five years from the commencement of business there (see *Westmore Lumber Co. v. Orne*, 48 Vt. 90), and the town could not within that period withdraw the exemption to his prejudice. *Caverly-Gould Co. v. Springfield*, cited above; *City of Middleboro, etc., v. New South Brewing & Ice Co.*, 108 Ky. 351, 56 S. W. 427; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *McGehee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Memphis & St. Louis R. R. Co. v. Loftin*, 105 U. S. 259, 28 L. Ed. 1042. Therefore to order a verdict for the plaintiff was error. The result of the case, however, does not depend on this exemption alone; for the record shows real estate owned by and taxed to the defendant, not a part of his manufacturing plant, also a poll tax against him.

[5] The plaintiff's evidence tended to show that the defendant's inventory, marked "Exhibit F", was signed and sworn to by him, as on its face it purports to have been; that, there being some irregularity as to one or more of the answers to interrogatories, the listers requested the defendant to change the inventory in those respects, which he refused to do; that the inventory was accepted by the listers and the defendant's list made up, based thereon. The defendant's evidence tended to show that although he filled out this inventory by way of answering the interrogatories, and signed it, and sent it to the listers, it was never sworn to by him. The inventory purports to have been sworn to by the defendant before the lister whose name is signed to the jurat, and not otherwise. Whether it was so sworn to was a material question in the case, and should have been submitted to the jury. If the defendant intentionally omitted to make oath thereto, as his testimony tends to show, the circumstances shown by the evidence were such that the listers in the performance of their duties must have had knowledge thereof, and they had no authority in law to base his list thereon. The statute is that in such circumstances the listers shall ascertain as best they can the amount of the taxable property of such taxpayer, appraise the same at its true value in money, and double the amount so obtained, etc. P. S. 561. This is the method prescribed by law for making a recusant taxpayer's list (*Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321), and it is essential to the validity of the list that such method be followed. This has been held even to the extent of the real estate appearing in the quadrennial appraisal. *Smith v. Stannard*, 81 Vt. 319, 70 Atl. 568.

[6, 7] The town clerk, called as a witness by the plaintiff, was asked to state whether or not the warning for the annual town meeting in 1909 was posted in a public place, and, if so, where, if he knew. This was objected to as incompetent. The witness answered, "I know that they were posted in three public places." No objection was made to the answer. The question was a proper one, and it was not rendered improper by the unresponsive answer. The bill of exceptions states that defendant asked to have this answer stricken out, but the transcript, made controlling, does not show that defendant so asked nor that the court made such refusal. The witness then testified without objection that he knew the warning was posted in two of those places more than 12 days, and that the notice was recorded. He was then asked whether he was able to state whether it was posted between its date or between the record—15th February—and 12 days before town meeting, and answered, "Well, I know it was posted in two public places between 12 and 20 days before town meeting." A certified copy of the record of the warning was then received in evidence subject to objection that the proper foundation had not been laid. Defendant's attorney then moved to strike out the last answer, saying: "Let him state where the posting was, and let the jury say whether a public place or not." Plaintiff's attorney said this motion came too late. The motion was then denied and no exception taken.

[8] It is unnecessary to pass upon the sufficiency of this evidence to go to the jury on the question of the warning being posted in three public places. The warning, recorded February 15th, was for a meeting of the legal voters of the town on Tuesday, March 2, 1909; and the record shows that the annual meeting of such legal voters was held at the time and place specified in the warning, and that officers were elected and business transacted pursuant to the articles therein. We think this was *prima facie* evidence that the warning was posted as required by law. *Lemington v. Blodgett*, 37 Vt. 210.

[9] The abstract of the individual list of the taxpayers was received in evidence. It is urged that it was erroneously admitted; for, if the taxpayer's inventory is accepted by the listers as containing a true and correct statement of his real and personal property subject to taxation, the abstract should correspond with the inventory, and, if the inventory is not so accepted, it is the duty of the listers to make up the list of such taxpayer under the doubling process, neither of which was done as to the defendant. This objection is without force. The requirements of the statute respecting the abstract are the same whether the particular list be based upon an inventory or

be made up under the provisions of the law because of willful failure to make a proper inventory; and it need not show the specific action of the listers in making up a particular list. *Smith v. Stannard*, cited above; *Taylor v. Moore*, 63 Vt. 60, 21 Atl. 919.

[10, 11] The only other objections to the admission of the abstract upon which reliance is now placed amount to this: (1) That it bears evidence on its face of having been altered; and (2) since the record shows clearly that the fixed machinery of the defendant's manufacturing plant had been once listed in one of the items of real estate, it was error for the listers to place it again in the abstract for the purpose of taxation. The abstract could not be excluded on the first ground, for the testimony of the town clerk was that no alteration had been made therein since it was lodged by the listers in the town clerk's office, nor on the second ground. Such machinery formed a part of the real estate to which it was fixed and could not be taxed in any other way, were it taxable at all. If it was also included in the item of personal property for the purpose of taxation and the tax assessed thereon, as the defendant claims, this would be the assessment of a tax upon a list made up in part of property erroneously set in the list. And, since the item of personal property is separable from the item of taxable real estate, such error does not invalidate the whole tax. P. S. 606.

Some point is made in defendant's brief touching the action of the board of civil authority on his appeal, and their qualification to act. Yet, as the certified copy of the record of the doings of the board shows the matters presented before it to pertain exclusively to the exemption of his manufacturing plant under the vote of the town, the questions raised become immaterial in view of our holding on that branch of the case.

[12] A copy of what purported to be a record of the listers' preliminary oaths was received in evidence. Objection thereto was made on six different grounds stated. In defendant's brief it is said that the evidence "was incompetent for the reasons given," referring to two pages of the transcript. No particular point is more definitely called to our attention. Some of the grounds stated in the transcript are without force, for instance, "as immaterial." It is the duty of an exceptor to state in his brief the precise point on which he relies as constituting reversible error; and, if he does not, the court will not examine the several grounds named in taking the exception to see whether error was committed. *Davenport v. Davenport*, 80 Vt. 400, 68 Atl. 49; *Wilkins v. Brock*, 81 Vt. 332, 70 Atl. 572. The brief is indefinite in the same way as to the exceptions

relied upon to the admission in evidence of the grand list book, and the notice to the taxpayers to pay their taxes. We pass them without consideration for the same reason.

[13] The plaintiff, having testified that he was elected constable of Essex in the year 1909, and served as such, testified in reply to questions by defendant's attorney that he took the oath as constable but did not subscribe it. Whereupon defendant objected to the plaintiff's official position as constable being shown, because by the Constitution such an official must subscribe the oath of office. Yet a constable is not an officer in authority under this state, within the meaning of chapter 2, § 29, of the Constitution, but is in authority under the town by the voters of which he was elected. Consequently the plaintiff was not required to take and subscribe the oath of office prescribed by the Constitution. *Rowell v. Horton*, 58 Vt. 1, 3 Atl. 906; *Brock v. Bruce*, cited above.

Since the case goes back for a new trial because of error in directing a verdict, the defendant's exceptions to the noncompliance with his requests to charge, and for special findings, and to the overruling of the motion in arrest of judgment, are not considered.

Judgment reversed and cause remanded.

HARTIGAN v. DEERFIELD LUMBER CO.

(Supreme Court of Vermont. Windham.
Oct. 9, 1911.)

1. MASTER AND SERVANT (§ 236*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

It is an employee's duty to exercise the care of a prudent man, in view of the attending circumstances and dangers, to prevent falling upon material accumulated around his place of work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 723-742; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 281*)—INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In a mill employee's action for personal injuries by stumbling over boards and catching his hand in a planer saw, evidence held to show that plaintiff was guilty of contributory negligence in not seeing the boards over which he tripped, and avoiding them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

3. MASTER AND SERVANT (§ 235*)—ASSUMPTION OF RISK—SERVANT'S KNOWLEDGE OF DANGER.

An employer is not liable for injuries through defects in the employee's place of work which he could have observed by exercising due care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

4. MASTER AND SERVANT (§ 231*)—INJURIES—ASSUMPTION OF RISK—RELIANCE ON FOREMAN.

The assurance of the foreman of a planing mill employé that he would take care of the

boards from a certain saw piled near such employe's machine did not excuse the latter from exercising due care to prevent stumbling over such boards, if he knew that they were being piled near his machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

Exceptions from Windham County Court; Willard W. Miles, Judge.

Action by John Hartigan against the Deerfield Lumber Company. Verdict and judgment for plaintiff, and defendant excepts. Reversed, and judgment rendered for defendant.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Herbert G. Barber, Frank E. Barber, and Arthur P. Carpenter, for plaintiff. Clarke C. Fitts and Hermon E. Eddy, for defendant.

WATSON, J. At the close of the evidence, the defendant moved for a verdict on different grounds stated, among which were that upon the whole evidence the plaintiff cannot recover, and that from the evidence he was guilty of contributory negligence, in that with the situation plainly before him he stumbled over a board or piece of lumber and fell against the machine; the stumbling or falling being an act of negligence which due care would have prevented. To the denial of the motion an exception was saved. Treating the defendant's negligence shown by the evidence as a proximate cause of the plaintiff's injury as he claims, we pass to the consideration of the question of negligence by him contributing thereto. The facts hereinafter stated either appeared on the trial or are in accordance with the evidence viewed in its most favorable light to the plaintiff. At the time of his injury, September 11, 1907, at 7:30 a. m., the plaintiff, a man of mature years, as an employe of the defendant, was operating a planing machine in the defendant's mill in Wilmington, this state. He had then been in the defendant's employ about eight months, taking lumber away from the planer in question between two and three months at first, and the rest of the time running the machine. The machine was located in the southeast corner of the mill, its front end toward the north. Near that end were feed rolls between which lumber was fed to the planer, and by which it was carried on between the cylinders and the knives some three feet or more further back. The position of the operator was in front of the machine and facing the feed rolls. Three levers were used in connection with this machine—a big lever four or five feet at the right and back of the operator's position, called the "shipper" or "shifter,"

used for the purpose of starting or stopping the entire machine; one at the left of the machine, used to set the bed for planing lumber to the desired thickness; and one also at the left, used to start or stop the feed rolls by shifting the belt from the loose pulley to the tight pulley, or in the converse manner, as might be required. By some of the witnesses this last-named lever was called the "feed lever," and for convenience we hereinafter refer to it by that name. The alleged negligence of the defendant upon which the plaintiff relies as the proximate cause of his injury pertains particularly to this lever.

The resaw was northwest of the planer from 15 to 20 feet further north, and its table extending southerly to within 3 or 4 feet of the planer. Usually the boards to be run through this planer came from the resaw, but sometimes they were brought on hand trucks from elsewhere. When the resaw was running, it was necessary to have a man to take the boards off the table and put them on the floor between that machine and the planer in question, from which place they were taken by the operator of the planer to feed to that machine. Witnesses estimated that about 10,000 feet of boards a day on an average thus came from the resaw to the planer, and some said that, when both machines were in operation, lumber came from the resaw faster than it could be put through the planer, though generally the resaw was not in operation constantly, and the lumber from it could be run through the planer in the course of the day; while others said the lumber could be run through the planer about as fast as it came from the resaw. A railroad ran past the mill on the east. On the morning of the accident the plaintiff was told by the foreman of the mill to commence planing dry lumber which came from the yard on a railroad car. Later, but before beginning work, the plaintiff asked the foreman, "What shall I do with the boards coming from the resaw?" to which the latter answered, "Never mind, I will take care of them." To be planed the dry lumber was taken from the car on a hand truck run up to about three feet of the planer, and lengthwise of it. The mill started at 6 o'clock, and was run to its full and usual capacity to the time of the accident. During that time the boards coming from the resaw were being piled on the floor between that machine and the planer, the usual place of putting them to be planed. After the mill had been running about 1¼ hours the pipe in the blower of the planer became clogged with shavings, as it sometimes did, and it was necessary for the plaintiff, in the performance of his duties, to go into the basement of the mill to clean out the pipe. In so doing he turned directly to his left, going northerly from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the planer a short distance, then turning to the right around the truck and the pile of lumber on it from which he was planing, thence southerly east of the truck into the basement. In about 10 or 12 minutes he returned over the same course, and when going from the north to the place where he ordinarily stood when operating the planer he tripped his foot on a board which had slipped off the pile of lumber accumulating from the resaw, or projecting from the bottom of it, across his path about two inches above the floor, three or four feet from the planer, and "was thrown headlong," his right hand being caught between the revolving feed rolls of the machine. After his hand was thus caught so that he could not pull it out, he shouted for help, and at the same time grabbed the feed lever with his left hand, and pulled it toward him to shift the belt from the tight pulley to the loose one, and so stop the rolls. The plaintiff's evidence tended to show that this was moving the lever in the right direction to effect that result, but that the condition of the lever and its attachments was then such that the belt was not shifted by so changing the position of the lever, and the rolls were not stopped till another employé in the mill, who came to the plaintiff's rescue, kicked off the belt by which they were driven. The plaintiff did not know the board was thus in his path before he tripped on it. When the plaintiff was planing the lumber taken from the truck, his back was towards the resaw, and to get the boards from the truck he turned to the left. No one saw the plaintiff when he tripped and fell against the machine. He testified that he did not see the pile of lumber from the resaw before his injury; that when he first started his planer that morning the operator of the resaw started that, and he supposed it was running; that he knew there was usually a man at the lower end of the resaw table to take boards away, and supposed a man was there then for that purpose. He then testified: "Q. What did you suppose he was doing with them? A. I didn't suppose he was doing anything. That was not my business. Q. There was nothing he could be doing only piling them on the floor, was there? A. Not if he was told to pile them there. All I went by was what the boss told me. He would take care of them. Q. Didn't you suppose the boards were coming through the resaw and being piled there? A. Yes; naturally. Q. And, when the resaw was working right along, it was making considerably fast? A. Always did. Q. And didn't you know that at times boards would not all be in line in that pile? A. They would be in line if properly piled." The plaintiff further testified that the lumber from the resaw on that morning was not piled, but "was thrown off the table and went wherever it had a mind to," and that, while he worked for the company, there was

no occasion when the lumber was allowed to accumulate about the planer in the manner it did the morning of the injury. He testified in cross-examination: "Q. You say lumber was all scattered about instead of being piled up? A. Yes. Q. Right back of you? A. Thrown off the table. * * * Q. None of it was piled up? A. Not that I would call piled up. Q. So when you went around the truck to go down into the basement the morning of the accident, you had to crawl over it? A. There was none on the truck. Q. There was no lumber scattered around there you say? A. From the path that I came out on to the resaw. Q. You say it was scattered about then? A. Yes; it wasn't piled up. Q. You could see that, instead of being piled up, the man had thrown it down carelessly? A. Yes, sir. Q. That was plain to be seen? A. Yes, sir."

The evidence is uncontradicted that the boards from the resaw were in plain sight from the front and side of the planer. It was also plainly to be seen by the plaintiff as he passed by it in going from the planer to the basement, and on his return when he tripped his foot on the board or boards across his path. It was in broad daylight, and there is no evidence that his vision was obstructed in any way. He testified that going down into the basement to clean out the blower was a usual duty he had to perform—some days "would go down oftener than others." There was no evidence showing any circumstances producing hurry, excitement, or confusion on the part of the plaintiff when going from the planer into the basement or at the time of passing this lumber and tripping on his return. In such circumstances it is no answer to the charge of contributory negligence to say that the plaintiff did not know the board was across his path until he tripped on it. When he went round the truck to go into the basement, he knew the resaw was in operation, and he then saw that the lumber therefrom was scattered about as it was being thrown off the table, though at that time none of it extended across his path. The plaintiff knew the location of the feed rolls in the planing machine, and that their use was to draw lumber applied thereto between them and so into the machine. He must have known that any other object coming in contact therewith at the same place, if its size or thickness would permit, was likely to be drawn between them in the same way. In other words, he knew the dangerous tendency of the machine in this respect.

[1] Knowing this, and the fact that the lumber from the resaw was being piled upon the floor between that machine and the planer, the manner of its being done, and its proximity to his path to and from the basement, and to the planer, it was his duty to exercise the care of a prudent man in view of the circumstances and the dangers attending them.

[2, 3] Had he exercised such care when thus returning, he would have seen the board or boards across his path, and have avoided tripping his foot thereon. What was said in *Harris v. Bottum*, 81 Vt. 346, 70 Atl. 560, regarding the observance of defects in place of work or in the machine, is equally applicable here: "It would be manifest injustice to hold an employer liable for injuries received by an employé through defects or insufficiencies in place or machines that the employé observed or that were plainly observable by him." In *Wiggins v. E. Z. Waist Co.*, 83 Vt. 365, 76 Atl. 36, in discussing the question of assumption of risk, it is stated as a general rule "that a servant is presumed to see and understand all that a prudent and intelligent person, with the same means and opportunity for acquiring a knowledge of the material facts and the same capacity for estimating their significance, would see and understand;" and that "the true test is, not whether he actually knows and comprehends, but whether, in the circumstances, he ought to know and comprehend the dangers which beset him." In *Carter v. Central Vermont R. R. Co.*, 72 Vt. 190, 47 Atl. 797, a case for personal injuries by the plaintiff while crossing the defendant's railroad track, the defendant's motion for a verdict was granted on the ground that it appeared that the plaintiff was guilty of contributory negligence in approaching and driving upon the track with too great speed, and in not using his eyes and ears with vigilance to discover and avoid the approaching train. On exception this court said: "If, by the vigilant use of his eyes and ears—which in the circumstances is only ordinary care—the plaintiff might have discovered and avoided the danger, and omitted such vigilance, he was guilty of contributory negligence; and he is chargeable with such knowledge of the approach of the train as he might have obtained by the exercise of that degree of care, which in the circumstances of danger, he was bound to use." The plaintiff's testimony showed that he did not use his eyes and ears vigilantly when he reached the crossing, and the judgment was affirmed. The same principle was applied as determinative in *Wallace's Adm'r v. Fox*, 81 Vt. 136, 69 Atl. 665; *Flint's Adm'r v. Central Vermont Ry. Co.*, 82 Vt. 269, 73 Atl. 500.

[4] The plaintiff testified that he went by what the foreman told him—that he would take care of the boards from the resaw. The foreman's statement thus alluded to may be given the meaning that the plaintiff seems to have given it in his testimony, and yet the result is the same; for, as before seen, when the plaintiff went to the basement, he knew from observation where and how these boards were being piled on the floor, which according to his uncontradicted testimony

was within ten or twelve minutes before the accident, and he knew the danger. Having such knowledge, the law required of him, when returning from the basement, care legally commensurate with the surroundings and dangers as he knew them or in the exercise of due care ought to have known them to avoid injury; and the assurance of the foreman did not relieve the plaintiff from such requirement. *Relser v. Southern Planing Mill & Lumber Co.*, 114 Ky. 1, 60 S. W. 1085; *Phillips v. Michaels*, 11 Ind. App. 672, 39 N. E. 689; *Gulf, etc., Ry. Co. v. Brentford*, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377. We think it clear that the defendant's motion for a verdict should have been granted on the ground of negligence by the plaintiff proximately contributing to the accident.

Judgment reversed, and judgment for the defendant to recover its costs.

UNITED STATES TRANSFER ADVERTISING CO. v. YOUNG.

(Supreme Court of New Jersey. June 18, 1910.)

1. APPEAL AND ERROR (§ 204*)—REVIEW—OBJECTION TO ADMISSION OF TESTIMONY.

The admission of testimony is not ground for reversal, where there was no objection to it when offered and received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

2. APPEAL AND ERROR (§ 719*)—ASSIGNMENT OF ERROR.

The action of the trial judge on a motion to strike out testimony must be assigned as reason for reversal, or it will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2974; Dec. Dig. § 719.*]

Appeal from District Court of Trenton.

Action by the United States Transfer Advertising Company against Willard H. Young. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued February term, 1910, before TRENCHARD and MINTURN, JJ.

W. Holt Apgar, for appellant. James & Malcolm G. Buchanan, for appellee.

TRENCHARD, J. This appeal brings up for review a judgment of the district court of the city of Trenton upon the verdict of a jury in favor of the defendant below. The only reason which plaintiff assigns for reversal is the admission of illegal testimony offered by the defendant.

[1] Assuming, without deciding, that the testimony was illegal, its admission is no ground for reversal, because the state of the case discloses that no objection was made to it at the time it was offered and received. *Oliphant v. Brearley*, 54 N. J. Law, 521, 24

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Atl. 600; Willett v. Morse, 71 N. J. Law, 104, 58 Atl. 72.

[2] We are not concerned with the action of the trial judge on the motion to strike out the testimony, made later in the trial, because such action is not assigned as a reason for reversal.

The judgment of the court below will be affirmed.

HAUSER v. SQUIRE.

(Supreme Court of New Jersey. June, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 515*)—RECORD—CASE ON APPEAL.

The act of 1905 (P. L. p. 259), relating to appeals from district courts, and providing that, when a stenographer is appointed to transcribe the proceedings at the trial and take down the testimony therein, the transcript of the proceeding and testimony shall be certified as the state of the case on appeal, establishes an exclusive method of laying before the appellate court all appealable rulings of the district judge occurring during the course of the trial, but does not supersede the provisions of the act of 1902 (P. L. p. 565) with respect to rulings that are entirely outside the scope of such stenographer's transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.*]

2. APPEAL AND ERROR (§ 627*)—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

But in cases where a stenographer is so appointed, it will be presumed that the transcript is an essential part of the case on appeal; and unless that presumption be overcome by it being made to appear that the appeal is on questions of law entirely apart from rulings at the trial, an appeal will be dismissed for failure to file the transcript with the clerk of this court within the time limited by the act of 1905, viz., 15 days after judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. § 627.*]

Action by William Hauser against Charles B. Squire. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal, and on cross-motion for a rule to the lower court to send up a state of the case for appeal. Cross-motion denied, and motion to dismiss granted.

Argued February term, 1911, before GARRISON, PARKER, and VOORHEES, JJ.

Frank E. Bradner, for appellant. Jacob L. Newman, for appellee.

PARKER, J. The case was tried without a jury, but a stenographer was appointed pursuant to Act 1905 (P. L. 1905, p. 259). Judgment was given for the plaintiff, and in due course defendant gave notice of appeal and filed the appeal bond as required by P. L. 1902, p. 565, relating to appeals from district courts to this court. The stenographer's transcript

not being furnished to appellant within the 15 days specified in the act of 1905, appellant applied to the judge for, and obtained, an order extending the time "for agreeing upon or settling the state of the case upon appeal for the space of 30 days" from its date.

[1] An attempt to agree with his adversary upon a state of the case failed and appellant then applied to the judge to settle the case, and the judge refused to do so, taking the ground that the act of 1905 was exclusive in all cases where a stenographer has been appointed, and hence that the only state of the case available is the transcript of the proceedings and testimony to be made by the stenographer and certified by the judge, and unless such transcript be filed with the clerk of this court within 15 days after judgment the right of appeal is lost, relying on Ervin v. Wohlfert, 76 N. J. Law, 430, 70 Atl. 153. This position is now taken by appellee on his motion to dismiss. The appellant maintains, on the other hand, that the act of 1902 remains in full force as governing appeals of this character, and—if we understand the argument of his counsel—that with respect to the proceedings at the trial there are provided by these acts of 1902 and 1905 two alternative methods of getting such proceedings and before the appellate court. In Paonessa v. Ruh, 78 N. J. Law, at page 255, 73 Atl. at page 114, Mr. Justice Voorhees remarked: "The practice permitted under this statute (of 1905) of returning the whole case should be confined to cases such as those arising on motions to consult or to direct a verdict, or where it is necessary to determine whether there is any evidence, or whether there is an entire absence of evidence, as the case may be, to justify the trial court in its rulings." This language indicates the use to which the stenographer's transcript is to be put. It is the exclusive method of placing before the appellate court the testimony taken at the trial, and all motions and objections of counsel and the rulings of the trial judge thereon, in the course of such trial. In these respects the provisions of the act of 1902 as to making up a state of the case are superseded by the act of 1905. But by the act itself the functions of the stenographer are limited to the proceedings at the trial and the testimony therein; and when the "determination or direction of the district court in point of law" falls outside of the proceedings at the trial or the testimony the act of 1905 will have no application, and it follows that questions of law arising apart from the trial and not connected with the trial proceedings may be raised on appeal without the stenographer's transcript.

[2] But an appellant who omits to file the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

stenographer's transcript within the 15 days does so at his peril. If the appellee refuse to join in a state of the case which does not include such transcript, and the judge, when applied to for a settlement of the case, refuses to settle it, the presumption will be that he has so refused because the appeal covers matters that are provable only by such transcript. In short, the transcript is *prima facie* a part of the appeal, unless it appears that the only questions raised are such that such transcript is not required for their determination.

In the present case there is nothing before us to show what questions were intended to be raised on appeal. Presumably, therefore, the points to be raised, or some of them, are of such a character that a transcript is required. The burden is on the appellant to show the contrary. This he has not done.

Consequently his motion to rule the judge to send up a state of the case must be denied; and the judge's action being sustained, though on a somewhat different ground from that taken by him, and appellant having failed to file his transcript in due time, or show that such transcript was not required, the appeal must be dismissed.

The appellee is entitled to costs on both motions.

VOORHEES v. BOROUGH OF NORTH WILDWOOD.

(Supreme Court of New Jersey. June 20, 1910.)

1. MUNICIPAL CORPORATIONS (§ 958*)—UNPAID TAXES—ADJUSTMENT—COMMISSIONERS—APPOINTMENT.

P. L. 1901, p. 364, amending P. L. 1898, p. 442, and authorizing the circuit judge, on the application of the mayor and council of the city, to appoint commissioners to adjust unpaid taxes, operates only on arrearages which had accrued prior to the date of the approval of the act, and does not authorize the adjustment of unpaid taxes subsequently accruing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2030; Dec. Dig. § 958.*]

2. MUNICIPAL CORPORATIONS (§ 978*)—TAXES—ADJUSTMENT OF ARREARAGES—APPOINTMENT OF COMMISSIONERS—TAXPAYER'S GENERAL INTEREST.

Where an appointment of commissioners to adjust unpaid taxes, as authorized by P. L. 1901, p. 364, amending P. L. 1898, p. 442, was shortly thereafter annulled, the general interest of a taxpayer was not sufficient to entitle him to maintain certiorari to set aside the annulment order; his taxes in arrears not being subject to adjustment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.*]

3. MUNICIPAL CORPORATIONS (§ 978*)—TAXES—ARREARAGES—CERTIORARI.

P. L. 1901, p. 364, amending P. L. 1898, p. 442, authorizes the circuit judge, on the application of the mayor and council of a city,

to appoint commissioners to adjust unpaid taxes. *Held* that, since the judge in appointing such commissioners merely took part in a municipal proceeding, the case was one in which public interest was involved, so that whether certiorari should be granted to set aside an order annulling the appointment was a matter of discretion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.*]

4. APPEAL AND ERROR (§ 87*)—DISCRETIONARY ACTION—CERTIORARI—REFUSAL OF WRIT.

Since an order annulling appointment of commissioners to adjust unpaid taxes involves the public interest, a writ of error will not lie to the refusal of certiorari to review such order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-596; Dec. Dig. § 87.*]

5. APPEAL AND ERROR (§ 87*)—DISCRETIONARY ACTION—CERTIORARI—DISMISSAL OF WRIT.

An order dismissing a writ of certiorari as improvidently allowed is not reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-596; Dec. Dig. § 87.*]

6. MUNICIPAL CORPORATIONS (§ 978*)—UNPAID TAXES—ADJUSTMENT—COMMISSIONERS.

Whether commissioners should be appointed to adjust unpaid taxes in a borough, as authorized by P. L. 1901, p. 364, amending P. L. 1898, p. 442, is a matter to be determined largely by the exercise of discretion by the municipal authorities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2104-2119; Dec. Dig. § 978.*]

Certiorari by Harrison H. Voorhees against the Borough of North Wildwood. Writ dismissed.

Argued June term, 1910, before GARRISON, SWAYZE, and PARKER, JJ.

Harrison H. Voorhees, pro se. J. Spicer Leaming, for defendant.

SWAYZE, J. [1] Upon application of the mayor and council of the defendant the circuit judge appointed commissioners to adjust unpaid taxes in the borough of North Wildwood pursuant to the act of 1898 (P. L. p. 442), as amended in 1901 (P. L. p. 364). The appointment was made October 25, 1909, and on November 22, 1909, on a similar application the order of appointment was annulled. The prosecutor, a taxpayer against some of whose property there were assessments over two years in arrears, considered himself aggrieved and sued out this writ to set aside the last order. His only special interest is the advantage to be derived from the adjustment of the past-due assessments upon his own property. His testimony is that "the assessment is delinquent more than two years." The fair inference is that it is not as much as three years in arrears; i. e., that it is no older than 1907. The act of 1901 is substantially a copy of the supplement of 1891 (P. L. p. 393) to the original "Martin act" of 1886 (P. L. p. 149). This act was before us in *Jersey City v. Speer*, 78

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

N. J. Law, 34, 72 Atl. 448, and we there held it operated only upon arrearages which had accrued prior to the date of its approval. The prosecutor's assessment, therefore, was not subject to adjustment, and he had no special interest which was adversely affected by the order annulling the appointment of the commissioners. [2] His general interest as a taxpayer is not sufficient under the circumstances of this case. [3] The judge of the circuit court, under the act of 1898, merely takes part in a municipal proceeding, as in *East Orange v. Hussey*, 70 N. J. Law, 244, 57 Atl. 1086. It is well settled that the writ of certiorari in such cases, where the public interest is involved, is a discretionary writ. *State v. Middletown*, 24 N. J. Law, 124. [4, 5] For this reason a writ of error will not lie to a refusal of the writ (*State v. Wood*, 23 N. J. Law, 560); and the court may quash the writ, even of its own motion, after its allowance (*Haines v. Camplon*, 18 N. J. Law, 49), and an order dismissing the writ as improvidently allowed is not liable to review upon a writ of error (*Weart v. Jersey City*, 43 N. J. Law, 662).

[6] We think the writ in the present case should, in the exercise of our discretion, be dismissed. The act of 1898 contemplates that the proceedings shall be instituted by the municipal authorities in their discretion. Since the only possible object of the appointment of adjustment commissioners is to secure an adjustment of the taxes at a sum less than their face and interest, it is manifestly proper that it should be left to the municipal authorities to decide whether they will enforce the full amount of the taxes or have them adjusted at a smaller sum. In the present case the amount unpaid is small, and for all that appears the possible gain to the borough from securing payment of a lesser amount than the face of the taxes is not enough to justify the expense of the commission. Moreover, the case leaves it in doubt whether there are any taxes which would justify the appointment of commissioners under the decision in *Jersey City v. Speer*, 79 N. J. Law, 596, 76 Atl. 1087, which has just been affirmed by the Court of Errors and Appeals.

The writ is therefore dismissed, with costs.

GEORGE LONG CONTRACTING CO. v. ALBERT.

(Court of Appeals of Maryland. June 22, 1911.)

1. EQUITY (§ 392*)—REHEARING—REMEDY.

Under Code Pub. Gen. Laws 1904, art. 16, § 177, providing that all final decrees shall be considered as enrolled after 30 days from their date, decrees are under the control of the court

until enrollment, and may be revised by a petition for a rehearing filed in the same proceeding, if the errors are not merely clerical or accidental; an original bill for that purpose only being proper after enrollment.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 834-851; Dec. Dig. § 392.*]

2. MECHANICS' LIENS (§ 201*)—PRIORITIES.

One who purchased at execution sale property against which a mechanic's lien claim had been filed before the fieri facias was issued, with notice of the lien claim, took it subject to the lien; Code Pub. Gen. Laws 1904, art. 63, § 15, providing that the mechanic's lien given thereby shall have preference over all judgments, liens, etc., upon the building or grounds.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 357; Dec. Dig. § 201.*]

Appeal from Circuit Court, Baltimore County, in Equity; Frank I. Duncan, Judge.

Action by Anton J. Albert against the George Long Contracting Company and others. From a judgment for plaintiff, defendant Contracting Company appeals. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

George Washington Williams and Robert H. Simpson, for appellant. Charles Herzog, for appellee.

BRISCOE, J. This is an appeal from an order of the circuit court for Baltimore county, overruling a demurrer to a bill of complaint, filed by the appellee against the appellant and others, and granting an injunction against the defendants until the further order of the court.

It appears from the record that the appellee, on the 22d day of June, 1909, obtained a judgment for the sum of \$1,048.44, in the superior court of Baltimore city, against a certain Elizabeth Leaverton, now Elizabeth Gerock, and under a writ of fieri facias, dated August 22, 1910, directed to the sheriff of Baltimore county, nine lots of ground, with improvements, owned by the defendant judgment debtor, and situate on the east side of Sixth street, in Highlandtown, Baltimore county, were levied upon to satisfy the debt and cost of the judgment. On the 18th day of October, 1910, six of these lots were sold at sheriff's sale, and purchased by the appellee, and subsequently, on the 9th day of November, 1910, they were by a sheriff's deed duly conveyed to him. It further appears that on the 16th day of August, 1910, the appellant, the George Long Contracting Company, filed for record with the clerk of the circuit court for Baltimore county a mechanic's lien claim for the sum of \$228.75, for material furnished in the erection of the houses on these lots, and on the 22d day of November, 1910, the circuit court of Baltimore county, under proceedings to enforce

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the payment of this and certain other mechanics' liens, decreed that the property here in dispute should be sold, and appointed trustees to make such sale.

The grounds of relief set up here in the bill consist of alleged errors in the mechanic's lien proceedings, such as want of proper parties, defects and insufficiency in the alleged lien claim of the appellant, and the failure of the decree to bind the property purchased by the appellee, and other alleged errors apparent upon the face of the proceedings.

The prayer of the bill is, first, that the decree passed in the mechanic's lien proceedings be reformed and amended by eliminating therefrom and striking out of the decree all direction and authority to sell and offer for sale the six lots of ground and improvements, purchased at sheriff's sale by the appellee; second, that the defendants, including the trustees named in the decree, be enjoined and restrained from selling or otherwise disposing of the lots purchased by the appellee; and, third, a prayer for general relief in equity.

[1] We think the learned judge below committed an error in overruling the demurrer, and in granting an injunction, restraining the sale by the trustees, under the facts alleged in the bill in this case. Conceding there was sufficient ground for reopening and modifying the decree in the mechanic's lien proceedings (the Johns Hopkins Hospital v. Elizabeth Gerock) sought to be reformed, the alleged errors and defects were such as to be revised and corrected by a petition for a rehearing, and not by original bill. The decree attacked here was passed on the 22d day of November, 1910, and the bill of complaint was filed on the 3d day of December, 1910. The decree at that date had not been enrolled, and was subject to the control of the court until enrollment. It is provided by section 177, art. 16, of the Code, that all final decrees and orders in the nature of final decrees shall be considered as enrolled from and after the expiration of 30 days from the date of the same, the day of the date inclusive.

There can be no question that until enrollment such decrees are entirely under the control of the court, and may be revised, modified, or revoked upon proper grounds shown. It is well settled, however, that a petition filed in the same proceedings, for a rehearing, and not an original bill, is the proper method of correcting, before enrollment, errors in a decree, not merely clerical or accidental. An original bill is usually resorted to after an enrollment of the decree. *Cherbonnier v. Goodwin*, 79 Md. 55, 28 Atl. 894; *Zimmer v. Miller*, 64 Md. 296, 1 Atl. 858; *Trayhern v. Nat. Mech. Bank*, 57 Md. 590; *Thruston v. Devcmon*, 30 Md. 210; *Aukam v. Zantzinger*, 94 Md. 425, 51 Atl. 93; Code, art. 16, § 179.

But, apart from this, we do not find from an examination of the allegations of the bill in this case that the appellee was entitled to an injunction when it was granted. The appellant's lien claim was filed and recorded under our mechanic's lien law (article 63 of the Code), and this law authorizes the enforcement of a lien claim by a decree in equity. Section 25 of that article provides that the same proceedings are had as used by the courts of equity to enforce other liens, and the court shall decree a sale and appoint a trustee to make sale thereof, and shall apportion the proceeds of such sale among the persons entitled to liens according to their respective rights. *Kelly v. Gilbert*, 78 Md. 431, 28 Atl. 274; *Trustees v. Helse*, 44 Md. 453.

[2] The appellant's lien claim attached prior in date to the appellee's judgment claim, and he purchased the property with notice of the lien claim. In *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. Rep. 431, this court adopted the language of the Supreme Court of Texas, in *Lyon v. Logan*, 68 Tex. 521, 5 S. W. 72, 2 Am. St. Rep. 511, where it is said: "This rule operates no hardship on the owner of the property or persons who purchased from him with notice of the lien. A purchaser buys with his eyes open, and if he voluntarily purchases property which he knows is incumbered he cannot complain if it is subjected, in his hands, to the payment of the debt for which its former owner has made it responsible." The Code (section 15, art. 63) distinctly provides that the lien given shall be preferred to all mortgages, judgments, liens, and incumbrances which attach upon the building or the grounds covered thereby subsequently to the commencement thereof. The authority of the court to pass such a decree as was passed in the mechanic's lien proceedings in this case cannot be questioned, and the effect of this decree, until reversed, was to settle and determine the rights of the parties, in so far as the mechanics' liens were concerned. In *Kelly v. Gilbert*, 78 Md. 431, 28 Atl. 274, it is said the proceeding is in the nature of a proceeding in rem, and when the property is sold, under a decree passed in the cause, it is sold free and discharged of all mechanic's lien claims; the proceeds of sale being apportioned among the persons entitled to such liens according to their rights. The validity of the appellant's lien was established for the purposes of the decree, and it cannot be disturbed, or the decree attacked, in a proceeding of this character, upon the grounds alleged in the bill of complaint, by one holding a lien like that of the appellee.

If follows, for the reasons stated, that the decree of the lower court will be reversed, and the bill dismissed, with costs.

Decree reversed and bill dismissed, with costs.

**EYRE-SHOEMAKER CONST. CO. v.
MACKIN.**

(Court of Appeals of Maryland. June 22, 1911.)

1. MASTER AND SERVANT (§ 85*)—LIABILITY FOR INJURY TO SERVANT.

The right of a servant to recover for injury received while in the master's employ rests either upon some negligent act of commission or on some omission of duty owed the servant by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135-140; Dec. Dig. § 85.*]

2. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—DEFECTIVE APPLIANCE.

In an action for injury to a servant caused by the negligent management of a machine of the master, the fact that a certain gear guard was missing on the morning of the accident does not show negligence on the part of the master, where it does not appear that the presence of the gear guard could in any way have affected or prevented the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 219*)—LIABILITY FOR INJURY TO SERVANT—ASSUMED RISK—OBVIOUS DANGER.

Where loads of from 3,500 to 6,000 pounds were continually being swung by a derrick and boom over and onto a scow, the danger of being struck by the swinging load was so open and obvious that the captain of the scow must be treated as having assumed the risk thereof, so as to preclude recovery from his employer for injury resulting from the danger of the place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

4. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURY TO SERVANT—DEFECTIVE MACHINERY.

To warrant recovery in an action for an injury to a servant, caused by a defective appliance, it must not only be shown that the plaintiff was injured from a defect in the machinery, but also that the injury occurred because the employer did not exercise proper care in the premises.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 180-184; Dec. Dig. §§ 101, 102.*]

5. MASTER AND SERVANT (§ 117*)—INJURY TO SERVANT—NEGLIGENCE OF RUNNING ENGINE EXPOSED TO WEATHER.

Even though hoisting engines are sometimes inclosed, it is not negligence per se for a master to run one exposed to the weather, where they are not only frequently so operated, but are built for that purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 208; Dec. Dig. § 117.*]

6. MASTER AND SERVANT (§ 185*)—DEFECTIVE MACHINERY—FELLOW SERVANTS.

Negligence of a master by which a servant in charge of a scow was injured cannot be predicated on a showing of failure of a foot brake on a hoisting engine to work on a previous occasion, where the testimony of the servant in charge of the engine shows that at the time of the accident he did not attempt to apply such brake, and that it was only an extra appliance, not often used, and not deemed

an integral part of the machine; any negligence in failing to use such brake if any being that of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

7. MASTER AND SERVANT (§ 200*)—FELLOW SERVANT—EXISTENCE OF RELATION.

An engineer of a hoisting engine is a fellow servant of a captain of a scow, employed by the same master, being loaded by such engine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 492; Dec. Dig. § 200.*]

8. MASTER AND SERVANT (§ 137*)—NEGLIGENCE OF SERVANT.

Where a scow being loaded by a hoisting engine and derrick was so placed that it could not be seen from the engine, and a signal man was placed to give the engineer signals for lowering and hoisting, the lowering of a load by the engineer without waiting for such signal is negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 273-278; Dec. Dig. § 137.*]

9. MASTER AND SERVANT (§ 285*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE—TAKING CASE FROM JURY.

Where evidence tends equally to support either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof, so that where, in an action against a master for an injury to a scow captain who was struck by a load of cement being loaded onto the scow, the evidence tends to show both that the accident resulted from the slipping of a friction drum on the hoisting engine by which the scow was being loaded, and it was caused by the negligent act of a fellow servant in lowering the load onto the scow without receiving the proper signal, the negligence of the master cannot be said to be established by satisfactory proof, and the cause should be taken from the jury for lack of evidence to support it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002-1053; Dec. Dig. § 285.*]

10. MASTER AND SERVANT (§ 229*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant must exercise ordinary care for his safety, and take ordinary care to inform himself of the dangers of his service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.*]

11. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a scow was used for the transportation of materials for a bridge, and such materials were loaded on the scow by a hoisting engine operating a derrick, boom, and cable which swung the loads over to the scow in iron buckets, carrying loads of from 3,500 to 6,000 pounds, a loaded bucket having an oscillation of four feet or less, the captain of the scow who either failed to watch an approaching bucket by which he was knocked down and injured, or who, without any duty to do so, attempted with his hands to move the heavily laden bucket, is guilty of contributory negligence, which will preclude a recovery for his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 723-742; Dec. Dig. § 236.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

12. TRIAL (§ 243*)—INCONSISTENT INSTRUCTIONS.

Where, in an action for injury to a servant, one instruction charges the master with the exercise of "ordinary and reasonable care" in furnishing suitable machinery, another, which charges him with a "higher" degree of care, must contemplate a higher degree of care than ordinary care, and is error; the inconsistency inevitably tending to a confusing effect upon the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

Appeal from Circuit Court, Cecil County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by Joseph Mackin against the Eyre-Shoemaker Construction Company. From a judgment for plaintiff, defendant appeals. Reversed without new trial.

Argued before BOYD, C. J., and BRISCOE, BURKE, URNER, and STOCKBRIDGE, JJ.

Wm. H. Harlan and J. J. Archer, for appellant. Albert Constable and John S. Young, for appellee.

STOCKBRIDGE, J. This is an action to recover damages for personal injuries received by Joseph Mackin, the appellee, while acting as captain of a scow for the appellant, the Eyre-Shoemaker Construction Company. The record presents a number of questions arising under 12 exceptions taken to rulings of the court upon the admissibility of evidence, and one to the action of the court upon the 26 prayers which were offered by the parties at the conclusion of the testimony, but, in the view which we take of this case, it will be sufficient to deal with only a few of them, those involving the application of the legal principles which govern all actions of this character. At the conclusion of the entire evidence, the defendant, by its first and second prayers, asked the court to take the case from the jury upon the ground of the lack of sufficient evidence.

[1] In this case, as in all other such cases, the foundation of the right to recover lies in some act of negligence, either of commission or omission on the part of the defendant, or its omission in the performance of some duty owed by it to the plaintiff.

What, then, are the facts as disclosed by the record tending to show the negligence of the defendant or its failure of duty? The construction company was engaged in building concrete piers on Watson's Island for the Baltimore & Ohio Railroad bridge across the Susquehanna river. The materials used in construction were brought by rail to a place called Frenchtown, about one mile north of Perryville, and from there transported by scow to the island. Mackin was employed by the construction company as captain of the scow used for such transportation. The method of transferring the

materials from the railroad to the scow was by means of a hoisting engine, which operated a derrick, and to this was attached a boom. Passing over the end of the boom from the drum of the engine was a cable to which could be attached iron receptacles or buckets, into which the materials were loaded, and, when so loaded, the bucket was raised clear of the ground by means of the hoisting engine, swung over to the scow, lowered into the scow, and unloaded. On the morning of the 7th of November, 1907, the scow was taken to Frenchtown. The material to be transported consisted of cement in bags, each bag weighing approximately 100 pounds. As soon as the scow was made fast to the wharf, Mackin proceeded to pump out the water which had collected in the bottom. The hoisting engine, which was what is known as a Mundy engine, was located some 35 or 40 feet from the edge of the wharf, but between the engineer who operated it and the scow there was a pile of stone sufficiently high to render it impossible for the engineer, when at his post, to see a person on the scow, or for a person on the scow to see the engineer. Accordingly, there was stationed at the end of the pile of stone a signal man, whose duty it was when the bucket had been loaded at the car to give the signal to the engineer to raise and swing the bucket around until over that portion of the scow where it was desired to have the load deposited, and then, by a signal, to direct the lowering of the bucket and the stopping of it for the purpose of unloading. The hoisting apparatus consisted of two drums, around one of which passed the end of the cable, and thence to the top of the boom, and on to the bucket. The revolutions of this drum were controlled by means of what was called the "friction"; that is, a cone composed of wood specially prepared, which by means of a lever was forced into the drum when it was desired to raise or hold a load, and released when the object was to lower the load. There was also on this particular engine a foot brake, the purpose of which was to afford a means of still further checking the revolutions of the drum. It was also in evidence that this foot brake was deemed as an extra part of the engine, and not always attached since the same end could be accomplished through means of the friction.

[2] The engine was provided with a gear guard, and there was some evidence to show that this gear guard was not in place upon the morning of the accident. That, however, may be disregarded, for the reason that it does not appear from the evidence that the absence of the gear guard would in any way have effected or prevented the accident. The engine stood and was operated in the open, without shed, covering or pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tection of any kind, either to the engine or any of its parts. On the morning of November 7th, the scow was towed to the Frenchtown wharf, and some half hour was consumed after its arrival there in getting up steam in the boiler before work could be begun. A bucket had been left attached to the cable the night previously, and, as soon as steam was gotten up, the bucket was raised from the ground where it lay, swung over to the car, where some 30 or 35 bags of cement were placed in it, and then swung around to the scow. The plaintiff was at the stern end of the scow, and as the bucket approached him it suddenly dropped, and, swinging too far, struck the plaintiff, throwing him to the deck, and severely injuring him. The bucket was stopped by the engineer when about one foot above the deck, with the plaintiff pinned between the bucket and the deck.

Such being the salient facts, it becomes pertinent to examine the evidence tending to establish negligence, and to ascertain whether such negligence was the negligence of the defendant construction company, or whether it was the negligence of a fellow servant. There is no question raised in the case as to the competency of the engineer. This differentiates the case at once from the case of *McCall's Ferry Power Company v. Price*, 108 Md. 96, 69 Atl. 832, where the evidence showed that the superintendent of the work had knowledge that the engineer was incompetent prior to the happening of the accident.

[3] It is manifest that the place in which the plaintiff had his duties to perform was a dangerous place, inasmuch as there were required to be continually passing over the scow heavily laden buckets with loads of from 3,500 to 6,000 pounds, but this danger was open and obvious, and was therefore one of which the plaintiff must be treated as having assumed the risk, and for any injury resulting from the danger of the place he has no claim against his employer. *Gleason v. Suskin*, 110 Md. 141, 72 Atl. 1034; *Harris v. Con. Coal Co.*, 111 Md. 225, 73 Atl. 805.

The type of engine used for the work was usual and appropriate for work of this description, the same that is used by many contractors. This was fully established by the evidence, and was not attempted to be controverted. The engine was not new, but had been inspected by Mr. Bowles about two days before the accident, and found to be in proper shape, and there is nothing in the evidence to suggest that Mr. Bowles was not a competent inspector, he being the man who put the engine up, and whose duty it was to keep the machinery of the defendant company in proper condition.

[4] To entitle the plaintiff to recover in an action such as this, it is not sufficient to show that the plaintiff was injured from a

defect in the machinery, but he must go further and establish the fact that the injury happened because the employer did not exercise proper care in the premises. *Buttner v. Steel Car Co.*, 101 Md. 168, 178, 60 Atl. 597.

[5] Nor can it be held to constitute negligence per se upon the part of the employer that the engine was run exposed to the weather. *Dettering v. Levy*, 114 Md. 273, 79 Atl. 476. The testimony in the case is not only to the effect that engines of this type frequently are so run, but that they are built for the very purpose of being so run. The fact that they are sometimes inclosed or covered over either in whole or in part cannot make it negligence to operate them in the open, something more than this must appear. There remain then three possible matters upon which negligence may be predicated: (1) The fact that the gear guard was missing; and (2) that the foot brake did not work; and (3) that by reason of a rain the night previous the friction was wet, and slipped or failed to hold.

[2] With regard to the first of these, the fact that the gear guard was missing was disclosed in the testimony of Blose, the engineer; but he further testified "the gear guard being off had nothing particular to do with the working of the engine," and the purpose of the gear guard is explained in the evidence of the witness Higgins, who was employed by the Mundy Company, which manufactured the engine, and his evidence is to the effect that, when the machinery "is idle, the part of the friction that is used that goes into the cone is covered by the gear guard." There is nothing, therefore, to show that the absence of the gear guard on this particular engine had anything to do with the occurrence of the accident.

[6] 2. The engineer, Blose, testified that the foot brake wouldn't work on the first day when he tried it on loads, and that he "at once reported it to Mr. Bowles, who said he knew it wouldn't work, but no one repaired it." But the same witness further testified that at this time he did not apply the foot brake at all, and he gives as his reason for not having attempted to apply it that "you can't depend on that at all." The evidence of the defendant showed conclusively that the brake was not deemed an integral part of the machine, but always an extra, that the control of the revolutions of the drum was had through the lever applied to the friction, and the other witnesses in the case corroborate this testimony, and it cannot be held to be negligence upon the part of the employer, where the servant does not even attempt to avail himself of the machinery and appliances provided for the greater safety of the employes, and the negligence, if negligence it was upon the part of Blose in not applying the foot brake,

was the negligence of a fellow servant of the plaintiff, and for that there can, of course, be no recovery as against the employer.

3. The alleged negligence chiefly relied upon by the plaintiff consists of testimony tending to show that by reason of a rain the night previous, and a fog that morning, the friction had become wet, and because of this condition slipped in the drum. The effect of this slipping, it was testified, would be to permit the drum to revolve more rapidly, and then allow the cable and bucket attached to it to descend faster than when under the full control of the friction. The defendant offered evidence of a contradictory nature. There was also testimony, uncontradicted, that there had been no slip of the friction when the bucket was first picked up that morning, or when, after the cement had been placed in the bucket, it was raised and swung over to where the scow lay. After the accident, the bucket was raised some ten feet in the air, and held there by use of the friction for several minutes, and the engine continued to be operated in like manner for the balance of the day. The only time when any slip of the friction is claimed to have occurred on this day was the one time when the plaintiff was injured.

[7, 8] But, before passing on the effect of the testimony given on behalf of the plaintiff to sustain the alleged slipping of the friction, there was another matter taking place at the same time which must be considered. This is an uncontradicted act of negligence which might have occasioned the accident equally with the slipping of the friction. As already stated, Blose, the engineer, could not from his position see a person on the deck of the scow, and therefore a signal man, Jacus, had been placed in a position where he could see both the engineer and the deck of the scow, and direct the movements of the engineer. Blose testified that, after he had started the load from the car platform and swung it around, "I eased the friction a little bit to cause the load to come down when I thought it was in the right position"; and, again: "Q. You didn't wait to get the signal from Mr. Jacus, but you undertook to lower it yourself? A. I used my own judgment." He further testified that he was looking at the boom, and that he did not know whether Jacus gave him any signal to lower the bucket or not. Mr. Jacus in his testimony testifies positively that he did not give any signal; that, after the load had been swung around, he turned towards the engineer for the purpose of giving such a signal, and then discovered that the engineer had already begun to lower, and continued to lower until Jacus observing the possible peril of the plaintiff, and that Blose, the engineer, was not paying attention to his signal, called to him to "hold it." The action of

the engineer in lowering this load without signal from the man whose duty it was to give the signal, who had been placed there by the construction company for that purpose, was itself clearly an act of negligence, and it was the act of negligence of a fellow servant.

[9] In this condition we have an accident which may have resulted from either one of two causes—one for which the defendant might be responsible; the other, for which it could not be held responsible, and in such a case the rule of law is that laid down by Chief Judge McSherry, in *Harford County v. Wise*, 75 Md. 38, 23 Atl. 65, and reaffirmed in *Baltimore v. Schnitker*, 84 Md. 34, 34 Atl. 1132, and *Darby Co. v. Hoffberger*, 111 Md. 84, 73 Atl. 565, "that, where the evidence tends equally to support either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong." It therefore follows that there was error in the rejection of the first prayer of the defendant.

The prayers of the defendant numbered 1½, 2¼, and 2½ all deal in varying phraseology with the doctrine of contributory negligence, and were all refused; but they may be properly considered together.

[10] To determine the question of contributory negligence in such a case, it must first be clearly understood what was the duty or obligation resting upon the plaintiff who was performing his duty in a manifestly dangerous place, and that duty has been tersely stated in *McGee v. Cuyler*, 112 Md. 321, 75 Atl. 973, as follows: "It is the duty of the servant to exercise care to avoid injury to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care upon his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere."

[11] The evidence is uncontradicted that, as the loaded bucket was swung from the shore over the scow at the end of the cable passing over the boom, it had, either as the result of its momentum or by reason of the wind, an oscillation of its own which at times was as great as four feet. This fact was in itself an added element of danger, for protection against which it was obligatory upon the plaintiff to be on his guard. What was the plaintiff doing to fulfill this obligation? According to his own testimony he was not looking at the bucket, but was standing looking out over the water, and he further testified that he paid no "attention to see which way the 'high-ball' (signal) man

or the engineer was sending the bucket"; and in this evidence he is corroborated by the witness Martin F. Abbott, a deck hand on the tug which was lying alongside of the scow, who testified that the plaintiff "was facing kinder catercorner. It looked to me like he was facing about the draw of the Penn. Railroad bridge." This is the testimony on behalf of the plaintiff, and it shows the plaintiff to have failed in the exercise of the ordinary care required of him. One of the other witnesses, Jacus, placed him in a somewhat different position, that of attempting with his hands to direct the descent of the bucket, yet, since that was no part of his duty, in either event the plaintiff was not fulfilling the obligation which rested on him to provide for his own safety, and was therefore guilty of contributory negligence, and the defendant's prayer No. 2½ should have been granted.

[12] In the ruling upon the prayers the court granted the fourth prayer of the plaintiff, which was as follows: "That what is due care in furnishing machinery must be measured by the character and risk and exposures of the business, and the degree of care required is higher where life or limb is in danger than in other cases." The tenth prayer of the defendant was also granted, as follows: "The jury are instructed that in furnishing a hoisting machine for the work on the Frenchtown wharf and a place for its employes to do the work the defendant was not required to use the highest degree of care; but to use only ordinary or reasonable care to furnish its employes with a reasonably safe and suitable machine and a reasonably safe and suitable place." By this last prayer the jury were instructed as to the measure of care which the plaintiff was entitled to receive from the defendant, and that it was "ordinary or reasonable care." The fourth prayer of the plaintiff, while very general in its terms, indicates to the jury that the plaintiff was entitled at the hands of the defendant under the circumstances in which he was employed to a "higher" degree of care. Higher than what is not stated, but the conclusion is inevitable that it was a degree of care higher than ordinary care. The two instructions were therefore inconsistent with one another, and the granting of both must inevitably have tended to confuse the jury as to the measure or extent of care which the plaintiff was entitled to receive from the defendant. The granting of these two inconsistent instructions, therefore, was prejudicial error.

In view of what has been said, it is unnecessary to discuss the other questions raised by the exceptions in this case, and for the reasons indicated the judgment below will be reversed without a new trial.

Judgment reversed without a new trial. Costs to the appellant.

CLARK v. SOUTHERN CAN CO.

(Court of Appeals of Maryland. June 22, 1911.)

1. JUDGMENT (§ 470*)—COLLATERAL ATTACK.

A judgment of a court having jurisdiction of the parties and subject-matter cannot be impeached in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

2. JUDGMENT (§ 480*)—COLLATERAL ATTACK—"JUDGMENT" WITHIN RULE.

The rule that a judgment by a court having jurisdiction of the case cannot be collaterally attacked applies to all kinds of judgments, including judgments of dismissal and for costs.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 916; Dec. Dig. § 480.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

3. JUDGMENT (§ 386*)—VACATING—FRAUD—TIME OF APPLICATION.

An application to vacate a judgment for fraud must be made within a reasonable time after discovery of the fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744; Dec. Dig. § 386.*]

4. JUDGMENT (§ 522*)—VACATING—COLLATERAL ATTACK.

Plaintiff herein brought a former action by her next friend against defendant for personal injuries, and the case was compromised and a full release executed by the next friend, and the case was marked, "Agreed and settled." *Held*, that plaintiff could not in a subsequent action by her father and next friend for the same injuries have the release set aside for fraud and a judgment entered pursuant thereto annulled, as that would be to permit the judgment to be annulled in a collateral proceeding; plaintiff's remedies being by motion in the court in which the judgment was entered to strike it, or by a direct proceeding brought within a reasonable time after discovery of the fraud to vacate the judgment on that ground.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 965; Dec. Dig. § 522.*]

Appeal from Baltimore Court of Common Pleas; H. Arthur Stump, Judge.

Action by Mary A. Clark, an infant, by her father and next friend, James Clark, against the Southern Can Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Robert F. Leach, Jr., and John H. Richardson, for appellant. J. Morfit Mullen and W. Calvin Chesnut, for appellee.

PATTISON, J. In this case the appellant, an infant, by her father and next friend, brought suit in the court of common pleas against the defendant company to recover for personal injuries sustained by her on or about March 1, 1909, while employed by the company in the operation of a cap-cutting machine. To this action the defendant company pleaded, first, that it did not commit the wrong alleged; and, second, "that the father and next friend of the said infant plaintiff did heretofore institute a suit at law

in this court for the benefit of said infant, based upon the same cause of action sued for herein, and that the said father and next friend of said infant did compromise and settle said suit and said cause of action, and that the said father and next friend did before this suit, by his deed under seal, release the defendant from any and all claims that may or might have existed against it by reason of the cause of action herein sued for." The plaintiff joined issue on the first plea, and replied to the second, alleging that the release mentioned therein was procured by the deceit, misrepresentation, and fraud of the defendant, its agents, servants, or employes. The defendants in their rejoinder thereto denied the facts alleged in the replication.

In the course of the trial, eight exceptions were taken by the plaintiff to the admission of testimony, and, at the conclusion of the plaintiff's case, four prayers were submitted to the court by the defendants. The court was asked in the first prayer to instruct the jury that there was no legally sufficient evidence to entitle the plaintiff to recover; in the second that the accident was caused by the negligence of the plaintiff; in the third, that as the uncontradicted evidence in the case showed the institution, compromise, and settlement by James Clark, father and next friend of the plaintiff, of a former suit in the same court and for the same accident as alleged in the second plea, the verdict of "the jury must be for the defendant, because, under the pleadings in this case, there is no evidence legally sufficient to show fraud, misrepresentation, or deceit on the part of the defendant, its agents, or servants in the procurement of the compromise and settlement of said suit," and by the fourth prayer the court was asked to instruct the jury as follows: "That as the following facts appear from the plaintiff's own testimony in this case: (1) The plaintiff herein by James Clark, her next friend, has heretofore brought a suit in this very court to recover for the same accident on account of which this suit is brought. (2) That the said prior suit was compromised and settled by the said James Clark, and a proper order of agreement and settlement was duly entered by order of the said James Clark's attorney in the said case, heretofore filed in this court. (3) That the said order to enter the said case agreed and settled is still valid and subsisting, and has never been attacked by any proceeding instituted directly for that purpose. Therefore the verdict of the jury must be for the defendant." The court granted all of said prayers, to the granting of which the appellant excepted, thus making the ninth exception.

We will first consider the ruling of the court in granting the fourth prayer. This accident occurred on the 1st day of March, 1909. An attorney, Eldridge H. Young, was promptly consulted, and on the 18th day of

the same month filed by titling two suits, one on behalf of the infant for the injuries suffered by her, and the other on behalf of the father for the loss of his daughter's services. Five days thereafter, on the 23d day of March, the plaintiff for a nominal consideration of \$1, as therein stated, executed under seal a release to the defendant company, releasing and discharging it from any and all liability by reason of said injuries. In this release the plaintiff alleges that she was injured on or about the 1st day of March, 1909, while in the employment of the defendant company, under circumstances which, as she claimed, rendered the company liable to her in damages, although such liability was, as therein stated, denied by the company. It further stated that the execution of the release was pursuant to a desire of both parties that the matter should be settled and adjusted. In addition thereto, the father likewise executed, under seal, to the defendant company a release wherein he, in consideration of the said sum of \$1 paid to his daughter at his request, acknowledged full satisfaction of all claims arising out of said injuries, and released the said company of any liability by reason thereof. Some days thereafter Eldridge H. Young, counsel for the plaintiff, was notified by postal card stamped as of the 27th of March, 1909, written by the sister with the knowledge of the plaintiff and with the name of the plaintiff signed thereto, that she wished to discontinue the suit against the defendant company. The card was worded as follows: "Mr. Young—I have changed my mind about the case against the Southern Can Company for Mary Clark as he gave us steady work and we took it and went to work, so I don't think will be any use bothering." Mr. Young promptly replied to this card, and in answer thereto his client, a few days thereafter, called at his office, and said to him that the agent of the company had come to her home; that the company had either turned her sister off, or was going to turn her off from work unless the case was settled; that he promised they would take her back to work, and she had signed the paper settling the case. Young having heard that the defendant company was represented by Gans & Haman, he called upon them, and they likewise told him of the release, but stated that it was obtained before they were retained as counsel in the case. Young did not ask to see the release, and it was not shown to him. He, however, discussed with them the payment of the costs of the case as well as the fee that he claimed should be paid to him by the defendant company, because, as he expressed it, "they settled the case over my head." Messrs. Gans & Haman declined to consider the payment of a fee, but took under consideration the payment of the costs, and in a few days thereafter wrote him as follows: "Our client is willing to pay the costs in these cases provided the same are entered 'agreed and settled.' They are not,

however, willing to do anything more than this." The next day Young called upon Gans & Haman, and directed them to prepare the papers necessary to effect the settlement suggested by them in the foregoing letter. In response thereto they prepared and sent to him, which was thereafter signed by his client, James Clark, father of the infant plaintiff, the following release: "This release made this 16th day of April in the year 1909, by James Clark individually and also as next friend of and on behalf of his infant daughter Mary Clark. Whereas, the said Mary Clark was injured on or about the first day of March, 1909, by working in the employment of the Southern Can Company, a corporation; and whereas, the said Mary Clark and the said James Clark claim the said injury was caused by the negligence of the said company or its agents, and two suits were subsequently brought against the said company in the court of common pleas of Baltimore city, one by the said Mary Clark and the other by James Clark, her father. Whereas the said Mary Clark and James Clark subsequently agreed to dismiss said suits and settle any claim that they or either of them might have against said company: Now, therefore, this release witnesseth: That in consideration of the sum of one dollar, receipt whereof is hereby acknowledged, and other good and valuable considerations, the said James Clark, on his own behalf and also as father and next friend of his infant daughter, Mary Clark, and acting in her behalf, does hereby release, acquit, exonerate, and discharge the said Southern Can Company, corporation, of and from any and all suit, action, claim, or demand of any claim whatsoever that the said Mary Clark now has or may have against said company, or that be, the said James Clark, now has or may have against said company by reason of the loss of services of his said infant daughter. Witness the hand and seal of the said James Clark individually and as father and next friend of the said Mary Clark. James Clark [Seal]. Individually and as Father and as Next Friend of Mary Clark, Infant. Test: J. C. Wheeler. E. H. Young." The above release was executed by Clark through and at the request of Young. Upon the execution of the release it was delivered to Gans & Haman, with the orders to enter the cases "Agreed and settled." The orders were filed April 21, 1910, and upon that day, as shown by the docket entries, the cases were marked, "Agreed and settled." The costs in the cases, including an appearance fee to Young of \$5 in each case, were paid by Gans & Haman.

The evidence further discloses that both the plaintiff and the sister returned to their work in the employment of the defendant company. The sister, after working for a short while, was taken sick, and by reason thereof remained at home for several weeks. When she returned, she was assigned to work which she claims was much less desirable

than that which she had been doing, and complained to one Funk, the employé in charge of the department in which she worked. He replied, saying that it was all he had, and, if she did not like it, she knew what to do. She left. The plaintiff remained at her work for a week thereafter, and, as testified to by the sister, was sent home, but the cause therefor was not stated. The plaintiff in her testimony makes no reference to the fact that she was sent home. Late in the spring or early in the summer of the same year (1909) the plaintiff again called upon Young, who stated to him fully, and, as he says, with greater detail than she had hitherto done, what was said and done by Funk, the agent of the defendant corporation, at the time he, Funk, procured for the company the execution of the release by her and her father, and it is upon what was said and done by Funk at such time that the plaintiff bases the allegation of misrepresentation, deceit, and fraud in the procurement of the release then executed. After making this statement she asked him to institute another suit. He declined, however, to do so, saying the matter was out of his hands. It was then that the plaintiff, accompanied by Young, called upon and retained Mr. Richardson, her present counsel. This, as stated above, was late in the spring or early in the summer of 1909, and although her counsel has since that time been in full possession of the alleged misrepresentation and fraud said to have been employed by Funk, agent of the company, in obtaining the release, no direct proceedings have ever been taken to strike down the release, and thereby restore to her any and all right of recovery against the defendant company for the alleged loss and injury which might have existed prior to the execution of the release, and not until the 3d day of March, 1910, fully nine months after full knowledge of the alleged fraud and misrepresentation complained of was made known to him, her counsel, and while the said release and the orders based thereon, whereby the cases were marked "Settled and agreed," were in full force and effect, did he take any action whatever to right the wrong complained of, at which time he instituted the present suit. With this statement of the case, we will now determine whether or not the fourth prayer should have been granted.

The compromise and settlement of the first suit involving the claim of the infant plaintiff for injury sustained by her, as above stated, by reason of the alleged negligence of the defendant company, was made under the provision of article 75, § 58, Code 1904. This section provides that "the next friend, or prochain ami, who shall have brought any suit at law for the benefit of any infant or infants, shall have authority to compromise and settle said suit and the cause of action." We think under this provision of the Code that James Clark, the father, had in this

case the power and authority to compromise and settle the suit so instituted by him. As stated above, no direct proceedings have been instituted to annul and set aside the said release, and the effect of the orders based thereon by which the suits were marked "Agreed and settled," but by this collateral proceeding the plaintiff is attempting, in effect, to annul and set aside said release and the effect of the said orders so based thereon.

[1] "A judgment rendered by a court having jurisdiction of the parties and the subject-matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment in respect to its validity, verity, or binding effect by parties or privies in any collateral action or proceeding." 23 Cyc. 1055.

[2] "The rule just stated as to the collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders made by courts of competent jurisdiction in all kinds of judicial proceedings." Among those enumerated are "orders or judgments dismissing the cause, and judgments or orders for costs," etc. 23 Cyc. 1057; *Cook's Lessee v. Carroll*, 6 Md. 112; *Edelen v. Edelen*, 6 Md. 288. In *Cook's Lessee v. Carroll*, supra, which was an action of ejectment, the defendant offered testimony, which was admitted by the county court, tending to prove that the patent upon which the plaintiff relied was obtained by fraud, but upon appeal the ruling was reversed, and the court said: "We also think the court erred in allowing testimony to be adduced for the purpose of showing fraud in the obtention of the patent. If there was any fraud or misrepresentation in causing its issue, it could only be inquired into by the tribunal which issued it, or by a court of equity. It is a well-settled principle of law that the acts of a competent tribunal cannot be reviewed collaterally. They are to be taken as a just and proper exercise of power in all other courts." And Judge McSherry in the case of *Taylor and Bradford v. State*, Use of Miller, 73 Md. 219, 20 Atl. 914, 11 L. R. A. 852, after quoting from *Cook's Lessee v. Carroll*, supra, the principle above stated, in speaking for this court, said: "The same principle has been repeatedly applied when in actions at law instituted by administrators attempts have been made to show by way of defense that the letters of administration were obtained or procured by fraud. In every such instance this court has held that the regularity of the appointment of an administrator by the orphans' court could not be impeached collaterally, even upon an allegation of fraud." *Raborg's Adm'r v. Hammond*, Adm'r, 2 Har. & G. 42; *Wilson v. Ireland*, 4 Md. 444. In the case of *Taylor and Bradford v. State*, supra, the suit was against the sureties upon the bond of Handy, trustee. The trustee had made sale of the property mentioned in the deed

of trust to him, and an audit had been stated making distribution of the fund among the creditors of the grantor. The wife of the grantor, Mrs. Miller, was a creditor for a large amount, and upon her claim the auditor in stating his account allowed a dividend. Some of the other creditors filed exceptions to the allowance of the same, but these exceptions were subsequently withdrawn or overruled and the audit finally ratified by the circuit court for Baltimore city. The defendants in their third plea "alleged that Mrs. Miller employed Mr. Handy as attorney to establish for her her claims against the trust fund; that those claims were fraudulent and fictitious; that Mrs. Miller agreed to compensate Mr. Handy for his services in securing the allowance of these claims; and that Mr. Handy, having an interest in their allowance, procured the withdrawal of the exceptions which had been filed by other creditors against these claims, and did not as trustee resist their allowance, and that the claims thus allowed were the very ones on which the pending suit was brought." The demurrer was sustained, and this court in affirming the court below in its ruling upon the demurrer said: "That fraud vitiates everything tainted by it, even the most solemn determinations of courts of justice, is an axiom of universal application, but, like every other subject of judicial inquiry, fraud must be investigated in the proper forum and by appropriate methods of procedure. That the circuit court which passed the order of ratification had, and still has, full power to rescind it upon the due application and proof of fraud, is undeniably true. But it is equally true that the allegation of fraud cannot in such a case as this confer upon a court of law the authority to strike down or even question an order of this character passed by a court of equity within the admitted scope of its exclusive jurisdiction."

In the case of *Tabler v. Castle*, 22 Md. 94, the appellee filed a bill in equity in the circuit court for Frederick county to obtain a decree to sell certain real estate devised to the appellant for the purpose of satisfying from the proceeds thereof an alleged debt of the appellant's testator. The appellee founded his claim to relief upon a single bill executed by Tabler to him. In that case there was a record of a prior suit instituted on the law side of the circuit court for Frederick county by the appellee against Peter Tabler to recover the amount of this single bill, which was made thereafter the basis of the equity proceeding. The record referred to showed that the suit so instituted was continued from time to time when the case was finally entered "settled," and the single bill impounded as the cause of action therein, where it was retained until some months after the death of Peter Tabler, when it was withdrawn by the appellee, under order of the court, without any explanation of the purpose or use to be made of it. This court

in discussing the case said: "The appellee, with an evident consciousness of the legal effect of this record on the cause of action exhibited, offered evidence to explain and qualify the entry of settlement, as well as to rebut the proper inferences therefrom; and the first question that presents itself is as to his competency to impeach collaterally, by any evidence whatever, the record thus produced as a bar to his claim. On this question we think the law is well settled. Had the docket entry, shown by the certified copy of the record in question, been made in fraud or by mistake, it could have been corrected by a proper application to the court in that case, but no suggestion either of fraud or mistake was made. In legal contemplation the entry of "settled" was made under the eye and with the sanction of the court, and in our opinion it should be considered and taken here as a judicial act, and for that reason is no longer open to question or controversy in any collateral proceeding. From considerations of sound public policy, as well as upon the authority of adjudged cases involving this question, we think the whole record, including the entry by which the cause was terminated, like all other judicial records when incidentally drawn in question, must be taken as absolutely true and as settled to full faith and credit.

[3] It is also well settled in this state that the application made to strike down a judgment alleged to have been fraudulently obtained "must be made within a reasonable time after the discovery of the facts which are supposed to establish the fraud; for, if there be any unnecessary or unreasonable delay in making the application, the right to make it will be considered as waived." *Worthington v. Gittings*, 56 Md. 549; *McCambridge v. Walraven*, 88 Md. 381, 41 Atl. 928.

[4] We think from both principle and authorities that the release in the prior case and the orders based thereon upon which the entry of "agreed and settled" was made under the eye and with the sanction of the court in that case cannot from the facts and circumstances here disclosed be annulled and set aside by the collateral proceeding thereafter instituted by the appellant against the appellee, and from the judgment in which case this appeal is taken. The appellant is asking in a collateral proceeding instituted in a court of law that a judgment previously entered in a prior case by the same court in a suit brought to recover for the same injuries for the recovery of which this suit is instituted be set aside and annulled. The plaintiff's remedy in this case was either by motion to strike out the judgment filed in due season in the court in which the judgment was entered or by a direct proceeding instituted in a court of equity within a

reasonable time after the discovery of the facts which are supposed to establish the fraud for the setting aside and annulment of the judgment. Instead, however, of pursuing the remedy suggested, the plaintiff waited, after the discovery by her of the alleged misrepresentation and fraud of which she complains, and after such had been made known to her counsel, for nearly a year when these proceedings were instituted.

We think the court committed no error in granting the fourth prayer. Entertaining this view of the case, it is unnecessary for us to pass upon the other questions raised upon this appeal. We will therefore affirm the judgment of the court, with costs to the appellee.

Judgment affirmed, with costs to the appellee.

SMITH v. WARRENFELTZ.

(Court of Appeals of Maryland. June 22, 1911.)

1. APPEAL AND ERROR (§ 781*)—DISMISSAL—MOOT QUESTION.

Where an order directed an executrix not to sell certain real estate belonging to her testatrix as advertised on February 14, 1911, but to readvertise the property for sale at a future time, pursuant to a different notice, and no sale having been had on February 14, 1911, the executrix appealed from the order February 21st following, the appeal presents a moot question, and will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3122; Dec. Dig. § 781.*]

2. APPEAL AND ERROR (§ 150*)—RIGHT TO APPEAL—INTEREST—EXECUTRIX.

Where an order directed an executrix not to sell certain real estate belonging to her testatrix under a specified advertisement on a specified day, but to sell the real estate under a different advertisement at a later date, the executrix had no sufficient interest in resisting the order to entitle her to appeal in her representative capacity.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

Appeal from Orphans' Court, Washington County.

Petition by Laura E. Warrenfeltz for an order restraining Ellen Gertrude Smith, as executrix of Mary Ellen Sprecher, deceased, from selling real estate belonging to her testatrix pursuant to a specified notice of sale. From an order granting the petition, the executrix appeals. Dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and URNER, JJ.

H. F. Wingert, for appellant. Albert J. Long, for appellee.

PEARCE, J. Mary Ellen Sprecher, of Hagerstown, Washington county, Md., died in December, 1910, and by her last will and testament executed in October, 1902, and admitted to probate by the orphans' court of

Washington county January 6, 1911, after making certain bequests not necessary to mention here, disposed of the residue of her estate, as follows: She empowered and directed her executor or executors named in said will to sell and convey all said rest and residue, and out of the proceeds thereof she bequeathed in trust to such trustee as a court of competent jurisdiction should appoint the sum of \$2,000 to be safely invested and re-invested, and the interest to be paid semi-annually by said trustee to her husband, Quincy A. Sprecher, during his natural life, this provision for him being declared by said will to be "in lieu of his legal share in said estate," and she directed that, upon his death, the said principal sum of \$2,000 should be divided, one-half thereof to her niece Laura E. Warrenfeltz, and one-half in equal shares between Harvey Ellsworth Smith, Ellen Gertrude Smith, Mary Louise Smith, and Ira Hurless Smith, children of Calvin R. Smith, deceased. All the remainder of her estate she gave and bequeathed in the same manner and proportions between the same persons to whom she gave the principal sum of \$2,000 after the death of her husband; and she appointed James P. Perry as executor of said will, and, if he should die or refuse to act, she appointed Harvey Ellsworth Smith and Ellen Gertrude Smith to be executors of said will, with full power to execute all its provisions. The record contains a copy of this will as the same was admitted to probate, but it does not appear from the record whether the said James P. Perry, first named as executor of said will, had died, or declined to act, nor whether Harvey Ellsworth Smith, named as executor with Ellen Gertrude Smith, in event of the death or refusal to act of James P. Perry, is also deceased or had refused to act; but there is attached to the copy of the will a certificate of the register of wills that on January 3, 1911, "Ellen Gertrude Smith, surviving executrix of Mary E. Sprecher," made oath that said paper was the whole and true will of said deceased that had come to her hands, and that she knew of none other. Nor is there in the record any evidence of the grant of letters testamentary to the said Ellen Gertrude Smith, but the three judges of the orphans' court certified under their hands that the will was admitted to probate January 6, 1911.

On February 11, 1911, Laura E. Warrenfeltz filed a petition in said court, alleging that she was a legatee under said will, and filing with said petition a copy of an advertisement of sale of the real estate of the decedent signed by Ellen Gertrude Smith as executrix of Mary E. Sprecher, giving notice that under an order of the orphans' court of Washington county she would on the 14th day of February, 1911, between 1 and 3 o'clock p. m., in front of the courthouse in Hagerstown, offer at public sale a

tract of land containing 17 acres and 6 perches of land within the corporate limits of Hagerstown; the location and improvements of the same and the terms of sale being sufficiently described therein. The advertisement contained the following clause: "This property will be offered subject to the right of the husband of said deceased to renounce his legacy under her will and to come in at any time within six months from the granting of letters of administration of the estate of the deceased and elect to take in lieu thereof his (the husband's) estate for life in the property hereby offered for sale." The petition of the appellee alleged that the above-mentioned clause was calculated to hinder and prevent a proper and advantageous sale of said property, and would certainly prevent the same from bringing its true value, and would thus work to the injury of the appellee and others interested in said estate, and further alleged that the surviving husband of the decedent had no life estate nor other estate or interest in said property than that provided for him by said will, and that he had no right to come in within six months or any other time from the grant of letters of administration upon said estate, and elect to take, in lieu of the estate or interest provided in the will, an estate for life as stated in said advertisement or any other estate or interest in the property so advertised. The petition prayed that an order be passed "directing and ordering the said executrix not to sell said real estate at the time and as so advertised, but to readvertise the same for sale at some future time, and in accordance with the proper description of the estate to be sold." On the same day, February 11, 1911, the court passed an order that said executrix "be and she is hereby ordered, directed, and required not to sell the real estate left by the said Mary E. Sprecher, deceased, and which said real estate said executrix has advertised for sale on February 14, 1911, on said day and in pursuance of said advertisement, and the said executrix is hereby ordered, directed, and required to readvertise said property for sale at some future time in a proper form and manner and free from the interests of all parties interested in said estate; and it is further ordered that a copy of this order be served upon the said Ellen Gertrude Smith, executrix, on or before February 13, 1911." From this order the executrix appealed February 21, 1911, and the appellee has filed a motion to dismiss the appeal: (1) Because the property was not offered for sale on February 14, 1911, but was readvertised for sale as directed by the order of February 11th, on February 25, 1911, before the appeal was taken, and that for that reason any order that this court might pass would be nugatory. (2) Because, if there is any substantial question that could be raised on this appeal, the only person affect-

ed thereby is the surviving husband of the decedent, who has not appealed. (3) Because the transcript does not present to this court certain facts which were before the court below when it passed the order appealed from. The record does not show that anything was before the court when that order was passed except the will of the testatrix, the petition of the appellee, and a copy of the advertisement, but the motion to dismiss the appeal states that the court had before it when the order was passed the land records and marriage records in the office of the clerk of the circuit court for Washington county, and the records in the office of the register of wills of said county, which records showed the following facts: (1) That the real estate advertised to be sold, and of which Mary E. Sprecher died seised, was acquired by her in fee simple before her marriage by deed dated April 28, 1874. (2) That she was married to her husband, Quinby A. Sprecher, April 23, 1878. (3) That she died without issue, leaving a will disposing of this real estate.

There are two imperative reasons for the dismissal of this appeal:

[1] First. The property not having been offered for sale on February 14th under the advertisement mentioned, and that day being long past, there is no practical or substantial question presented by the appeal, and if the order forbidding such sale were now reversed on the ground that the court had no jurisdiction to pass it, or on any other ground, such decree of reversal would be idle and nugatory. Courts will never order any action which would be nugatory, if taken. This principle finds its most frequent illustration where the writ of injunction or mandamus is sought when too late to restrain in the one case or to perform in the other, but it is applicable in any form of proceeding where the action prayed must be unavailing. *Wells v. Hyattsville*, 77 Md. 142, 26 Atl. 357, 20 L. R. A. 89; *Syfer v. Spence*, 103 Md. 68, 63 Atl. 256. In the latter case the appellant sought an injunction to restrain the bond of undertakers from revoking his license, which expired April 30, 1905, and in May, 1905, the bill was dismissed. On appeal this court said: "Having expired by operation of law, it could not be revived by any action of the court. * * * The appellant was entitled to a reversal of the license upon complying with the requirements of the statute, and this the appellee says in its brief was actually done and the license renewed. There is therefore no substantial question in this case to be passed

upon, and a decree to restrain the board would be nugatory. The appeal will be dismissed." So, in this case, the appellant is entitled to readvertise and sell, as directed in the will, and the order appealed from recognizes this right and provides for its exercise, and the motion to dismiss states she has readvertised. It cannot be doubted if this property had been actually sold under the advertisement mentioned, and upon reporting said sale it had been made to appear upon exceptions thereto that the question raised by the advertisement as to the husband's interest in the property had prevented a sale for a fair price, that the court would have sustained such exceptions, and would have ordered a resale under a proper advertisement. If this be so, we should be slow to hold that the court had not jurisdiction to pass the order in this case, when informed as they were by the petition of the appellee, and the accompanying copy of the advertisement, of the obvious injurious effect of attempting to sell in that manner.

[2] Second. But, apart from the ground just stated, in order to justify a reversal of this order, the appellant must appear to have a standing in court and to have been injured by the order appealed from. She has appealed only in her capacity as executrix. In that capacity, as was said in *Johns v. Caldwell*, 60 Md. 262, "she had no interest in resisting the order, and no right to refuse to obey it. She is not a party aggrieved by its passage, and from such an order she has no right to appeal." And to the same effect is *Grabill v. Plummer*, 95 Md. 60, 51 Atl. 823. It is true that the appellant is also a legatee under the will, and as such has an interest in the proceeds of sale of said real estate, but the order appealed from could not aggrieve her because it operated beneficially for all the legatees in preventing a sale under circumstances which must necessarily have depressed the price of the property. We were requested by the appellant to express our views as to the interest or estate of the husband in this property upon the death of his wife, but, as we have already stated, the facts necessary to enable us to do this are not embraced in the record, and anything we might say upon that subject would be mere advice and would be exclusive upon no one. We must therefore decline this request. For the reasons stated, the appeal must be dismissed.

Appeal dismissed, with costs to the appellee.

RUSHE et al. v. MAYOR AND COMMON COUNCIL OF TOWN OF HYATTSVILLE et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. MUNICIPAL CORPORATIONS (§ 994*)—ULTRA VIRES ACTS—INJUNCTION BY TAXPAYER.

A municipal taxpayer can enjoin negotiation of an ultra vires loan by the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2162; Dec. Dig. § 994.*]

2. MUNICIPAL CORPORATIONS (§ 57*)—POWERS—SCOPE.

Municipal corporations have only such powers as are granted by the Constitution or statutes expressly or by fair and reasonable construction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 144; Dec. Dig. § 57.*]

3. MUNICIPAL CORPORATIONS (§ 57*)—POWERS—SCOPE.

Any reasonable doubt as to the existence of municipal power must be resolved against the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 144; Dec. Dig. § 57.*]

4. MUNICIPAL CORPORATIONS (§ 863*)—CURRENT REVENUES—POWER TO BORROW MONEY.

Under Hyattsville Charter (Acts 1908, c. 79) §§ 2, 28, authorizing the town to purchase property and to erect buildings, and under section 25 prohibiting expenditures in excess of current revenues except as provided in section 17, the town authorities cannot issue notes or other evidence of indebtedness for loans to purchase land and erect a municipal building thereon.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.*]

Appeal from Circuit Court, Prince George's County; Fillmore Beall, Judge.

Action by J. Frank Rushe and another against the Mayor and Common Council of the Town of Hyattsville and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Charles Benedict Calvert and James C. Rogers, for appellants. Vincent A. Sheehy, for appellees.

BURKE, J. This suit was instituted to test the validity of two ordinances of the mayor and common council of Hyattsville, a municipal corporation. One ordinance authorized, empowered, and directed the corporation to contract with Hillary T. Willis for the purchase of a lot of land on the terms and conditions set forth in the ordinance, "and in the name and under the seal of the mayor and common council of Hyattsville to make, execute and deliver such promissory notes, bonds and other evidences of indebtedness, mortgages or deeds of trust as may be requisite and necessary to secure the pay-

ment of the purchase money aforesaid," etc. The ordinance authorized the purchase of the lot for \$1,000, payable in five years, with interest at 6 per cent. per annum, payable half yearly, the purchase price to be represented by the promissory note, bond, or other evidence of indebtedness of the corporation, and secured by a second mortgage or deed of trust on the lot. The other ordinance authorized the municipal corporation to borrow the sum of \$3,000 from the Hyattsville Building Association to be applied to the erection and construction of a suitable building upon the lot to be used as a town hall and quarters for the fire department and other municipal purposes. The ordinance provided that the amount borrowed should "be represented by the bond, note, or other evidence of indebtedness of the mayor and common council of Hyattsville as may be required by the constitution and by-laws of said association, and the repayment thereof secured by a first deed of trust or mortgage" on the lot described in the ordinance.

The appellants are residents and taxpayers of the town of Hyattsville, and filed the bill in this case in which they prayed:

(1) That the said the mayor and common council of Hyattsville, its agents, servants, and employes, and the said William P. Magruder, as mayor, and George Hodges Carr, as clerk thereof, they and each of them, may be enjoined from purchasing said lot from the said Hillary T. Willis or from any one else, upon the terms stated, or contract for the purchase of the lot aforesaid, or issue any note or give said mortgage, or from doing anything else as provided by said ordinance as aforesaid.

(2) That the said the mayor and common council of Hyattsville, its agents, servants, and employes, and William P. Magruder, as mayor, and George Hodges Carr, as clerk thereof, they and each of them may be enjoined from negotiating said loan and from contracting or issuing any bond, note, or other evidence of indebtedness, or executing said mortgage to the Hyattsville Building Association, or to any one else for the said sum of \$3,000, or for any other sum upon the terms and conditions mentioned or of doing anything else as provided by said ordinance as aforesaid.

The ground upon which this relief is asked is stated in the thirteenth paragraph of the bill as follows: "That the aforesaid ordinances provide for acts and contracts that are illegal, and the ordinances themselves are beyond the power and authority of the said the mayor and common council of Hyattsville, and the said mayor and clerk thereof, and are illegal and void, and the said the mayor and common council of Hyattsville having by ordinances aforesaid provided that said illegal acts are to be done, and instructed the said William P. Magruder as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mayor and George Hodges Carr as clerk of said town to negotiate said loans, execute said note, contract for said indebtedness, and execute said mortgages aforesaid, and their execution or enforcement will work great damage and injury to the plaintiff and the other taxpayers of the said town of Hyattsville." An answer was filed by the corporation, and the case was heard in the lower court upon bill and answer. The court denied the injunction, and from this order the plaintiffs have appealed.

It is quite evident, we think, that the purpose of the corporation in the passage of the two ordinances was to borrow money with which to pay for the lot and the erection of the building referred to therein. It is important to bear in mind the precise question we are dealing with. It is not as to whether the mayor and common council of Hyattsville has power to purchase this lot and to erect the building provided for in the ordinance; but whether it has the power to borrow the money for those purposes by the issue of the obligations of the character mentioned in the ordinances to be repaid out of future levy upon the property of the residents of the corporation. Confessedly it has no such power unless it be granted by its charter. The ultimate inquiry is whether by a true construction of the charter of the appellee corporation it has the power to do the things which are complained of in this case.

[1] If the ordinances are ultra vires, the right of the complainants as taxpayers to maintain the bill is beyond question. This has been settled by numerous decisions in this state. *Mayor & City Council v. Gill*, 31 Md. 375; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *Christmas v. Warfield*, 105 Md. 530, 66 Atl. 491, and other cases. In the case of the *Mayor & City Council v. Gill*, supra, this court said: "In this state the courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations; and have not hesitated to exercise their rightful jurisdiction for the purpose of restraining them within the limits of their lawful authority, and of protecting the citizens from the consequences of their unauthorized or illegal acts."

[2] It is settled by all of the authorities that municipal corporations have only such powers as are granted to them by the Constitution or statutes, either expressly or by fair and reasonable construction. The following statement from 1 *Dillon on Mun. Corp.* (4th Ed.) § 89, is supported by practically an unbroken line of decisions: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First. Those granted in express words. Second. Those necessarily or fairly implied in or incident to the powers expressly granted. Third. Those essential to the declared ob-

jects and purposes of the corporation, not simply convenient, but indispensable." See, also, cases of *St. Marys Industrial School v. Brown*, 45 Md. 331; *Baltimore City v. Bond*, 104 Md. 590, 65 Atl. 318; *Revell v. Annapolis*, 81 Md. 9, 31 Atl. 695; *Minturn v. Larue*, 23 How. 436, 16 L. Ed. 574.

[3] It is equally well settled that any fair and reasonable doubt as to the existence of the power attempted to be exercised must be resolved against the corporation, and in such case the power must be denied. In 1 *Dillon on Mun. Corp.* § 117, the author says: "It is perhaps settled law in this country that private corporations, organized for pecuniary profit, have, in the absence of special limitation or restriction, an implied or incidental authority to borrow money for their legitimate purposes, and to give negotiable obligations for its repayment. The question of the incidental authority of municipal corporations to borrow money has not been so thoroughly considered and so often decided as to be entirely closed to controversy. In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of this power by reason of the temptations it holds out to incur needless debts and to make extravagant expenditures, and the facilities it offers for fraud, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author, where the legislative will is wholly silent, is strongly inclined to deny the existence of a general implied or incidental power to borrow money. But it must be admitted that down to the present time a majority of the expressed adjudications on the subject favor the contrary opinion." It is stated in *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Am. & Eng. Ann. Cas. 760, that "on the question whether a municipal corporation has or has not, in the absence of an express grant, power to borrow money to make public improvements, the decisions are in direct conflict. Probably in the majority of jurisdictions it is held, in conformity with the rule announced in the leading case of *Nashville v. Ray*, 19 Wall. 475 [22 L. Ed. 164], that the power to borrow money does not belong to a municipal corporation as an incident of its creation, but that it exists only when conferred by expressed legislative grant, or by force of legislative investment of power coupled with the imposition of duties which are incapable of exercise and performance without the borrowing of money." In *Luther et al. v. Wheeler et al.*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, the court said: "The power to borrow money is not a necessary incident of municipal life, and hence

does not exist unless expressly given, or unless some duties are imposed or powers conferred on the corporation which manifestly could not be exercised at all without borrowing money. The two leading cases on the subject are *Nashville v. Ray*, 19 Wall. 408, 22 L. Ed. 164, and *Swackhammer v. Hackettstown*, 37 N. J. Law, 191. Authorities to the same effect will be found collected in 8 *Rose's Notes*, 453; Note to *Jones v. Camden*, 44 S. C. 319, 23 S. E. 141, 51 Am. St. Rep. 828; *Wells v. Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759; *Allen v. La Fayette*, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497; 1 *Dillon on Munic. Corp.* § 125, 1, and section 507a; 20 Am. & Eng. Ency. of Law (2d Ed.) 1143. A contrary view was taken in a number of the earlier cases cited in 1 *Dillon on Munic. Corp.* § 118, and by some of the justices of the Supreme Court of the United States in *Nashville v. Ray*, supra. There is now, however, little, if any, judicial dissent from the view that municipal corporations are not the general fiscal agents of the corporation with the implied power to borrow money for corporate purposes. This conviction of the courts has been greatly strengthened by the disasters which have befallen so many communities growing out of the negligent and fraudulent misappropriation of money borrowed by counties, cities, and towns." These principles are in accord with the views expressed by Judge Dillon, and we think they are the principles which should control this case. They are less liable to lead to the needless creation of debts and extravagant expenditure than those contended for by the appellee, although the position taken by the appellee has the support of courts of high authority.

[4] It is conceded that there is no express authority conferred upon the corporation to borrow money for the purposes stated in the ordinances. Nor is there any duty imposed upon it to purchase the lot, or to erect the proposed building. By sections 2 and 28 of the charter of the town of Hyattsville (Acts 1908, c. 79), the municipality is authorized "to purchase and hold real, personal, and mixed property, and sell and dispose of the same for the benefit of the town," and "to purchase and hold said property, real, personal, and mixed for town purposes, and dispose of the same for the benefit of said town, and may erect suitable buildings." It was upon these provisions of the charter that the court below implied the power in the defendant corporation to pass the ordinances in this case. We cannot concur in this view. The power to borrow money and to issue the notes or obligations of the corporation to be paid out of future levies cannot be implied from the

mere authority to purchase property and erect public buildings. In 1 *Dillon on Munic. Corp.* § 125, it is said: "The power to borrow money as a means of raising a fund to make future local improvements, or to carry on the ordinary operations of the municipality, cannot be implied from the mere authority to make such improvements or from the usual grant of municipal power. These contemplate that the expense of the execution of the ordinary municipal powers shall be met by the revenue derived year by year from taxation." Moreover, we think it reasonably clear from sections 17 and 25 of the charter that the Legislature did not intend that the appellee should have the power to borrow money, except for the specific purposes mentioned in section 25. That section provides that "the mayor and common council shall not expend or contract to expend in any one fiscal year more money than the amount receivable from taxes and other sources during that year except as provided in section 17," which section expressly limits the tax rate for all purposes, but contains the provision that, "in the event of an emergency arising which could not have been reasonably anticipated at the time of making the annual levy by the mayor and common council and demanding the immediate raising of money in excess of the town's revenue, the mayor and common council shall have power by ordinance to provide for an additional tax levy," but such ordinance, however, must be submitted to the voters of the town, and be approved by a majority vote, before such additional levy can be made. Section 25 further provides: "That the present mayor and common council may authorize the obligations of the town to be issued to an amount not exceeding two thousand dollars, and payable and renewable at such times as may be agreed upon by said mayor and common council or the council, provided for by this act, to the extent of not exceeding two thousand dollars, to cover existing deficiencies in the town revenue, and may also purchase on installments to be agreed upon between the mayor and common council and the vendors, meters necessary to regulate the flow of water to each consumer, the indebtedness therefor not to exceed three thousand dollars." These provisions of the charter manifest a clear intention to restrict the taxing power of the appellee, and to deny it the power to borrow money except in the two instances mentioned.

The order appealed from will be reversed, and the case remanded in order that the injunction prayed for may be granted.

Order reversed, with costs to the appellants above and below, and cause remanded.

**JOFFE & MANKOWITZ v. NIAGARA
INS. CO.**

(Court of Appeals of Maryland. June 23, 1911.)

1. INSURANCE (§ 335*)—FIRE POLICY—IRON-SAFE CLAUSE—"OPEN FOR BUSINESS."

Where a store containing insured's fixtures and stock was locked for a half hour at noon while the persons in charge were at lunch, and during that time the property was destroyed by fire, the store was not then "open for business," within a provision of the iron-safe clause in the policy, requiring that assured shall keep his books and inventory locked in a fireproof safe when the building is not actually open for business, or in some place not exposed to a fire which would destroy the building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.*]

For other definitions, see Words and Phrases, vol. 6, p. 4986.]

2. INSURANCE (§ 335*)—IRON-SAFE CLAUSE—PROTECTION OF BOOKS.

Where a policy provided that the breach of the iron-safe clause should avoid the policy, a mere failure of assured to produce the books after the fire would not necessarily bar a recovery, if, in good faith, he placed the books in a safe which he believed to be fireproof, or in some place which he had a right to believe was not exposed to a fire which would destroy the building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.*]

3. INSURANCE (§ 335*)—FIRE POLICY—ENTIRE POLICY—IRON-SAFE CLAUSE—BREACH—EFFECT.

A policy insuring a stock of goods, as well as fixtures, was entire and not divisible, so that, where insured was unable to enforce it as to the stock because of a violation of an iron-safe clause contained therein, he could not enforce it as to the fixtures.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 702, 853; Dec. Dig. § 335.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Action by Joffe & Mankowitz against the Niagara Insurance Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

George R. Gaither, for appellants. W. Calvin Chestnut, for appellee.

BOYD, C. J. The appellants sued the appellee on a policy of insurance which included what is known as the iron-safe clause. At the conclusion of the case, the court refused two prayers offered by the plaintiffs, and granted two, instructing the jury to render a verdict for the defendant. The rulings on those prayers present the only questions for our consideration.

The appellants were engaged in the millinery business, trimming hats and selling them. They had been on High street, in Baltimore city, but, on the 23d of January, 1909, moved to Baltimore street, where they still were at the time of the fire at which the loss occurred, November 26, 1909. The

policy of insurance was for the term of one year from the 22d of September, 1909, being for \$1,000 on the stock of merchandise and \$200 on the furniture and fixtures. The business was run by Mrs. Mankowitz, the wife of one, and Miss Joffe, the daughter of the other, appellant. Miss Joffe was absent the day of the fire by reason of illness, and Mrs. Mankowitz and a Miss Rosen, who was employed to trim hats, were at the store on that day. Mr. Mankowitz was a tailor, but he kept the books, paid the bills, etc., for the millinery business, going to the store every night, and at other times when he was not engaged in his regular occupation. He was not working the day of the fire, but some time before it started he had left the millinery store to pay a bill which was due. When Miss Joffe was there, it was her custom to go to dinner at 12 o'clock and return at half past 12, and then Mrs. Mankowitz would go; but as Miss Joffe was not there on November 26, 1909, Mrs. Mankowitz and Miss Rosen left for dinner at the same time—12 o'clock. Mrs. Mankowitz went to her brother-in-law's, which was near the store, and only intended to be away 20 minutes or half an hour. She locked the store door, and while she was at luncheon heard an alarm of fire, and upon going out on the street found it was at their store. After the fire was discovered, a neighbor broke the door open, but the stock of goods was practically ruined by fire and water, and the fixtures were very much injured.

By the first prayer granted, the jury was instructed "that it appears from the plaintiffs' own evidence that they failed to comply with the provision of the policy sued on, known as the iron-safe clause," and by the second "that it appears from the plaintiffs' own evidence that the plaintiffs did not keep the books required by the condition of the policy." Each of them concluded with an instruction that the verdict must be for the defendant.

The clause in this policy relied on was as follows: "Iron-Safe Clause. Warranty to Keep Books and Inventories, and to Produce Them in Case of Loss. The following covenant and warranty is hereby made a part of this policy: 1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2nd. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date

of inventory as provided for in the first section of this clause and during the continuance of this policy. 3rd. The assured will keep such books and inventory and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

Mr. Mankowitz admitted that they did not have a safe, but testified that every night he carried such books as they had to his brother's store, which, according to his evidence, was about six or seven houses away, and according to that of his brother was about ten houses, from the one in which the fire occurred. He arranged with his brother that the books were to be taken to the latter's store every night, when the plaintiffs' store was closed, and then taken back in the morning. They were kept in a drawer in the brother's store, as the latter's safe was already full. On the morning of the fire, Mr. Mankowitz got the books and took them to the store.

[1] We do not understand the appellee to claim that the plaintiffs could not keep the books at the brother's, as they were kept there, but the important question is whether the store was actually open for business at the time of the fire, within the meaning of the policy. As the books and inventory were not kept in a safe, it was undoubtedly the duty of the plaintiffs to keep them in some place, not exposed to a fire which would destroy the building, at night, and at all times when the building was not actually open for business. It cannot be doubted that in a literal sense the building was not actually open for business when the fire occurred, and it would seem to be equally clear that if it had been open the probabilities are that the fire would not have been so disastrous (if it had occurred at all), and, at any rate, the books would have been easily saved. They are thus described in the testimony: "Three of them were small books of the size of the one produced, and one was a 200-page ledger; the book produced was a book about twelve inches long by four inches wide by three-quarters of an inch thick, weighing about six ounces. The ledger was a little wider and a little thicker." An inventory, made just before they moved to Baltimore street, was in one of the books. All but one of them was totally destroyed by the fire, and that was what Mr. Mankowitz called "the sales book." They could by reason of their size very easily

have been taken to his brother's when Mrs. Mankowitz went there to dinner.

It is true that she only expected to be absent about half an hour, but she was gone long enough for the fire to make such headway that, according to the plaintiffs' claim, the stock was practically destroyed and the fixtures very much damaged. If it be conceded that the plaintiffs had such books and inventory as this clause required, the very object of the requirement was defeated by reason of the plaintiffs' representative leaving them where they were, unprotected in case of fire in her absence. If an insured can relieve himself of the obligation of his warranty to produce the books and inventory in case of fire by shutting up his store for half an hour with no one in it, and claiming the books, etc., were kept, but were destroyed, there is but little protection to the insurer by such a clause, and it might as well be abandoned. If it can be done for half an hour, then why not for an hour or more?

Such a clause in an insurance policy should undoubtedly receive "a fair and reasonable interpretation," as the authorities have frequently said of it; but it will be observed that in considering such a question as the one now before us the courts have been largely governed by the circumstances of each particular case, rather than attempting to lay down general rules. When there is no question about that which caused the loss having been without the fault or negligence of the owner, courts naturally shrink from placing such an interpretation on a clause of this kind as will deprive the owner of a right to recover, by reason of a purely technical defense, if that can be properly avoided; but even then, when the terms of the contract are clear and unambiguous, courts have no right to make new contracts for the parties, or ignore those already made by them, simply to avoid seeming hardships. A review of the many decisions on this iron-safe clause will show a tendency in some instances to do more for the protection of the insured than they seemed ready to do for themselves, although the clause has been very generally recognized as valid and reasonable, and has been declared to be useful and desirable, not simply for the insurer, but for the honest insured.

It may be that it might be well to require by legislation insurance companies making use of it to make it so prominent in the policies, or to give such notice of it, as will leave no question about the insured having notice of it, when it is inserted in or attached to a policy, as we do not understand that all standard policies on stocks of merchandise contain it; but in this case the plaintiffs knew of it, and hence do not even have the excuse of their ignorance of such provision. They knew of the necessity of taking their books out of the building when the store was not actually open for business, and presuma-

bly they knew the object of such a provision. If they had had a safe in the store, it would not have been unreasonable to require them to place those four little books in the safe before shutting up the store and leaving it without protection. The undoubted fact is that the storeroom was left unprotected long enough to give the fire such headway as to consume the contents before any one could extinguish it. Customers not only could not enter the room, but those who discovered the fire could not, until the door was finally broken open. And, as we have already indicated, the store being closed, without any one in charge, and the books being left there exposed, have deprived the insurer of the kind of evidence of the loss it was by the express terms of the contract entitled to. We do not feel justified in saying that because it was intended to close the store for half an hour, and then open it again, it was during the half hour in which the fire occurred actually open for business, and hence the clause in the policy does not apply. The provision not only says the building must be open for business to avoid the necessity of putting the books in a safe, or, in the alternative, keeping them in some place where they would not be exposed to a fire in the building, but it says *actually* open for business. It cannot be correctly said that a store is "*actually* open for business" when it is *actually* locked up, with no one in it, for half an hour, and no one there to attend to business or protect the property.

It will be observed that by section 1 of this clause a policy becomes null and void if the inventory is not taken as required, and hence we held in *Reynolds v. German Am. Ins. Co.*, 107 Md. 10, 68 Atl. 262, 15 L. R. A. (N. S.) 345, that the policy had become null and void by the assured failing to take an inventory within the time limited, and that it was not revived by his making an inventory afterwards, although before a loss by fire; but in section 3 (the one applicable here) the insured is required to keep the books and inventories as therein provided, and, "in the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." The latter does not make a policy null and void merely because the assured does not keep his books in a safe, or as provided in the alternative, but the failure to produce the books and inventories has that effect, and constitutes a bar to recovery for a loss sustained. In other words, if there had been no fire, the closing of the store on this occasion would not have invalidated the policy, but as the fire did occur, and did confessedly prevent the books and inventories from being produced, then there can be no recovery in the absence of such books and inventories, unless the assured did what they agreed to do for

the safe-keeping of the books and inventories, or can be excused from not doing so.

[2] In that connection, we would add that we would have no hesitation in holding that if an assured, acting in good faith, placed the books in a safe which he believed to be fire-proof, or in some place which he had the right to believe was not exposed to a fire which would destroy the building, the mere failure to produce the books would not necessarily be a bar to his recovery. On the contrary, we could readily concur in the view taken by the Supreme Court in *Liverpool Fire Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460, and other cases on such a question. Mr. Justice Harlan said, "We are of the opinion that the failure to produce the books and inventory referred to in the policy means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence, or design of the insured," and, as the failure to produce them in this case was by reason of the fault and negligence of the plaintiffs in leaving them in the store when it was not actually open for business, they cannot be excused.

The cases relied on by the appellants on this point were *Sun Mutual Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034; *Jones v. Insurance Co. (C. C.)* 38 Fed. 19; *Major v. Insurance Co.*, 112 Mo. App. 235, 86 S. W. 883; and *Phoenix Ins. Co. v. Schwartz*, 115 Ga. 113, 41 S. E. 240, 57 L. R. A. 752, 90 Am. St. Rep. 98. In the two first named, which referred to the same fire, it was held that the store was still open for business. In the Missouri case, a physician who had a drug store responded to an urgent call to see an ill patient, and during his absence of 10 or 15 minutes the fire occurred. He had a safe, but did not put the books in it in his absence, and did not remember whether he had locked the door of the store. The court said the store was still open for business. In the Georgia case, there was a suspension of business, caused by a fire raging in the neighborhood, and threatening the building. In none of those cases did the courts think the parties were at fault, but we cannot say that of these plaintiffs. In the case of *Etna Ins. Co. v. Johnson*, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. (N. S.) 667, as annotated in 9 Am. & Eng. Ann. Cas. 466, a number of cases are cited on the various phases of the iron-safe clause, and, although some of them may not be entirely in accord with the conclusion reached by us, none of them have gone so far as we would have to go in order to relieve the appellants of the consequences of their own deliberate acts, which resulted in this loss. In this state we have not followed the construction of insurance contracts adopted by some other courts, but, as Judge McSherry said in *Agric. Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457: "In *Kelly's Case*, 32 Md. 421 [3

Am. Rep. 149], and in *Weaver's Case*, 70 Md. 539 [17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478], this court repudiated the principle of interpretation adopted in some cases that insurance contracts are to be construed more strongly against the underwriter, and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail."

As in our judgment the plaintiffs cannot recover by reason of the provision contained in section 3 of this clause, it is unnecessary to discuss the question whether sufficient books were kept, or whether the inventory made at High street was a sufficient compliance with the clause.

[3] The only remaining question for our consideration is whether the policy can be treated as divisible, and recovery allowed for the fixtures. The cases in the various jurisdictions have differed greatly on that question, but in this state the decisions have adopted the view that such a contract as this is an entire one. In *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 185, there was a policy of insurance to the amount of \$1,000; \$700 on stock of books and stationery, and \$300 on music, musical instruments, fancy goods, bronze powder, and medicines. The policy provided that if the assured "shall hereafter make any other insurance on the hereby insured premises" he shall notify the company, "or, in default thereof, this policy shall cease and be of no effect." The court held: "That the proper construction of the covenant is that if any part of the goods mentioned therein was afterwards insured in any other insurance office without notice to the appellants, as provided in the covenant, the policy thereby becomes void and of no effect." In *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620, the policy contained a provision that an incumbrance on the property insured must be assented to by the company; "otherwise the policy shall be void." Part of the insurance was on the building, and part on the machinery therein, and there were judgments against the owner, which were liens on the real estate. Judge Alvey said: "The difficulty in the plaintiff's way is that the contract is entire. The consideration for it was entire; and in such case the contract is held to be entire, although its subjects may consist of several distinct and wholly independent items. Moreover, this stipulation in regard to the forfeiture applied to the policy as an entirety." See, also, *Agric. Ins. Co. v. Hamilton*, supra, and *Norris v. Conn. Fire Ins. Co.*, 80 Atl. 960, decided recently by this court and not yet officially reported.

In this case the consideration was not only entire, but the stipulation as to the forfeiture applied to the policy as an entirety—"this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." That the author-

ities differ widely on this subject can be seen by reference to the notes to *Republic County Mutual Fire Insurance Co. v. Johnson*, in 69 Kan. 146, 76 Pac. 419, 105 Am. St. Rep. 157, 2 Am. & Eng. Ann. Cas. 22. See, also, *Aetna Ins. Co. v. Johnson*, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. (N. S.) 667, 9 Am. & Eng. Ann. Cas. 470, and the case of *Coggins v. Aetna Insurance Co.* (1907) 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924, where cases on both sides are cited. But in view of our own decisions on the question of the divisibility of the contract, and of the language of the policy itself, we feel constrained to hold that there can be no recovery in this case for the reasons given. The judgment will therefore be affirmed.

Judgment affirmed; the appellants to pay the costs.

EDEN STREET PERMANENT BLDG.
ASS'N NO. 1 OF BALTIMORE CITY
et al. v. LUSBY et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. CONSTITUTIONAL LAW (§ 194*)—RETROACTIVE LEGISLATION—CURATIVE STATUTES.

Statutes validating defectively executed and acknowledged deeds and mortgages, but saving the rights of third parties which have been acquired in good faith, are valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 545-549; Dec. Dig. § 194.*]

2. DEEDS (§ 88*)—RECORDING—EFFECT OF FAILURE.

Under Code, art. 21, §§ 19, 21, providing that any deed or conveyance duly acknowledged and required by law to be recorded, except mortgages, may be recorded after the time prescribed, and when recorded shall, as against the grantor, have the same validity as if recorded in time, a deed not recorded within six months from its date is valid as between the parties to it, being subject only to the rights of creditors and purchasers without notice.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 88.*]

3. RECORDS (§ 6*)—STATUTORY PROVISIONS—CONSTRUCTION—"DULY RECORDED."

The term "duly recorded," used in Acts 1908, c. 105, providing that all deeds, mortgages, releases, etc., which have not been properly executed and acknowledged shall be valid, if duly recorded, merely requires that the instrument defectively acknowledged must be recorded, and not that the record must be made within the statutory six months after execution, for a deed lawfully registered is valid without any aid from statute.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 3, p. 2263.]

4. DEEDS (§ 52*)—VALIDITY—CURATIVE STATUTES.

A deed was dated "— day of October, 1902," and was acknowledged on "this — day of — in the year 1902," and was recorded in March, 1906. Laws 1908, c. 105, provide that all deeds which have not been sealed, witnessed, or certified according to law shall be valid, if duly recorded; and Laws 1910, c. 588, amending Laws 1908, c. 259, pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vide that all deeds executed subsequent to the passage of the act of 1858, which have not been acknowledged according to the laws existing when they were executed, shall be valid. *Held*, that the defects in the deed were cured.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 52.*]

Appeal from Circuit Court of Baltimore City, Chas. W. Heulsler, Judge.

Suit by the Eden Street Permanent Building Association No. 1 of Baltimore City and others against Arthur A. Schaeffer and another to foreclose a mortgage. Upon trustee's sale the property was purchased by Harry D. Lusby and another, and from an order sustaining exceptions to the sale plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Charles Lee Merriken, for appellants.
Arthur Herzog, for appellees.

BRISCOE, J. The question in this case is a narrow one, and upon the record before us is free from difficulty.

The record presents a single question, and that is the validity of a deed of assignment from one Arthur A. Schaeffer, of Baltimore city, to John Beck, dated — day of October, 1902, conveying a leasehold lot of ground, situate in Baltimore city, at the intersection of Castle and Gough streets, subject to an annual ground rent of \$30, payable on the 1st days of January and July in each year. The property is described as the same piece or parcel of ground described in the deed from John Beck to Arthur A. Schaeffer, dated October 14, 1902, and recorded the same day in one of the land records of Baltimore city. The deed was acknowledged on this — day of —, in the year 1902, before C. Chas. Friedel, a justice of the peace of the state of Maryland, in and for Baltimore city, but was not recorded until the 22d of March, 1906. The property was subsequently, on the 8th day of June, 1906, mortgaged to the appellants, to secure a loan of \$450, and upon default in the covenants and conditions of the mortgage the property was, under a decree of the circuit court of Baltimore city, dated the 27th day of July, 1910, sold at trustees' sale to the appellees for the sum of \$1,025. The sale was duly reported to the court for ratification, and on the 28th day of October, 1910, the appellees, as purchasers of the property, filed exceptions to the sale, upon the ground that the trustee could not, by reason of omissions of dates and various other errors in the title deeds to the property, the long lapse of time between the dates of their execution and time of recording, execute and deliver a good and marketable title and estate to the property sold to them. On the 16th day of February, 1911, the circuit court for Baltimore city sustain-

ed these exceptions, and held that the sale should not be ratified, but did not by its order vacate or set aside the sale as so reported.

It further appears that on the same day that the mortgage was executed by the Schaeffers to the appellants, under which the sale was had, to wit, on the 8th day of June, 1906, this property was conveyed by deed by John Beck to Matilda Schaeffer, the wife of Arthur A. Schaeffer, and the deed appears to have been duly recorded on the same day among the land records of Baltimore city. The original conveyance from Beck to Schaeffer is dated the 14th day of October, 1902, was properly executed and recorded, in conformity to the statute, and this deed is specifically referred to in the alleged defective deed.

[1] It is objected that the deed in dispute is defective for three reasons: First, because the day in the month of October, 1902, when it was executed is omitted; second, because the certificate of acknowledgment contains the year, but omits both the day and the month, when the deed was acknowledged; and, third, because the deed was not recorded until March 22, 1906, a matter of more than three years subsequent to the apparent date of its delivery.

These objections, we think, in the view we take of this case, are more technical than substantial, and even if they be defects, as insisted upon, they are such defects as have been cured by the curative acts of the Legislature of Maryland, passed since the execution and recording of the deed, for the very purpose of correcting and curing errors in defectively executed and acknowledged papers and deeds. Acts of 1908, cc. 105 and 259; Acts of 1910, c. 588. The disputed deed in this case is dated — day of October, 1902, and was recorded on the 22d day of March, 1906, and we think clearly falls within the remedial legislation and the provisions of the statutes above cited. These acts were passed for the very purpose of correcting and curing such defects as here urged against this deed, and to confirm and make valid such deeds and other instruments, as indicated by the statute.

By chapter 588 of the Acts of 1910, it is provided that "all deeds, mortgages, releases, bonds of conveyance, bills of sale, chattel mortgages and all other conveyances of real or personal property, or of any interest therein, which may have been executed, acknowledged or recorded in the state subsequent to the passage of the act of the General Assembly of Maryland passed at its January session, 1858, chapter 208, which may not have been acknowledged according to the laws existing at the time of said acknowledgment, or which may not have been acknowledged before the proper officer, or when the certificate of acknowledgment is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

not in the prescribed form or when the official character of the officer taking the acknowledgment has not been certified to as required by law, or where the conveyance has not been witnessed to or sealed as required by law, shall be and the same are hereby made valid, to all intents and purposes, as if the conveyance had been acknowledged, certified to and witnessed according to law; provided the said deeds, mortgages, bonds of conveyance, bills of sale and other conveyances are in other respects in conformity with the laws; provided further, that nothing in this section shall affect the interest of bona fide purchasers or creditors, without notice, who may have become so previous to the passage of this act."

In *Wingert v. Zeigler*, 91 Md. 326, 46 Atl. 1077, 51 L. R. A. 316, 80 Am. St. Rep. 453, this court said we have in this state many instances of similar legislation in what are called "curative statutes" to correct errors in deeds, mortgages, etc., defectively executed or acknowledged. They save the rights of third parties which have been acquired in good faith, and the power to pass such laws has been sustained over and over again by the court and its predecessors. *Grove v. Todd*, 41 Md. 641, 20 Am. Rep. 76; *Barnitz v. Reddington*, 80 Md. 622, 24 Atl. 409; *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426; *Bechtel et al. v. U. S.*, 101 U. S. 597, 25 L. Ed. 1019.

[2] It is not shown here that any rights of creditors are involved, and the nonrecording of the deed within six months from its date did not render it invalid as between the parties to it, subject to the rights of certain creditors and purchasers without notice, and these qualifications, as we have seen, do not affect this deed. By sections 19 and 21 of article 21 of the Code, any deed or conveyance of or relating to land, duly acknowledged and required by law to be recorded, except mortgages, may be recorded after the time prescribed, and when so recorded shall have, as against the grantor, etc., the same validity and effect as if recorded within the time prescribed. *Cissel v. Henderson*, 88 Md. 576, 41 Atl. 1068; *Hearn v. Purnell*, 110 Md. 466, 72 Atl. 906.

[3] The contention of the appellees that the words "duly recorded," found in some of the curative acts (chapter 105, Acts of 1908), must be construed to apply alone to deeds recorded within the six months required by the statute is clearly without force. It has been distinctly held that such a construction would strip these curative acts of all meaning. In *Brinton v. Seevers*, 12 Iowa, 389, the court said: "Nor is the suggestion entitled to weight that the term 'duly recorded,' found in the act, shall control and have reference to those lawfully recorded. These words were only intended

to declare that the deed defectively acknowledged must be recorded to give it the designed validity, and not that a deed lawfully registered under the old law was valid. The latter had this validity without any aid from this act." *Dunning v. Coleman*, 27 La. Ann. 47; *Martens v. Rawdon*, 78 Ind. 85, 86.

[4] The certificate of acknowledgment in this case, except as to the date and the month, is in conformity with the statute, and we do not understand that it is seriously urged that the deed is not in other respects legal and valid. The deed is dated _____ day of October, 1902, and the reference following the description is to a deed dated October 14, 1902, from Beck to Schaeffer. for the same property, the same parties, and acknowledged before the same justice of the peace. In *Kelly v. Rosenstock*, 45 Md. 389, it is said, when a deed is attacked for want of definiteness on this subject, the court is not confined to the certificate, but may refer to the entire instrument, or any part of it. To determine whether it conforms to the law, it is to be read in connection with the deed itself. In *Basshor v. Stewart*, 54 Md. 376, Judge Alvey, in delivering the opinion of the court, said: "Any form of acknowledgment under our Code, containing in substance the contents of the forms prescribed, is sufficient. We are not therefore restricted by mere matter of form. We must look to what will reasonably and substantially gratify the requirements of the statute." *Wickes v. Caulk*, 5 Har. & J. 36; *Frostburg Bldg. Association v. Brace*, 51 Md. 508; *Van Ness v. Bank*, 13 Pet. 17, 10 L. Ed. 38; *Carpenter v. Dexter*, 8 Wall. 526, 19 L. Ed. 426.

In this case, however, we are not called upon to determine whether the deed here in dispute can be sustained upon other grounds, in aid of the certificate of acknowledgment, because we are of opinion that the alleged defects and omissions of dates existing in the deed have been cured and corrected by the curative acts of 1908 and 1910, herein referred to, and the deed has the same effect and validity between the parties as if it had been recorded in proper time.

For these reasons, the order of the circuit court of Baltimore city, dated the 16th day of February, 1911, will be reversed, and the cause remanded, to the end that the sale may be finally ratified and confirmed, with costs.

Decree reversed and cause remanded, with costs to the appellant.

HILLERS v. TAYLOR.

(Court of Appeals of Maryland. June 23, 1911.)

1. HUSBAND AND WIFE (§ 333*)—ALIENATION OF HUSBAND'S AFFECTIONS—ADMISSIBILITY OF CONVERSATION.

While, in an action for alienation of a husband's affections, evidence of statements to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

plaintiff by her husband as to the wishes of the defendant is inadmissible as proof of the alienation, either because of its hearsay character or because a mere expression of opinion made out of the presence of the defendant, evidence of such conversations between husband and wife is properly admitted to show the state of the husband's mind and the state of feelings between husband and wife by reason of efforts and influence of defendant, otherwise proven.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. § 333.*]

2. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ABSTRACT INSTRUCTIONS—MEASURE OF DAMAGES.

Where, in an action for alienation of a husband's affections, defendant neither offered testimony in her own behalf, nor sought to have the cause taken from the jury, but proceeded with the trial and offered prayers based on her theory, that there was no ground of recovery shown, part of which were granted as the law of the case, a prayer offered by plaintiff stating the measure of damages in the usual form and under the facts of the case could not prejudice the defendant, and was properly given to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

3. TRIAL (§ 216*)—INSTRUCTIONS—MEASURE OF DAMAGES.

Where, in an action for the alienation of a husband's affection, there is evidence on the part of plaintiff which tends to prove the issue, and defendant's theory of the case has been submitted by proper prayers, the issue is for the jury, and a prayer setting forth the measure of damages under the facts is properly given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 484; Dec. Dig. § 216.*]

4. TRIAL (§ 216*)—INSTRUCTIONS—MEASURE OF DAMAGES.

Where, in an action for alienation of affections, there is evidence tending to support plaintiff's case, a refusal of a prayer setting forth the proper measure of damages under the facts would amount to a holding that there was no evidence whatever of the alienation, and it should be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 484; Dec. Dig. § 216.*]

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Suit by Elizabeth H. Taylor against Flor-
led H. Hillers. From a judgment for plain-
tiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRIS-
COE, PEARCE, BURKE, PATTISON, UR-
NER, and STOCKBRIDGE, JJ.

Robert Moss, for appellant. George P.
Hoover, Edward T. Owens, and T. Van
Clagett, for appellee.

BRISCOE, J. When this case was before
us on a former appeal from the circuit
court for Prince George's county, reported
in 108 Md. 148, 69 Atl. 715, a judgment of
that court in favor of the defendant was
reversed for error in the rulings of the
court below, on the evidence presented at
the trial, and the case was remanded for a
new trial. Subsequently, on the 8th day of
October, 1908, the case was removed to the

circuit court for Anne Arundel county for
trial, and from a judgment in that court in
favor of the plaintiff, the defendant has ap-
pealed.

The questions for our consideration on
this appeal are presented by two bills of
exceptions, one relating to the ruling of the
court upon a motion by the defendant, at
the conclusion of the testimony, to strike
out certain testimony of the plaintiff, which
had been admitted subject to exception;
and, second, to the action of the court in
overruling the defendant's special exception
to the granting of the plaintiff's second pray-
er, which submitted the proper rule of law
for the guidance of the jury in assessing
the damages if they found a verdict for the
plaintiff. The suit was brought by the plain-
tiff against the defendant to recover dam-
ages for alienating the affections of the ap-
pellee's husband and persuading him to
abandon her.

The declaration contains two counts; the
first charging the defendant with criminal
conversation with the appellee's husband re-
sulting in the alienation of his affections,
and the second charging her with having
caused the alienation and abandonment by
wrongful and wicked persuasion and the
practice of alluring arts upon him, well
knowing him to be the husband of the ap-
pellee.

The record shows that in the course of the
trial the plaintiff offered evidence tending
to prove the facts set out in the second
count of the declaration, and the defendant
offered no testimony, but at the conclusion
of the plaintiff's testimony submitted the
following motion: "The defendant moves
the court to strike from the record all the
testimony of the plaintiff in this case with
reference to conversations with her husband,
upon the ground that the conversations have
not been in any way shown to have been
caused or induced by the acts of the de-
fendant." The testimony here referred to
had been admitted subject to exception, and
the ruling of the court, in overruling this
motion forms the basis of the first excep-
tion.

[1] We think upon the state of the rec-
ord now before us the court was entirely
right in overruling the motion. The testi-
mony was competent, under the well-defined
exception to the rule against hearsay evi-
dence, in suits like the present one to show
the state of feelings existing between the
husband and the wife on the second count
of the declaration. In the former appeal
we held that evidence of statements made
to the plaintiff by her husband relating to
the wishes of the defendant or of declara-
tions made by the defendant on the facts
of that case was inadmissible. Such evi-
dence is either hearsay or a mere expression

of opinion made out of the presence of the defendant. Judge Schmucker in delivering the opinion of the court said: "The subject has received careful consideration in sections 1730 and 1768 of volume 3 of Wigmore on Evidence, and more recently in section 1730 of the supplement to that work, where the rule is stated to be from an examination of the authorities that in alienation suits the utterance of the alienated spouse are admissible to show the result on his or her state of mind of the efforts and influence of the defendant which have otherwise been proven." In that respect the defendant's acts and utterances as recited by the spouse are not hearsay, and are admitted, not as evidence of the truth of the statements, but of the mental state and motives of the party making them without reference to the truth of the statements themselves. Section 1648 of 3 Elliott on Evidence states the rule to be that "declarations or letters tending to show the feeling existing between the plaintiff's consort and the defendant may be shown, but it must first be shown that the defendant was responsible for the affection manifested for him." In this case they were admissible as offered to show the mental state of the husband's mind, and the state of feelings existing between the husband and wife by reason of the efforts and influence of the defendant which had otherwise been proved. *Nevins v. Nevins*, 68 Kan. 413, 75 Pac. 492; *McKenzie v. Lautenschlager*, 113 Mich. 171, 71 N. W. 489; *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67; *Billings v. Albright*, 66 App. Div. 243, 73 N. Y. Supp. 22.

The second exception does not appear to have been signed by Judge Brashears, who sat in the case, in the court below, but the signature, "Jas. R. Brashears [Seal]," appears in the record at the conclusion of the defendant's fourth prayer. Assuming that the signature there appended was intended to be affixed to the special exception to the plaintiff's second prayer, we have an exception to the granting of the plaintiff's second prayer upon the ground and because there was no testimony in the case that the defendant alienated the affections of the plaintiff's husband.

[2] The plaintiff's second prayer stated the measure of damages in the usual form, and, under the facts of this case, no possible injury resulted therefrom. *Hilliers v. Taylor*, 108 Md. 156, 69 Atl. 715. In *Dexter v. McDonald*, 103 Md. 398, 63 Atl. 958, in passing upon a similar prayer, this court said: "The third prayer as to the measure of the damages while it seems to state a correct rule for assessing damages under the

facts of the case, or a rule as favorable to the defendant as it could ask, is open to the criticism of being abstract in form, and in not referring sufficiently to the facts to instruct the jury in the application of the rule stated to the facts. It is apparent, however, that no injury resulted from this. There was no conflict of evidence in the evidence going to the damages in the case." The plaintiff's evidence as to these was offered according to the rule stated, and the verdict of the jury was evidently based on this evidence. There was no prayer at the close of the case on the part of the defendant asking the court to withdraw the case from the consideration of the jury for the want of legally sufficient evidence to entitle the plaintiff to recover, and no proof whatever was submitted on the part of the defendant in the trial of the case. On the contrary, the defendant, notwithstanding the rejection of the plaintiff's first and third prayers, proceeded with the trial of the case, and submitted five prayers, two of which were conceded, upon propositions of law, based upon the defendant's theory of the case, which were granted by the court.

[3] To have rejected the plaintiff's second prayer would have left the jury uninstructed upon the proper rule as to damages at this stage of the case. *Gill v. Staylor*, 93 Md. 474, 49 Atl. 650; *Sittig v. Birkensack*, 35 Md. 278.

We discover no error in the ruling of the court upon this exception for the further reason that it required the court to hold that there was no evidence whatever that the defendant alienated the affections of the plaintiff's husband, and to have sustained the exception on this ground would have been error. There was no prejudicial injury done the defendant by the granting of this prayer, and the conceded prayers were the law of the case. *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342.

[4] The evidence upon the part of the plaintiff tended to prove the issue, and the jury upon the instructions from the court and the conceded prayers was the proper tribunal to pass upon it under the situation of the case as here presented by the record; there being practically a waiver of the exception to this prayer by the submission of the case on the conceded prayers and the defendant's instructions. *Gans Salvage Co. v. Byrnes*, 102 Md. 230, 62 Atl. 153, 1 L. R. A. (N. S.) 272; *Com. Realty Co. v. Dorsey*, 114 Md. 172, 78 Atl. 1099.

Finding no reversible error in the rulings of the court presented by the two exceptions contained in the record, the judgment will be affirmed.

Judgment affirmed, with costs.

MUNDY et al. v. JACQUES.

(Court of Appeals of Maryland. June 22, 1911.)

1. FRAUDULENT CONVEYANCES (§ 136*)—BILLS OF SALE—REQUISITES.

Under Code, art. 21, § 41, providing that no personal property shall pass or title change, unless by bill of sale or mortgage acknowledged and recorded, but that the section shall not extend to any sale or gift accompanied by delivery, the president of a corporation cannot, as president, make a sale and delivery of corporate property to himself as an individual, so as to obviate the necessity of a bill of sale, but he must execute a bill of sale with due statutory formalities, making an affidavit as to the bona fides of the sale.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 428-431; Dec. Dig. § 136.*]

2. CORPORATIONS (§ 542*)—CONVEYANCE TO PRESIDENT—VALIDITY.

In an action to set aside a conveyance by a corporation to its president as an individual, evidence *held* to show that the transaction was to delay and hinder corporate creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2156; Dec. Dig. § 542.*]

3. FRAUDULENT CONVEYANCES (§ 64*)—GOOD FAITH.

For a conveyance of property to be valid as against creditors, the transfer must be bona fide, as well as for value.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 159-165; Dec. Dig. § 64.*]

4. CORPORATIONS (§ 542*)—CONVEYANCE TO PRESIDENT—VALIDITY.

The president of a debtor corporation cannot, to the prejudice of its creditors, purchase all the corporate property and pay the consideration to the stockholders.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2156; Dec. Dig. § 542.*]

5. JUDGMENT (§ 818*)—COLLATERAL ATTACK—EVIDENCE.

In connection with the presumptions in favor of judgments of foreign states, evidence *held* to show that defendant was served with process in an action culminating in a judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1472; Dec. Dig. § 818.*]

6. JUDGMENT (§ 818*)—FOREIGN JUDGMENTS—SERVICE OF PROCESS—PRESUMPTIONS.

While a court of one state can inquire into the jurisdiction of the court of another which rendered a judgment sought to be enforced in the domestic forum, the presumption is in favor of jurisdiction, and hence in favor of the validity of an officer's return of service of process.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1472; Dec. Dig. § 818.*]

7. EVIDENCE (§ 348*)—DOCUMENTARY EVIDENCE—EXEMPLIFICATIONS.

The record of a judgment had in a foreign court was certified by the clerk under the act of Congress; his certificate stating "the above to be a true transcript," except the *præcipe*, declaration, and verdict. After the admission of this record, part of the record to which the papers in evidence referred was introduced, being certified merely by the clerk. *Held*, that neither that part of the record certified under the act of Congress, nor those portions certified by the clerk, nor the two taken together, were admissible, for Code art. 35, § 40, provides that an exemplification of the record under the hands of the keeper of the same and the

seal of the court where such record shall be filed shall be evidence to prove any debt of record made or entered in any other state; while section 64 of that article provides that short copies of judgments or decrees rendered by any court of record in the state shall be admissible in any other court, and thus an exemplification of the record must contain all material parts of the record, and a mere certificate of the clerk as a portion thereof is not an exemplification.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1361-1383; Dec. Dig. § 348.*]

Appeal from Circuit Court No. 2 of Baltimore City; Henry Stockbridge, Judge.

Action by Ira J. Jacques, by Joseph O. Jacques, his next friend, against Percy J. Mundy and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, and URNER, JJ.

J. Cookman Boyd, for appellants. Frank B. Smith and John P. Bruns, for appellee.

BOYD, C. J. This is an appeal from a decree of circuit court No. 2 of Baltimore city, declaring a bill of sale from the Baltimore & Ohio Investment Company to William T. Bridle to be null and void and of no effect, and decreeing that the sum of \$4,102.81, with interest, be paid by the investment company to the plaintiff. As printed in the record, there was apparently no corporate seal attached, but if the word "(Seal)" opposite the president's name was intended to represent the corporate seal of the company, the instrument was not acknowledged as required by section 41 of article 21 of the Code. Nor was there an affidavit by the vendee that the consideration was true and bona fide as therein set forth, as required by section 50 of that article.

[1] It is true that section 41 provides that nothing therein contained shall be construed to extend to any such sale or gift as is therein mentioned, when accompanied by delivery, but this instrument purported to be executed for the company by William T. Bridle, president, to William T. Bridle, individually, and to permit William T. Bridle, president, to deliver the property to himself individually, and thereby avoid the necessity of executing a bill of sale, as required by the statute, would make the statute a farce, instead of what it is intended to be—protection of the public against secret transfers of personal property. If the property originally belonged to the investment company, the public would not be informed that Bridle was in possession as an individual owner by an attempted delivery to himself. If a bona fide sale is to be made by a corporation to its president of property, the situs of which is not even changed, there should be recorded an instrument of writing, which would inform the public of the change in title, and especially should he be ready to make oath

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to the bona fides of the sale. The absence of such affidavit on an instrument which is recorded would cause strong suspicion that it was because he could not truthfully make it. We are of opinion, therefore, that this instrument was not only wholly void, but that there was a total failure to prove such delivery as would avoid the necessity for a bill of sale.

[2] It is impossible to escape the conclusion from this record that the transaction was an effort to put the property beyond the reach of this creditor. The judgment on which the appellee is relying was obtained against Percy J. Mundy, Alice Mundy, his wife, and the Baltimore & Ohio Investment Company, in the superior court of Cook county, Ill. On the 8th of February, 1908, suit was brought on that judgment in Baltimore, under the rule day act (Laws 1898, c. 123, §§ 312-318), and judgment was obtained thereon on the 25th of November, 1908, against the Mundys. The record is not clear as to that; but we suppose the investment company was not served with process in that case. At any rate, the judgment was not against it. Percy J. Mundy was the son-in-law of William T. Bridle, Mrs. Mundy being his daughter, and was in charge of the property. According to the date in the bill of sale, it was executed on March 25th, in Baltimore, and the circumstances all go to show that Bridle knew that the judgment was about to be or had just been obtained against the Mundys, and an attachment against the investment company was issued just about the hour that the bill of sale was put on record on March 26th. Just how long Bridle was in Baltimore is not shown, but the record does show that, although he was summoned on March 26th to answer the bill, the injunction, which was ordered on March 28th and served on the Mundys on March 30th, was returned non sunt as to William T. Bridle, individually and as president of the investment company.

But beyond all that, when it is attempted to show that there was a valid consideration for the bill of sale, what do we find? The papers which Mr. Schirm spoke of as being in his possession disappeared, and were not offered in evidence. Mr. Schirm's explanation is that they were in "a very large envelope," which he placed on a box next to his desk in which papers were filed, and he sometimes threw waste paper on that box, and as the janitor would sometimes leave the scraps of paper there he told him to take them off, and his theory is that the janitor had thrown the envelope with the waste paper, which had been carted away.

Mr. Mundy testified, in speaking of the consideration in the bill of sale: "The payment was made by check, I believe. In fact, I know it was. I saw the check." Then he was asked: "What do you know about the payment; how do you know it was paid?"

and replied: "Why, the canceled checks for the stockholders Mr. Bridle sent me to go to Mr. Schirm, and I turned them over to Mr. Schirm." He said the canceled checks were payable to the different stockholders of the corporation; that he could remember four out of the five stockholders, but could not be positive as to the fifth; that he knew the signatures on the checks which went through the bank. He did not state who the stockholders were, how much each check was for, or give the dates of them. So far as the record discloses, one of them might have been to Bridle himself for the greater part of the \$6,000, the consideration mentioned in the bill of sale. The judgment in Illinois was then standing against the company, whether valid or not. It is true that the appellants claim that that was not known to the company, but when the relationship between the Mundys and Bridle is considered, in connection with the proceedings by the attorney in Illinois, it would require more than we have in the record to convince us that it was not known that the judgment by default had been rendered against the investment company.

In his testimony, Mr. Schirm speaks of the checks and various papers which were left with him and were lost, as explained, but it is perfectly manifest that his testimony as to them is hearsay of the most pronounced character. The substance of it is simply that Mundy and Bridle left certain papers with him, which he in a very general way described, but he made no attempt to establish the authenticity of any of them. If it be admissible to have a client deliver to an attorney papers purporting to be a certified copy of the records of a corporation ratifying the sale of its property, canceled checks to various stockholders, releases and receipts of the stockholders, etc., and then when the papers are lost to permit the attorney to testify to them as such papers as they purported to be, there would be no protection against fraud, however honest the attorney may be. We will assume that Mr. Schirm believed that these papers were what they purported to be, but he does not pretend to say that he knew the signatures of the parties, or that he had any knowledge as to what they were, excepting what he got from Bridle and Mundy. He does not attempt to give their contents, but simply said what they were. Bridle was not called as a witness, and, although it was stated at the argument that he was at some remote point, the record does not disclose that any effort was made to have the case postponed until he or his deposition could be procured. Over two years had elapsed between the filing of the bill and the hearing of the case. Bridle not only had a considerable sum of money involved in the controversy, but he was charged with such fraud as ought to cause an honest man to make great sacrifices, in order that he might meet the charge.

[3] The circumstances undoubtedly tend to show that the bill of sale was given, when and as it was, with the intent to hinder and delay the plaintiff, and that there was every reason to believe that the plaintiff would proceed against the investment company by way of attachment. If the law permitted a president of a corporation to buy all of its property just as it is likely to be seized by a creditor, and even pay the consideration to the stockholders, instead of into the treasury of the company, where it might be reached for its debts, it would sanction and encourage fraud, instead of condemning and checking it. It is well settled that as against creditors a transfer of property must be bona fide, as well as for value (*Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960; *McCauley v. Shockey*, 105 Md. 641, 68 Atl. 625, and other cases), and it would require very strong evidence to overcome the presumption of fraud that is raised by the conduct of Bridle and the circumstances of this case.

[4] So without prolonging the discussion on this branch of the case, we would have no hesitation in declaring this attempted transfer of the property formerly held by the investment company null and void against a subsisting creditor of that company, even if the bill of sale had been executed in accordance with the requirements of the statute, or if there had been sufficient evidence of such delivery of the property as would have made a bill of sale unnecessary, as the law will not permit a president of a corporation to thus take over all of its property to the prejudice of its creditors, especially when, according to the evidence offered in his behalf, he paid the consideration to the stockholders, and not to the company.

[5] The next question presented by the brief of the appellants is whether the Illinois court had acquired jurisdiction over the investment company; it being contended that it had never been served with process. Assuming for the present that the records of the proceedings in that state offered in evidence are sufficient, let us see what they show. The summons against the Mundys and the investment company was issued on July 12, 1907. The return of the sheriff as to that company was: "Served this writ on the within-named Baltimore & Ohio Investment Company, a corporation, by delivering a copy thereof to Percy J. Mundy, director of said corporation, this 19th day of July, 1907. The president of said corporation not found in my county." On the 7th of August, 1907, what is spoken of as an order of default was entered, in which, together with other things, is the statement that, "it appearing to the court that due personal service of process of summons issued in said cause has been had on the defendants for at least ten days before the first day of this term." Then, on the 10th day of August, the following proceedings took place: "This day come the defendants by their attorney, and enter

herein their motion to set aside and vacate the order of default heretofore entered herein of record on the 7th day of August, A. D. 1907, which motion is entered and continued to the 16th day of September, A. D. 1907." On the 24th of October, on motion of defendants' attorney, it was ordered that leave be given the defendants to file an additional affidavit by October 31st, and that a hearing of said cause be set for November 2d. On that day it was ordered that the defendants' motion to set aside and vacate the order of default be overruled, and that said cause be set for hearing to assess the damages for Monday, December 9, 1907. On December 7, 1907, there was another order "that the defendants' motion to set aside and vacate the order of default heretofore entered herein of record on the 7th day of August, A. D. 1907, be and is hereby overruled and denied."

An order of December 13, 1907, is set out in the record, which shows that reference was had to a jury to assess the plaintiff's damages against the defendants. The names of the 12 jurors are then given, and the order concludes that they, "after hearing of the evidence adduced, say: 'We, the jury, assess the plaintiff's damages at the sum of thirty-five hundred dollars.' Thereupon the defendants entered herein motions in arrest of judgment." On the 4th of January, 1908, a formal order was entered under a titling of the plaintiff against the three defendants, which begins: "This cause coming on to be heard upon the defendants' motion entered herein for a new trial in said cause, after arguments of counsel and due deliberation by the court, said motion is overruled, and a new trial denied. Thereupon the defendants enter herein their motion in arrest of judgment, which motion is also overruled"—and a formal judgment was entered in favor of the plaintiff against the defendants for the \$3,500 assessed by the jury, together with costs. Whereupon the defendants prayed an appeal, which was allowed on their filing a bond, etc.

The record further shows that Mr. Erbstein, attorney for the defendants, gave notice to the attorney for the plaintiff that he would ask, on the 10th of August, 1907, "that the default heretofore entered in the above-entitled cause be set aside," and that he would in support of the motion offer an affidavit of George F. R. Cummerow, who was associated with Mr. Erbstein, a copy of which was attached. Both the motion and the affidavit have the title of the case in the superior court of Cook county, and the names of the two Mundys and the Baltimore & Ohio Investment Company are set out as the defendants. There was no suggestion in the motion, the notice of the motion, or the affidavit that the investment company had not been served with process, and, as we have seen, the notice referred to "the default heretofore entered," and that default was against

the three, and the affidavit states "that the aforesaid defendants" have a good and meritorious defense. "The aforesaid defendants" are the two Mundys and the investment company. The only paper in the record which does in any way cast any doubt on the subject is one filed on August 7, 1907, after the default, in which Mr. Erbstein stated, "I hereby enter the appearance of Percy J. Mundy and Alice J. Mundy as defendants in the above-entitled cause, and my appearance as their attorney in the above-entitled case," but that is not explained, and he must have known that the default was against the three, as there was nothing in the order or judgment of the court to limit it to the two. The return of the sheriff of Cook county shows that he served the summons on the investment company by delivering a copy to Percy J. Mundy, on Percy J. Mundy and Alice Mundy, by reading the same and leaving a copy with each of them. When Mr. Mundy was on the stand in this case, he produced three copies of the summons, and it would seem strange that, even if he did not, the attorney would not know that as there were three defendants named in the summons the three copies were intended for them. An examination of the return of the sheriff would have shown for whom they were intended, and it is not likely that an attorney would have endeavored to set aside the default without knowing what the return was. Mr. Erbstein's testimony was not taken.

But if the facts referred to left the question in doubt, the bill in equity filed by the investment company in Illinois alleges that "on the 7th day of August, A. D. 1907, after the default had been entered in said suit, an appearance of your orator and the other parties named as defendants in said suit, and the appearance of the said Charles E. Erbstein as their attorney, was filed by the said Charles E. Erbstein, and that thereafter the said Charles E. Erbstein made various ineffectual attempts on behalf of your orator and the other parties defendant to (the) cause to have the default thereinbefore entered in said suit set aside, but all without any authority or knowledge on the part of your orator, or any of its officers, agents, or employés."

It is therefore shown by the record that the investment company was returned summoned, that an attorney was undoubtedly employed to defend the individual defendants, and that after default that attorney appeared for all three defendants, made numerous efforts to have the default set aside, and upon failure to do that, represented the defendants when the damages were assessed, and made motions for a new trial and in arrest of judgment. The daughter and son-in-law of Bridle certainly knew that Erbstein was appearing in the case, and it is difficult to believe that one or both of them did not inform Bridle of the plaintiff's pro-

ceedings, if he was the president of that company. But, as we have seen, there was no objection made on the ground that the company had not been properly served until its property was seized in Baltimore, and then it also sought to escape the attachment by attempting to transfer the property to Bridle individually, under such circumstances as give some foundation for the allegation in the answer filed in the chancery case in Cook county that the Mundys were the real owners of the property. Mundy was one of the original incorporators of the company, and seems from the record to have had more connection with it than any one else.

[6] While a court of one state can inquire into the jurisdiction of the court of another state, which has rendered a judgment sought to be enforced, the presumption is in favor of the jurisdiction, and, of course, an officer's return to process. It is scarcely necessary to cite authorities to sustain such a familiar principle of law, but for convenience we will refer to 17 Am. & Eng. Ency. of Law, 1073, where many cases, including some of those in this state, are cited. It is there said: "A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction, not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. It will accordingly be presumed that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found. Thus, to illustrate the rule, unless the contrary appears, it will be presumed * * * that there was due service of process or appearance by the parties; that an appearance by an attorney was authorized," etc. As we are satisfied that this record shows that the investment company had ample opportunity to show that it was not properly served in the Illinois court, if that was the fact, and as it failed in the only attempt it has made in that state to have the judgment set aside on the ground that it was not properly served, we are not willing to accept the unsupported statement of Mundy as sufficient to overcome the presumptions we have spoken of, and the many circumstances which tend to contradict him, and cannot declare the judgment void, if the records which are before us correctly state the facts.

[7] That brings us to the consideration of the sufficiency of those records. We do not regard those of the proceedings in Illinois under which the judgment was obtained sufficient to enable the court to enter a personal decree on it. While it may not always be necessary to have a complete record of a foreign judgment to make it admissible, when, as in this case, it is sought to obtain a decree based on the judgment of another state, and the answer in effect

pleads nul tiel record, and also specifically denies that the Illinois court had jurisdiction over the defendants, it would seem to be necessary and proper to require a complete record. Section 40 of article 35 of the Code provides that: "An exemplification of the record, under the hand of the keeper of the same and the seal of the court or office where such record may be made, shall be good and sufficient evidence in any court of this state to prove any debt of record made or entered *in any other of the United States, or in any foreign country;*" and section 64 of that article provides that: "Short copies of judgments or decrees rendered by any court of record of *this state*, certified by the clerk under the seal of the court, with the docket entries, shall be admissible evidence in any other court in this state, to prove the recovery of such judgment or decree; and it shall not be necessary to produce a full exemplified copy of the record in order to prove such judgment or decree." The Code therefore in terms makes a distinction between the record of a foreign judgment and that of a domestic judgment. In *Orndorff v. Mumma*, 3 Har. & J. 70, the judgment was reversed because the lower court had admitted in evidence a record of an action in the general court which did not contain a plat or copy thereof. At that time, plats in ejectment cases were considered as part of the record. The court said, "Part of the record only being produced was not sufficient evidence to support the action in this case." The case of *McCormick v. Deaver*, 22 Md. 187, is to the effect that a record of a decree, certified under the act of Congress, which showed that all the proceedings affecting the merits of the case had not been transmitted would be defective. See, also, 17 Cyc. 355.

In this case, it was peculiarly important that the record of the judgment in the Illinois court be complete. It may be possible that something was done which would materially reflect upon the question before us, but we cannot tell whether all of the papers had been certified, unless we hold that the record which the court required the defendants to produce was sufficient, and that it was properly admitted. But in that copy the clerk certified, "the above and foregoing to be a true, perfect and complete transcript of the record," except the præcipe, the declaration, and the verdict. That copy is certified under the act of Congress. After the appellee succeeded in having that admitted, he procured a copy of the notice of the motion to strike out the default and of the affidavit of George F. R. Cummerow (neither of which is in the record produced by the defendant); also copies of the præ-

cipe, of another motion and affidavit as to the default, and of the declaration. All of those copies are certified by the clerk alone, and not under the act of Congress.

It is not necessary to pass on the question whether, under the circumstances, the court was right in requiring the defendant to produce the copy of the record, in order that the plaintiff could offer it in evidence, as we are of the opinion that it was a defective copy, showing on its face that it did not include parts of the original record which may be material. Indeed, some of the papers subsequently filed by the plaintiff showed that there were others in addition to those excepted by the clerk. Those which were thus subsequently offered, being certified by the clerk alone, cannot be said to be such exemplifications of the records as are authorized by section 40 of article 35. Neither one of these papers could prove any debt of record, and that section does not authorize such authentication of copies of paper of their kind.

We are also of opinion that the copies of the bill, answer, and order in the chancery case were not admissible as offered. There should be a full record containing all of the papers. The order refers to the master's report, and the bill is dismissed for want of equity pursuant to that report, but it is not in the record. The copy of that order is also only certified by the clerk, although the copies of the bill and answer were each certified under the act of Congress.

So, without meaning to hold that under all circumstances the copy of a record must contain every paper filed, whether relevant or not to the question for which they are to be used, we are of the opinion that the court erred in admitting these parts of what are supposed to be the records of the law and chancery cases in Illinois, and that there should be complete records of them. We will reverse the decree, and remand the cause, and the plaintiff can then obtain full and complete copies, unless that can be avoided by agreement. We have referred to the other questions raised, so our views as to them would be known to the parties and possibly save some further litigation; but, of course, if the complete records present different facts from those we have assumed to exist from what we have before us, reflecting upon the jurisdiction over the investment company, the parties will not be precluded by what we have said on that subject. The lower court can also, if it deems the ends of justice require it, allow further testimony to be taken after those records are offered in evidence.

Decree reversed, and cause remanded; the appellee to pay the costs.

AUTO & ACCESSORIES MFG. CO. v. MERCHANTS' NAT. BANK.

(Court of Appeals of Maryland. June 23, 1911.)

1. CUSTOMS AND USAGES (§ 19*)—EVIDENCE—FOUNDATION.

Evidence of a custom cannot be received until proof has been made that the custom exists and has been established so long as to have become generally known, and to warrant a presumption that the contract in question was made in reference to it, and that it was uniform in reference to the business and localities involved in the inquiry.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 41-46; Dec. Dig. § 19.*]

2. CUSTOMS AND USAGES (§ 17*)—CONTRACT—CONTRADICTION.

Where a banker testified that a draft, indorsed to the bank for deposit, was taken as a discount, and was subject to check immediately after entered in the depositor's pass book, evidence that it is the custom of bankers to credit such items as cash, though in fact they are taken only for collection, was inadmissible as contradicting the contract proved.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.* Evidence, Cent. Dig. §§ 1945-1952.]

3. BANKS AND BANKING (§ 129*)—DRAFTS—DEPOSIT—EFFECT.

Where a bank accepted a draft of a depositor as a discount, and not for collection merely, the title to the draft passed immediately on deposit to the bank as against the creditors of the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 129.*]

Appeal from Superior Court of Baltimore City; James P. Gorter, Judge.

Action by the Auto & Accessories Manufacturing Company against the American Motor Car Sales Company, with the Merchants' National Bank as garnishee. From a judgment in favor of the garnishee, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Carl K. Mengel and Richard B. Tippet, for appellant. R. E. Lee Marshall, for appellee.

PEARCE, J. The American Motor Car Sales Company, a corporation not resident in the state of Maryland, kept a large and active account with the Capitol National Bank of Indianapolis, and frequently deposited with that bank drafts drawn by the American Motor Car Sales Company upon different persons and corporations. It appears from the testimony of Mr. Kahler, the assistant cashier of the Capitol National Bank of Indianapolis, who was also the person in charge of the discounts of that bank, that bills of lading calling for one or more automobiles were sometimes attached to these drafts so deposited, and sometimes there were no bills of lading attached, but that under the course of dealing between these parties all drafts so deposited were en-

tered as cash and passed to the credit of the American Motor Car Sales Company, and became immediately subject to their check after it was credited upon their pass book. He also testified that there was no agreement between the bank and the Motor Car Sales Company in respect to these drafts. On May 7, 1909, the Motor Car Sales Company drew a draft to the order of the Capitol National Bank of Indianapolis on the Auto & Accessories Manufacturing Company, a corporation under the laws of Maryland, in the city of Baltimore, for the sum of \$2,165, with a bill of lading attached calling for several automobiles. This draft with the bill of lading attached was deposited by the Motor Car Sales Company in the Capitol National Bank of Indianapolis by which the proceeds were credited as cash to the Motor Car Sales Company, both upon the books of the bank, and upon the pass book of the Motor Car Sales Company, and the draft was by that bank sent to the Merchants' National Bank of Baltimore for payment, and it was paid on May 7, 1909, by the Auto & Accessories Manufacturing Company. On the same day, May 7, 1909, the Auto & Accessories Manufacturing Company issued out of the superior court of Baltimore city a nonresident attachment against the American Motor Car Sales Company upon an alleged indebtedness of \$2,750 for commissions due on sales of nine automobiles, and for cash advanced, and the attachment was on the same day laid in the hands of the Merchants' National Bank of Baltimore, and it was summoned as garnishee. The garnishee appeared and pleaded nulla bona, and upon replication and issue joined thereon verdict was rendered for the garnishee under the instruction of the court and judgment entered thereon, and from that judgment the plaintiff in the attachment has appealed.

The only evidence in the case as to the general course of dealing between the Motor Car Sales Company and the Capitol National Bank of Indianapolis, and as to this particular transaction between them, is the testimony of Mr. Kahler, to which we have already referred for a general statement of the case, but we will now refer briefly more particularly to his testimony. When he was asked by plaintiffs' counsel if he took the draft for collection, he replied, "No; we took it and credited it as cash." Being further asked, "But you took the draft for collection, did you not?" he replied, "No, sir. Why didn't you? Because it was the same as a discount. Why do you call it the same as a discount? Because it was subject to their check immediately after it was passed on to their pass book." And under continued pressure from counsel for plaintiff he continued to assert that it was not taken for collection for the drawer, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was placed to its credit as cash and forwarded for payment.

Mr. Barthel, the general bookkeeper of the National Bank of Baltimore, was called as a witness for the plaintiff, and it was sought to prove by him some custom of national banks applicable to this case, and three exceptions were taken to the refusal of the court to allow him to answer certain questions propounded for that purpose. The first question asked was: "What is the custom of national banks where they take drafts from customers that are in excellent standing with them, and carrying large balances, in cases where they take drafts on other concerns in other cities?" The second question is: "Can you state whether, if a draft is put in bank by a depositor in good standing with the bank, it is carried to the credit of the depositor as cash?" The third question is: "Will you please state whether or not drafts that are put in the manner I have indicated, even though they may be marked 'for collection,' are carried as cash to the depositor's credit, if the depositor is in good standing with the bank?" These rulings all involve the same principle and may be considered together.

[1] Before evidence of a custom, or usage can be received, it must appear that there exists a usage established long enough to have become generally known, and to warrant a presumption that the contract in question was made in reference to it, and that the usage is uniform in reference to the business and localities involved in the inquiry. In this case the witness was not asked whether there was any usage relating to the subject of inquiry, nor was his attention directed to the field to be covered by it, and it by no means follows that the same usage which may prevail in bank management in Baltimore or in Eastern cities obtains in Indianapolis or in the cities of the west, and the failure to show these preliminary conditions constitutes a substantial objection to these questions.

[2] Moreover, proof of usage cannot be received if it contradicts expressly, or by implication, the language or the substance of the contract. Jones on Evidence (2d Ed.) p. 585. "Usage may be admissible to explain what is doubtful. It is never admissible to contradict what is plain." Here the draft was drawn to the order of the bank, and was indorsed by it alone, for collection for it, and, when this is considered in connection with the clear and uncontradicted testimony of Mr. Kahler as to the circumstances of the transaction, such a usage as the plaintiff sought to show would contradict the conclusion naturally to be drawn from those circumstances and from his testimony. Balt. Baseball Club v. Pickett, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; First Nat. Bk. of Balt. v. Tallafarro, 72 Md. 169, 170, 19 Atl. 364. There was no error in the rejection of

these questions. The principal question in this case, viz., the ownership of the draft when it was deposited in the Indianapolis Bank and credited as cash to the depositor, both upon the books of the bank, and also upon the depositor's pass book, was raised by the granting of an instruction to the jury at the close of the plaintiff's case "that there is no evidence in this case that the garnishee had at the time of the laying of the attachment in this case, or has since had, or now has, any property, funds, or credits of the defendant, and therefore their verdict must be for the garnishee." Upon this question it was said in Tyson & Rawls v. Western Nat. Bank, 77 Md. 419, 26 Atl. 521, 23 L. R. A. 161: "There has been much apparent conflict between the authorities; * * * but this conflict has been more in appearance than in reality." In 2 Morse on Banking (4th Ed.) 1903, §§ 575, 577, the general rule is thus stated: "A deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank." Section 575. "When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank owe the amount until the check is collected. But where the customer has a deposit account with the bankers on which he is accustomed to deposit checks payable to himself, which are entered on his pass book, and to draw against such deposits, an indorsement of the words, 'for deposit' on a check so deposited, is, in the absence of a different understanding, presumption of more than a mere agency or authority to collect. It is a request and direction to deposit the sum to the credit of the customer and gives to the bankers authority not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available in their possession, and they may have it certified by the bank on which it is drawn." Section 577. Section 575 is supported by reference to the case of Nat. Citizens' Bank v. Howard, 3 How. Prac. (N. S. N. Y.) 512, and section 577 by reference to Nat. Commercial Bank v. Miller, 77 Ala. 168. The text is supported by numerous well-considered cases, and is in accord with the current, and in our opinion with the weight of, authority.

In Titus & Scudder v. Mech. Nat. Bank, 35 N. J. Law, 589, the court said, speaking of certain checks which had been deposited with the bank: "They were received and credited in the same way as bills or notes of other banks. By such crediting the bank became the owner of these checks as they do of legal tender notes or bank bills so

deposited." And in *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law, 605, it was held that a check deposited by general indorsement of the payee and passed to the credit of the depositor from that moment became the property of the bank, and the bank became liable to the depositor to pay any check drawn upon it to the amount of his deposits. In *Metropolitan Bank v. Loyd*, 90 N. Y. 530, Murray deposited certain checks for collection; others he deposited, and took credit for as cash upon his pass book. The check in controversy in that case was of the latter class. The court said: "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. * * * The dealings between the parties show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the Bank to receive the money upon it as Murray's agent. * * * The appellant urges that the check was not delivered by Murray as the result of a negotiation or application for its discount, or sale or for a credit, and, if we look for such negotiation in the words of the parties only, this must be conceded, but, if we take the conduct of the parties during the transaction, it is otherwise. They adopted a mode of intercourse which fulfilled the function of spoken words, and brought about a result as intelligibly as words could have done." In *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, citing and approving *Met. Nat. Bank v. Loyd*, supra, the court said: "The general doctrine that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or of drafts or checks, received and credited as money, the title to the money, or to the drafts or checks is immediately vested in and becomes the property of the bank, is not open to question." In *St. Louis & S. F. Ry. v. Johnston* (C. C.) 27 Fed. 245, Judge Wallace relied upon 90 N. Y. 530, supra, and said: "The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred in the absence of new and inconsistent circumstances." It is true that this decree was reversed in 133 U. S. 567, 10 Sup. Ct. 390, 33 L. Ed. 683, but the court said: "The question was one of fact rather than of law," and "that, so far from there being shown an unequivocal course of dealing tending to support the conclusion (of the

circuit court), it seems to us the tendency of the evidence is otherwise." There is therefore nothing in that reversal to impair the legal principle announced so emphatically by Judge Wallace. In *Amer. Trust Bank v. Guelder Mfg. Co.*, 150 Ill. 338, 37 N. E. 227, the payee of a check indorsed the same "for deposit" to be placed to his credit, and mailed the check to his banker, who gave him credit for the amount, and, after indorsing it, "For collection and return," forwarded it to the drawer for payment. The court held such deposit was in legal effect a negotiation of the same so as to vest the legal title in the bank, with the right to charge it back to the depositor in case it was not paid on presentment, and that the credit given the depositor was a sufficient consideration for the assignment. To the same effect are the cases of *Cody & Moore v. Bank of Grand Rapids*, 55 Mich. 379, 21 N. W. 373; *Security Bank of Minnesota v. North Western Fuel Co.*, 58 Minn. 141, 59 N. W. 987; *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421, 49 Am. Rep. 235.

Zane in his work on Banks and Banking (pages 210 to 212) seems to take the position that banks in which checks and drafts have been deposited for the credit of the depositor can only be regarded as owners of the paper in favor of third persons who have acquired intervening rights, though he says there are cases which hold that, if the deposit is credited as cash, the title passes to the bank, and he adds: "The conflict of authority is not capable of being explained, but the true rule is that of *Beal v. Somerville*, 50 Fed. 647 [1 C. C. A. 598, 17 L. R. A. 291]." That case will be referred to later.

[3] Whatever conflict there may be or want of harmony in the decisions in other states or jurisdictions, a careful examination of the two Maryland cases (*Tyson & Rawls v. Western Nat. Bank*, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161, and *Ditch v. Western Nat. Bank*, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375) leads us irresistibly to the conclusion that title to the draft in question here had vested in the Indianapolis Bank under the decision in the last-named case, and that there is no conflict in this state upon the question as here presented. In *Tyson & Rawls v. Western Nat. Bank* the checks which were the subject of controversy were sent to Nicholson & Sons by Tyson & Rawls, indorsed, "For collection for account of Tyson & Rawls, Greenville, North Carolina." Nicholson & Sons credited these checks to them as cash, and treated and used them as their own property, but Tyson & Rawls did not know and did not inquire how Nicholson & Sons dealt with them. Nicholson & Sons indorsed them for value to the Western National Bank, which collected them

and held the proceeds as its own. Nicholson & Sons failed subsequent to such indorsement, and were in fact insolvent at that time, but this was not known to Tyson & Rawls nor to the Western Bank. The court said: "When a check, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement. And, in case it is not paid at maturity, it has the ordinary remedies which belong to the indorsee of instruments of this character which have been dishonored. * * * This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. * * * The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the paper or its proceeds." One of the cases relied on by the appellant in the case at bar is *Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515, but in that case the indorsement was for collection simply, and the court in *Tyson & Rawls v. Western Nat. Bank*, 77 Md. 419, 26 Atl. 522, 23 L. R. A. 161, cites that case to sustain its opinion, saying that the opinion in 117 N. Y. "contains a very clear and convincing exposition of the difference between the rights of the banker in case of a deposit of a check or draft indorsed in blank and one where the paper is indorsed for collection." *Tyson & Rawls v. Western Nat. Bank* was argued before all the judges, Judge McSherry dissenting, and the opinion was delivered by Judge Bryan. In *Ditch v. Western Bank*, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375, which grew out of the same failure of Nicholson & Sons, *Ditch & Bro.*, holders of a check indorsed to them by the payee, indorsed the same "for deposit to the credit of J. S. Ditch & Bro.," and deposited it with Nicholson & Sons, who entered the same as cash to the credit of *Ditch & Bro.* both on the books of the bank and on the depositor's pass book, and indorsed the check to the Western Bank, by which it was paid to Nicholson & Sons who afterwards made an assignment for the benefit of its creditors, and it was held that the title had vested in the bank which held it and had paid for it. That case was argued before six judges, Judges Briscoe and Boyd not sitting, and the court declined to hear counsel for the appellee. The case was subsequently reargued before all the judges except Judge Page, who, however, examined the briefs of counsel, and

noted his concurrence in the opinion of the court. The opinion in both these cases was written by Judge Bryan, and they both evince the most careful consideration of the subject. In the latter case he reviewed at some length the principal cases urged by the appellant, among which is *Beal v. Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291, supra, stated by Mr. Zane to lay down the true rule for such a case. Judge Bryan says: "It being our opinion that Nicholson & Sons acquired title to this check, we must declare our carefully considered judgment. If other tribunals for whose learning and ability we entertain the greatest respect have arrived at conclusions different from our own, we do not feel called upon to abandon the deliberate convictions which we entertain." In that case Judge Fowler delivered a vigorous and exhaustive dissenting opinion, in which Chief Judge Robinson and Judge Roberts concurred, and it was doubtless in view of this dissenting opinion that Judge Bryan used the emphatic language just quoted. Judge Fowler reviewed and analyzed the leading text-writers and a number of the decisions adverse to the view expressed by the majority opinion, but without avail to shake the deliberate convictions entertained by the majority. The question here presented, and there decided, upon such full deliberation, must be regarded as finally settled by that decision.

Judgment affirmed, with costs to the appellee above and below.

SMITH v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

RAILROADS (§ 297*)—OPERATION—INJURIES TO PERSON ON OR NEAR TRACK—CARE REQUIRED.

Where the only evidence that a derailing switch owned by defendant railroad company was out of repair is that of a witness who saw the condition of things only at the moment of the accident, a nonsuit is properly entered, in an action for the death of an employee of another railroad lawfully using the tracks of the defendant, where the undisputed testimony shows that the switch was inspected the day before the accident, and found to be in good condition and working properly, that the device was in good order within 1½ hours of the accident, and that two trains passed over it without any difficulty, since, conceding that defendant owed the decedent the same duty as an employer owes an employee, the plaintiff must not only show that the defect existed at the moment of the accident, but that the railroad company had an opportunity of previous knowledge, or that the facts were such that it ought to have known of the defect.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 297.*]

Appeal from Court of Common Pleas, Franklin County.

Action by Emma L. Smith against the Philadelphia & Reading Railway Company. From a judgment for defendant non obstante veredicto, plaintiff appeals. Affirmed.

Charles M. Smith, the husband of the plaintiff, died from injuries sustained by the wrecking of a train of the Western Maryland Railroad Company while running on the tracks of the Philadelphia & Reading Railway Company on May 30, 1907. Smith was the engineer of the train. The plaintiff alleged that the cause of the accident was the defective condition of a derailing switch. Verdict for plaintiff for \$10,203.08. The court subsequently entered judgment n. o. v. for defendant.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

O. C. Bowers and John W. Hoke, for appellant. J. R. Ruthrauff and J. W. Wetzel, for appellee.

POTTER, J. After taking ample time to consider carefully all the testimony in this case, the learned judge of the court below reached the conclusion that the evidence was not sufficient to establish any fact which could fairly be deemed negligence upon the part of the defendant company. He therefore entered judgment for the defendant notwithstanding the verdict. As the trial judge says, the burden of plaintiff's contention is that the accident was due to the negligence of the defendant in allowing the derailing switch to be out of repair. Evidence as to any faulty construction was lacking, and there was nothing to show that the switch was not such a one as is generally used for the purpose. The testimony of the section foreman and the track walker shows that the switch was inspected the day before the accident and was found in good condition and working properly. The undisputed evidence of other trainmen showed that the device was in good order within an hour and a half of the accident, and that one train and another engine east-bound passed through it without any difficulty. The only testimony that appears in the case tending to show that the switch was out of order was that of the witness Kindle, who saw the condition of things only at the moment of the accident. We have searched the record in vain for any evidence, prior to his observations, to show that the derailing switch was not in good condition and working properly. It is unnecessary to say that, in order to recover, the plaintiff was bound to show by affirmative proof the cause of the accident, and that it resulted from some negligent act on the part of the defendant.

Counsel for plaintiff place great stress upon the fact that there was testimony to show that, after the accident, a nut was found broken off the derailing switch, and that the

absence of this nut prevented the switch from working properly. But it was not shown how, or by whom, or how long before the accident, if at all, the nut was broken off. Plaintiff's husband was not an employé of the defendant company, but was at the time in the service of another railroad lawfully using the tracks of the defendant. We assume, however, that it owed to him the same degree of care as that which it was obliged to exercise for the protection of its own trainmen. The rule of law is plain that "it is not enough to show that the defect existed at the moment of the accident. It must also appear that the master had an opportunity of previous knowledge, or that the facts were such that he ought to have known of the defect." *Mixter v. Coal Co.*, 152 Pa. 395, 25 Atl. 587. That much must be shown in order to convict him of negligence in failing to repair. The language used by this court in *Mensch v. Penna. R. R. Co.*, 150 Pa. 598, 610, 25 Atl. 31, 35 (17 L. R. A. 450), is very appropriate to the facts here shown. "A nut may wear off from a bolt by the ordinary usage of travel, or it may be forced off by rough handling in the movement of the train; but for this alone there is no liability to an employé, because it is one of the risks of the business. If an opportunity to discover the defect were shown to have existed, and no attempt to repair was made, then a condition of liability would arise which, in the absence of exculpatory proof, would justify an inference of culpable negligence. The same would be true if a prior actual discovery of the defect had been shown. But the difficulty of the case, as it seems to us, is that there is no proof of either of these contingencies, and in the absence of such proof the case for the plaintiff can only be adjudged by conjecture."

Our examination of all the testimony leads us to agree with the conclusion reached by the trial judge that there was not sufficient affirmative proof of negligence upon the part of the defendant to justify the submission of the question to the jury.

The assignments of error are overruled, and the judgment is affirmed.

HUSVAR v. DELAWARE, L. & W. R. CO.
(Supreme Court of Pennsylvania. July 6, 1911.)

1. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for personal injuries to an employé, caused by the fall of a hopper in which he was working, where plaintiff has rested after simply showing an unexplained accident, a judgment for defendant non obstante veredicto will not be sustained, where it appears that the plaintiff, a carpenter, was removing the lining of a coal hopper, which was part of a coal breaker and washery, that he had been assured by the foreman of defendant that the hopper was secure and all shored up,

that thereafter the hopper fell, carrying plaintiff with it and injuring him severely, and that the general carpenter foreman had known by personal examination for a day or two that the timbers supporting the hopper were in bad condition, and that he wanted the hopper torn out to remove the timbers; the case under such evidence being for the jury, though the evidence as to the bad condition of the supports was adduced by the defendant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

2 TRIAL (§ 143*)—QUESTIONS FOR JURY.

Where the facts are in dispute, the prime object of a trial is to elicit the truth, and all the evidence is for the consideration of the jury, whether it makes for or against the party calling a witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by James C. Husvar against the Delaware, Lackawanna & Western Railroad Company. From a judgment non obstante veredicto for defendant, plaintiff appeals. Reversed, and judgment entered for plaintiff on the verdict.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

M. A. McGinley, for appellant. Everett Warren, J. H. Oliver, and D. R. Reese, for appellee.

STEWART, J. [1] This was not a case calling for the application of the rule *res ipsa loquitur*. When the plaintiff rested he had simply shown an unexplained accident. Had a nonsuit been then ordered, plaintiff would have had no ground to complain. But the case proceeded, and the defendant company assumed the unrequired burden of acquitting itself of negligence in connection with the accident by attempting to show that the plaintiff's own negligence was the sole producing cause. The result on submission to the jury was a verdict for the plaintiff, which on motion was set aside and judgment non obstante entered for the defendant. It is now contended on part of appellant that the evidence introduced by the defendant fully supplied what was lacking in that offered by the plaintiff, and that the case upon all the evidence presented a triable question. The facts as developed by plaintiff's testimony are as follows:

The defendant company was engaged in operating a coal breaker and washery in connection therewith. The latter was a frame structure about 60 feet in height, used for the purpose of washing, screening, dividing, and otherwise preparing the coal for market. The coal is carried by elevators to the top of the washery, where it is run through screens and shakers, and from there dropped into a hopper, from which it is discharged through a chute at the bottom upon

other screens and shakers beneath. This hopper, into which all the coal passes, is angular at its surface, about 20 feet in length and about 12 in width, with sides inclining to the chute at the bottom. The whole structure was undergoing repairs at the time of the accident, and was not then being operated. Among other repairs required was the renewing of the hardwood lining within the hopper. The plaintiff, a carpenter, for about a week preceding the accident had been engaged in this kind of work on the elevator shaft through which the coal was carried to the top of the washery. He was then assigned, with another, to make like repairs to the hopper—the removal of the old lining and the replacing of it with new. While so employed, other workmen were engaged in the general repairing of the structure, including the supports to the hopper, with a view of strengthening it. He and his associate had proceeded so far with the work inside the hopper that three or four of the hardwood boards of the lining had been torn up, and discharged through the chute at the bottom of the hopper, when the men below complained and called them to desist and come down. Plaintiff went down and inquired of one Cadugan, the foreman of this particular job, and the person who had directed plaintiff to work in the hopper, whether the hopper was secure and a safe place to work in. He was told that it was all right—that it was all shored up; the foreman expressing his own willingness to work in it. With this assurance plaintiff resumed work in the hopper. In a very short time thereafter the entire hopper, according to the testimony of one of plaintiff's witnesses, fell to the ground, carrying plaintiff with it and injuring him severely. The plaintiff offered no evidence explaining the collapse, and developed nothing from which the true cause could be reasonably inferred. A nonsuit might well have followed; but it was not ordered, nor was it asked for.

The defendant company proceeded with its case, and called among other witnesses one William H. Bryant, who was the general carpenter foreman of all the defendant company's work in that district. This witness having testified that Cadugan had charge of the work on this particular washery under his general direction, and that he had directed him to get men to tear out the hopper, was asked on cross-examination why he had directed the hopper to be torn out. His reply was, "To put in new timber." He was then asked, "What was the matter with the timber under the hopper?" To this he replied, "They were getting a little dozy on the edges." Asked to explain his meaning, he said, "The timbers had bad edges," and that he wanted the hopper torn out in order to remove the timbers. These questions and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

answers followed: "Q. Why did they need removing? Because they were in bad condition? A. Yes, sir. Q. Those timbers you wanted to tear out were the ones that support the hopper? A. Yes, sir. Q. For how long a time did you know that the timbers in that Diamond washery that supported the hopper were in bad condition? A. A day or two. Q. Had you examined them? A. Yes, sir. Q. And you saw they were in bad condition? A. I saw them."

Had the plaintiff's case disclosed such condition of the timbers supporting the hopper as this witness testified to, it is not open to question that quite enough would have been shown to warrant a reasonable inference that the collapse occurred as the result of such condition, in the absence of all evidence of other cause. A nonsuit on that state of the evidence could not have been sustained. The case would necessarily have been for the jury. How was it any less for the jury because of the fact that this evidence was elicited from a witness called on behalf of the defendant? The evidence was for their consideration, whether it made for or against the party calling the witness. If it made for the plaintiff, it was entitled to quite as much weight as though it had been introduced by him.

[2] The prime object of a trial, where the facts are disputed, is to elicit the truth. That is what the jury is to seek after and find, if they can, upon a consideration of all the evidence submitted to them. Here the first question was: What caused the collapse in which plaintiff was injured? The fact that it was not discoverable from the testimony offered by plaintiff did not prevent the jury from seeking for the cause in the evidence voluntarily offered by the defendant and submitted to them. It is called to our attention that this witness called by the defendant, and who testified to the bad condition of the supporting timbers, attributed the collapse of the structure to the improper methods pursued by plaintiff in removing the lining of the hopper. We need only say that with respect to the condition of the timbers the witness was testifying to a fact; whereas, with respect to the cause of collapse, he was but expressing an opinion. The one made for the plaintiff, the other against him; but both were for the jury. We are not concerned about the difference in statement between this witness and the plaintiff with respect to the circumstances attending the collapse of the hopper, whether it was total or partial. Their disagreement on this point was for the jury. Nor does it concern us to inquire to what extent the witness' theory of the cause was supported by the evidence he gave. This, also, was for the jury; but so, too, was the fact, undisputed, testified to by the witness, that the timbers supporting the

hopper were in bad condition. This latter, as we have said, was sufficient to support a reasonable inference that this caused the accident. This evidently was the inference which the jury derived.

The assignments of error are sustained. The judgment non obstante is reversed, and judgment is now entered for the plaintiff on the verdict.

RIEFLER & SONS, Inc., v. WAYNE STORAGE WATER POWER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. DEEDS (§ 138*)—CONSTRUCTION—"RESERVATION" OR "EXCEPTION."

A "reservation" is distinguished from an "exception," in that the former is some new thing issuing out of what is granted, while the latter is a withdrawal from the operation of the grant of some part of the thing itself, and can apply only where the subject already exists.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2539-2544; vol. 8, p. 7656; vol. 7, pp. 6140-6144; vol. 8, p. 7787.]

2. DEEDS (§ 138*)—CONSTRUCTION—"RESERVATION" OR "EXCEPTION."

The technical meaning of the terms "reservation" and "exception" will give way to their evident intent, though the wrong technical term be used, since they are frequently used interchangeably.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 138.*]

3. EASEMENTS (§ 26*)—CONSTRUCTION—TERMINATION.

A clause in a deed of land by a canal company, whose powers were limited to the operation of a canal and railroad appurtenant thereto, excepting from the premises conveyed and reserving to the canal company the absolute and unqualified right to occupy so much of the land as they may consider necessary for a reservoir or reservoirs, and to construct a dam or dams for such reservoir purposes and to overflow all the land required for such purposes, and reserving the right to take from the land all stones or other materials requisite or convenient for constructing or maintaining a reservoir, constituted a reservation of an easement of taking and storing water only as incidental to the maintenance of the canals, and when the canal was abandoned the easement was extinguished.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-74, 80-82; Dec. Dig. § 26.*]

4. EASEMENTS (§ 1*)—NATURE OF RIGHT.

The right to use another's land for a precise and definite purpose, not inconsistent with the latter's general right of property, constitutes an easement or franchise, and not a grant of the soil.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. § 1.*]

Appeal from Court of Common Pleas, Wayne County.

Action by Riefler & Sons, Incorporated, against the Wayne Storage Water Power Company. From a judgment for the defendant, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCH-ZISKER, JJ.

Homer Greene, Russell Duane, and E. C. Mumford, for appellant. F. P. Kimble, for appellee.

POTTER, J. On March 8, 1851, the corporation entitled "The President, Manager & Company of the Delaware & Hudson Canal Company," conveyed by three separate deeds to Russell F. Lord and Thomas H. R. Tracy three tracts of land situated in Lebanon township, Wayne county, Pa., containing in all about 1,164 acres. Each deed contained the following clause: "Excepting out of the premises aforesaid, and hereby expressly reserving to the said President, Manager & Company of the Delaware & Hudson Canal Company, and their successors and assigns, the absolute and unqualified right to occupy so much of the land as they may consider necessary for a reservoir or reservoirs, or for any appendages to the same, or for repairing, improving, enlarging, or maintaining the same, and to construct a dam or dams for such reservoir purposes, and to overflow all the land that they may require for such purposes. Also reserving to the said party of the first part, their successors or assigns, the right at all times hereafter freely and without charge to have, take, and use from the land or premises hereby conveyed to the parties of the second part all the stones, earth, brush, or other material of any kind whatsoever requisite or convenient for constructing, improving, altering, repairing, enlarging, or maintaining the said reservoir and its appendages and the works incident to or connected therewith, with the right also at any and all times, forever, of full ingress, egress, and regress to and for the said party of the first part, their successors or assigns, by themselves, their engineers, agents, or workmen, with their beasts of draught or burden and implements of labor, any or every of them, upon, through, or from the lands hereby conveyed to the said parties of the second part, as fully and as absolutely in regard to all the exceptions and reservations herein made as if this indenture had never been executed, and without any obligation on the part of the said party of the first part, their successors or assigns, to erect or maintain any bridge or fence on the premises hereby conveyed." The title to the lands thus acquired by Lord and Tracy is now vested in Riefler & Sons, Incorporated, the plaintiff in this case.

Upon the premises conveyed as above stated in 1851 were, and still are, two bodies of water, known as "Upper Woods Pond," a natural body of water, containing about 80 acres, and "Lower Woods Pond," also a natural body of water, but raised considerably by a dam at its outlet, containing about 96 acres. From the year 1851 until 1898 the canal company, acting under the authority

of the clause in the deeds above cited, used these ponds as feeders or storage reservoirs for its canal, and at no time used them for any other purpose. In the year 1898 the canal was abandoned, and has remained in a state of abandonment and decay until the present time. On August 6, 1903, the Delaware & Hudson Company, being the corporation which was the grantor in the deeds above referred to (its name having been changed by the Legislature of New York, where it had been incorporated), executed and delivered to Alonzo T. Searle and Levi F. Patterson, trustees, a deed for a portion of the lands described in the deeds of Lord and Tracy above mentioned, excepting and reserving "so much thereof as was conveyed by the party of the first part to Russell F. Lord and Thomas H. R. Tracy by deed dated 8th March, A. D. 1851." The interests thus conveyed to Searle and Patterson, trustees, have since become vested in the Wayne Storage Water Power Company, the defendant in this case.

The powers of the Delaware & Hudson Canal Company were limited by its charter granted in New York, and by statute in Pennsylvania, to the operation of a canal and a railroad appurtenant thereto. The powers of the Wayne Storage Water Power Company comprise the "storage, transportation, and furnishing of water for manufacturing and other purposes, and for the creation, establishing, and furnishing, transmission and using of water power therefrom."

The present action in ejectment was brought to recover possession of the land covered by the two ponds above mentioned, upon the theory that the clause in the deeds to Lord and Tracy was in the nature of a reservation, and was not an exception, and that, being a reservation, it created an easement for the purpose of storing water, which under the corporate powers of the canal company could only be used by it for the supply of the canal, and when its use for that purpose ceased the easement was extinguished, and the right to unqualified possession of the land became vested in the owner of the fee. The learned trial judge in the course of his decision said: "There can be no doubt that if the deed did create an easement, and if the easement was restricted to that particular corporate purpose, it has terminated, and plaintiff may recover in this action the land upon which such easement was imposed."

[1] The first question thus brought squarely before us for determination is whether the clause in the deeds under consideration constitutes a reservation or an exception. The trial judge held that it was an exception. The distinction between a reservation and an exception is thus stated in 2 Devlin on Deeds, § 979: "A reservation is some new thing issuing out of what is granted; an exception is a withdrawal from the operation of the grant of some part of the thing it-

self." In the recent case of *Sheffield Water Co. v. Tanning Co.*, 225 Pa. 614, 619, 74 Atl. 742, 744. our Brother Stewart said: "The essential characteristic of a reservation, as distinguished from an exception, is that its subject is something that did not exist before, but is created by and grows out of the transaction. An exception applies only where the subject already exists." In the opinion in that case it is further shown that in the deed then under consideration "nothing was excepted out of the general grant. The deed invested the grantee with the legal title to the whole of the premises described in the grant. It conveyed to the grantee every inch of land falling within the description, whether occupied by dam, reservoir, pipes, tannery, or otherwise howsoever, subject only to the right of the grantors, their heirs and assigns, to do those things upon the premises which the grantors had expressly reserved the right to do."

[2] This language seems to apply precisely to the terms of the present grant. The entire fee is conveyed by the deeds, and only certain rights are reserved to the grantors. The reservation is of "the absolute and unqualified right to occupy" so much of the land as may be necessary for reservoirs and dams, and "the right at all times hereafter freely and without charge to have, take, and use from the land or premises hereby conveyed" stones, earth, brush, or other material necessary for the construction and repair of these reservoirs, etc. No part of the thing granted is excepted from the effect of the grant, but a new right or interest in the grantors is created, which they retain. It is something which did not before exist apart from the ownership of the land. It is true that in the case at bar the words "excepting" and "reserving" are both used, and this fact was regarded as significant by the trial judge. No special importance can, however, be attached to the use of both of these words, as they are frequently used together without careful discrimination as to whether an exception or a reservation is intended. This usage is noted in the text-books. Thus in 2 *Devlin on Deeds*, § 980, it is said: "The terms 'exception' and 'reservation' are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception." And again in 13 *Cyc.* 674, it is said: "The terms 'reservation' and 'exception' are often used interchangeably, and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used." The point is discussed at considerable length in *Whitaker v. Brown*, 46 Pa. 197, and in *Klister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608, where it is said that the terms "reservation" and "exception" are "often used in the same sense; the technical distinction being disregarded." By reference to the deed it appears that, except for the purpose set forth in the clause of reservation, the right of the

grantees to the land described was not restricted. Upon the other hand, in so far as may have been considered necessary to serve the required end, there was reserved to the grantor, not merely the right to occupy specific parts of the land, but in so far as any physical limitations of the boundaries were concerned, the reservation was indefinite and uncertain.

[3] Our examination of the clause satisfies us that the effect of the language was to create something new out of what was granted; that is, it created the right to maintain reservoirs upon the land conveyed, and to repair, improve, and enlarge them, and to construct dams, and overflow all the land the grantor might require for that purpose, and to enter upon the land, and take from it stone, earth, brush, and other material requisite or convenient for construction or repair of the reservoirs. This right, as a thing separate and apart from the ownership of the land, was created by and grew out of the transaction between the parties to the deeds, and it did not exist before. The new right in this respect thus created by the transaction was from that time forth to be enjoyed apart from, and in no way dependent upon the ownership of the land. As it was not in existence prior to the making of the deeds, it could not be made the subject of an exception, which must always be of something in existence at the time, as part of the whole of the grant, from which it is excepted.

[4] The facts in this transaction seem to correspond in every particular with the requirements of the legal definitions of a reservation, and to be lacking in the essentials which distinctly define an exception. We are therefore impelled to the conclusion that the clause in question constitutes a reservation. It imposed a servitude upon the property, by which the new owners were restrained from the full and unlimited use of the land, and were obliged to suffer the canal company to do certain things upon the property, which, were it not for the burden imposed upon it, the owners would have had the sole right to do. The right to make use of the land of another for a precise and definite purpose, not inconsistent with a general right of property in the owner, is in legal contemplation an easement or franchise, and not a grant of the soil. *Boston Water Power Co. v. B. & W. R. R. Corp.*, 33 Mass. 512. A general definition of an easement and description of its properties is compiled in 3 *Farnham on Waters*, § 808, as follows: "An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose not inconsistent with a general property in the owner. Being an interest in land, it must be created and transferred by deed, by prescription, which presupposes a grant, by an agreement for a conveyance which may be enforced in equity, or by a sale of property with reference to an existing convenience

which entitled the grantee to its continued enjoyment. In order to establish an easement, the dominant and servient estates must be owned by different persons. * * * This principle applies to drains, flowage rights, and all other uses to which one portion of a tract may be [subjected] in favor of another. The easement may be created by conveyance of the right when transferring property in favor of which it is to exist, or it may be reserved in favor of the grantor."

There is a class of rights which one may have in the land of another, without their being exercised in connection with other land, and which are known as easements in gross. In these cases there is no dominant tenement. But in easements proper, it is essential that there should be both a dominant and a servient estate; but it is not essential that they should be contiguous. For example, a pew in a church may be appurtenant to a house quite distant from the church. *Jones on Easements*, § 5. In *Perrin v. Garfield*, 37 Vt. 304, it was held that a dam located a mile away was appurtenant to a mill to which it supplied water. This case was cited in *Cady v. Waterworks Co.*, 134 N. Y. 118, 121, 31 N. E. 245, 246, where *Follett, C. J.*, said: "An easement may be created, though the dominant and servient estates are not contiguous." In the latter case it was held that the right to receive water from a spring located in a village was appurtenant to a lot some distance from the lot upon which the spring was located. In the present case the bed of the canal, or the canal property, was the dominant tenement. It was that to which the servitude was due, or for the benefit of which it existed, and for which it was constituted. The Delaware & Hudson Canal Company was confined in the use of this easement to the limits of its corporate purpose, as set forth in its charter. This would confine the use of the easement, or the right to store and take water, to the needs of the canal; and if the canal was abandoned, then the purpose for which the easement in question was lawfully created failed, and the easement was extinguished. "An easement is extinguished when the estate to which it is appurtenant ceases to exist." *Jones on Easements*, § 843.

The parties here agree that in or about the year 1898 the Delaware & Hudson Canal Company ceased to operate the canal. The water was drawn off, locks, gates, and equipment were dismantled, and this condition of general disuse and decay has prevailed to the present time. The court below found the facts in accordance with the agreement, and also found as a conclusion of law that the acts of the canal company constituted a legal abandonment of its canal. It had no right under its charter to use the water from the reservoirs for any other purpose. An authority very much to the point is *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8. In that case a canal company had been

converted by act of Parliament into a railway company, and the canal itself was abandoned. The canal company owned certain water privileges which the railway company undertook to dispose of by lease. It was held that the railway took no rights in the water privileges. *Pollock, C. B.*, said (page 16): "The railway company arose out of a previously existing canal company. The canal company had a right to take water for the canal; but the canal had ceased to exist, therefore the right of the canal company had also ceased. I agree with my Brother *Martin* that if an easement for a particular purpose is granted, when that purpose no longer exists, there is an end to the easement." He then referred to *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287, and said: "That case is a direct authority that a parliamentary corporation is a corporation for those purposes only for which it has been established by parliament, and has no existence for any other purpose, and that whatever is done beyond the scope of such purpose is ultra vires and void. * * * This easement was incidental to the canal, and when the canal ceased to exist the easement altogether ceased." This reasoning commends itself to us, and we think it applies closely to the case now before us, and leads clearly to the conclusion that the Delaware & Hudson Canal Company reserved the easement of storing and taking water only as incidental to the maintenance of its canal; and when that was abandoned, the easement came to an end with it. "Any act of the dominant owner that is inconsistent with his further enjoyment of the right is an abandonment of it." *Jones on Easements*, § 852.

The principle is identical with that set forth in *Jessup v. Loucks*, 55 Pa. 350. There a canal company abandoned its works and ceased to use its easements. But before doing so it undertook to sell the right to use its surplus water, and its grantee claimed the right to reconstruct a dam. It was held that the easement had been lost and the company had no right to make such a grant. *Mr. Justice Thompson* said (page 362): "The grant itself, being of an incident connected with or arising out of the principal object in granting the charter to the company, must necessarily expire with the principal, and cease when that ceases. In the nature of things, there could be no fee-simple estate in it. The grant might be perpetual if the works continued to be so; but its perpetuity would depend upon that. * * * Such a grant, in its enjoyment, is as permanent only as the creation of which it is an incident, and necessarily as unstable. Like the natural phenomenon of the shadow cast by a substance, it vanishes when the substance disappears."

It will be remembered that the right of the Delaware & Hudson Canal Company to alienate its lands is not at all in question. It did that in the conveyance to Lord and Tracy.

But in so doing it created a reservation which imposed a burden of servitude upon the lands in the hands of its grantees, the new owners of the fee. We are dealing merely with the character of this reservation. Our study of the question has satisfied us that the reservation created a right in the grantor to use the land for a special purpose not inconsistent with the general property right in the owners. That this purpose was the storage and supply of water for the maintenance of the canal of the grantor, under the authority of its charter, and was incidental to the maintenance of the canal, and when that was abandoned the purpose for which the right or easement was created ceased to exist, and the easement was extinguished. The owners of the property in fee were then relieved of the servitude. It follows that the defendant and its predecessors in title have been wrongfully in possession of the property described in the writ since the extinguishment of the easement.

The judgment of the court below is reversed, and it is now ordered that judgment be entered for the plaintiff for the premises described in the writ.

CITY OF READING v. UNITED TRACTION CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

CARRIERS (§ 12*)—REGULATION—RATE OF FARE—STRIP TICKETS.

A third party, in communicating with a committee of councils as to proposed changes in certain lines of a lessor street railway company, stated that there would be no increase in fare, the fare not to be increased carrying a passenger on the designated lines between certain points. The councils, in an ordinance granting permission for extensions, provided that "the rate of fare shall not exceed five cents for a single fare, or six tickets for twenty-five cents." Held not to prevent the railway company from discontinuing the sale of strip trolley tickets at the rate of six for a quarter on all its lines.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.*]

Bill by the City of Reading against the United Traction Company and others. Decree for plaintiff, and defendants appeal. Reversed.

The following facts appear from the record:

The United Traction Company was formerly the lessee of the various street railways in the city of Reading. The Reading Transit Company is the present lessee, under a lease from the United Traction Company. The Front & Fifth Street Railway Company is one of the original lessor companies. In 1906 the Front and Fifth Street line and the Schuylkill Avenue line radiated from the center of Reading to the outskirts, running not parallel, but in the same

general direction. Each was a single track railway, with turnouts, and each terminated in a dead end. It was deemed desirable that the dead ends be connected by a loop, so that cars could run out one street and in the other, thus abolishing the necessity for turnouts. This suggestion was taken up by Dr. Walter A. Rigg, who was a son of the president of the United Traction Company, who conferred with the railway committee of the city councils on the subject, writing the following letter:

"John A. Rigg, Pres. H. C. Moore, Asst. to Pres. T. W. Groomett, Jr., Sec'y & Treas. S. E. Rigg, Gen'l Supt. United Traction Company. Reading, Pa., Oct. 6, 1906. Mr. Ira W. Stratton, Chairman Railways Committee of Councils of the City of Reading, Pennsylvania—Dear Sir: In answer to your inquiries concerning the removal of the turnout on Schuylkill avenue in the event of the laying of an additional track on Windsor street, to better the railway service in the northwestern section of the city, and as to the service, fare, etc., I can only say that all turnouts are obstructions to be avoided if possible, and that therefore, in the event of the action you refer to, the turnout on Schuylkill avenue will be removed. It is manifest to the company as well as to the public in that district that the travel is congested under the present arrangement, and this would, of course, be relieved by the so-called loop, which would enable the company to give more frequent service, and that would be done; the only limit of the service in all cases being the possibilities under the circumstances. In this case I may say that the company would give a more frequent service than the present ten-minute schedule, and will increase the service from time to time as the travel may warrant. There would be no increase in fare. The fare limit would be Buttonwood street; that is, a single fare would carry a passenger from any part of town to any point on Schuylkill avenue or around the loop to Front and Buttonwood streets, and for incoming passengers a single fare would be good from Schuylkill avenue and Buttonwood street, and points beyond, around the loop to any part of the city. Yours truly, [Signed] Walter S. Rigg."

The committee reported to councils, presenting the above letter and recommending the grant of permission to make the connection suggested and the passage of an ordinance for that purpose. Such an ordinance was at once passed, in the following form:

"Section 1. Be it ordained by the select and common councils of the city of Reading: That the ordinance entitled, 'An ordinance granting the Front & Fifth Street Railway Company, the privilege of laying a single track railway, with necessary curves, turnouts, connections and switches, begin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ning at Front and Schuylkill avenue, there connecting with the track of the Reading City Passenger Railway Company, thence north on said Front street to Oley street, thence west on Oley street to Weiser street, thence north on Weiser street to Windsor street, thence east on Windsor street to Front street, thence connecting with the track of the Reading & Temple Electric Railway Company, and to cross all other streets and to erect poles and string overhead wires to operate the same,' approved November 11, 1902, be and the same is hereby amended so as to grant the Front & Fifth Street Railway Company the privilege of laying a single track railway on Windsor street from Weiser street to Schuylkill avenue, with necessary curves and connections, subject to all the conditions, provisions, restrictions and stipulations of the ordinance to which this is an amendment, and of section 2 and section 3 of this ordinance.

"Sec. 2. That the rate of fare shall not exceed five (5) cents for a single fare, or six tickets for twenty-five (25) cents."

In March, 1910, the company stopped the sale of "strip tickets" at the rate of six for a quarter on all their lines. The city thereupon filed this bill in equity. A preliminary injunction issued, commanding the company to "restore and continue the practice as to the sale of tickets on its cars pursued prior to March 18, 1910, and they are commanded * * * to sell to passengers on the cars of the said Union Traction Company in the city of Reading six tickets for twenty-five cents, each ticket constituting one fare." This injunction was later made permanent.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Isaac Hiester, C. H. Ruhl, and R. L. Jones, for appellants. Henry P. Kelsner, City Sol., for appellee.

BROWN, J. The court below, in its sixth finding of fact, found that "the stipulations contained in the letter of October 6, 1906, relative to the removal of the turnout on Schuylkill avenue, the fare limit, and the fare itself, were carried out; the United Traction Company accepting all over the city for a single fare 5 cents in cash or one of six tickets sold in strips for 25 cents." This, to say the least, is misleading. The bill avers and the answer admits that for years prior to the date of the filing of the bill the rate of fare charged by the United Traction Company for a continuous passage, with transfers at various intersections of its railways, had been 5 cents, or, at the option and request of passengers, six tickets, each constituting one fare, were sold for 25 cents, and each of said tickets was good for a ride upon any of the cars of the company at any time, and was accepted in the same manner and to the same effect as if a cash fare of 5 cents had been paid. What the

company did after the letter of October 6, 1906, from Walter A. Rigg, and the approval of the ordinance permitting the connection of the Front & Fifth Street Railway Company's track with the Schuylkill Avenue line, was merely a continuance of what it had done of its own motion for a long time prior thereto, and, not having been required by any law, ordinance, contract, or agreement with the city to introduce a strip system, or to continue it, the company's right was to discontinue it at any time prior to the approval of the ordinance which, in the opinion of the learned chancellor below, has imposed upon the company the duty of selling to all passengers on its cars in the city of Reading six tickets for 25 cents; each ticket constituting one fare and good on any of its lines. The question before us is not whether, under the ordinance, the United Traction Company ought to be compelled to sell six tickets for 25 cents, good over the Schuylkill Avenue or Front & Fifth Street Railway line. The bill was not filed for the purpose of having that question determined. Its prayers are that the United Traction Company be required to continue to sell six tickets, each constituting one fare, for 25 cents to passengers on the cars operated by it; that the discontinuance of the sale of said tickets be decreed to be in violation of the ordinance of December 8, 1906; and that the letter of October 6, 1906, from Walter A. Rigg, be decreed an obligation on the part of the United Traction Company to sell six tickets for 25 cents, each constituting one fare for a passenger over any one of the lines controlled by the said company and to be good on any car on any one of its lines in the city of Reading.

Even assuming that Rigg was authorized to act for the United Traction Company, or, if not authorized to act for it, that it subsequently ratified what he did, what was done by him that committed the company to an agreement to continue for all time to sell six tickets for 25 cents, each good for a single fare over any one of the lines operated by it? His letter to the chairman of the railways committee of councils related solely to the proposed change in the operation of but two of the lines leased by the traction company. They were the Schuylkill Avenue and the Front & Fifth Street lines. Not another line operated by the company was mentioned in the letter or referred to in the interviews between Rigg and the chairman of the railways committee. And what is said in the letter? Simply that "there would be no increase in fare." Nothing is said about a sale of six tickets for 25 cents. The fare not to be increased was to carry a passenger from any part of the city to any point on Schuylkill avenue, or around the loop to Front and Buttonwood streets, or from Schuylkill avenue and Buttonwood street and points beyond around the loop to any part of the city. Two

months after the letter was written the ordinance was approved, the second section of which provides that the rate of fare shall not exceed 5 cents for a single fare, or six tickets for 25 cents. Though this ordinance granted to the Front & Fifth Street Railway Company the privilege of connecting with the Schuylkill Avenue line and was formally accepted by the railway company, the learned court below correctly held that the United Traction Company was bound by its provisions. But as there was nothing in Rigg's letter to indicate that when he wrote it he had in his mind all of the lines operated by the traction company, so there is nothing in the ordinance to indicate that the sale of six tickets for 25 cents, good over all of its lines, was to be continued by the United Traction Company; and one of its valuable rights is not to be taken from it by any process of reasoning to show that, under the circumstances, it had impliedly agreed to surrender such right. If the city of Reading had intended, as a condition of the passage of the ordinance of December 8, 1906, that the United Traction Company should continue permanently the sale of six tickets for 25 cents, good over all of its lines, such a provision could have been expressly written into the ordinance, and the acceptance of it by the Front & Fifth Street Railway Company, followed by the United Traction Company's exercise of the privilege granted by it, would commit that company to its provisions; but this is not the situation. Nothing in the letter nor in the ordinance can be construed into an agreement by the United Traction Company to continue the general sale of strip tickets, and its right was, and the right of the Reading Transit Company, its successor, is, to charge a fare of 5 cents for every passenger riding on its lines, except as it may be committed by the ordinance of December 8, 1906, to continue to sell six tickets for 25 cents, good to or from points on the Schuylkill Avenue and Front & Fifth Street Railway lines. That question, however, is not to be passed upon until it is properly raised.

The decree of the court below is reversed, and the bill dismissed, at the cost of the appellee.

HONESDALE ICE CO. v. LAKE LODORE IMPROVEMENT CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. SALES (§ 420*)—PERFORMANCE OF CONTRACT—PAYMENT OF PRICE—WAIVER OF BREACH.

In an action for breach of a contract to furnish ice for a definite time, where the contract gave the vendor the right to cancel it if the vendee made default for a period of five days after any payment fell due, but every monthly payment for the year 1908 was more than five days overdue, but was received with-

out objection, and without any intimation that the time or method of payment was unsatisfactory, and the last payment for ice delivered in 1908 was made on January 31, 1909, and the vendor wrote a letter, February 10, 1909, stating that it had terminated the agreement on account of the delay in payments, there was no error in submitting to the jury the question whether defendant by repeatedly accepting without objection overdue payments had waived its right to terminate the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 420.*]

2. SALES (§ 407*)—PERFORMANCE OF CONTRACT—WAIVER OF BREACH.

Where a vendor refuses to complete a contract of continuing sales, basing his refusal on the ground that payments had been delayed, he cannot set up as a defense to an action for such refusal to complete the contract the insolvency of the buyer.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 407.*]

3. SALES (§ 418*)—REMEDIES OF PURCHASER—ACTION FOR BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages for failure of a vendor to deliver property according to the terms of the sale is, as a general rule, the difference between the contract price and the market value at the time and place for delivery, with interest.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Appeal from Court of Common Pleas, Wayne County.

Action by the Honesdale Ice Company, to use of Russel T. Whitney, against the Lake Lodore Improvement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On February 1, 1909, the treasurer of the Honesdale Ice Company wrote the defendant the following letter, which the defendant denied ever having received: "Honesdale, Pa., Feb. 1, 1909. Mr. John H. Jordan, Lake Lodore Imp. Co., Scranton, Pa.—Dear Sir: This is to advise you that the property and business of the Honesdale Ice Company has this day been sold and transferred to Russel T. Whitney, of Honesdale, formerly manager of the company. The contract between the Honesdale Ice Company and the Lake Lodore Improvement Company has been accordingly assigned to Mr. Whitney under authority therein contained. Mr. Whitney desires to continue the terms of the contract for the coming season. I enclose herewith check for \$100, balance of account due the Lake Lodore Improvement Company. Very truly yours, Homer Greene, Treasurer."

On February 9, 1909, Mr. Greene, treasurer of the Honesdale Ice Company, wrote to the defendant, complaining that winter ice (which was not included in the contract in this case) was not furnished to Mr. Whitney, and upon receipt of this letter the defendant replied as follows, on February 10, 1909: "Scranton, Pa., February 10, 1909. Homer Greene, Esq., Honesdale, Pa.—Dear Sir: We just received your letter referring to the refusal of Mr.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

McNally to supply ice to Mr. Whitney, successor to the Honesdale Ice Company, at Honesdale. In reply wish to say that the reason for Mr. McNally's action was that the contract between the Lake Lodore Improvement Company and the Honesdale Ice Company was invalidated before any assignment of it was made to Mr. Whitney by your company. The essential conditions in reference to paying for the ice were not complied with by your company, and exercising the option accorded to us under the terms of the contract, we have terminated and canceled the same. Under the circumstances we do not feel obligated to furnish to Mr. Whitney any ice, but we shall be pleased to take the matter of a new contract up with him at any time he may desire, and discuss the terms and conditions he desires to be inserted therein. Trusting that this explanation is sufficient, and thanking you for the receipt of your check as final payment for the balance due us by your company, we are, Very truly yours, Lake Lodore Improvement Co., by John H. Jordan, President."

The improvement company refusing to furnish ice to Mr. Whitney, suit was brought on November 24, 1909. Verdict and judgment for plaintiff for \$3,250.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCH-ZISKER, JJ.

Chas. P. O'Malley, Frank P. Kimble, and Reese H. Harris, for appellant. Homer Greene and Chas. A. McCarty, for appellee.

POTTER, J. [1] The contract between the parties in this case contained a provision, giving the defendant the right to cancel the contract, if the other party made default for a period of five days after any payment fell due. Payments were to be made not later than the 10th day of each month following the shipments, and in no event were they to be delayed longer than the 10th of October in each year. It is admitted that every monthly payment made during the year 1908 was more than five days overdue, yet they seem to have been received by the defendant without protest or objection, and without any intimation that the time or method of payment was unsatisfactory. The last payment for ice delivered in the year 1908 was made on January 31, 1909. The defendant, the improvement company, wrote a letter on February 10, 1909, stating that, exercising the option contained in the contract, it had terminated the agreement by reason of the delayed payments. The court below submitted to the jury for determination, as a question of fact, whether or not the defendant, by repeatedly accepting without objection overdue payments had waived its right to terminate the contract on account of the delay. Counsel for appellant contend that the question of waiver in this case was one of law for the court. But, if so, the

trial judge could only have instructed the jury that under the admitted facts, and the course of dealing between the parties, the defendant could not suddenly terminate the contract without warning of its intention thereafter to require payments in strict compliance with the terms of the agreement. The general rule is that a forfeiture for nonpayment of money, at an appointed day, is waived by the subsequent acceptance of payment in full; without objection upon that account. "If the promisor has made default in performance with respect to the time thereof, and the promisee subsequently permits or urges him to continue performance, or accepts performance thereafter, or accepts payments made in performance, or otherwise treats such contract as still in force, such breach is waived." 8 Page on Contracts (1905) 1502. In *Morgan v. McKee*, 77 Pa. 228, 231, it was said that it was the duty of parties to a contract for the sale and delivery of oil "to act promptly on the occurrence or discovery of the breach, and if they were guilty of undue delay they must be regarded as having waived their right to rescind, and elected to treat the contract as still subsisting." See, also, *Forsyth v. Oil Co.*, 53 Pa. 168, and *Portland Ice Co. v. Connor*, 24 Pa. Super. Ct. 493, where Judge Rice carefully reviewed the authorities, and pointed out that, where the terms of a contract as to payments have not been observed, notice of the seller's intention to require strict compliance with the terms of the contract, as to future bills, should precede rescission.

As the record here stands, the verdict of the jury must be accepted as establishing the fact that the defendant waived its right to cancel the contract upon the ground that the payments were not promptly made. Another question of fact, settled by the verdict, is that the contract was duly renewed for the year 1909. The ice company assigned, on February 1, 1909, all its interest in the contract to Russel T. Whitney, and on the same day Homer Greene, treasurer of the company, notified the improvement company of the assignment, and of Mr. Whitney's desire to continue the contract for another season. With this letter a check for \$100, balance due by the ice company since October 10, 1908, was inclosed. The receipt of this letter was denied by the improvement company, although the receipt of the check was admitted; but the verdict of the jury established the fact that it had been received. Mr. Whitney, as assignee of the contract, was exercising a clear right to renew, if the contract was then in force; and the right to renew was not denied by defendant, except as it maintained that it had canceled the contract for delay in making payments. The sufficiency of the notice that Mr. Whitney was exercising the option of renewal given by the contract can hardly be seriously questioned.

[2] Counsel for appellant also complain that the trial judge excluded testimony as to the insolvency of the plaintiff company and its assignee, Mr. Whitney. But this reason was not suggested at the time when the defendant sought to cancel the contract. Its action was at that time avowedly based upon the specific ground that the payments were not made as required. This was the only reason assigned at the time, and it was too late, we think, at the trial to attempt to base the right to rescind upon the alleged insolvency of the assignee of the contract. "A refusal to perform on the ground of a specific breach assigned by the party so refusing as a ground for such refusal is a waiver of other breaches which are known to him or brought to his notice." 3 Page on Contracts (1905) § 1504. "A party who proposes to insist upon a technical forfeiture of a contract upon certain grounds specified is usually held to the case he has made. If he assumes to claim a forfeiture upon grounds specifically stated, he is deemed to have waived other breaches." *Wright v. Land Co.*, 100 Wis. 260, 274, 75 N. W. 1000, 1001. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Railway Co. v. McCarthy*, 96 U. S. 258, 267 (24 L. Ed. 693).

A familiar application of this principle is often found in suits upon contracts of insurance. It has been generally held, where a company sets up one ground of forfeiture as a defense to an action on a policy, and denies liability on this ground alone, all other known grounds of forfeiture are thereby waived. 3 *Cooley on Insurance*, 2680. We said, in *Freedman v. Fire Ass'n of Philadelphia*, 168 Pa. 249, 32 Atl. 39: "The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the ground of defense, and thus misleading the insured to his disadvantage. They may remain silent, except when it is their duty to speak, and the failure to do so would operate as an estoppel; but, having specified a ground of defense, very slight evidence has been held sufficient to establish a waiver as to other grounds." In the present case, we do not find in the record any intimation, until after suit was brought, that the refusal by the defendant to carry out the contract was based upon any other reason than that stated in the letter of February 10th. Having based its attempt to rescind on the allegation of a specific breach, appellant is now precluded under the authorities from setting up a different ground for its action. The offers of evidence to show insol-

veny were therefore immaterial, and were properly excluded.

[3] As to the measure of damages, if there was a breach of the contract, it was a continuing one, or a succession of breaches during the four months in which the defendant was bound to deliver ice. It is agreed that the correct measure was the difference between the contract price for the ice and the market price. But appellant contended that the market price was to be ascertained as of February 10, 1909, the date when appellant gave notice that it regarded the contract as at an end. The court below held that the price at the time when the ice was to be delivered was to be taken as the market price. He was correct in so holding. This court, said, in *White v. Tompkins*, 52 Pa. 363: "On failure to deliver specific articles contracted for, the damages are generally the difference between the contract price and the market price at the time for delivery." A statement of the general rule is thus set out in 2 *Sedgwick on Damages* (8th Ed.) § 734: "When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when and the place where it should have been delivered, with interest." In a late decision of this court, in *Morris v. Supplee*, 208 Pa. 253, 57 Atl. 566, Mr. Chief Justice Mitchell pointed out that in case of refusal to deliver goods by the vendor the buyer has the right to wait until the contract time for delivery has passed, and then purchase at the market price, holding the seller liable for any loss. As he there says, "the buyer is entitled to have the goods at the stipulated time of delivery." This would be particularly true of a perishable commodity like ice, needed for summer delivery. "The buyer is not bound to supply himself before the contract date of delivery, even on a rising market." These authorities fully sustain the position taken by the trial judge as to the proper measure of damages to be applied in this case.

We see nothing in any of the assignments of error which requires further consideration. They are overruled, and the judgment is affirmed.

SELIG v. CITY OF PHILADELPHIA et al.
(Supreme Court of Pennsylvania. July 6, 1911.)

MUNICIPAL CORPORATIONS (§ 971*)—POWERS OF COUNCIL—REVISION OF TAXATION—DUPLICATE ASSESSMENT.

Act of March 14, 1865 (P. L. 320) and its supplements, withdrawing from the councils of the city of Philadelphia supervisory power over

assessments of real estate, and giving power to the court of common pleas of the county of Philadelphia to appoint a board to revise the taxes, establishes a complete system for assessing taxable property, and the councils of Philadelphia have no power to appropriate money for a duplicate assessment, which would have neither validity nor utility, if made.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 971.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Emil Selig against the City of Philadelphia and others. From the decree granting an injunction, defendants appeal. **Affirmed.**

The following is the opinion in the lower court by Sulzberger, P. J.:

"This is a motion for preliminary injunction on a bill by citizens, residents, and taxpayers, to prevent the payment of moneys of the city of Philadelphia, alleged to be due by said city to a corporation of another state doing business within this commonwealth, under a contract entered into between the city and it on August 12, 1910. Under the terms of that contract, it was provided that the corporation in question should make a report to a committee of councils of Philadelphia of an appraisal, showing, in its judgment, the present value in money of the lands and buildings comprised in wards fifth, sixth, seventh, eighth, ninth, tenth and twenty-second in the city of Philadelphia, in consideration for which services the city agreed to pay for said report and appraisal the sum of \$1.70 for each appraisal of land valued and reported, and, in addition, the sum of \$1.70 for each building valued and reported, the payments to be made in installments as follows: \$15,000 on the last day of August, 1910; \$10,000 on the last days of September, October, and November, 1910, and the balance on the completion of the valuation and delivery of the report, which must be on or before December 15, 1910; it being understood that the total payments under the contract should not exceed \$85,000.

"The plaintiffs contend that the contract is void, and that no payment can be made thereunder, because: (1) It was awarded without competition. (2) The price is exorbitant. (3) The Somers system, under which the work is to be done, is composed of two elements, personal judgment and well-known arithmetical rules, and that arithmetical rules, being the property of all persons, have no pecuniary value. (4) The report of the contracting company would be valueless because, when put in the possession of councils, the latter have no authority over the subject. (5) The ordinance authorizing the contract and the contract itself are void, because (a) the ordinance is in violation of the act of assembly of May 23, 1874, § 3 (P. L. 231); (b) because the contract is in viola-

tion of the act of assembly of May 23, 1874, § 6 (P. L. 233); (c) because the passage of the ordinance and the making of the contract are not within the power of the city, and the payment of money thereunder would be an appropriation of money for a corporation, in violation of article 9, § 7, of the Constitution.

"Some testimony was offered on both sides. We are clear, however, that its consideration is of no substantial importance.

"In our view, the question is one of law purely, involving the consideration of the power of the city of Philadelphia to use the money of the city for the purpose contemplated. Under the Constitution and laws of Pennsylvania, all the sovereignty inherent in a state, and not ceded to the United States of America, belongs to the commonwealth, and to the commonwealth alone. Within its domain, there are no co-ordinate sovereignties. There are agencies called counties, cities, towns, etc., upon whom the power to exercise certain portions of the state sovereignty, within certain limits and for certain specified purposes, may from time to time be conferred by the state. Cities upon which such powers are conferred are commonly said to have city charters. These charters, however, are merely revocable at the will of the Legislature by laws properly enacted. From the historical fact that in England there were charters of a higher grade for certain cities, no consequences can be drawn for our commonwealth. Doubtless it was felt, when sovereignty was divided between the United States and our commonwealth, that a further subdivision within the commonwealth would imperil its position, if any question should ever arise between its sovereignty and that of the nation. At all events, the one and indivisible nature of our state sovereignty has been consistently and jealously guarded.

"By the Constitution of 1874, article 3, § 7, it is expressly provided that the General Assembly should not pass any local or special law incorporating cities, towns, or villages, or changing their charters; the manifest object being to prevent the conferring upon one locality of powers of a higher grade than could safely be conferred on all.

"Taxation is one of the highest functions of sovereignty. Its effect is to take for the use of the state a portion of the private property of a citizen, upon his implied consent to such taking, which implied consent may not, in law or in fact, be denied. In order that such taxation shall be fair and equal, the state has established a uniform system, providing for assessors of counties, whose duty it is to take an account of real and personal property belonging to each of the taxable inhabitants within their jurisdiction. And these assessors must swear that

they will justly and honestly, to the best of their judgment, assess and value every separate lot, piece, or tract of land, with the improvements thereon, and all personal property made taxable by the laws of this commonwealth, at the rate or price which they, after due examination and consideration, believe the same would sell for, if sold singly and separately and at a bona fide sale, after full public notice, and that they will perform their duties with honesty and fidelity, according to the laws of this commonwealth, without fear, favor or affection, hatred, malice, or ill will. This oath is under the act of July 27, 1842, § 9 (P. L. 441, 445), and by section 10 of the same act a board of revision is provided, whose duties, under section 13, are defined to be to examine and inquire whether the returns of the assessors have been made in conformity with the laws of this commonwealth, and whether all property to be valued for taxation for state and county purposes has been valued at a sum or price not less than the same would bring, after full public notice, at a public sale, supposing each separate lot or piece or tract of land, with the improvements, or the personal property of each individual, company, or corporation only, were to be sold. They are, moreover, to consider the written communications of any taxable inhabitant of the county relative to any property which such taxable inhabitant shall believe to have been reduced too low or raised too high, and raise or reduce the same, so as to revise and equalize the assessment.

"This system, general through the state, was altered by the consolidation act of February 2, 1854 (P. L. 21) for the city of Philadelphia, and the councils of that city were made the supervisory power, but after the lapse of a decade, to wit, on March 14, 1865 [P. L. 320], this special privilege to the city was withdrawn, and power was conferred upon the court of common pleas of the county of Philadelphia to appoint a board of revision of taxes, and this act, with the supplements thereto, has had the effect of bringing the system within the city into its former harmony with the system prevailing in the state generally. It has been used without question for 45 years, and by common consent has been accepted as a substitute for the legislation on that subject, contained in the consolidation act of 1854, for the obvious reason that, where the simultaneous administration of an earlier system and a later system is practically impossible, the act establishing the later system, by necessary implication, repeals the former act.

"We have therefore a complete system established by the commonwealth itself for assessing taxable property. By the concession of the commonwealth, the taxes on one great class of property taxable by the state are yielded to the city, to wit, the taxes on real estate. By no stretch of imagination can it be conceived that the city has any power over

the assessors or the board of revision on questions affecting the assessment of subjects of taxation in which the state alone is concerned, to the exclusion of the city. If, therefore, the city claims any power in the premises, it must be only a partial power. Its utmost contention cannot go beyond a claim that it may interfere with the assessment of real estate, but not with the assessment of personal estate. Any power claimed by a municipal corporation to supervise, in part or in whole, a department created by the commonwealth must be based upon an express grant, or upon necessary implication from such a grant.

"The able presentation of this case by the learned counsel for the various defendants has not indicated to us any such grant of power. The full and satisfactory discussion of the various questions involved has, however, made plain that the making of this contract was based on a supposed power of the city to expend municipal taxes for the establishment of a complicated and extensive censorship of a state department, whose rulings are subject to appeal, not to the municipal councils, but to the courts of the commonwealth. No reason has been shown why this power, if it exists, in the councils of the city of Philadelphia does not inhere likewise in all the municipal corporations within the commonwealth, nor has it been made clear that this censorship is or ought to be limited to but one department or bureau of the state government.

"To follow the claim to its logical conclusion would be to place at the mercy of a temporary majority in councils enormous sums of money for the mere purposes of complaint and criticism, to duplicate existing state agencies responsible to proper tribunals by phantom municipal agencies, totally irresponsible and totally powerless. This is not an orderly, legal, or constitutional mode of correcting public abuses.

"By the third section of the act of May 15, 1841 (P. L. 394), any assessor or assistant assessor who shall knowingly or intentionally omit, neglect, or refuse to assess and return any property, person, or thing made taxable by law, or shall knowingly and intentionally assess, rate, or value the same at more or less than he shall know and believe the just cash value or rate thereof, or neglect or refuse to assess any tax required by law, shall be guilty of misdemeanor in office, and on conviction thereof be subject to imprisonment for not less than three nor more than twelve months, and fined in a sum not less than \$100 nor more than \$200.

"Moreover, from the decision of such an assessor, there is an appeal to the board of revision, and from the decision of the board of revision an appeal to the court of common pleas. These are orderly and legal modes of carrying on public business, and involve no capricious outlay of vast sums of public money for mere purposes of inquiry.

"The most that can be said for the defendants' position is that they desire to show that, in some way not known to the assessors, a more equal and just system of fixing valuations can be devised than is at present in use. With the merits or demerits of the particular system in question, we have no concern. It seems to be conceded by all that, whatever system is adopted, its basis must be the fair prices obtained by actual sales in each vicinity. The most that can be contended is that it is theoretically possible from such actual sales to derive a stable law which shall ascertain the general judgment of buyers as to values in a particular vicinity. In view of the great differences between the intellects of men, and having regard to the complexity of modern urban life and the vicissitudes in national financial conditions and prosperity, the establishment of such a fixed rule cannot be said to be easy of attainment. Assuming, however, that the difficulty has been perfectly solved, and that it shows that the law now regulating the judgment of assessors is inadequate and should be replaced by an improved standard, the proper forum to address is the Legislature of the commonwealth. One who, by his industry, his talent, and a happy combination of circumstances, has succeeded in solving the problem may, if he chooses, preserve it as a trade secret with which he is unwilling to part, save for an adequate consideration. We are bound to assume that the Legislature, representing the people of this commonwealth, will be alert to amend laws that need improvement, and also to give just compensation to any one who renders service to the commonwealth.

"From all this, however, it is impossible to gather, or by any process of reasoning to infer, a power in the councils of Philadelphia to appropriate large masses of the funds collected by taxation for the mere purpose of a duplicate assessment, which, when made, will have neither validity nor utility. It has no validity, because the assessment as made by the constituted authorities stands. It has no utility, because the assessment does not of itself disclose the method employed in the making of it with such precision and certainty that the Legislature could incorporate it into an act of assembly instructing the assessors how they are to proceed.

"There is no provision in the Constitution or in the statutes which expressly confers such vague powers upon the city of Philadelphia; nor is there anything in them from which the grant of such powers could be necessarily or even remotely implied. We entertain grave doubts whether the Legislature itself could constitutionally duplicate an official bureau, whose province it is to act, by an unofficial bureau without any governmental function whatever.

"Be that as it may, we are clearly of opinion that the councils of the city of Philadel-

phia had no power to direct the payment asked to be restrained.

"Let a preliminary injunction issue to John M. Walton, Esq., comptroller of the city or Philadelphia, and Murrell Dobbins, Esq., treasurer of the city and county of Philadelphia, restraining them from paying to the said the Manufacturers' Appraisal Company any sum or sums of money under the authority of the ordinance of councils exhibited to us as Exhibit B, attached to and a part of the bill of complaint. Security to be entered in \$5,000."

Wiltbank, J., delivered the following opinion in the lower court:

"This is a motion for a special injunction to restrain certain officers of the city and county of Philadelphia from paying to the Manufacturers' Appraisal Company any sum or sums of money under and in pursuance of an intended authority or direction in a certain ordinance of councils, and to enjoin the defendants from performing any act or acts preliminary to the making of such payments.

"Some preliminary suggestions occur to us as worthy of mention here, although they do not state or affect what we conceive to be the point open for our order.

"The litigation has been inaugurated by taxpayers of the city in consequence of its employment of a corporation to make appraisals of real estate in houses and lands situate in certain wards, and of the appropriation by councils of a sum of \$85,000 to be expended, in part or in whole, in compensation for the services and outlay of the company engaged.

"It has been shown to us by competent and extended proof that the object of the employment was and is to secure a scientific ascertainment of values by the use of a method brought to our notice as the Somers system. This system has been discussed at large. A respectable company, one of the defendants, avails itself of it, and for the purposes of this inquiry it may be regarded as embodying a defensible method, worthy of intelligent and earnest study.

"With respect to it, however, certain inquiries are pertinent. What is the authority and what the sanction of this appraisalment? Does it bind persons or bodies, civic or politic? Is it a method of lawful municipal action? And, were we to assume it to result in an ascertainment of values, would it be open to just criticism on the part of the taxpayer that the proper tests had not been applied, and that, in its most important particular, the test adopted had been an avowed departure from the rule of market value? This rule prevails here at common law and by statute (act of July 27, 1842 [P. L. 441]), and is inflexible.

"We find no answer to these inquiries which accredits the system and discloses features superior to those of the procedure of the state officers now and for many years en-

gaged upon the same work. A standard of market value is always available, and it should not be superseded by an artificial scheme, the peculiar merits of which, if any, are not published, and which, therefore, its advocates may well claim we are not in position either to approve or condemn.

"The present, however, is not a question of the merit of the Somers system, or of the sanction or authority of the investigation and report in which some of the defendants are engaged; but it is a question solely of the authority of the city to pay moneys provided for as incident to the contract with the Manufacturers' Appraisal Company. Whether the order for this appraisal is within the law or not, I conceive we have not the jurisdiction to determine, because its promulgation by the city, according to the papers in evidence, rests in the legislative discretion of councils, if they have the authority to act, and this discretion we may not review.

"It is not disputed that the councils have authority to make proper investigation in matters of civic government, in the interest of the municipality and for the benefit and welfare of the citizens at large. We cannot be asked to interfere with the exercise of a function both lawful and beneficial. *Stegmaier v. Goeringer*, 218 Pa. 499 [87 Atl. 782]; *Commonwealth v. Pittsburgh*, 183 Pa. 202 [38 Atl. 628, 63 Am. St. Rep. 752]. Here, however, an exhaustive investigation with relation to taxation has been provided and prescribed by the Legislature, and has proceeded, according to one statutory method or another, from the beginning of the history of the municipality to this day. The officers to whom it is, and has been, committed are experts chosen under legislative sanction, and they are the fountain of information open to councils, and of them no complaint is made by the defendant. Indeed, there has been at bar a special and official disclaimer of any imputation upon the skill, the industry, or the integrity of the assessors in charge of the work. The legislative instrumentality may not be overridden by the agency created by the city authorities, and the work of that agency must therefore of necessity be legally ineffective. No new assessment is within the power of the municipal legislative body as a consequence of the judgment of the Manufacturers' Appraisal Company. The best that could be obtained from an admirable return of skilled workmen would be a statistical report, not conclusive even of the mathematical values of a comparatively small number of districts of the city out of the many comprising the whole.

"It has been conceded in the able argument offered in behalf of the officers of the city that there is no express legislative authority in the councils of the city to appropriate moneys in this behalf, and that if the present appropriation is lawful it is in vir-

tue of an implication of authority. It is contended that it is thus lawful. We have considered the arguments and proofs submitted on this point. We fail to find warrant for the affirmative contention.

"In *Commonwealth v. Pittsburgh*, 183 Pa. 202 [38 Atl. 628, 63 Am. St. Rep. 752], it was held that the city might appropriate money to a committee of private citizens which had been created by the chamber of commerce, a corporation therein existing, and later approved and accredited by the city councils, to defray the expenses of surveys for a ship canal, and to secure information from experts touching the practicability of such canal and the probability of its commercial advantage. It was held that the appropriation was valid as within the power of the councils. The argument on the part of the contestants was that this action was within the inhibition of section 7, art. 9, of the Constitution, which forbids a municipality 'to appropriate money or loan its credit to any corporation, association, institution or individual.' The Supreme Court did not sustain the appeal. The judgment there proceeded, according to our understanding, upon the doctrine frequently announced, and herein expressed, that in matters of civic government councils may legislate in the interest of the municipality for the benefit and welfare of the citizens at large, where they do not interfere or impinge upon the sphere and authority of agencies already created for the attainment of the same object, or violate the conditions of their charter. That case differs from this, in that there had been created no power to act upon the important subject committed to a body described upon the record as 'The Provisional Committee of the Lake Erie and Ohio River Ship Canal.' In the case at bar, we have already shown that the state has provided a public department for the appraisal of real estate.

"In *Lesley v. Kite*, 192 Pa. 268 [43 Atl. 959], the councils of Philadelphia gave subcontractors a remedy that was analogous to an attachment of certain funds due by the city to the principal contractor, although the Legislature had provided no such remedy. The ordinance was held invalid, as an attempt to provide an action inconsistent with, and not authorized by, the existing legislative system. The Supreme Court said: 'Councils are powerless to provide any remedy to be used as a substitute for attachment, or any other remedy which the Legislature has heretofore withheld on grounds of public policy or otherwise.' In *Bechtel v. Fry*, 217 Pa. 591 [86 Atl. 992], it was adjudged that the county commissioners had no authority to pay special counsel in a criminal prosecution in which the county was interested, for the reason that the Legislature had committed to a special officer the duty of prosecuting offenders against the peace and dignity of the state, and of bringing them to judgment.

"In *Grannis v. Commissioners*, 81 Minn. 55, 83 N. W. 495, individuals had been employed to make search for land which the constituted authorities had failed to list for taxation, and were to receive a compensation contingent on the amount discovered and reported. It was held: 'The Legislature has provided officers whose duty it is to levy all taxes, officers to cause all property to be properly assessed and placed upon the tax rolls, and officers for the collection of such taxes. * * *

It is true that a county is interested and concerned in the matter of the collection of taxes. Its revenues are derived chiefly therefrom, and it is important to it, and to the state as well, that all property properly taxable pay its just share and proportion of the public burdens. But the county is not charged with the duty of seeing to it that all such property is assessed and placed upon the tax rolls. Other officers acting independent of the county are charged with the performance of such duties, and they are alone responsible therefor. The matter of unearthing and discovering property which has escaped taxation is not only not necessary to the exercise of the corporate powers of a county, but is beyond its express or its implied authority.'

"In *Stevens v. Henry County*, 218 Ill. 468, 75 N. E. 1024 [4 L. R. A. (N. S.) 339], the court enjoined payment upon a contract for the employment of a tax expert which employment was independent of the legislative system then in force. 'The statute having designated the proper officers to discharge this duty and having charged them therewith, and provided for the compensation they shall receive, we do not think the county, in the absence of any specific grant, had power to enter into the contract' under review.

"The limitations upon the power of a municipality to legislate the appropriation of funds out of the course of the usual and ordinary administration of the affairs common to the life of such a body have been ascertained in many of the states of the Union, and laid down with precision upon final judgments of the courts of last resort. These decisions have been in accord with the views we herein express. We may cite *Minot v. West Roxbury*, 112 Mass. 1 [17 Am. Rep. 52]; *Coolidge v. Brookline*, 114 Mass. 592; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Henderson v. Covington*, 77 Ky. 312; *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 231. These cases have been relied on as bearing mainly upon the question of the power of a municipality to expend money in an appeal to a state Legislature for the grant of additional and special municipal authority, but the discussion therein of the issues severally involved is sufficiently wide and authoritative to afford light and assistance in the treatment of the question at large.

The plaintiffs have shown an equity to relief under the first clause of the third prayer of the bill."

Decree: "This cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof it was ordered, adjudged, and decreed as follows: Let a preliminary injunction issue to John M. Walton, Esquire, comptroller of the city of Philadelphia, and Murrell Dobbins, treasurer of the city and county of Philadelphia, restraining them from paying to the said Manufacturers' Appraisal Company any sum or sums of money, upon the authority of the ordinance of councils, exhibited to us as Exhibit B, attached to and made a part of the bill of complaint. Security to be entered in \$5,000."

Argued before FELL, C. J., and POTTER, ELKIN, and STEWART, JJ.

John C. Bell and Paxson Deeter, for appellant Manufacturers' Appraisal Co. Francis Shunk Brown, for appellant councils' committee. James Alcorn, City Sol., and Ernest Lowengrund, for other appellants. Horace Stern, Hampton L. Carson, and Morris Wolf, for appellee.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of the learned judges of the common pleas.

In re ARCHAMBAULT'S ESTATE.

Appeal of HART.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WILLS (§ 695*)—CONSTRUCTION—JURISDICTION.

The courts have no jurisdiction to construe a will by way of advice, and without adverse litigants actually before them.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1665-1669; Dec. Dig. § 695.*]

2. WILLS (§ 695*)—CONSTRUCTION—JURISDICTION.

Where a testator directed incomes from certain realty to be paid his widow for life, and provided for a fund to support a pew in perpetuity out of the income after her death, the validity of the latter provision cannot be considered until the termination of the life estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1665-1669; Dec. Dig. § 695.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Victor E. Archambault, Jr. From the decree dismissing exceptions to adjudication, Virginia M. Hart appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Theodore F. Jenkins, for appellant. A. I. Phillips and J. Kirk McCurdy, for appellees Dora B. Archambault and trustees under will. Samuel H. Thomas and Robert D. Maxwell, for other appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

POTTER, J. In the fourth paragraph of the will of Victor E. Archambault, Jr., he provided as follows: "After the death of my said wife, I direct my trustees to set aside out of the income from my said property at the Northeast corner of Eleventh and Market streets, or out of the income from the proceeds of the sale of that property, a sum, the interest of which will be sufficient to pay the rent, for all time to come, of my pew, number six, in the Church of the Holy Trinity, situate at the Southwest corner of Nineteenth and Walnut streets in the city of Philadelphia, to be free forever as a memorial to myself." Upon the audit of the account of the trustees, it was contended upon behalf of Mrs. Virginia M. Hart, claiming as heir under the intestate laws, that this provision taking effect at the death of the cestui que trust for life was void for uncertainty as to the amount required, and that it and all subsequent provisions relating to the trust fell, and that the estate passed, therefore, under the intestate laws.

[1] The auditing judge and the court below in banc refused to take this view, and held that this question could not properly be raised until the expiration of the life estate, and it was not therefore to be considered or decided at the present time. We agree entirely with this conclusion. It is clear that the testator made his wife the first object of his bounty, for, after giving her the house in which he lived and all of his personal property, he directed that all the net income from his property at Eleventh and Market streets should be paid to her for life. Clearly the widow was entitled to the entire sum which was ready for distribution under the present account. Any question as to the ultimate distribution of the estate cannot arise until after the termination of the life estate. There is abundant authority to sustain the auditing judge in declining, at the present time, to declare the rights of the parties under the will, as respects the subsequent trusts. In Willard's Appeal, 65 Pa. 265, 268, speaking of the settlement of questions arising upon the construction of a will by way of anticipation, Mr. Justice Sharswood said: "The acts of assembly which confer jurisdiction on the orphans' court may be searched in vain for any such power. Without authority so derived, we must say that the decree below or in this court on appeal would be inconclusive and possibly a snare. It would not be binding upon any of the parties; certainly not upon those of them not sui juris. Consent cannot give jurisdiction. Any opinion which we should express upon the proper construction of this will in this appeal would be merely extrajudicial." The same principle is reiterated in Tyson's Estate, 191 Pa. 218, 224, 43 Atl. 131, where Mr. Justice Mitchell said: "It is quite true that the

courts of Pennsylvania have no jurisdiction to declare the construction of a will and rights under it by way of advice in limine, and without adverse litigants actually before them. It is not desirable that they should have."

[2] In the present case, the setting out of an estate for the life of the widow is clearly a valid limitation, which is readily separable from the subsequent limitations. There is no good reason for involving it in any way with the provision for the distribution of a portion of the remainder, which is claimed to be void by reason of uncertainty. It will be time enough to meet the question of the validity of the provision for a fund to support a church pew in perpetuity when that question can properly be raised after the termination of the life estate. Its consideration and decision would have been premature upon the audit of the account in this case.

The specifications of error are dismissed, and the decree of the orphans' court is affirmed.

In re ARCHAMBAULT'S ESTATE.

Appeal of HART.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WILLS (§ 684*)—CONSTRUCTION—RIGHTS OF BENEFICIARY.

A testator devised certain real estate in trust to pay the income to his widow for life, and after her death to make certain payments out of the income, or from the sale of the property. When testator died, the property was leased until January 1, 1913, at a rental of \$1,041.67 per month. A third party, under an agreement with the original lessees, took a lease with the trustees for 10 years, the rental to be paid \$10,000 in cash at the signing of the lease, and \$1,041.67 monthly until January, 1913, and thereafter \$1,750 per month for the remainder of the term. Held, that the \$10,000 was payable to the widow as rental accrued in her lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1625; Dec. Dig. § 684*]

2. TRUSTS (§ 280*)—LIFE TENANT AND REMAINDER—APPORTIONMENT OF RENT.

Where, pending a lease, four years of which were unexpired, the trustees of the property accepted a bonus of \$10,000 for an extension of the lease for 10 years, the rental belonged to the beneficiary of the trust, and could not be apportioned among the four remaining years of the original term of lease.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 400; Dec. Dig. § 280*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Victor E. Archambault, Jr. From a decree dismissing exceptions to adjudication, Madeleine A. Hart appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Theodore F. Jenkins, for appellant. A. I. Phillips and J. Kirk McCurdy, for appellees.

POTTER, J. Victor E. Archambault, Jr., died January 10, 1906, seised in fee of the premises at the northeast corner of Eleventh and Market streets, Philadelphia, and leaving a will, dated February 9, 1904, which was duly admitted to probate, and letters testamentary thereunder granted. He devised the property above mentioned to his executors in trust to rent and manage the same, with power to sell and invest the proceeds and to pay over the net income to his wife during the term of her natural life, and after her death to make certain payments out of the income derived from the property, or from the proceeds of its sale; a portion of such income to be paid to testator's niece, Madeleine A. Hart, during her life. At the time of testator's death, the premises in question were leased for a term ending January 1, 1913, at a rental of \$12,500 per annum, payable in monthly installments of \$1,041.67 each. The United Gas Improvement Company, having arranged with the former lessees, entered into a new lease with the trustees for the term of ten years from January 1, 1909, the rent to be as follows: \$10,000 in cash at the signing of the lease; \$1,041.67 to be paid monthly until January, 1913; and thereafter \$1,750 per month during the remainder of the term. The lessees paid the \$10,000, entered into possession, and also paid the subsequently accruing installments of rent each month.

On November 10, 1909, the trustees filed an account, wherein they charged themselves with the \$10,000 paid by the lessees on the execution of the lease. At the audit, the widow claimed the whole \$10,000 as rent accrued in her lifetime, but the niece, Madeleine A. Hart, contended that this sum should be ratably distributed over the whole term for the benefit of those entitled to it during the term. The auditing judge held that the amount was to be treated as rent of the year in which it was paid, and awarded it all to the widow. Upon exceptions, the court in banc modified the decree to the extent of distributing the \$10,000 in equal monthly payments during the term of four years from January 1, 1909. This was done upon the theory that it would make the rent reserved conform in its monthly collections to the reasonable economic value of the property during that part of that term.

The appellant here complains that the court below erred in not directing that the \$10,000 should be apportioned in equal monthly payments to those entitled to the beneficial interest during the ten years from

January 1, 1909, the certain term of the lease. In the opinion of the auditing judge, as in that of the court in banc, the rule of the common law was recognized that rent is not to be apportioned in respect to time. It is not to be regarded as accruing from day to day, as interest does. This rule has been altered in England by the apportionment act of 1870, 33 and 34 Victoria, c. 35, so that rents, annuities, etc., are now there considered as accruing, like interest, from day to day, and are made apportionable in respect to time. See 1 Woodfall on Landlord and Tenant (1st Am. Ed. 1890) *405, *406. But we know of no such legislation in Pennsylvania. In Agnew's Estate, 17 Pa. Super. Ct. 201, 203, it was held that where rent was paid to a life tenant in advance, and the life tenant died before the expiration of the term for which the rent had been paid, the remainderman could not recover any portion of the amount so paid in advance from the estate of the life tenant, although both had joined in the lease. Referring to the act of February 24, 1834, § 7 (P. L. 74), Judge Beaver further said: "But this section relates to rents accruing, not to those which have accrued; and, if it has any application to this case, would by inference at least indicate that rents which had accrued would be properly included in the estate of a deceased life tenant."

[1] In the case at bar, the widow is entitled under the will of her husband to the entire net income accruing from the premises at Eleventh and Market streets during her lifetime. As to when or how the income should be paid to her by the trustees, the will is silent. But the net income belonged to her, whenever it was realized. It matters not whether the sum of \$10,000 in question be regarded technically as rent, as it was called in the lease, or as a bonus; it was certainly income derived from the premises, which were made the subject of a trust for her benefit during her lifetime. Being received by the trustees during the lifetime of the widow, she was clearly entitled to it under the will. Suppose the building had been rented for an extraordinary sum for a short time, as buildings are known at times to be let upon unusual occasions, such as the passing of a pageant, or during inaugural or other ceremonies. Certainly such extraordinary rent would belong to the life tenant. We do not agree with the suggestion of the court below that the rule of law that rent is not apportionable applies only to "normal rent." We see no reason for any such distinction, and no authority to sustain it has been cited. For some reason satisfactory to itself, the new tenant was willing to pay a large bonus to the trustees for an extension of the lease. The remaindermen have not been prejudiced in any way by the transac-

tion. In addition to the bonus, the trustees are receiving the same rental (\$12,500 per annum) as that reserved in the original lease. After January 1, 1913, the rental will be at the increased rate of \$21,000 per annum. We agree with the auditing judge that the payment of this bonus of \$10,000, or the initial payment of that sum as rent, however it may be regarded, belongs to the life tenant, and should have been awarded to her.

[2] The court in banc was in error in directing that the sum should be apportioned over a period of four years. However, the life tenant has acquiesced in the final decree of the orphans' court, and has taken no appeal. Her counsel is here asking that the decree of the court below be affirmed. The present appeal is by one of those interested in remainder, who contends that the sum should be apportioned throughout the entire term of the lease, a period of ten years. The specifications of error filed in her behalf are dismissed, and the decree of the orphans' court is affirmed.

CITY OF WILLIAMSPORT v. CITIZENS' WATER & GAS CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. DISCOVERY (§ 3*)—PRODUCTION OF BOOKS AND PAPERS—EXISTENCE OF OTHER REMEDY.

Where a city seeks to acquire the works of a water company, as authorized by Act April 29, 1874 (P. L. 95) § 34, cl. 7, it cannot, by proceedings in equity, compel the company to render an itemized statement of the net cost of erecting and maintaining its works and a statement of dividends declared, nor to exhibit such books and papers and vouchers as may be necessary to verify the statements; mandamus being the ordinary and appropriate remedy.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

2. MANDAMUS (§ 3*)—JURISDICTION OF EQUITY—REMEDY AT LAW.

Where there is jurisdiction by mandamus to give relief sought in equity, the pendency of an equity proceeding will not oust the jurisdiction by mandamus, unless the court is satisfied that the issues can be appropriately and finally determined in equity and complete justice be given to all the parties, particularly if the remedy by mandamus affords more complete justice than could otherwise be obtained.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8-34; Dec. Dig. § 3.*]

3. JURY (§ 19*)—RIGHT TO TRIAL BY JURY—MANDAMUS.

Trial by jury may be had in mandamus proceedings in the court of common pleas, and such a trial is conducted as in other actions at law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

4. MANDAMUS (§ 174*)—PROCEEDINGS—TRIAL—GENERAL OR SPECIAL FINDINGS.

Though the whole structure of Act June 14, 1836 (P. L. 621), and Act June 8, 1893 (P. L. 345), indicates that jury trials are contemplated in mandamus, the rule that the jury

have the right to judge whether they shall find a general or special verdict does not prevail, and the court may submit special issues, instead of the general issue, and thereby secure special findings on essential and controlling points.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 386, 387; Dec. Dig. § 174.*]

5. MANDAMUS (§ 172*)—PROCEEDINGS—ISSUES.

In preliminary mandamus proceedings by a city seeking to acquire the works and property of a water company, the paramount issue is the right of the city to have access to the company's books and records to secure data of the cost and maintenance of the company's plant and the dates and amounts of dividends, but, since mandamus will never issue for a vain or useless purpose or to satisfy a mere curiosity, the proceedings would also involve the issues of the financial ability of the city to purchase the plant, the assessed value of the city's real estate, and the amount of its indebtedness, and the cost of the waterworks plant, its maintenance, and the dividends declared.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381-385; Dec. Dig. § 172.*]

6. EVIDENCE (§ 157*)—BEST AND SECONDARY EVIDENCE—ADMISSIBILITY.

In preliminary mandamus proceedings by a city seeking to acquire a water company's works and property, testimony relied on by the water company to show the cost of its plant, when otherwise competent, cannot be declined simply because the trial court assumes that the water company's books and papers would better show the actual cost price.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.*]

7. EVIDENCE (§ 157*)—BEST AND SECONDARY EVIDENCE—ADMISSIBILITY.

Though secondary evidence cannot be admitted in place of primary evidence, evidence which is primary or original in its character cannot be excluded because other corroborative or stronger and more conclusive primary evidence might have been introduced, it being essential for the exclusion of evidence, under the best evidence rule, that the evidence not produced should be not only more direct, satisfactory, and conclusive, but also higher in grade or degree than that which is offered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.*]

8. WATERS AND WATER COURSES (§ 183*)—ACQUISITION OF WATERWORKS BY MUNICIPALITY—PROCEEDINGS—VALUATION.

Where preliminary mandamus proceedings by a city against a water company disclosed that the works and property of the company greatly exceeded in value the amount which the city could raise under the law for the purchase thereof, the city cannot maintain mandamus to compel the water company to submit to an investigation of its books and properties; but, where the probable price which would have to be paid and the borrowing capacity of the city approximate one another, the company may be compelled to submit to an investigation, and thereafter, in case of refusal of the city's offer for the plant, the city could maintain mandamus to compel its conveyance to the city, and in such proceedings the water company could take issue on the estimated price submitted by the city.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183.*]

9. EQUITY (§ 43*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

Under Act June 16, 1836 (P. L. 789) § 13, par. 5, giving to the courts the supervision and

control of all corporations other than those of a municipal character, the ordinary and adequate remedies at law are not superseded at equity as against a corporation, and, where there is an appropriate remedy at law, a bill in equity will be dismissed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-166; Dec. Dig. § 43.*]

10. APPEAL AND ERROR (§ 1106*)—DISPOSITION OF CAUSE—MANDATE TO TRIAL COURT.

Where a city by a bill in equity seeks to compel a water company to render an itemized statement of the cost of erecting and maintaining its works and of dividends declared, and to exhibit its books and papers, the service on the corporation having been presumably made in compliance with equity rules in the mode prescribed by law for the service of a writ of summons on the corporation, which is consistent with the mode prescribed by Act June 8, 1893 (P. L. 346) § 5, for the service of a writ of alternative mandamus, the appellate court will remit the record with directions to transfer the cause to the law side of the court, as directed by Act June 7, 1907 (P. L. 441) § 3, providing that if, on an appeal, the question whether the suit should have been brought at law is raised by the defendant's assignments of error, and the appellate court decides that it should have been brought at law, it shall remit the cause, with directions to transfer it to the law side of the court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1106.*]

Potter and Mestrezat, JJ., dissenting.

Appeal from Court of Common Pleas, Lycoming County.

Bill in equity by the City of Williamsport against the Citizens' Water & Gas Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to transfer cause to the law side of the court.

Bill in equity to compel the defendant water company to render to the plaintiff city an itemized statement of the net cost of erecting and maintaining its works, together with a detailed statement of dividends declared, and to exhibit such books, papers, and vouchers as might be necessary to verify the statements so made.

The bill avers: (1, 2, 3) The incorporation of the borough of Williamsport on March 1, 1806, and its erection into a city on January 15, 1866. (4) The incorporation of the Lycoming Gas & Water Company under special act of March 24, 1865 (P. L. 767). (5) The provisions of section 7 of said act authorizing the company to erect its necessary works "for the purpose of supplying the inhabitants residing within the limits of the territory, here described, and parts adjacent thereto," sufficient gas and pure water, and describing the territory referred to. (6) Section 9 of the act, as to rates. (7) That the property and franchises of this company were sold January 8, 1880, and the purchasers reorganized the company under the act of May 25, 1878 (P. L. 145), as the Citizens' Water & Gas Company, accepting the provisions of article 16 of the Constitution and the provisions of the general corporation act of April 29, 1874

(P. L. 73). (8) That clause 7 of section 34 of the act of 1874 provides: "It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district, in which the said company shall be located, to become the owners of said works and the property of said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon, at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared. * * *"

(9) That defendant company and its predecessor have supplied water to the city of Williamsport and its inhabitants for more than 20 years. (10) That neither the city nor the borough has at any time constructed waterworks. (11) That on June 1, 1907, the councils of Williamsport passed the following resolution: "Whereas, the Williamsport Water Company and the Citizens' Water & Gas Company have for more than twenty years supplied water to the public and the city; and whereas, it is the desire of the councils that the city shall become the owner of the works and properties of these companies under the provisions of clause 7 of section 34 of the act of April 29, 1874; therefore, resolved: (1) That the city declares its intention to become the owner of the works and properties of the companies and hereby agrees to pay therefor the net cost of erection and maintenance, with interest thereon at the rate of ten per centum per annum, deducting from the interest all dividends theretofore declared, provided, that the cost to the city of Williamsport, ascertained as above set forth, shall not, when taken together with the existing indebtedness of said city, exceed seven per centum of the valuation of the property in the said city taxable for county purposes; and provided further, that the electors of the said city shall assent, at a public election to be held for that purpose, to the increase of additional indebtedness of said city (not exceeding, when taken with the existing indebtedness, seven per centum of said assessed valuation) to a sum sufficient to effectuate the purchase. (2) The companies are requested to exhibit to the light and water committee of the city councils of the city of Williamsport a detailed and itemized statement showing the net cost of erecting and maintaining the works and property of the said company, as well as the amounts and dates of payment of all dividends heretofore declared, together with such other information as will enable said light and water committee to verify the statement or statements so made. (3) If the companies neglect or refuse to comply with the request for twenty days after notice, the light and water committee are to take legal steps to compel the companies to give the information demanded." (12) That on July 12, 1907, a demand was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

made upon the defendant reciting the above resolution, and requiring a statement in writing showing the net cost of erecting the waterworks and property of the Williamsport Water Company and the Citizens' Water & Gas Company, the net cost of maintaining the works and property of said companies, the amounts and dates of the payments of all dividends theretofore declared, the date of completion of the waterworks of each of the said companies, the general character of the maintenance of the works and property, and such other information as will enable the committee to verify the statements above required. (13) That on July 13, 1907, the two companies by their attorneys answered, declining to furnish the information, giving as a reason that it was obvious that the city did not have enough borrowing capacity under the law to raise a sufficient amount of money to make the purchase. (14) That on November 1, 1907, the plaintiff's solicitor had been instructed to proceed against the two companies. (15) That the refusals of the desired information rendered it impossible for the city authorities to take intelligent action in the premises. The bill ends with a prayer for the specific relief indicated at the beginning of this report, and with a prayer for general relief.

The defendant company demurred, denying the jurisdiction of the court to proceed in equity, since there was an adequate remedy at law by mandamus. The demurrer was overruled. The defendant then answered (1, 2, 3), admitting the incorporation of the borough and of the city of Williamsport. (4) Admitting the incorporation of the original water company, and averring certain amendments to its charter whereby it was authorized to make a loan of \$100,000 to complete its works, in addition to a then existing indebtedness of \$50,000. (5, 6, 7, 8, and 9) Admitting corresponding paragraphs of bill, and averring that the defendant company had not only supplied water in Williamsport, but also in the borough of Du Bois and in Loyalsock township, for more than 20 years. (10) While not denying corresponding paragraphs, averring that the plaintiff had owned 400 shares of stock of the Williamsport Water Company, and had had a representation of two members upon the board of managers of said corporation from 1856 to 1873 when the stock was sold. (11) Calling for proof of matters in corresponding paragraph. (12, 13) Denying that either the demand or the refusal set forth in the corresponding paragraphs of the bill was made upon or by the defendant company alone; averring that the demand was made upon and the reply by the defendant company and the Williamsport Water Company jointly; and calling attention to the fact that the councilmanic resolution referred to these companies jointly, and not to either one of them separately. (14) Calling for proof of matters in corresponding paragraph. (15)

Denying that the answer of the two companies averred in the corresponding paragraph of the bill prevents intelligent action by the plaintiff in the matter of acquiring the works and property of the defendant. (16) Averring that on September 3, 1907, before the bill was filed, the plaintiff, pursuant to a councilmanic resolution, requested its city engineer to furnish data and estimates of the cost of the works and property of the two water companies; that the engineer rendered such a report stating that he had had complete access to "all maps, plans, and data" of the two companies, and that the report "furnished a very reliable basis for the city to work upon," and, further, that "the prices and areas of the land included in this report are matters of record"; that the total cost estimated by the engineer was \$858,221.55, not including the cost of maintenance. (17, 18, 19) That the defendant company and its predecessors had begun the construction of its work and the laying of its mains in 1865, and had continued with them to the present time, always supplying fresh and pure water to the places before stated. (20) That, in order to protect the water supply from pollution and "acceding to the demands of the board of health of the city of Williamsport," the two companies had purchased and owned large tracts of land, in the case of the defendant amounting to 5,017 acres and of the Williamsport Water Company to 2,020 acres. (21, 22) That when the report was made by the city engineer on September 12, 1907, and at the time of the filing of the bill, the defendant owned and operated the property set forth in the paragraphs, and that the value of such property greatly exceeded the borrowing capacity of the plaintiff. (23) That prior to the resolution of June 1, 1907, and to the filing of the bill, the plaintiff had knowledge that the defendant had become the owner of land and other properties in Armstrong township, largely at the command of the aforesaid board of health, which property was acquired at a cost greatly exceeding the borrowing capacity of the plaintiff city. (24) That on July 12, 1907, when the demand was made, and at the time of the filing of the bill, the last assessed valuation of taxable property within the plaintiff city was "\$9,578,853, and its existing indebtedness \$545,561.54, which indebtedness could not be increased more than \$124,958.17, without violating section 8, of article 9 of the Constitution; a financial condition known to the plaintiff." (25) "That the plaintiff * * * having knowledge before filing its bill that the cost of a portion of the works and property of the company, when taken together with the existing indebtedness of the city, very largely exceeded 7 per centum of the valuation of its taxable property, it was unnecessary and useless for her to proceed further and to require from the company the statement demanded; and hence the relief prayed for * * * was inquisi-

torial and an unreasonable search, against * * * section 8 of article 1 of the Constitution." (26) Calling attention that the resolution of the city councils declared its intention to purchase the works of the two companies provided that the city had sufficient borrowing capacity, and further calling attention to the fact that the report of the city engineer showed that the probable cost of the work would exceed the borrowing capacity by more than \$700,000, and averring for that reason the proceedings against it were an unlawful attempt to enforce an unreasonable search. (27) Averring that, because the resolutions of councils were aimed against the two companies jointly, the suit was improperly brought against the defendant company alone. (28, 29) A general denial of the rights of the plaintiff and a specific denial of the jurisdiction of the court in equity, and an averment that there was an adequate remedy at law by mandamus.

When the case came on to be heard, the court below found the historical facts concerning the several corporations as averred in the bill and admitted in the answer. The facts as to the resolutions of councils and the demand upon the companies and their refusal were found substantially as averred in the bill, but the court found that the demand and refusal were by and against the two companies jointly as averred in the answer; further, that the two companies maintain the same headquarters in the city of Williamsport where each of them "transacts its principal business," and that they have the same office.

The court refused, "as irrelevant, incompetent, and immaterial to the issue being tried," requests for findings submitted by the defendant concerning the borrowing capacity of the city, the investigations made by its engineer and the value placed by him upon the defendant's works, the general details of the property owned by the defendant, and the fact that their value exceeded the borrowing capacity of the plaintiff, and concerning the value of real estate recently purchased by the defendant and that it exceeded the borrowing capacity of the plaintiff, as contended for in the answer of the defendant.

The court's conclusions of law were: (1) That clause 7, § 34, of the act of April 29, 1874 (P. L. 95), applied in this case, and that the plaintiff had the right to acquire the defendant's works thereunder. (2) That the relief prayed for by the plaintiff was not inquisitorial, and did not constitute an unreasonable search in violation of the Constitution. (3) That the court had jurisdiction. (4, 5) That, in the absence of proof on the part of the defendant that it was possessed of no written evidence or data of the costs of the construction and maintenance of its water plant and as to dividends declared, no secondary evidence thereof was competent, and "for this reason we have excluded the testimony of the character here indicated,

which we received." (6) That the only question at issue was the right of the plaintiff to obtain from the defendant "a statement, or data, of the cost" of construction and maintenance and of dividends, and "access by the city to its books and records for the purpose of making such statement and data." (7) That, to entitle the plaintiff to the relief prayed for, "it is not necessary that she first show her ability to make the purchase," or "bind herself to make the purchase." (8) That the plaintiff was entitled to the information and the relief prayed for. (9) That the plaintiff had no adequate remedy at law. Concerning conclusions 4, 5, and 7, the opinion states: "Whilst we opened the door widely and permitted the defendant to introduce testimony showing the assessed value of taxable property of the city for the year 1907, and also to show by an expert witness his estimate of the cost of erecting the works of the company defendant, we are convinced, upon more careful consideration of the question, that this evidence is incompetent and irrelevant to the issue here being tried. This evidence as to the cost of erecting the works is not the best evidence, for the reason that the defendant company is presumed to be possessed of the actual net cost of the erection and maintenance of its works. * * *

On July 11, 1910, the court decreed: "That the Citizens' Water & Gas Company, defendant, its president, Henry D. Brown, and its secretary and treasurer, William H. Bloom, render to the light and water committee of the councils of the city of Williamsport, plaintiff, a detailed and itemized statement showing the net cost of erecting and maintaining the works and property of said * * * company, the amounts and dates of its various expenditures, as well as the purposes for which the same were made, the amounts and dates of payment of all dividends heretofore declared, together with such other information and exhibition of books, papers, and vouchers as will enable said committee to verify the statements so made."

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. La Rue Munson, for appellant. Frank P. Cummings, City Sol., for appellee.

MOSCHZISKER, J. [1] The controlling question in this case is as to the appropriate remedy, and we have reached the conclusion that it lies not in equity, but at common law. The right of the plaintiff city and the obligation of the defendant corporation arise under clause 7, § 34, of Act April 29, 1874 (P. L. 95), which provides: "It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district into which the said company shall be located, to be-

come the owners of said works, and the property of said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon, at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared: * * * Provided * * * that the court of common pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process." The act fails to provide any special remedy to carry this section into effect other than that in the proviso just quoted, and, while the Legislature saw fit expressly to give equity jurisdiction to the extent therein set forth, it refrained from going further.

Mandamus is the ordinary and appropriate remedy to compel corporations to disclose information such as the plaintiff claims to be entitled to. *Commonwealth ex rel. v. Phoenix Iron Co.*, 105 Pa. 111, 51 Am. Rep. 184; *Phoenix Iron Co. v. Commonwealth ex rel.*, 113 Pa. 563, 6 Atl. 75; *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123. In each of these cases the application was by one claiming the right to inspect books and papers so that he might secure accurate knowledge of the affairs of a corporation. The plaintiff had the interest of a stockholder who desired to be placed in a position to assert his legal rights in an action which he proposed to bring against the corporation. In the present case the plaintiff has the interest of one possessed of a prima facie right under the act of 1874 to acquire the property of the defendant, which right it desires to be placed in a position to assert in an action proposed to be brought against the corporation. In common they are instances of a plaintiff with a special interest, desiring information contained in books, papers, and records, so as to be in a position to assert a legal right in or to the property of a corporation, and there is no apparent reason why the same remedy should not apply here as in the cases cited.

[2] But the appellant contends that the equitable remedy invoked by it is amply sufficient to the cause, and that, in order to oust the jurisdiction of equity, it is not only necessary to point to a legal remedy, but it must be a convenient one. Where the parties have already sought relief in equity, unless the court is satisfied from the nature of the questions involved that they can be appropriately and finally determined in chancery and that complete justice to all parties can there be had, the dependency of the proceeding in equity will not oust the jurisdiction by mandamus, particularly

if the latter remedy affords more complete justice than could otherwise be obtained. High on Extraordinary Legal Remedies, §§ 21, 22. We shall endeavor to show that equity does not give a remedy that will afford complete and final justice in a case of the character of the one at bar, and, furthermore, that the remedy by mandamus is no more inconvenient than a proceeding in equity.

[3, 4] Originally at the common law of England, mandamus being a high prerogative writ, no return was allowed, and hence jury trials were not a part of the practice; for the verdicts of juries could not control the hand of the crown or of its officers. Tapping on Mandamus, c. 1, p. 57. The practice was changed from time to time by acts of Parliament allowing answers, returns, and other pleadings. Special provisions for jury trials were made by these various acts, among them St. 9 Anne, c. 20, enlarged by 3 and 4 Wm. IV, c. 42, §§ 24, 25, but a power was reserved to the courts to "give judgment according to the very right and justice of the case." Tapping on Mandamus, c. 7, p. 383 et seq. It would seem from Roberts' Dig. of Statutes, p. 384, that this statute of 9 Anne, and by inference its supplements above referred to, were part of our common law, but in the year 1831, in *Com. v. Mitchell*, 2 Pen. & W. 517, 518, referring to the statute, Gibson, C. J., said, "With us, it (mandamus) is supposed to stand very nearly, as it did in England before the statute 9 Anne, chap. 20." However this may be, first by an act of 1722, then by the general mandamus act of June 14, 1836 (P. L. 621), and later by that of June 8, 1893 (P. L. 345) the substance of these English statutes was re-enacted into our law, and we established our own practice and pleading, which, while subject to some of the common-law rules, is not controlled absolutely by them. Trial by jury has become part of our mandamus system as administered in the common pleas, and such trials are conducted as in other actions at law, but the rule that the jury always have the right to judge for themselves whether they shall find a general or special verdict (*Chambers v. Davis*, 3 Whart. 40, 47; *Patterson v. Kountz*, 63 Pa. 246, 252), does not prevail. The whole structure of our acts of 1836 and 1893 indicates that, although jury trials are contemplated, they are for the purpose of ascertaining the facts for the guidance of the court in determining the question of issuing the peremptory writ. The fact that by sections 32 and 33 of the act of 1893 the Supreme Court is given the general power in mandamus to decide issues of fact without a jury is a legislative recognition that such proceedings are not necessarily subject to all of the rules regulating the trial of common-law cases; for, if they were, the Legislature would have been obliged to provide a jury for the trial of these

cases in the Supreme Court. Again, section 21 of the act of 1893 evidently had in view that there might be cases where the issues of fact would be decided by the common pleas without the aid of a jury. A review of the common law and the Pennsylvania acts shows that, while trial by jury has become part of our system in administering the law of mandamus, the court may, if it deem such a course wise, submit special issues instead of the general issue, and thereby secure special findings on the essential and controlling points raised by the pleadings and covered by the evidence, all of which couples the benefits of the special findings afforded by an equity proceeding with the advantages of trial by jury.

Under our practice, the initial steps in a statutory proceeding by mandamus and in a proceeding in equity are much alike, and, if anything, the practice in the former is more simple than in the latter. In a case like the present the applicant for the writ presents a petition "setting forth the facts upon which he relies for the relief sought" and "the act or duty whose performance he seeks." If the "petition presents the substance of a case for mandamus," the court directs the writ to issue in the alternative form. The defendant then files his answer or return, and issue may be joined thereon, as directed in the act of 1893, *supra*. When the case comes on for trial, the issues of fact which are thus raised may be submitted to the jury, or by agreement of the parties they may be found by the court; or, if the parties so desire, certain of them may be submitted to the jury, and others may be reserved for the decision of the court. *Treasurer of Jefferson County v. Shannon*, 51 Pa. 221; *Commonwealth ex rel. v. Commissioners*, 32 Pa. 218; *Seabolt v. Northumberland County Commissioners*, 197 Pa. 110, 46 Atl. 928; *Kell v. Rudy*, 1 Pa. Super. Ct. 507; *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 61 Atl. 123. As we have already pointed out, there is nothing in the law to prevent special findings by the jury upon the issues submitted to them, and, in fact, this practice was to a certain extent, pursued in *Neubert v. Armstrong Water Co.*, 211 Pa. 582, 586, 61 Atl. 123.

All issues must be disposed of before final judgment (*Smith v. Commonwealth*, 41 Pa. 335; *Commonwealth ex rel. v. Warwick*, 185 Pa. 623, 40 Atl. 93), but the issuance of the writ is left within the control of the court. *Commonwealth v. Mitchell*, 2 Pen. & W. 517; *Commonwealth v. Commissioners*, 1 Whart. 1. The law does not say that after the findings or verdict the court is absolutely obliged to issue the mandamus; on the contrary, the act of 1893, *supra* (section 22), provides: "Whenever * * * judgment is given for plaintiff the court may award that a peremptory mandamus shall issue in that behalf and shall enter judgment for damages and costs, and thereupon such peremptory writ of mandamus may be issued accordingly at any

time after twenty days from the signing of the judgment, and not before, unless the exigence of the case, in the discretion of the court, requires it, in which event the court may direct that such writ shall issue forthwith." Section 26 provides: "Defects in substance in the alternative writ may be taken advantage of at any stage of the proceedings. Amendments may be allowed as in other civil actions save as hereinafter mentioned"; and section 28: "The peremptory writ, though issued, may be superseded or quashed for such causes as to the court may seem just, but no amendment thereto shall be allowed." Thus the court can either issue the writ or withhold it, or, the writ having issued, the court may supersede or quash it. These provisions practically leave the question of the issuance of the peremptory mandamus and its form within the control of the court, subject always to the well-settled principles which have been established by the authorities and to the regulations fixed by legislative enactment.

On the whole, the remedy by mandamus is as conveniently applicable to a case like the present as equity, and it has points of advantage not possessed by the latter; for, if it should be admitted that equity has jurisdiction, a chancellor might well claim the right to carry the proceedings to final conclusion, which would deprive the defendant of the right to trial by jury on the issue of the net costs of its works and property, or, in other words, the price which it would be obliged to accept from the plaintiff as the value of its plant. On the other hand, in the proceeding by mandamus, should it be decided in the first instance that the plaintiff was entitled to examine the books, papers, and property of the defendant, and after such examination had been made and the plaintiff had secured sufficient knowledge to estimate the price which under the law it would have to pay for the works, should an offer of that price be refused, the next step would be the application for another writ of mandamus to compel the conveyance of the waterworks, etc., upon payment of the price offered. The defendant could then raise any issues of fact which it deemed essential to a proper determination of the case, and the issues, particularly those concerning the amount to be paid by the city to the water company, would go to a jury, as in other instances where property is taken by the state or a municipality.

[5] In the first mandamus proceedings the paramount issue would be the right of the city to have access to the books and records of the water company for the purpose of securing the data of cost and maintenance of the defendant's plant and the dates and amounts of dividends by it theretofore declared, and also, if desired, to make a physical examination of its works and property. But since a mandamus will never issue for a vain or useless purpose (*High on Extraordinary Legal Remedies*, c. 1, § 14; *Common-*

wealth v. Commissioners, 1 Whart. 1; Cristman v. Peck, 90 Ill. 150), or to satisfy mere curiosity (Commonwealth ex rel. v. Phoenix Iron Co., 105 Pa. 111, 116, 51 Am. Rep. 184; Phoenix Iron Co. v. Commonwealth ex rel., 113 Pa. 563, 572, 6 Atl. 75; Bloede Co. v. Bancroft & Sons Co. [C. C.] 98 Fed. 175, 189), this first proceeding would involve certain subsidiary issues, for instance, Is the city financially able under the law to purchase the defendant's plant? And this question would raise the issues as to the assessed value of the city's real estate and the amount of its indebtedness, or, in other words, its borrowing capacity, and also necessarily the issue as to the cost of the plant, its maintenance, and the dividends declared. The plaintiff would have a prima facie right under the statute to make an investigation of the proper sources of knowledge to ascertain these latter points. Therefore it would be entitled to an alternative writ. In making return to that writ, however, the defendant could raise all the issues indicated, and since, in order to raise these issues, the water company would be obliged to assert an affirmative, the burden of proof would be upon it. 2 Spelling on Extraordinary Remedies, § 1696; Mercur v. Electric Light, Heat & Power Co., 19 Pa. Super. Ct. 519, 524.

[§. 7] If in this preliminary proceeding the defendant saw fit to rely on testimony other than its written records in order to show the cost of its plant, and such testimony was competent evidence, it could not be declined simply because the court assumed that the water company's books and papers would better show the actual cost price. "While secondary evidence cannot be admitted in substitution for primary evidence, yet, where the evidence offered is primary or original in its character, it cannot be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive. Under such circumstances, it is the weight of the evidence, not its admissibility, that is involved. In brief, it is essential to the exclusion of evidence under the best evidence rule that the evidence not produced should be not only more direct, satisfactory, and conclusive than that offered, but should be also higher in grade or degree." 17 Cyc. 466; Executors of Shoenberger v. Hackman, 37 Pa. 87, 93; Western Union Tel. Co. v. Stevenson, 128 Pa. 442, 454, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; Canfield v. Johnson, 144 Pa. 61, 76, 22 Atl. 974, 976. In the last of these cases we said: "The rule that the best evidence of a fact must be produced * * * requires that, where two different grades or qualities of proof exist, that which is the best shall be adduced, if practical; as, for instance, the contents of a writing must be proven by the production of the writing, before secondary evidence can be given. But that rule has no application to a choice between witnesses, where both have legitimate

knowledge of the subject-matter of the inquiry. Some may have a better knowledge than others, but that will not exclude the knowledge of those who are the less informed, if it is otherwise competent. It is for the jury to judge of the sufficiency of the proof. * * * The proof offered by the expert testimony of Mr. Douglass was entirely legitimate, and should have been received. He had a competent experience to qualify him for proving the probable cost of building * * * the monument, * * * and therefore he was a competent witness for that purpose." "Evidence is not considered secondary where it carries with it no indication that better remains behind." Cutbush v. Gilbert, 4 Serg. & R. 550, 555. Ordinarily receipts and vouchers are not primary evidence. Townsend v. Kerns, 2 Watts, 180, 182. Therefore, indefinite "written data" of the cost of construction and maintenance of a water company's works, assumed by a court, as in this case, to be in the possession of the defendant company, would not be proof of the first order when offered by the defendant, unless brought within the principle of "memoranda made in the usual course of business and under circumstances where they cannot be supposed to be fabricated." Ganzer v. Fricke, 57 Pa. 316, 318. While a court might feel that a higher class of evidence probably exists than that offered, it cannot refuse the latter, unless it carries with it the indication that better remains behind.

At the trial of the present case, the actual records of the defendant company might have been convincing proofs, but they could not be held to be the only competent evidence to sustain the affirmative of the issue that the cost of the defendant's plant was so great as far to exceed the borrowing capacity of the city; and that was the contention sought to be sustained by the testimony offered. The inquiry was not so much to ascertain the actual cost of the plant which the plaintiff would have to pay if it should become the purchaser thereof, but to determine if the city was in a financial position reasonably to entitle it to compel the defendant to submit to an investigation of its records and properties.

[8] If the evidence plainly showed that the cost of certain real estate recently acquired by the defendant, as a necessary part of its plant, actually exceeded the borrowing capacity of the city, that such real estate represented but small part of the cost value of the whole plant, and that the defendant's other properties, according to the testimony of expert witnesses, totaled a value that would cost many times the amount which the city could raise under the law, then the plaintiff was not in a position to make the purchase, and hence it was not entitled to a mandamus to force the water company to submit to an investigation of its books and properties.

But, in a case where it could be shown that the probable price which would have to be paid for the defendant's property and the borrowing capacity of the plaintiff city approximated one another, the mandamus would issue to enable the plaintiff to make its investigations; and, as before stated, after securing sufficient knowledge to qualify it to submit an intelligent offer, in accordance with the act of 1874, if that offer should be refused, the plaintiff could demand another mandamus to compel the water company to convey its plant to the city upon payment of the estimated price. The water company could then take issue on the figures submitted by the city, and there would be a common-law trial to adjudge the issues thus raised.

[9] While it is true that paragraph 5 of section 13 of the act of June 16, 1836 (P. L. 789), gives to the courts "the supervision and control of all corporations other than those of a municipal character," this has never been construed to mean that the ordinary and adequate remedies at law are superseded by equity as against such corporations. *Jenkins v. Baxter*, 160 Pa. 199, 28 Atl. 682, and *Bedford Springs Co. v. McMeen*, 161 Pa. 639, 29 Atl. 99, are authorities for the rule that where there is an appropriate remedy at law against a corporation, even though equitable jurisdiction has been invoked, the bill will be dismissed. Also see *Brower v. Kantner*, 190 Pa. 182, 43 Atl. 7. Since at the time of the enactment of the act of 1874 a complete system of law adequate for the adjustment of the rights of all parties was present in the old mandamus act of 1836, and as such a system is still available under the acts of 1893 and March 19, 1903 (P. L. 32), equity had no jurisdiction, and the decree of the court below must be set aside. Under no circumstances would the defendant company be bound to render to the city "a detailed and itemized statement" as ordered in the decree here entered; for we cannot agree with the view of the court below that the act of 1874 places upon the defendant corporation "the obligation to at all times be ready, when called upon by the city, to furnish to the city the net cost of construction and maintenance of its works and property. * * * The act of assembly simply provides that "it shall be lawful * * * for the * * * city * * * to become the owner of said work * * * by paying therefor the net costs of erecting and maintaining the same," etc. While we agree that this is sufficient to give the city such a special interest that under proper circumstances it would have the right to investigate the books and plant of the defendant, and that such an investigation would not constitute "an unreasonable search," we see nothing in the statute which would compel the defendant company to assume that the city was going to exercise its right to purchase, or would fix the company with the onerous

obligation of being constantly obliged, upon call, to furnish at its own expense such a statement as indicated in the decree entered by the court below.

It is not requisite to the decision of this case to discuss the various questions argued by counsel concerning the legal rights of the two water companies, under the peculiar facts relevant to their charter powers, to supply water beyond the borders of Williamsport, or of the city to acquire and operate the property of these companies outside of its limits and to supply the inhabitants of territory other than its own. If necessary, all of these points can be decided in due time and in a proper proceeding. In that connection, for the present we go no further than to decide that the plaintiff, as a municipality in which the defendant company is located, has a prima facie right to acquire the works and property of such company on the terms fixed in the act of 1874. Whether or not the facts peculiar to this case, when properly determined, will show that this particular company is not within the purview of the act, or that for any reason the city is not in a position to insist upon the rights given to municipalities under the statute, we do not now decide or indicate any view. The court below made no findings in respect to the amount of the available borrowing capacity of the city, or the probable value of the defendant's property; and, while we will not prejudice either of these points, we do not refrain from saying that the testimony introduced indicates a strong probability of a lack of sufficient borrowing capacity, and that it will likely take years before this plaintiff will be in a financial position to acquire the works and property of the two water companies. In the meantime the development in the statutory law may eliminate as live issues between the parties all of the questions referred to at the beginning of this paragraph.

[10] Section 8 of the act of June 7, 1907 (P. L. 440) provides: "If upon an appeal, after a decision upon the merits, the question whether the suit should have been brought at law is * * * specifically raised by the defendant's assignments of error * * * and the decision of the appellate court is that the suit should have been brought at law, it shall remit the cause to the court below, with directions to transfer it to the law side of that court, all costs in the cause to abide the final determination thereof in the court of law." Instances may arise in the application of this act where it will be open to attack as an attempt indirectly to confer jurisdiction not theretofore existing (*Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 457, 54 Atl. 334); but we do not now pass upon that question, or determine any other point in connection with the act. We acquiesce (*Commonwealth ex rel. v. Commissioners*, 37 Pa. 237, 239) in the statute so far as its words apply to the facts of this case; for

here the defendant is a corporation, and the service required by the equity rules (rule 10), and presumably made in compliance therewith, was "in the mode prescribed by law for the service of a writ of summons upon such corporation," which is consistent with the mode prescribed in section 5 of the act of 1893, *supra*, for the service of a writ of alternative mandamus. Therefore there can be no objection to holding the defendant in court. When the record is remitted, the court below can make such appropriate orders to speed a determination of the cause as may be just and proper within the law.

Out of regard for the desire of the plaintiff city to take over as a whole the properties of both of the water companies at one and the same time, this appeal and that of the Williamsport Water Company were argued together by agreement of counsel, and, as like questions were involved in each, both appeals were treated as one. We have considered this case from that point of view.

The first, second, third, and twenty-fifth assignments of error are sustained, the decree is set aside, and the record is remitted, with directions to transfer the cause to the law side of the court, all costs to abide the final determination thereof in the court below.

POTTER, J. (dissenting). The object of this proceeding is to compel a conveyance of property under the terms of the statute. This involved an accounting in order to determine the value of the property and the amount to be paid therefor. The case is one in which the services of a chancellor are peculiarly appropriate and desirable, in order to dispose of the questions involved, justly and equitably to all parties concerned. Any remedy that may be attempted upon the law side of the court will be uncertain, inconvenient, and inadequate.

I would sustain the jurisdiction in equity.

MESTREZAT, J., joins in the dissent.

CITY OF WILLIAMSPORT v. WILLIAMSPORT WATER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

Appeal from Court of Common Pleas, Lycoming County.

Bill in equity by the City of Williamsport against the Williamsport Water Company. From a decree for plaintiff, defendant appeals. Reversed, with directions to transfer cause to law side of the court.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. LaRue Munson, for appellant. Frank B. Cummings, City Sol., for appellee.

MOSCHZISKER, J. This is a companion appeal to the case of City of Williamsport v.

Citizens' Water & Gas Company, 81 Atl. 316, an opinion in which was filed to-day. For the reasons there given, the decree is set aside and the record is remitted, with directions to transfer the cause to the law side of the court, all costs to abide the final determination thereof in the court below.

MESTREZAT and POTTER, JJ., dissent.

LEWISBURG BRIDGE CO. v. UNION COUNTY et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. COURTS (§ 37*)—JURISDICTION—OBJECTIONS AND WAIVER.

Objections to the jurisdiction of a court over the subject-matter, as distinguished from objections to its authority over the parties, cannot be waived nor jurisdiction obtained by acquiescence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-151; Dec. Dig. § 37.*]

2. ACTION (§ 35*)—NATURE AND FORM—STATUTORY PROVISIONS.

Act March 21, 1806 (4 Smith's Laws, p. 332) § 13, providing that where a remedy is provided by any act of assembly the directions of the act shall be strictly pursued, and nothing shall be done agreeably to the provisions of the common law further than shall be necessary for carrying the act into effect, applies to ordinary civil suits, so that where a special remedy is provided by an act of assembly it must be pursued.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273-294; Dec. Dig. § 35.*]

3. EMINENT DOMAIN (§ 267*)—REMEDIES OF PROPERTY OWNERS—STATUTORY PROVISIONS.

Under Special Acts March 23, 1865 (P. L. 602) and February 19, 1868 (P. L. 177), authorizing a bridge company to erect a new bridge to take the place of a destroyed bridge, and providing, in section 9 of the latter act, that all property and franchises held by the company at the site of the old bridge shall continue to be held by the company as if the bridge had been re-erected, a new bridge was located 500 feet north of the old bridge, part of the abutments and the tollhouse of which remained. The two counties between which the river was the boundary line afterwards constructed a free bridge at the site of the old bridge, using the stone from the abutments of the old bridge. The contractor also caused the old tollhouse to be broken into, and it was subsequently sold at auction. The bridge company sued for trespass for violation of their franchise, and for the taking of the stone, tollhouse, and the land on which it stood. Act May 6, 1897 (P. L. 46), as amended by Act May 13, 1901 (P. L. 191), authorized compensation in such case to the owner of the former bridge by the appointment of viewers to assess damages. Held, that such acts furnished a special remedy which the bridge company must pursue, so that the court of common pleas has no jurisdiction of the action in trespass.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 267.*]

4. APPEARANCE (§ 18*)—JURISDICTION—WAIVER OF OBJECTIONS.

Where a defendant questioned the jurisdiction of the court over the subject-matter by its plea, by a motion for nonsuit, and by requests for binding instructions, it did not waive the ob-

jection by general appearance to defend the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 76-78; Dec. Dig. § 18.*]

5. EMINENT DOMAIN (§ 75*)—COMPENSATION FOR PROPERTY TAKEN—NECESSITY FOR PAYMENT BEFORE TAKING.

Act May 13, 1901 (P. L. 191), authorizing the appointment of viewers to assess damages from the taking of abutments, tollhouse, and land used in connection with old bridge in construction of a bridge by counties, is not unconstitutional because of failure to provide for paying or securing the damages before the taking, since such provision is not required, where the power of eminent domain is exercised by municipal corporations.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199; Dec. Dig. § 75.*]

6. EMINENT DOMAIN (§ 71*)—PROCEEDINGS TO TAKE PROPERTY—STATUTORY PROVISIONS.

Act May 13, 1901 (P. L. 191), authorizing the taking of abutments and other property of a bridge company for the erection of a bridge by counties, and providing for the appointment of viewers to assess damages, is not unconstitutional as failing to provide a proper method for the ascertainment and payment of damages, or for the concurrent action between the counties in relation thereto.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 71.*]

7. MANDAMUS (§ 90*)—PUBLIC IMPROVEMENTS—"SHALL."

In Act May 13, 1901 (P. L. 191), authorizing the taking of abutments and other property of a bridge company in the building of a free bridge by two counties, the provision that if the commissioners of the counties shall neglect to act on the petition of property owners and taxpayers in the city, borough, or township in which the bridge was located, which petition shall set forth fully all the facts supported by the affidavit of five of the property owners and taxpayers, the court of common pleas on hearing "shall" issue a mandamus to the commissioners means that the court in each of the counties shall have jurisdiction over the commissioners in its own county, that the commissioners are first authorized to use their discretion as to whether a bridge shall be built, but that this discretion is expressly subject to review by the common pleas of the respective counties; and if, on review, the court decides that the commissioners should exercise their authority, it can compel action by mandamus; the word "shall" in the statute being construed as "may."

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6459-6469; vol. 8, p. 7799.]

8. MANDAMUS (§ 173*) — PUBLIC IMPROVEMENTS—"HEARING."

Under Act May 13, 1901 (P. L. 191), authorizing the court of common pleas, on hearing, to issue mandamus to the commissioners of counties to proceed under the provisions of the act for the erection of a bridge, the term "hearing" means the session of any court, or of an adjunct thereof, for considering the proofs in a case, or the receiving of facts and arguments thereon for the sake of deciding correctly (citing 4 Words and Phrases, 3237).

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 173.*]

9. BRIDGES (§ 15*)—BRIDGE COMPANIES—FRANCHISE.

Act Feb. 19, 1868 (P. L. 177), authorizing a bridge company to erect a new bridge in place

of one which had been destroyed, did not, by its provision in section 9 that all property and franchises held by the company at the site of the old bridge should continue to be held in the same manner as if the bridge had been there erected, allow the company a continuing franchise at the site of the old bridge, as well as the site on which the new bridge was to be constructed.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 15.*]

Appeal from Orphans' Court, Lycoming County.

Action by the Lewisburg Bridge Company against the Counties of Union and Northumberland. From a judgment for defendants, plaintiff appeals. Affirmed.

Action in trespass to recover damages because of the construction of a rival bridge erected under the act of May 6, 1897 (P. L. 46), as amended by the act of May 13, 1901 (P. L. 191).

The plaintiff claimed that its franchise was an exclusive one, and that the erection of a new intercounty bridge had depreciated the value of the franchise. The court below ruled that it was not exclusive, and refused to admit evidence offered to show the alleged depreciation. The plaintiff's bridge was erected under and by authority of the special acts of March 23, 1865 (P. L. 602) and of February 19, 1868 (P. L. 177) to take the place of an old bridge, which had been destroyed. Section 2 of the latter act provides: "That said company be and are hereby empowered to rebuild said bridge * * * at any place within half a mile of the location of the old bridge, * * * and that the site where the new bridge has been located and commenced, north of where the old one stood, is hereby made valid. * * *" And section 9: "All property and franchises held by said company at the site of the old bridge shall continue to be held in the same manner as if the bridge had been there erected."

The other facts in the case are sufficiently stated in the following abstracts from the charge of the trial judge: "The plaintiff seeks to recover the value of certain stone, * * * and also for the value of a certain tollhouse, and the land occupied by the tollhouse and leading from the tollhouse to the Susquehanna river. The plaintiff company is a corporation originally incorporated by act of * * * March 26, 1814 (P. L. 223), in which it was authorized to erect a bridge from the east end of Market street, in the town of Lewisburg, to the opposite shore; * * * the plaintiff company did proceed and construct a bridge * * * upon piers located in the river and abutments at either end. * * * This bridge continued to be used down to the year 1865, when, on the 17th day of March of that year, it was destroyed by a flood. In the year 1867, the plaintiff constructed another bridge at a

point which is about 400 feet north from the old bridge, at the western side of the river, and a distance of about 200 feet north at the east side of the river. * * * Subsequent to the destruction of this old bridge * * * and to the building of the new bridge, * * * the county of Union and the county of Northumberland constructed a free bridge at the site of the old bridge as located prior to 1865; in the construction of this intercounty bridge, there was used * * * stone taken from the western abutment, and it has been testified on the part of the plaintiff that this stone amounted to about four car loads. * * * It is my recollection that the testimony showed that there were two car loads used in the construction of * * * the new bridge, * * * and that the other two car loads were not used in the new bridge, but were used by the contractor. * * * It is also shown on the part of the plaintiff that about the time of the commencement of the construction of this new bridge, which was on the 30th of December, 1905, * * * the contractor, or those who were interested in clearing the ground for the construction of the new bridge, caused this old tollhouse to be broken into, and * * * at a later date the building was put up at public auction by the commissioners of Union and Northumberland counties, and sold at public sale, and that there was derived from this sale the sum of \$56.50, including the foundation and all. It has been testified on the part of the plaintiff by Mr. Wendel that he lived in this house from 1874 down to 1894, and that he had not been in the house from that time down to the sale, but gives it as his opinion that the whole premises, assuming that the plaintiff was the owner of the land on which they were located, were worth about a thousand dollars, and he fixed its market value at about that figure, but also said that considering the building alone he did not consider it of much value. * * * Now this is substantially the testimony on the part of the plaintiff that relates to the subject of our inquiry. * * * It presents at least two questions in reference to the stone; one as to the amount of stone that was actually taken and made use of by the defendants, * * * and the other as to the value thereof. The only witness that I recall that undertook to testify as to the value of this stone said that such stone had a value of about \$1.40 a perch, but stated further that in place they did not possess much, if any, value. * * * The value of the building, considering it as an independent proposition, must depend upon what it was worth at that place and at the time it was taken. If the land is considered with it, then of course the measure of value would be the value of the house as it stood there at the time, and any other property connected with it."

Here the trial judge refers to the testimony going to show the circumstances under

which the tollhouse was erected, and whether or not it stood upon ground which could be classed as a public street, after which he said: "If the jury believe from the evidence that plaintiff never had any other title to this land, and there is no evidence here of any grant of title to any piece of ground connected with this bridge at the western end, then when it ceased to use this ground for bridge purposes, or when it ceased to use it for the purpose of maintaining a tollhouse there for that bridge, the land reverted back to either the original owner, or to those by whom it was dedicated, and the plaintiff would have no right to damages for the land itself in this action. * * * If you believe that this land was public property, then we say to you that when the plaintiff bridge company ceased to use this land for the necessary purposes of a bridge at that place it had no longer a claim in the soil or to this easement that it may have up to that time enjoyed. * * * The next question you come to is, if you find this was public land there—a street or a dedicated plot of ground—and that plaintiff had abandoned it for bridge purposes, What value had this tollhouse simply as a dwelling as it was used at the time of its being taken away? That is a question entirely for the jury under the evidence, and as you decide that so will you determine its value." In answering requests for charge, the court informed the jury that the plaintiff was entitled to recover what they might determine to be the worth of the tollhouse, and also the value of the stone from the old bridge which was used in the construction of the new intercounty bridge; but, if they believed from the evidence that the property referred to had no real value, there could be no recovery. Verdict and judgment for the defendant.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZISKER, JJ.

Andrew A. Leiser, C. Larue Munson, Erwin M. Beale, and Andrew A. Leiser, Jr., for appellant. W. H. M. Oram, Albert W. Johnson, John F. Oram, and James B. Krause, for appellees.

MOSCHZISKER, J. The appellee contends that the court below had no jurisdiction, and for that reason, if for no other, the judgment for the defendant should not be interfered with. To which the appellant replies that the question of jurisdiction is not in the case, since none of the assignments of error raise the point.

[1] Aside from whether any error was committed in arriving at the judgment, was the result complained of inevitable under the law? For if it was, the judgment will not be disturbed. This inquiry necessarily involves the underlying jurisdictional question: In the proceedings as instituted and tried, could any judgment, other than the one ren-

dered, have been sustained? If this is determined against the appellant, then all subordinate issues are out of the case, and the appeal must be dismissed. The question of jurisdiction is before us to this extent at least. "Objections to the jurisdiction are of two classes, between which there is a clear and well-defined distinction: First, those relating to the authority of the court over the subject-matter; and, secondly, those relating to its authority over the parties. Objections of the first class cannot be waived or jurisdiction obtained by acquiescence." *Commonwealth v. Barnett*, 199 Pa. 161, 177, 48 Atl. 976, 979 (55 L. R. A. 882); *English v. English*, 19 Pa. Super. Ct. 586.

The present action was brought in trespass to recover direct and consequential damages to the property and franchises of the plaintiff company. The act of May 6, 1897 (P. L. 46), as amended by the act of May 13, 1901 (P. L. 191), provides: "That the county commissioners of the several counties of this commonwealth are hereby authorized to * * * rebuild * * * any bridge over any stream or river forming the boundary line between two counties, when the same is on the line of a public highway or deemed necessary for the use of the traveling public, * * * which has been destroyed by ice, flood or otherwise, at any time, or which has been or may be abandoned, and the site or location and piers and abutments no longer used by the owners of said bridge, and the same rebuilt * * * on another site, or on new foundations at another point. And the said commissioners of the respective counties are hereby authorized to take charge of and rebuild and maintain jointly such bridge as a county bridge, and the costs and expenses of such joint reconstruction shall be paid by the said counties respectively in the proportion of the population thereof as ascertained at the last census; * * * provided, further, that just compensation shall be made to the owners of the former bridge for the taking or impairment of the rights and franchises of such owners, in the same manner as is provided in this act for ascertaining the compensation due for the piers and abutments." The original act provides (section 4): "When the said commissioners have taken any piers, abutments, approaches, toll-houses or other property necessary for the rebuilding or maintenance of any bridge aforesaid, and are unable to agree with the owners upon the amount of the damages they may sustain by reason thereof, the court of quarter sessions of the county in which said property is situate shall, upon petition of any party in interest, appoint three disinterested freeholders of such county to view the property and assess the damages, if any, which said owners may sustain by the taking of the same. * * *" The section further provides a right of appeal to the common pleas, and to the Supreme Court. Section 3 of this act likewise provides that the county commissioners of

the respective counties "are hereby authorized to borrow any sum of money, not exceeding the constitutional limitations, * * * and issue bonds therefor, * * *" for the purpose of carrying into effect the provisions of the act. And the amendment of 1901 provides that the commissioners may be compelled to act by mandamus.

[2] The new intercounty bridge was constructed subsequent to and under the provisions of this act of 1897, as amended in 1901. Section 13 of the act of March 21, 1806 (4 Smith's Laws, p. 332; 1 Pepper & Lewis' Dig. 107), provides: "In all cases where a remedy is provided, or duty enjoined or anything directed to be done by any act or acts of assembly, * * * the directions of the said acts shall be strictly pursued; no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases further than shall be necessary for carrying such act or acts into effect." In *White v. McKeesport Borough*, 101 Pa. 394, the action was in trespass to recover damages suffered in the grading of a public street. In affirming a judgment for the defendant, we said: "The Legislature has provided a special remedy for that kind of injury by the act of May 24, 1878 (P. L. 129), and that form of proceeding must therefore be adopted in all cases coming within its terms. The act provides that in all cases where the proper authorities * * * may * * * change the grade * * * of any street, * * * thereby causing damage to the owner or owners of property abutting thereon, * * * in case they fail to agree with the owner for the proper compensation for the damages so done, * * * the court of common pleas of the proper county upon application * * * shall appoint viewers, who shall proceed to assess the damages in the mode pointed out by the act. This being the method established by law for the recovery of damages for changing grades, * * * it must be strictly pursued in accordance with the provisions of the act of March 21, 1806. * * *"

[3] While it was at first doubted that the doctrine of the act of 1806, supra, applied to ordinary civil suits, this point has long been decided in the affirmative (*Wike v. Lightner*, 1 Rawle, 289); and there are a host of authorities in Pennsylvania applying the rule, where the controlling acts of assembly furnish a remedy to recover damages to property by means of a board of viewers, from *McKinney v. Monongahela Navigation Co.*, 14 Pa. 65, 53 Am. Dec. 517, to *Deer v. Sheraden Borough*, 220 Pa. 307, 69 Atl. 814. The controlling act of assembly in this case, as we have seen, provides that just compensation shall be made to the owners of the former bridge, and that the proceedings to recover such damages shall be before a jury of view. "The act having provided a special remedy, such remedy must be pursued." *Power v.*

Ridgway Borough, 149 Pa. 317, 318, 24 Atl. 307, 308. This necessarily means that the court below had no jurisdiction over the subject-matter of the present suit in an action of trespass.

[4] The plaintiff's contention that the defendant waived the point of jurisdiction is not well taken. The defendant neither expressly nor by its conduct at any time waived this point, but, on the contrary, questioned the jurisdiction of the court in its plea by a motion for a nonsuit, and by requests for binding instructions (see *Wiggins v. Columbian Fireproofing Co.*, 227 Pa. 511, 516, 76 Atl. 742). This is a case where the jurisdictional point goes to the authority of the court over the subject-matter, and therefore the appearance to defend the action cannot be taken to have given jurisdiction by acquiescence. In substance, this point was ruled against the contention of the plaintiff in *Stork v. Philadelphia*, 193 Pa. 101, 45 Atl. 678, 49 L. R. A. 600. There a claim was made before a jury of view for damages caused to property in the construction of a city improvement, an appeal was taken to the common pleas, and upon a verdict there rendered judgment was entered for the plaintiff, and an appeal taken to this court. The evidence showed that the injury complained of was not the necessary consequence of the improvement, but that it arose through the negligent performance of the work. In reversing, we held that the liability declared upon could not be enforced in the form of proceeding adopted, and that the city was not estopped from raising the question of jurisdiction, for the viewers could not be given authority to pass upon a question of liability which the law had not put within their jurisdiction. We are constrained to hold that, if the plaintiff suffered any injury by reason of the construction of the new intercounty bridge, the only body that had original jurisdiction to adjudicate a claim for the damages arising therefrom was the tribunal named in the act of assembly under and by authority of which the bridge was constructed, and the court below had no jurisdiction to entertain plaintiff's action.

[5] But the plaintiff contends that the act in question is unconstitutional and void, and that, since the Constitution gives a right to damages for property taken, injured, or destroyed, the present action could be maintained under the rule that, "when a right exists and no adequate remedy is provided, it may be enforced by an action on the case." *Chester County v. Brower*, 117 Pa. 647, 656, 12 Atl. 577, 578 (2 Am. St. Rep. 713). We cannot agree that the act should be set aside as unconstitutional legislation. The fact that there is no express provision in the statute for paying or securing the damages before the taking or injury cannot be urged as a valid basic objection. In *Keene v. Bristol Borough*, 26 Pa. 46, 47, dealing with this subject, we said: "Ordinarily the power of

taxation which is given to municipal corporations is adequate security to the citizen for his property which may be taken * * * for public use." In *McClinton v. Railway Company*, 66 Pa. 404, it is pointed out that, while private corporations invested with the right of eminent domain must pay or secure payment before the taking or injury, this strict rule does not apply to the state or to municipal corporations; as to them, it is only necessary to provide the means of payment in the act of assembly authorizing the improvement. And in *Delaware Co.'s Appeal*, 119 Pa. 159, 171, 13 Atl. 62, 65, we said: "It has been repeatedly held that the power of taxation in a municipal corporation is sufficient security for property taken by such corporation; hence it logically follows that it is sufficient for property injured."

[6] We are not impressed with the appellant's contention that there is no proper method provided in the act for the ascertainment and payment of damages, or for concurrent action between the counties in relation thereto. The act provides that "the costs and expenses" of the joint construction of the bridge are to be paid by the "counties respectively, in the proportion of the population thereof"; and it further provides for the payment of damages for property taken, injured, or destroyed, and "authorizes the county commissioners of the respective counties" to raise the money therefor by the issuance of bonds, if necessary. These damages, when adjudicated and awarded to one injured, would constitute part of the "costs and expenses" of the bridge. Of course, the construction of the bridge could not take place without the concurrent action of the two counties. Proceedings must be had in each of the counties affected before any final action can be taken which would cause such damages; and if these proceedings are not concurrent those concluded in the first county would have to be subject to or await the action of the other county. The act provides that the court of quarter sessions of the county in which any tangible property taken or destroyed is situate shall appoint viewers to assess the damages. By this method the courts of the two counties could, working concurrently, arrive at the total cost and expense of such items of damage. The act also provides that the damage to franchises suffered by the owners of the former bridge shall be ascertained in the same manner; and this presents the question as to which court shall adjudicate damages of this character. The better rule would probably be that the court of the county in which the headquarters of the corporation are situate, or the court wherein the first proceedings are had, should be intrusted with this duty; but these are matters of detail which the Legislature has left for the courts and the administrative authorities to work out. While it would have been better, had all such detail been provided for in the legislation, we can-

not declare the statute invalid because of this omission; for the act distinctly declares that damages for injuries shall be paid, fixes the proportions in which they shall be paid, and provides machinery for ascertaining them.

[7, 8] The statute further provides that the commissioners of the several counties can jointly build the bridges over streams forming the boundary line between two counties, and "if the said commissioners of the said counties" (the two counties affected in any particular instance) shall neglect or refuse to act then proceedings may be taken to compel action. It is contended by the appellant that this provision is in itself sufficient to invalidate the act, because it is revolutionary and an encroachment upon the functions of the courts. The full text of the provision is as follows: "If the said commissioners of the said counties shall neglect or refuse to act as herein provided, then, upon the petition of fifty property owners and taxpayers residing in the city, borough or township in which the bridge is or was located, which petition shall set forth fully all the facts supported by the affidavit of five of said property owners and taxpayers, to the court of common pleas of the counties where located, upon hearing, said court having jurisdiction shall issue a mandamus to said commissioners to proceed as provided by this act." We fail to see anything objectionable in the provision. We construe it to mean that the courts in each of the counties shall have jurisdiction over the commissioners of their own county. The commissioners are first authorized to use their discretion as to whether or not a bridge should be built; but this discretion is expressly made subject to review by the common pleas of the respective counties. While the discretionary power of a public official cannot ordinarily be controlled by mandamus, there is nothing in the law to prevent the Legislature from ordaining such control when conferring the power, and that is precisely what they did in this particular instance. It is not necessary to construe the statute as a legislative encroachment upon judicial powers; we can never assume that the Legislature intended such encroachment, and that construction should not be placed upon an act of assembly, unless the words employed leave no other choice. The language of the section is that the 50 property owners shall present a petition fully setting forth the facts (it does not say what facts), and that "upon hearing" the court "shall issue a mandamus." The word "hearing" means "the session of any court, or of an adjunct thereof, for considering the proofs in a case." *Anderson's Law Dictionary*, 506. "The receiving of facts and arguments thereon for the sake of deciding correctly." 4 *Words and Phrases*, 3237. If the act had provided without more that upon the petition of the 50 property owners the court must issue the mandamus, the appellant's ar-

gument would have much force, but it does not so provide; on the contrary, it particularly leaves the ascertainment of the facts and the decision of the cause to the court. In other words, the statute makes the action of the county commissioners subject to review by the common pleas; and if upon such review the court decides that the commissioners, under the facts presented, should, as the representatives of the county, exercise their authority for the purpose of the joint construction of an intercounty bridge, then it can compel action by a mandamus. The use of the word "shall" is consistent with this construction, and the phrase "shall issue a mandamus" simply designated the writ which shall be used for the purpose of compelling county commissioners to act. It is to be assumed that before a court would issue the extraordinary writ of mandamus, in order to compel the county commissioners to enter into such an arrangement with the officials of another county, it would first ascertain as a fact the condition of each of the counties, and see that the division of the financial burdens was properly arranged. We conclude that the act can be sustained as a constitutional and workable piece of legislation.

The act in question has been before the courts on several occasions. It was held to be constitutional in *Seabolt v. Commissioners of Northumberland County*, 187 Pa. 318, 41 Atl. 22, when attacked as special legislation and because of alleged defects in title. In *Commonwealth v. Attorney General et al.*, 13 Pa. Dist. R. 521, a proceeding concerning the bridge in this case, the amendment of May 13, 1901, was upheld as not in conflict with the Constitution, while another amendment was there declared void. When the act was again before us in connection with the same bridge, in 197 Pa. 110, 46 Atl. 928, we said: "The county commissioners are authorized, not required, to rebuild destroyed and abandoned bridges. The discretion as to whether it is necessary * * * and for the best interests of the county to do so is, in the first instance, in them, but it is reviewable by the court, * * * and the action of the court appears to be intended to be final."

It is true that the original act of 1897, before its amendment by the act of 1901, uses the word "may" in connection with the phrase "issue a mandamus," instead of the word "shall"; but, as already explained, we construe the latter word, with its context, to have the same meaning as the former. It is also true that the facts found in 197 Pa. 110, 46 Atl. 928, so located the old bridge that the case was taken out of the act of 1897; but the amendment of 1901 makes the statute much more extensive in its operation, and the case as presented at the trial now under review was within the act as amended.

The act of 1897, as amended, especially covers damages of the character claimed. As we understand the record, there was no denial that the plaintiff had owned the original

bridge, that the commissioners had taken the old piers and tollhouse in the construction of the new bridge, or that they had been unable to agree with the plaintiff as to the amount of the damages sustained, if any. Hence the case falls squarely within the jurisdictional conditions for the appointment of viewers as provided in the act, and the fact that the defendants contended that the property claimed for had long since been abandoned, and had no value, was not such a denial of the claimant's title as would estop the defendants from demanding their right to have the case tried according to the method prescribed in the statute.

We cannot look into the record of the mandamus proceedings under the act of 1897 for the alleged irregularities whose existence the plaintiff asserts; those proceedings are not here for review, and we must assume the judgments entered therein to have been founded upon sufficient bases of fact. On the whole, we fail to see anything to take the case out of the special remedy prescribed in the act of assembly.

Since the court below had no original jurisdiction to try the case as instituted, the only judgment possible was one for the defendant. We might, therefore, conclude this already overlengthy opinion with that statement. But, with the thought of possibly ending the litigation, we have examined all the other points suggested by the specifications of error and ably argued by counsel, and, while we do not conceive it necessary to make specific reference to the assignments, we will say that we have not been convinced of any reversible error in the rulings of the learned court below.

[9] In conclusion we will notice briefly the principal rulings complained of. The grant to the bridge company must be construed most favorably for the public, and it cannot be said that the court below fell into error in holding that such grant could not be viewed as an exclusive franchise. The words used do not require such a construction, and so to hold would partially deprive the commonwealth of its sovereignty over the extension of roads and highways made necessary by the increase in population. Nor do we feel that error was committed in the conclusion that the ninth section of the act of February 19, 1868 (P. L. 179) did not allow the plaintiff a continuing franchise at the site of the old bridge, as well as at the site upon which the new bridge was to be constructed. The authority given by the act was not to build an additional bridge, but to rebuild the old bridge at a new site, and we construe the section in question to mean that all of the plaintiff company's franchises for the bridge at the old site were preserved to it for the new bridge, and not that such franchises were to continue to exist at the old site. The plain-

tiff company's abandonment, for bridge purposes, of the old site for more than 40 years indicates that it likewise so construed the statute. The issues as to the old tollhouse and its value, and as to the value of the other tangible property claimed by the plaintiff, appear to have been fully and fairly treated in the charge of the trial judge. If it were an open question whether or not this case should be sent back to the court below for a retrial, the incident complained of in the last assignment of error would not move us so to do.

The appeal is dismissed, at the cost of the appellant.

WELLS v. ERIE R. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to an employé from the breaking of a rope or sling, which caused a number of pieces of timber to fall on him, evidence *held* to present a question for the jury as to defendant's negligence in furnishing a defective rope or sling.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1081; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTIONS—PLEADING—STATEMENT.

In an action for injuries to an employé from the breaking of a rope or sling, which caused a number of pieces of timber to fall on him, there is no inconsistency in a statement which alleges, first, that the ropes and appliances used in lashing the timbers were old, rotten, and insufficient, and, second, that they were not properly inspected.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to an employé, the testimony of witnesses who examined a broken rope after the accident and described its condition was properly submitted to the jury, where the uncontradicted evidence was that but one broken sling was seen, though the witnesses did not identify completely the rope they saw with the one which broke.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 286.*]

4. APPEAL AND ERROR (§ 316*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—RESERVATION.

A reservation in the form, "We reserve as a question of law whether or not there is any evidence in the case upon which the plaintiff is entitled to recover," is good.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1778-1783; Dec. Dig. § 316.*]

Appeal from Court of Common Pleas, Bradford County.

Action by Otis L. Wells against the Erie Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKEER, JJ.

Rodney A. Mercur and Halsey Sayles, for appellant. L. T. Hoyt and Chas. E. Mills, for appellee.

POTTER, J. [1] The plaintiff in this case was employed by the defendant company to aid in unloading heavy timbers, and in transferring them from one car to another. The defendant supplied ropes to be passed around the timbers, which were arranged in piles, so that a number of pieces could be lifted and swung over at one time. The necessary power for lifting the timbers was obtained from a steam engine operating a derrick or crane, connected with the ropes and tackle. During the early progress of the work, one of the ropes broke, the timbers fell, and the plaintiff was severely injured. It was charged that the rope by which the timbers were slung, and which was furnished as part of the apparatus by the defendant, was not fit for use, and was supplied without a reasonably careful attention to its condition. Upon the trial the jury were instructed that the plaintiff could not recover if there was anything about the appearance of the rope or sling, when it was placed in use, to indicate to him that it was not safe; or if he failed to exercise proper care for his own protection during the work; or if good slings or ropes were supplied by defendant, which might have been used by the men, instead of the unfit rope. As to some of these matters, there was discrepancy in the testimony; but as questions of fact they were properly for determination by the jury.

[2] In the first assignment of error, counsel for appellant complain that the trial judge did not compel the plaintiff to elect as between what they termed two wrongs, which were charged in the statement. These allegations were, first, that the ropes and appliances used in lashing the timbers together were old and rotten and insufficient; and, second, that they were not properly inspected. We think this criticism is without merit. The substantial negligence charged was supplying an article unfit for the use for which it was intended. If the charge was true, the failure to subsequently inspect it was only an aggravation of the original wrong. There was no inconsistency in the two statements; both related to the same feature of negligence. If the rope was bad when brought into use, an inspection, either then or afterwards, would only have revealed what the defendant was in duty bound to know.

[3] In the second, third, and fourth assignments, it is alleged that the trial judge erred in refusing to strike out the testimony of certain witnesses, because they did not identify completely the rope which they examined, and whose condition they describ-

ed, with the rope which gave way at the time of the accident. We think the testimony of these witnesses was properly submitted to the jury. The identification of an object by a witness is necessarily an exercise of his judgment. The uncontradicted testimony showed that but one broken sling was seen on the job, as it was expressed. The coincidence in the admitted facts made it more reasonable to conclude that the rope which the witnesses examined and found in bad condition was the one which had been in use, rather than to conclude that it was not identical with the latter. The coincidence was therefore properly laid before the jury as a guide to their judgment in deciding upon the probability of the pieces of rope being identical. In addition to the evidence of these men, to which objection was made, the plaintiff testified that he saw the broken rope lying on the ground after the accident, and that a Mr. Rice, who was in charge of the men, picked it up, and that he saw him go with it as far as the blacksmith shop. There was also the evidence of the bridge foreman to the effect that he made an examination of the broken sling or rope in the blacksmith shop, and identified it as a rope that he had examined and condemned prior to the accident, and had thrown away as unsafe, and had forbidden its further use. He identified it by the way in which it was spliced. There is nothing in the evidence to indicate that the broken rope or sling described by the witness was not the one which caused the injury. These assignments are therefore overruled.

[4] In the sixth assignment of error, counsel for appellant criticise the form of the reserved point, which was, "We reserve as a question of law whether or not there is any evidence in the case upon which the plaintiff is entitled to recover." The reservation in its form follows precisely that which was approved in *Newhard v. Penna. R. R. Co.*, 153 Pa. 417, 426, 28 Atl. 105, 108 (19 L. R. A. 563). Mr. Justice Dean there said: "Whether there is any evidence of a fact essential to recovery is a pure question of law, and was decided to be a good reservation in *Wilde v. Trainor*, 59 Pa. 439, where Justice Sharswood most carefully considers the whole question, and examines all the authorities." The proper form of a reservation was again thoroughly discussed and the essentials of a good reservation carefully pointed out by the present Chief Justice, in *Casey v. Paving Company*, 198 Pa. 348, 47 Atl. 1128. The reservation here was unquestionably good. In any event, no harm was done to appellant in this respect, for the trial judge did not enter judgment n. o. v. All questions as to defendant's right to binding instructions may be raised on this appeal, and they have been raised by the fifth and seventh assignments of error.

The accident for which recovery was

sought occurred in the state of New York, and the case was therefore tried under the rules of law prevalent there. Counsel for appellant contend that the evidence does not disclose such negligence as would permit recovery under the law in New York. They rely upon the decision in *Vogel v. Bridge Co.*, 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725, in which it was held that when the employer had furnished a sufficient supply of ropes strong enough for the work it was not liable for injuries to a workman, caused by the breaking of a defective rope which the foreman by an error of judgment directed to be used, instead of another rope which might have been selected from the supply furnished. It appears from the opinion in that case that there was no dispute as to a sufficiency of suitable rope having been furnished by the defendant. That point in itself is enough to distinguish the case from the one now before us. In the present case it was charged, and there was evidence to support the allegation, that the rope furnished by the defendant was improper and unsafe. In a later New York case (*Pluckham v. Bridge Co.*, 104 App. Div. 404, 93 N. Y. Supp. 748, affirmed without opinion in 186 N. Y. 561, 79 N. E. 1114), the distinction is noted between a case where the master has furnished sufficient suitable rope for the purposes of the work, and one where he has not done so. Where a suitable rope was not furnished, the master was held liable for the consequences arising from the use of a defective article. Here there was evidence tending to show that the sling or rope which broke had been furnished by the defendant, and that it had been prepared by the men working on another job, and that the rope had been continuously in use three or four years, although the limit of its safe use was fixed by some of the witnesses at from eight months to a year. The evidence further tended to show that the rope in question had not been inspected, and that it was weatherbeaten, worn, and rotten, and unfit to sustain anything like the weight required. While it did appear upon examination of some of the witnesses that there were other slings that could have been used, it was not shown that they were sufficient and suitable for the particular use to which the defective rope was being applied when it broke. No evidence whatever was offered by the defendant to show that it had furnished sufficient or suitable rope. Under the evidence, we think it is clear that the question whether or not appellant had performed its duty in furnishing a sufficient quantity of suitable rope was for the jury. The trial judge applied the doctrine of the New York case in his charge to the jury, and instructed them that, if the defendant had provided suitable and proper appliances for the work, it could not be held responsible for a defective rope selected from the supplies by the employes. No complaint is made here of the

instructions to the jury; but it is contended that the case should not have been submitted to the jury at all. Even under the New York rule, the master could not be relieved of liability, unless it clearly appeared that it had furnished a sufficient supply of suitable rope for the purpose required. Giving to appellant the full benefit of the rule for which it contends, the case was for the jury.

While not necessary for the purposes of this case, yet it may not be out of place to note that the distinction which seems to have been made in New York has not been recognized in our own state; nor does it seem to embody the rule which prevails generally. In 26 Cyc. 1136, it is said: "It is not only the duty of a master to use ordinary care to furnish his servants with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time, and by the use of ordinary care and diligence in making repairs, keep them in a reasonably safe condition." This expression of the rule is in line with our own decisions. Thus, in *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. 211, 218 (40 Am. Rep. 634), where the plaintiff's husband was killed under circumstances somewhat similar to those attending the accident in this case, it appeared that the rope which broke had been in use and exposed to the weather two or three years, perhaps more, and had become rotten and unsafe. Mr. Justice Sharswood said: "It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it." In *Lohr v. Phillipsburg*, 156 Pa. 246, 27 Atl. 133, Mr. Justice Mitchell refers to the duty laid down for an employer as being that of "not only furnishing safe tools to his workmen, but in knowing their liability to decay, and in replacing them at the proper time."

Our examination of the record in this case satisfies us that the defendant had the full benefit of everything to which it was entitled under the law of the place where the accident occurred.

The assignments of error are overruled, and the judgment is affirmed.

BUCKMAN v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. APPEAL AND ERROR (§ 589*)—RECORDS—PAPER BOOK.

Supreme Court rule 26, limiting the space allowed in paper books on appeals for statement of the questions involved, is mandatory.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2690; Dec. Dig. § 589.*]

2. TRIAL (§ 139*)—QUESTION FOR JURY—WEIGHT OF EVIDENCE—POSITIVE AND NEGATIVE TESTIMONY.

In an action for causing the death of a person at a railroad crossing, where three witnesses

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

who were present at the time of the accident, two of whom were particularly interested in the train which caused the death, testified positively that the first warning from the train was a blast of the whistle an instant before the collision, it is for the jury to determine whether such testimony is overcome by the positive testimony of four witnesses that the proper signal had been given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 322-341; Dec. Dig. § 139.*]

3. RAILROADS (§ 350*)—OPERATION—INJURIES AT CROSSINGS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action for causing the death of a person at a railroad crossing, whether deceased was guilty of contributory negligence in going upon the track without stopping a second time after having stopped 140 feet from the crossing held to be for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

4. RAILROADS (§ 347*)—OPERATION—INJURIES AT CROSSINGS—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for causing the death of a person at a railroad crossing, evidence that the place where the deceased stopped before entering on the track was the usual and customary place of stopping to look and listen for trains was competent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

5. DEATH (§ 67*)—ACTIONS FOR CAUSING DEATH—EVIDENCE—DAMAGES.

In an action for causing the death of plaintiff's husband, evidence of the amount of farming and trucking which had been done by him was competent as bearing on the question of his earning capacity.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 88; Dec. Dig. § 67.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Ella P. Buckman against the Philadelphia & Reading Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 227 Pa. 277, 75 Atl. 1039.

The appellant's statement of the question involved took up about one page and a half, but was printed in large type and double spaced. It was as follows:

"IV. Statement of Questions Involved.

"I. Whether the evidence as to the proper and customary place for the driver of a wagon to stop before crossing a railroad was admissible in this case?

"II. Whether the testimony of the wife to prove the average proceeds from the loads of truck sold by her husband is admissible as evidence of the earning capacity of a truck farmer who leased a farm which he worked by his own services, the services of his wife, two sons, and hired employes, in the course of which he also employed horses, wagons, and farm implements?

"III. Whether the charge of the trial judge upon the view that could be had at a grade crossing was adequate?

"IV. Whether the trial judge erred in charging the jury upon the duty of care to

be exercised by the driver of a wagon at a grade crossing of a railroad?

"V. Whether the evidence of the plaintiff to prove negligence was sufficient to carry the case to the jury?

"VI. Whether the deceased was guilty of contributory negligence in failing to look and listen for a train which struck his horses the instant they entered upon the tracks?"

Verdict for plaintiff for \$18,000, of which all above \$15,000 was later remitted, and judgment was entered for plaintiff for \$15,000.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

Wm. Clarke Mason, for appellant. A. S. L. Shields, for appellee.

BROWN, J. [1] In exceeding the space allowed by rule 28 for the statement of the question or questions involved, counsel for appellant has very narrowly escaped the suppression of his paper book and the non-crossing of his appeal, and he makes this escape only because in the judgment of a majority of the court the statement would not have exceeded half a page if type of ordinary size had been used and the spacing had not been so wide. The rule as to space is mandatory, and counsel for an appellant must remember that they assume great risk for their client in disregarding it themselves or in permitting printers to do so for them.

[2] At about 6 o'clock on the evening of October 24, 1903, the husband of the plaintiff was instantly killed by the collision of a train of the defendant company with the team which he was driving. He was seated in a covered market wagon, drawn by two horses, and the instant they got upon the first track of the company over the York road, at Willow Grove station, the collision occurred. The first contention of the appellant to be noticed is that there was no proof of its negligence. What is charged against it is that it failed to give notice, by bell or whistle, of the approach of its train to the crossing. Three witnesses called by the plaintiff testified that no warning had been given of its approach. Their testimony was not merely that they had not heard the blast of a whistle or the ringing of a bell. It was that no such warning had been given. The first of these was waiting at the station to take a train; the second was a passenger on the colliding train, looking out of a window for friends at the station; and the third was standing at the station, looking for the arrival of the train, and all three testified positively that the first warning given of the train's approach was the blast of the whistle an instant before the team was struck. Two of them had their attention upon the coming train, and the testimony of all three was not merely negative, amounting to a mere scintilla upon the question of the defendant's negligence. On the contrary,

it was positive testimony that what ought to have occurred had not occurred, and was negative only in the sense that all testimony as to the nonexistence of a fact may be said to be negative. In character it may have been negative. In effect, it was positive, and was therefore sufficient for a finding by the jury that the defendant had negligently and carelessly omitted to perform its duty of giving proper notice of the approach of its train to the crossing. *Winterbottom v. P., B. & W. R. R. Co.*, 217 Pa. 574, 66 Atl. 864; *Schwarz v. Delaware, Lackawanna & Western R. R. Co.*, 218 Pa. 187, 67 Atl. 213; *Rottmund v. Pennsylvania R. R. Co.*, 225 Pa. 410, 74 Atl. 341. Whether the testimony of these witnesses was overcome by that of the positive testimony of four witnesses that the proper signal had been given was a question solely for the jury, and it is not for us to interfere with their finding, even if we, as jurors, might have found differently.

[3] The appellee did not rely upon the presumption that her husband had stopped, looked, and listened for an approaching train, but undertook to prove affirmatively that he had performed that duty. Several witnesses testified that he stopped about 140 feet east of the crossing, at a point where persons driving teams were accustomed to stop, look, and listen for trains coming from Philadelphia. At that point there was a view in the direction from which the train was coming of from 300 to 500 feet, but this did not continue down to the railroad. A house, shed, barber shop, fence, and trees more or less obstructed the view until a point was reached 16 feet, by actual measurement, from the first rail of the track on which the train came. The great preponderance of the testimony shows that at any point within 16 feet of the railroad track there was a clear view of an approaching train of 2,290 feet. After the deceased started from the point at which he stopped—about 140 feet from the track—he did not stop again, but, seated back in his wagon, drove on until his team was struck, and the main contention of the appellant is that his death ought, under the circumstances, to be charged to his contributory negligence, because, if he had stopped and looked within the space of 16 feet east of the track, he would have seen the coming of the train. On the oral argument we were impressed by this, but our examination of all the testimony in the case has led to the conclusion that the contributory negligence of the deceased was for the jury. He did stop to look and listen for a train, and this in itself is opposed to the idea of negligence (*Ely v. Pittsburg, Cincinnati, Chicago & St. Louis Railway*, 158 Pa. 233, 27 Atl. 970), and he stopped at the place where those driving towards the railroad usually stopped to look and listen for an approaching train. Under the tes-

timony the jury were not bound to find that he was guilty of contributory negligence in not stopping at a point within 16 feet of the railroad, especially in view of the testimony of Thomas F. Stackhouse, a witness called by the plaintiff, who testified that, even after passing the line of the barber shop and getting into the 16-foot space, a clear view in the direction from which the train was coming could be had for only about 125 feet, and then only when the heads of the horses were over the first rail. While the jury might most fairly have found that the deceased was guilty of contributory negligence, it was, under all the testimony, their province to pass upon that question, and not for the court to decide it as a matter of law.

[4] Four of the assignments of error complain of the admission of testimony that the place where the deceased stopped was the usual and customary place of stopping to look and listen for trains of the defendant company coming from Philadelphia. No testimony could have been more competent. What the appellant complains of was not a mere expression of opinion by the witnesses that the place where the deceased stopped was a proper one and the best one from which to obtain a view of the approaching train, but was the statement of an actual fact, viz., that he had stopped where others habitually stopped for the same purpose. This was persuasive evidence that the place was the right one (*Cookson v. Pittsburg & Western Railway Company*, 179 Pa. 184, 36 Atl. 194); but it was by no means conclusive evidence on the point, and it was therefore competent for the appellant to show that the usual and customary stopping place was not the proper one, and that the deceased ought to have stopped at a point nearer the track. This is what it unsuccessfully attempted to do, and the first four assignments are dismissed.

[5] The testimony of the wife, the admission of which is complained of by the fifth and sixth assignments, shows the amount of farming and trucking which had been done by her husband, and that it was competent for her to prove this we decided on the appeal from the first judgment in the case. *Buckman v. Philadelphia & Reading Railway Company*, 227 Pa. 277, 75 Atl. 1069. The judgment on the former trial was reversed because of the leading questions put to the wife. On the second trial no such question was put to her in eliciting what she said as to the extent of her husband's business. If she improperly testified as to what she regarded as the profits, there are no assignments calling our attention to such testimony.

If counsel for appellant regarded the charge as inadequate upon the evidence as to the view which could be obtained of a coming train from a point upon the cross-

ing, the learned trial judge gave him the opportunity to ask for fuller instructions, which were given, and in them, considered in connection with the general charge, no error is discoverable.

The assignments of error are all overruled, and the judgment is affirmed.

CITY OF SCRANTON v. GENET et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MUNICIPAL CORPORATIONS (§ 530*)—PUBLIC IMPROVEMENTS—CONTRACTORS' LIENS—ENFORCEMENT.

Act June 4, 1901 (P. L. 364), providing a complete and exclusive system regulating the creation of liens for municipal improvements and prescribing the mode of their enforcement, providing in section 10 that on each municipal claim a writ of scire facias must issue within five years from its filing, and verdict must be recovered or judgment entered on scire facias within five years after it is issued, that final judgment must be entered on the verdict within five years after its recovery, that after judgment is entered it must be revived by writ of scire facias to revive the judgment, or by judgment thereon within each recurring period of five years, and that if a claim be not filed within the time prescribed, or if it be not prosecuted in the manner stated, it shall be wholly lost, does not contemplate an indefinite prolongation of the lien of a claim through successive revivals by writs of scire facias.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 530.*]

2. LIMITATION OF ACTIONS (§ 122*)—COMMENCEMENT OF PROCEEDINGS—DEFECTS IN SERVICE.

Where, in an action on a municipal lien, a scire facias, issued within the time prescribed by law, proved ineffective because not served according to law, and the statutory period closed with the return of the writ, the lien was wholly lost, and defendant's general appearance to an alias scire facias, issued after the expiration of the statutory period, could not supply the existence of a legal claim to support such a scire facias, without which any action of the court would be a mere nullity.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 538; Dec. Dig. § 122.*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by the City of Scranton, to use, etc., against George C. Genet, in which Augusta G. Genet intervenes as defendant. From the judgment, the intervening defendant appeals. Reversed.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Everett Warren and F. K. Tracy, for appellant. David J. Davis, City Sol., for appellee.

STEWART, J. [1] For a determination of this case, we need not look beyond the act of June 4, 1901 (P. L. 364). That act within itself provides a complete system regulating the creation of the liens for municipal im-

provements, and prescribes the method of their enforcement. It repeals all former acts, whether general or special, which were inconsistent with it. It would not be profitable to consider these various acts or the decisions of the court with respect to them, since the acts were not parts of a general system, but each had its own peculiar features, and no one that we have examined was exactly like the act of 1901 with respect to that feature upon which we rest our conclusion. A careful study of the later act is convincing that it does not contemplate indefinite prolongation of the lien of a claim filed through successive revivals by writs of scire facias, and that the scire facias provided for in the act is not for purpose of revival of the lien filed, but for enforcement of the claim, with extension of lien as an incident to a delayed scire facias. Section 10 of the act reads as follows: "Upon each tax or municipal claim a writ of scire facias, in the form herein-after set forth, must issue within five years from its filing, and verdict must be recovered or judgment entered on the scire facias within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery. After judgment is entered, it must be revived by writ of scire facias to revive the judgment; or by judgment thereon within each recurring period of five years. If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the times aforesaid it shall be wholly lost." The above extract from the statute contains everything therein relevant to the question in hand. We have here a provision that if the claim be not filed within the time prescribed, or if it be not prosecuted in the manner aforesaid (by scire facias), and at the times aforesaid (within five years from filing), it shall be wholly lost. The distinction in the office of the first scire facias provided for in the act, and any which may be subsequently resorted to, is apparent; the first is process by which the claim may be reduced to a judgment, and all controversy with regard to it ended; with judgment once obtained, the lien thereafter attaches to it, and not to the claim. No provision for revival of the lien of the claim can be found in the act; but after judgment is entered the judgment must be revived by writ of scire facias "to revive the judgment."

The marked difference between this procedure and that provided for in the earlier mechanic's lien law, now repealed, is significant. We call attention to it since in both the proceeding is in rem. The general mechanic's lien law of June 16, 1836 (P. L. 701), provided, in section 24, after declaring the lien of the debt for which the claim was filed should expire at the end of five years from the day of filing the lien: "Unless the same shall be revived by scire facias, in the manner provided by law in case of judgments;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in which case, such lien shall continue in like manner for another period of five years, and so from one such period to another, unless such lien be satisfied, or the same be extinguished by a sheriff's sale or otherwise according to law." Here was express provision that the lien could be revived by writs of scire facias as often as was necessary, in the same manner as a judgment. The writ there was not simply for the enforcement of the lien, but for its preservation. That the difference between the provision in that act and the provision in the general municipal lien act was not due to accidental omission from the latter, but was fully intended, becomes apparent upon examination of the general mechanic's lien act of June 4, 1901, which superseded and repealed the act of June 16, 1836. The later act, passed the same day as the general municipal claim act, changed the procedure in cases of mechanics' liens, and brings it into exact accordance with the procedure provided for in the municipal lien act. This later mechanic's lien act, in section 10, after providing that a writ of scire facias must issue within a certain period, proceeds: "And a verdict must be recorded or judgment entered on the scire facias within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery. After judgment is entered, it must be revived by a writ of scire facias to revive the judgment, or any judgment thereon, within each recurring period of five years. If a claim be not filed within the time aforesaid, or if it be not prosecuted in the manner and at the times aforesaid, it shall be wholly lost." We derive from this a manifest purpose to restrict the debatable period with respect to the claim. The provision that the claim shall be wholly lost if it be not prosecuted in the manner and at the times aforesaid—that is to say, by writ of scire facias issued within five years to bring it to judgment—indicates clearly that the right to revive pertains, not to the lien, but the judgment obtained thereon. The proceeding is purely statutory, and we can introduce nothing into the remedy which is not expressly provided by the statute. Not only is there lacking here any express authority for a scire facias to revive the lien of the claim, but we think it clear that none was intended.

[2] In the present case, a scire facias was issued within the statutory period. But not having been served according to the requirements of the law it proved abortive. Unfortunately for the claimant, it issued so closely to the expiration of the five-year limit that with the return of the writ the period had closed. Had it issued a term earlier, this fatal effect could have been avoided by the abandonment of that particular writ, and the issuing of another within the period. Admittedly the writ returned was so defective that a judgment thereon could not be

supported. The case stood, therefore, as though no writ had issued within the statutory period. *Philadelphia v. Cooper*, 212 Pa. 306, 61 Atl. 926. An alias writ of scire facias was sued out after the expiration of the limit, and it is upon this writ that the present contention hangs. The appellee, alleging that she was the sole owner of the premises against which the claim was filed, and that her husband, who was named in the claim and writ as owner, was without interest in the premises, filed her petition, asking that she be allowed to intervene. This being allowed, a general appearance for her followed. When the alias writ issued, not only was the lien at an end, but in the language of the act the claim was "wholly lost" beyond possible recovery. The claim was never enforceable, except by a scire facias, and the right to this remedy was gone. If the first scire facias, because of defective service, was a nullity, for the reason that it was not sufficient to support a judgment, the second or alias scire facias must fall under like condemnation. Nothing remained of the claim on which any such writ could issue. The purpose of the scire facias was to warn the owner and bring her into court to make known her defense, if any she had, not to answer to a personal demand against herself, but to show, if she could, why her property should not be under judicial subjection to a municipal claim. Her appearance certainly cured all mere defects in matters of form and irregularities in service, if there were any; but it did not and could not supply the one fact, the existence of which was absolutely necessary to the validity of the proceeding, and without which the action of the court would be a mere nullity, namely, the existence of a legal claim upon which a scire facias could properly issue. The right of the court to hear and determine questions arising in connection with the filing and enforcing of claims for municipal improvements is purely statutory. The right of the municipality to enforce the collection of any such claim is also statutory. When the record fails to disclose the existence of such a claim, or, what is equally decisive, when facts are brought to the attention of the court which establish that no such claim exists, there is a lack of power in the court to hear the case, even though the defendant consent; and it follows that a judgment rendered in such case is void for want of jurisdiction. With this question disposed of in favor of appellant, the other questions raised on the appeal do not call for consideration.

The refusal of the defendant's request for affirmance of the following point, "Under the evidence in this case there can be no recovery," is the subject of the first assignment of error. This point should have been affirmed. This assignment of error is sustained, and judgment is reversed.

**JAPANESE IMPORTERS CO. v.
WALSH.**

(Supreme Court of Rhode Island. Nov. 3, 1911.)

JUDGMENT (§ 138*)—DEFAULT—VACATION.

Where plaintiff, on October 6, 1911, obtained judgment against defendant by default on service of a writ by leaving it at defendant's last usual place of abode, and on such judgment issued execution against defendant's body, whereupon, on November 2d, defendant applied for trial, alleging want of actual notice of the service of the writ, and that he had a good and valid defense to the action, the judgment will be set aside, and new trial granted.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 138.*]

Action by the Japanese Importers Company against Thomas Walsh, alias, etc. On defendant's petition for a trial notwithstanding judgment by default, under Gen. Laws 1909, c. 297, § 1. Granted.

The following is defendant's petition:

"Japanese Importers Co. v. Thomas Walsh.
Alias.

"Thomas L. Walsh, the above defendant, respectfully represents and shows that on the 6th day of October, A. D. 1911, the above-named plaintiff corporation obtained a judgment by default against him for \$162.70 and \$3.00 costs in an action of deceit upon a writ of summons returnable to the district court of the Sixth judicial district; that he had no knowledge whatever of the service of said writ, which service appears to have been by leaving a copy at his last and usual place of abode; that he has a good and valid defense to said action; that an execution was issued in said action against his body; and that he is now under arrest on said execution and in the custody of a deputy sheriff. And he says that by reason of accident, misfortune, and mistake he has been denied and has not had a fair trial of said action. He therefore prays for a new trial in said action, that the default aforesaid be removed, and that further service of said execution be stayed, and that he be released from arrest thereunder till the further order of the court.

"Thomas L. Walsh.

"Subscribed and sworn to in Providence, in said county, this 2d day of November, A. D. 1911, before me.

"H. J. Carroll, Notary Public."

Bassett & Raymond, for plaintiff. Hugh J. Carroll, for defendant.

PER CURIAM. The defendant's petition for a trial is granted, and he is directed to enter his appearance in the district court of the sixth judicial district on or before November 9, 1911. The judgment heretofore entered in said cause is vacated, and the defendant is released from arrest.

NICHOLS v. TOWN OF MANCHESTER.

(Supreme Court of Errors of Connecticut. Nov. 1, 1911.)

**1. APPEAL AND ERROR (§ 994*)—REVIEW—UN-
CONTRADICTED EVIDENCE.**

Under Rules of the Supreme Court of Errors (Practice Book 1908, p. 268) § 10, providing that the refusal to find a material fact, which was undisputed, shall be ground for an exception, but that the mere uncontradicted testimony to a fact is not sufficient, the trial court being the judge of the credit of witnesses, a fact in issue is not undisputed, though the only direct testimony thereon is not contradicted, and hence a finding in opposition to such testimony will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

**2. APPEAL AND ERROR (§ 1010*)—REVIEW—
FINDINGS WITHOUT EVIDENCE.**

A finding of fact, contrary to the affirmative testimony, not directly contradicted, or when no witness has directly testified to such fact, is not necessarily a finding without evidence; for facts may be inferred from other facts without direct evidence, and the trial court is judge, not only of the truthfulness of witnesses, but of the weight to be given to their testimony, and its finding will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

**3. MUNICIPAL CORPORATIONS (§ 819*)—COURTS
—STREETS—ACTIONS—EVIDENCE.**

In an action against a municipal corporation for wrongful death, caused by an obstruction in a highway, evidence held to warrant a finding that deceased might have avoided the obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 819.*]

**4. MUNICIPAL CORPORATIONS (§ 818*)—OB-
STRUCTION IN STREET—EVIDENCE.**

In an action against a municipality for wrongful death, caused by an obstruction in a highway, the court, in making a finding of fact whether deceased might have driven his horse so as to have avoided the obstruction, should consider the disposition of the horse, his actions after the accident, and all matters surrounding such accident.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 818.*]

Appeal from Superior Court, Hartford County; William H. Williams, Judge.

Action by Mary R. Nichols, as administratrix of the estate of Benjamin F. Nichols, deceased, against the Town of Manchester. From a judgment for defendant, plaintiff appeals. Affirmed.

Action for damages for personal injury, resulting in the death of the plaintiff's intestate, alleged to have been caused by a defective highway, which it was the duty of the defendant to maintain, brought to the superior court of Hartford county and tried to the court. Facts found and judgment rendered for the defendant.

Leslie W. Newberry and Richard J. Goodman, for appellant. Theodore M. Maltbie and Olin R. Wood, for appellee.

HALL, C. J. On February 4, 1908, at about 9 o'clock in the forenoon, the plaintiff's intestate, Benjamin F. Nichols, was driving his horse and buggy southerly along a highway in the town of Manchester, when, after his horse had run for about 500 feet, the right-hand front wheel of his carriage struck and passed over a stump at the westerly side of the road, and he was thrown from his carriage and killed.

The stump was within the limits of the highway. Its easterly side was about 18 inches west of the west wheel track of the highway, and the center of the top of the stump was about 9 inches above the level of the roadway. The width of the worked and traveled part of the highway was about 17½ feet, and the unobstructed and available part of the highway east of the stump was about 16 feet wide. To one driving southerly on the highway the stump was visible from a point about 500 feet north of the stump.

The issue joined upon the question of the dangerous condition of the road was decided by the trial court in favor of the plaintiff, and the issue upon the alleged due care of the deceased in favor of the defendant. Paragraphs 26 and 27 of the finding of facts are as follows:

"At and before the buggy struck the stump, the deceased was able so to control and guide said horse as to avoid a collision with the stump, and if he had exercised reasonable and ordinary care and prudence in driving said horse he would have readily avoided such collision, and the accident would not have occurred.

"From the time the horse began its running gait the deceased did not endeavor to restrain it from such gait. If he had chosen to do so, he could readily have so restrained the horse before the buggy left the wheel ruts."

[1] The plaintiff has caused the entire evidence to be certified to this court under the provisions of section 797 of the General Statutes, and, among other claims for corrections of the finding, claims, in paragraphs 21 and 22 of the assignment of errors, that said two paragraphs of the finding should be corrected, upon the grounds that the facts stated in said paragraph 26 are contrary to the undisputed facts appearing in the record, and that the facts stated in paragraph 27 are contrary to the undisputed facts, or are found from guess or surmise. We deem it necessary to consider only those reasons of appeal relating to corrections of the finding, and of these only the assignments of error claiming the correction of said paragraphs 26 and 27, since, if the requests for the correction of these paragraphs are not granted, the decision of the trial court upon the question of due care upon the part of the deceased must stand.

First. The facts stated in said paragraphs

26 and 27 are not contrary to admitted or undisputed facts. It was not an undisputed fact, nor one admitted by the defendant, that the deceased was unable to control or guide the horse, so as to avoid running upon the stump, nor that the deceased endeavored to restrain the horse from running. The defendant in its answer denied the averment of due care by the deceased, and the record clearly shows that the defendant claimed, and in the cross-examination of plaintiff's witnesses endeavored to show, as facts material to the issue of due care, that the deceased could have so controlled the horse as to avoid running upon the stump.

Section 10 of the rules of the Supreme Court of Errors (Practice Book 1908, p. 268) states as grounds upon which a finding may be corrected by proceedings under sections 795 and 796: (1) The refusal to find a material fact which was admitted or undisputed; (2) the finding of a fact in language of doubtful meaning; and (3) the finding of a material fact without evidence.

It appears to be the claim of the plaintiff that the three eyewitnesses to the accident testified contrary to the facts stated in paragraphs 26 and 27 of the finding, that no witness directly contradicted such testimony, and that, therefore, the facts stated in these two paragraphs were found contrary to undisputed facts or without any evidence. But the rule just referred to states that the fact that the testimony of a witness to a material fact is without contradiction does not render the fact so testified to an undisputed one, and that the trial court must judge of the credit to be given to witnesses. We said in *Allis v. Hall*, 76 Conn. 322, 340, 56 Atl. 637, 644: "Absence of direct contradiction by the mouth of a witness does not make a fact undisputed within the meaning of the rule. * * * The trial court is at liberty to discredit any witness, or multitude of witnesses, if it deems that it has cause to do so."

[2] Again, the finding of a fact contrary to the affirmative testimony of witnesses who have not been directly contradicted, or when no witness has directly testified to such fact, is not necessarily a finding of such fact without any evidence. The trial court is the judge, not only of the truthfulness of witnesses, but of the weight to be given to their testimony; and there are many facts which are not required to be proved by direct evidence, but which may properly be inferred from other facts. That this court, in proceedings for correcting findings of facts, will not weigh evidence and retry cases, has been fully settled by the familiar cases of *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165, and *Thresher v. Dyer*, Ex'r, 66 Conn. 404, 37 Atl. 979.

[3] It was not necessary that there should have been direct evidence that the deceased could have controlled or guided his horse

so as to avoid the accident, to justify the court's finding in paragraphs 26 and 27. The exercise by the injured person, or his failure to exercise due care in cases of this character, may be inferred from all the facts and circumstances of the case; and if such inference is one which can reasonably be drawn, it is final. *Fay v. Hartford & Springfield Street Ry. Co.*, 81 Conn. 330-335, 71 Atl. 364. But we think it cannot fairly be said that all of the three eyewitnesses to the accident, and who testified at the trial, said that the deceased was unable to control his horse. In answer to the question, "Was or was not the horse apparently under the driver's control?" the plaintiff's witness Newberry answered, "I could not say." To the question, "Did he appear to be able to guide the horse?" the plaintiff's witness Dewey answered, "I don't know." The same witness upon cross-examination testified, "I think he could have kept him in the road all right." In answer to the question upon cross-examination, "So that, if he diverged from the roadway, it was on account of his failure to guide him properly—is not that true? There can't be any question about that, can there?" the plaintiff's witness Grant answered, "No;" and to the further question, "Is it true?" answered, "Yes." The same witness also testified upon cross-examination that there was no reason why the deceased could not have guided the horse in a roadway 15 feet wide.

But if all three of these witnesses had testified that the deceased was unable to control the horse, the trial court was not required to accept these statements as correct. The court could reasonably have thought, as it very likely did, that these witnesses did not profess to be able to state with certainty; and from where they were at the time of the accident, which was some 200 feet west of the stump, could not state with certainty whether or not the horse was running from fright, or whether or not the horse was within the driver's control, and that, in so far as they testified regarding these points, they were only expressing their own opinions or judgment from what they saw.

But these witnesses apparently stated fully to the court the facts upon which their judgment upon these points was based. By their testimony, and by the maps and photographs in evidence, the entire scene as viewed by these witnesses, showing the action of the horse and the conduct of the driver from the time the horse began to run until the time of the accident, was pictured to the trial court, and from all this evidence it was proper for the court to draw its own reasonable conclusion as to whether the deceased could have controlled the horse and have avoided the accident. Even if others might reasonably have drawn different con-

clusions than those stated in paragraphs 26 and 27, it does not follow that those of the trial court were unreasonable and erroneous in law, and we think they were not.

[4] In addition to the facts and testimony above stated, there was evidence that the horse was a gentle one, which the deceased was accustomed to drive; that deceased was an experienced driver, and knew of the existence, condition, and location of the stump. It was not shown that the horse was running from fright. There was evidence that he did not appear to be "running wild"; that he was running at a "frisky gait"; that one of the eyewitnesses remarked that Mr. Nichols was "taking a fast ride"; that there was nothing out of the ordinary in the manner of Mr. Nichols; that he did not call out to stop the horse, but sat upright in his seat, with his arms extended, holding onto the reins, "holding the reins straight before him"; that when about 25 feet north of the stump the horse turned slightly to the west of the traveled track and ran toward the stump; that after the deceased had been thrown out, and some distance south of the stump, the reins became wound around the hub of the wheel, and the horse was "drawn up tight" and stopped. These were all proper subjects of consideration by the trial court in reaching its conclusions stated in paragraphs 26 and 27 of the finding. *McCarthy v. Consolidated Ry. Co.*, 79 Conn. 73, 63 Atl. 725.

There is no error, and the requests for corrections of the finding are denied. The other Judges concurred.

BELEVICZE v. PLATT BROS. & CO.

(Supreme Court of Errors of Connecticut. Nov. 1, 1911.)

1. MASTER AND SERVANT (§ 96*)—INJURY TO EMPLOYÉ—LIABILITY.

An employer's liability for injury depends primarily upon whether the injury was caused by his negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 158, 162; Dec. Dig. § 96.*]

2. MASTER AND SERVANT (§§ 101, 102*)—SAFE PLACE OF WORK, ETC.—EMPLOYER'S DUTY.

Defendant owed a continuing duty to use reasonable care to provide a reasonably safe place and a machine for plaintiff employé for his work, and to maintain them in such condition, including the duty of reasonable inspection.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 180-184; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 150*)—INSTRUCTION OF EMPLOYÉ—EMPLOYER'S DUTY.

A master was bound to give an employé such instruction and warning as was reasonable under the circumstances as they were known or ought to have been known to the master, so as to enable the employé to appreciate the risk, and, with proper care, to do his work without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

peril except from the ordinary risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 305-307; Dec. Dig. § 150.*]

4. MASTER AND SERVANT (§ 157*)—INSTRUCTION OF EMPLOYÉ—SCOPE.

Instruction of an employé against dangers must be graduated to his age, experience, and capacity, and should point out the risk and its nature and extent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. § 157.*]

5. MASTER AND SERVANT (§ 203*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

All risks of the service not in violation of the master's duty the servant assumes by the contract of employment, and for such injuries an employer is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

6. MASTER AND SERVANT (§ 125*)—DEFECTS—EMPLOYER'S LIABILITY.

An employer is not liable for injuries resulting from defects of which he did not know or was not bound to know by the use of due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

7. MASTER AND SERVANT (§ 276*)—INJURIES—PRIMA FACIE LIABILITY.

An employer is prima facie liable for injury to an employé for failure to perform a duty to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952; Dec. Dig. § 276.*]

8. MASTER AND SERVANT (§ 217*)—INJURIES TO EMPLOYÉ—EMPLOYER'S LIABILITY.

A master is not liable for negligent injury to his employé, if the latter knew, or ought to have known, the danger, and voluntarily encountered the risk, though he has not been instructed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

9. MASTER AND SERVANT (§ 203*)—"ASSUMPTION OF RISK"—APPLICATION OF DOCTRINE.

Assumption of risk is not properly applicable to "ordinary risk," since it can mean no more than that the risk inhered in the contract of service, and, as applied to an extraordinary risk, assumption of risk means that the servant has by his own act waived the effect of the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 203.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585.]

10. MASTER AND SERVANT (§ 155*)—WARNING TO EMPLOYÉ—DUTY TO GIVE.

An employer must warn his employé against latent dangers known to the employer, but of which the employé neither knows nor ought to know.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

11. MASTER AND SERVANT (§ 278*)—INJURY TO EMPLOYÉ—EVIDENCE—SUFFICIENCY.

In an action for injury to an employé at a machine containing a revolving cylinder, evidence held to sustain a finding of negligence in failing to warn him against dangers of the employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

12. MASTER AND SERVANT (§ 286*)—INJURIES RELATING TO EMPLOYÉ—JURY QUESTIONS.

Ordinarily, in an employé's personal injury action, what warning or instruction should have been given him is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

13. MASTER AND SERVANT (§ 286*)—INJURIES RELATING TO EMPLOYÉ—JURY QUESTIONS.

In an employé's personal injury action, whether defendant was negligent in failing to warn him of dangers attending work at a machine containing a revolving cylinder held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

14. APPEAL AND ERROR (§ 999*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A verdict on a question properly submitted to the jury cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by William Belevicze against Platt Brothers & Co. Verdict and judgment for plaintiff for \$2,500, and defendant appeals. Affirmed.

Terrence F. Carmody, for appellant. William E. Thoms and Francis P. Gullfoile, for appellee.

WHEELER, J. The jury may reasonably have found from the evidence submitted by the plaintiff these facts: The plaintiff was a Lithuanian, and when injured in the defendant's factory was 18 years and 5 months old, and had lived in this country 3 years. His knowledge of English was limited and confined to a few simple words. He entered defendant's employ and had worked nine days when he was put at work on a blocking machine of a type that was not dangerous in its operation, and he had worked on this machine two days when, at 4 o'clock in the afternoon, he was put to work on another type of blocking machine which was dangerous. The only instruction he received was for about 10 minutes from a boy of 17, who spoke in a language he did not understand, and by motions attempted to teach him to operate the machine by having him coil one strip of metal, and by observing the plaintiff doing the work. The plaintiff was not warned of the danger of the work he was to do, nor told of the liability of his arm getting caught, nor cautioned as to the proper way in which to do the work to avoid this liability. In order to have given the plaintiff the instruction, facility, and practice to operate this machine with reasonable safety to himself, a skillful operative should have instructed him in a language he understood and have shown him how to operate it and watched him in trying to operate it, and should have continued to instruct and watch him for a considerable time so that in

case his hand got caught before he had acquired manual dexterity in its operation the machine might be instantly stopped by the watcher, as it was impossible for the operative to have stopped the machine after being caught. The work the plaintiff did on this machine appears simple; in reality it is dangerous and requires considerable dexterity, practice, and skill. It was this: A strip of metal passes between very heavy revolving steel cylinders and leaves it in a thin strip a few inches wide, which is called a bar. This bar is then wound upon a revolving cylinder or spool of quite large diameter, called a winding block, or a blocking machine, which revolves about 52 revolutions to the minute. The plaintiff was required to take hold of the bar with his left hand as it came from the revolving steel cylinders and place it upon and around the revolving cylinder while it was in motion and hold it upon the cylinder until enough of the bar had come in contact with it so that the resulting friction would wind the bar upon it. While the bar was being placed upon and around the revolving block, if the hand should be allowed to remain upon the metal a fraction of a second too long it is liable to be caught between the layers of the bar as it is being wound upon the block, and serious injury may result. The danger of injury in this way was not one the plaintiff knew of or was warned concerning.

The plaintiff had worked on this machine for 5½ hours and coiled 20 strips of the metal when, on the second day, without negligence on his part, his hand was caught between the layers of the metal which he was trying to place upon the revolving cylinder, carrying him over the machine, and as a result he lost his arm. The defendant knew, or ought to have known, the age, lack of experience, and ignorance of our language of the plaintiff, and knew that he did not understand the operation of the machine, nor have sufficient instruction and practice to have been reasonably capable of running it. The plaintiff did not comprehend the danger nor appreciate the risk, and the defendant knew or ought to have known this. The appellant bases its appeal upon the trial court's refusal to direct a verdict and its motion for a new trial upon the same ground, viz., that there was no legal evidence from which the jury could either have legally found the defendant negligent, or that the plaintiff was ignorant of the alleged danger, and did not have equal means with the defendant of knowing, appreciating, and understanding the danger, since the injuries of the plaintiff were caused by a risk which was one of the ordinary risks of his employment, and if not that, but an extraordinary one, it had been assumed by him.

[1] The liability of a master for an injury to a servant primarily depends upon whether or not the injury was caused by his negli-

gence, and is determined by ascertaining whether there has been on his part a breach of duty owed the servant.

[2, 3] The duty of the master in this case was to use reasonable care to provide a place and a machine which were reasonably safe for the plaintiff for his work. This duty was a continuing one, and hence included that of maintenance, which necessarily involved that of reasonable inspection and care (*Rincicotti v. O'Brien Contracting Co.*, 77 Conn. 620, 60 Atl. 115, 69 L. R. A. 936), and it likewise included the giving of such instruction and warning to the plaintiff as would be reasonable under the circumstances as these were known or ought to have been known to the master so as to enable the servant to appreciate the risk and comprehend the instructions, and with proper care on his part to do his work without peril other than from the subsequent negligence of the defendant or from the ordinary risks of the work he was to do. *Pelow v. Oil Well Supply Co.*, 194 N. Y. 68, 86 N. E. 812; *Marklewitz v. Olds Motor Works*, 152 Mich. 113, 120, 115 N. W. 990.

[4] The instruction must be graduated to the age, inexperience, and incapacity of the servant and should point out the risk and its nature and extent. *Thompson on Negligence*, §§ 4106, 4107.

[5] All the risk of the service not in violation of the master's legal duty the servant by his contract of employment takes upon himself. For such risk of service the master incurs no liability, not because the servant has assumed the risk, but because the master owes no duty in reference to it.

[6] Reasonable or due care in the performance of the master's duty does not require the master to insure the safety of place, instrumentalities, or servants; hence he is not liable except for defects he knew or ought to have known of.

[7] When, subsequent to the beginning of employment, a servant is injured through the failure of the master to perform his duty towards him, the master is *prima facie* liable.

In the terminology of the law this risk, due to the master's misconduct, comes within what is called an extraordinary risk as distinguished from the ordinary risk of service. "As applied to the risk of a servant in his employment, it becomes transformed from ordinary into extraordinary whenever, among other conditions, the master's negligence contributes an added hazard to the situation in which the servant is placed." *Baer v. Baird Mach. Co.*, 84 Conn. 269, 273, 79 Atl. 673.

[8] When the servant knows, or ought to have known, the danger, and, even though no instruction has been given, appreciates the risk and voluntarily encounters it by continuing in the work without promise of remedy, his conduct prevents his taking advantage of the master's negligence. *Ellie v. Cowles*,

82 Conn. 236, 73 Atl. 258; *American Sheet & Tin Plate Co. v. Urbanski et al.*, 162 Fed. 91, 96, 89 C. C. A. 91. This is so, not because the servant has assumed the risk through his contract of employment, but because his voluntary continuance in service with knowledge of the danger and appreciation of the risk created by the defendant's breach of duty prevents him from taking advantage of the defendant's breach. *Volenti non fit injuria*. Lord Esher, in *Yarmouth v. France*, (1887) 19 Q. B. D. 647, 652; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 307, 91 S. W. 460; *Worden v. Gore-Meenan Co.*, 83 Conn. 642, 78 Atl. 422.

By his own voluntary act he has waived his right to secure compensation for injuries suffered through the defendant's breach of duty.

The books use the term "assumption of risk" as applicable to either the "ordinary risk" or the "extraordinary risk."

[9] Assumption of risk is not properly applicable to "ordinary risk." As applied to the ordinary risk, "assumption of risk" can mean no more than that the risk inhered in the contract of service; as applied to the extraordinary risk, it means that the servant has by his own act or volition waived the effects of the master's violation of his legal duty. *Martin v. Light Co.*, 131 Iowa, 735, 106 N. W. 359; *Vohs v. Shorthell & Co.*, 130 Iowa, 538, 544, 107 N. W. 417; *Duffey v. Consolidated Block Co.*, 147 Iowa, 225, 124 N. W. 609, 310, 30 L. R. A. (N. S.) 1067; note, 28 L. R. A. (N. S.) 1216; *Worden v. Gore-Meenan Co.*, 83 Conn. 642, 78 Atl. 422.

[10] Dangers, though latent, may be known to the master, and, if so, the duty is placed on him of warning the servant who neither knows nor ought to know of these, and his failure to do so is negligence, recovery for which is based, not upon the existence of the danger, but upon his failure to warn. See extremely valuable discussion of assumption of risk in note to 28 L. R. A. (N. S.) 1216.

The grounds upon which the appellant rests its motions are that the danger through which the injuries to the plaintiff arose was one within the scope of his contract of service, and, if not such, but an extraordinary one, it was one which the plaintiff knew and voluntarily encountered.

If the evidence supported either conclusion, the verdict could not stand.

[11] The verdict of the jury, under the allegations of the amended complaint and the facts in evidence, must have been based upon a finding that the defendant was negligent in the manner described, and that that was the proximate cause of his injuries to which he did not materially contribute. That negligence consisted in putting the plaintiff at work upon a machine which it knew to be dangerous and liable to injure him in the

manner it did without warning him of the danger and properly instructing him in its operation. Likewise the verdict imports that the jury found that the risk which was the proximate cause of the injury to the plaintiff was not an ordinary risk of the service which inhered in his employment, but a risk arising through a breach of the master's duty either in failing to warn and instruct when having full knowledge or otherwise. Otherwise under proper instructions, and no complaint is made of these, a different conclusion must have resulted. Likewise the verdict imports that the jury found that the plaintiff did not know and appreciate the risk in the operation of the machine and voluntarily encounter it.

Unless these conclusions were so unreasonable that the jury ought not on the evidence to have reached them, the verdict should stand.

The evidence before the jury was conflicting; but there was evidence from which they might reasonably have found either a breach by the defendant of its primary duty to the plaintiff, which he did not know of, or an extraordinary risk which the plaintiff did not assume, and hence there was sufficient evidence to support the verdict. *Bradbury v. South Norwalk*, 80 Conn. 300, 68 Atl. 321.

[12] What warning or what instructions should have been given depended, as they do in every case, upon the circumstances, and these are for the jury, and ordinarily not reviewable. *Clemens v. Gem Fibre Package Co.*, 153 Mich. 495, 509, 117 N. W. 187.

[13, 14] As all of the conclusions which the verdict imports together with that of contributory negligence, which is not seriously pressed, depended upon many circumstances, they were essentially questions of fact for the jury, and the verdict based thereon cannot in the proper application of our rule of law be set aside and a new trial granted. It also follows that the court was right in refusing to direct a verdict.

There is no error. All concur.

RUSKIN v. ARMN.

(Supreme Court of New Jersey. Nov. 6, 1911.)

(Syllabus by the Court.)

LIBEL AND SLANDER (§ 104*)—EVIDENCE—ABANDONED PLEADING.

In an action of libel, when the defendant files a plea of justification and afterwards withdraws such plea, by leave of the court, plaintiff is nevertheless entitled to put such plea in evidence as bearing on the question of malice.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 104.*]

Error to Circuit Court, Essex County.

Action by Charles Ruskin against Samuel Armn. Judgment for nominal damages for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff, and he brings error. Reversed, and venire de novo ordered.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

William Greenfield, for plaintiff in error.
Frank E. Bradner, for defendant in error.

PARKER, J. This is an action of libel. The plaintiff had a verdict for six cents, and sues out this writ of error. There are 27 specific assignments of error, but with one exception we find no harmful error in the case. This error, however, will require a reversal of the judgment and a venire de novo.

The suit was based on a petition, signed by some 40 persons, which was addressed to the Newark excise board and protested against the granting of a liquor license to plaintiff on two grounds: First, that there were already enough saloons in the particular locality; and, secondly, that plaintiff was not of good reputation and had conducted a saloon previously in an illegal manner. This second ground was of course the part charged as libelous. The defendant did not sign the petition, but he circulated it and obtained signatures and was instrumental in presenting it to the excise board. Some 20 signers were joined with him as defendants, but as to them there was a discontinuance at the trial.

Defendant pleaded: First, the general issue; secondly, that the statements, etc., in the petition presented to the board, etc., "are true"; thirdly, that the communication was privileged. At the opening of the trial, defendant's counsel asked leave to strike out the "plea of justification," evidently meaning the second plea. This was opposed on the ground that plaintiff had prepared to rebut it, and had been holding a number of witnesses for that purpose. The court allowed the withdrawal of the plea on payment of costs, and added that the "question . . . whether plaintiff is entitled to claim any damages against these defendants for putting on the record a plea of that character and then not following it up, I need not decide now." Toward the end of plaintiff's case in chief, however, the question came up in this way: Plaintiff's counsel offered in evidence the second plea, and asked leave to read it to the jury. This was objected to and argument had, and the court overruled the offer and refused to let the plea be read. This was excepted to and error duly assigned; and this was the judicial action which in our view was erroneous and prejudicial to the plaintiff, and requires a reversal of the judgment.

No exception was taken to the action of the trial judge in permitting the withdrawal of the plea; and indeed it was unexceptionable. *Van Pelt v. Wittleck*, 5 N. J. Law,

810. But the judge took the ground in excluding the plea when offered in evidence that its withdrawal as a part of the record removed it from the case for all purposes; and this in spite of the facts that it had been placed on the record by defendant and allowed there to remain as a substantial reiteration of the alleged libel until after the jury was sworn and until after plaintiff's counsel had in the course of preparation for the trial subpoenaed a large number of witnesses and presumably communicated to them the contents of the plea that they were to be called to contradict by their testimony.

The rule, as we understand it, is that a plea of justification, unsupported by proof, may be considered by the jury as an aggravating circumstance in assessing the damages. 25 Cyc. 416; 18 Encyc. Law (2d Ed.) 1104; Townshend, L. & S. § 400; Odgers, L. & S. § 311; 1 Chitty, Pl. (12th Am. Ed.) 509; Fodor v. Fuchs, 79 N. J. Law, 529, 532, 76 Atl. 1081.

In *Moore v. Beck*, 71 N. J. Law, 8, 58 Atl. 166, this court held that, when evidence was produced in support of a plea of justification, the fact that it "failed to convince the jury of the truth of the alleged slanderous words afforded no ground for holding as matter of law that the plea was filed in bad faith, or that the words were spoken with a malicious motive, and therefore justified the jury in awarding exemplary damages." But this does not reach the question under consideration, which is whether the jury were entitled to consider the reiteration of the accusation in judging of the question of malice.

There are authorities which hold that, if a plea of justification be withdrawn, it is out of the case for all purposes, and the jury are not entitled to consider it in aggravation of damages. *Gilmore v. Borders*, 2 How. (Miss.) 824; *Shirley v. Keathey*, 4 Cold. (Tenn.) 29. We find difficulty in adopting the reasoning of decisions which hold that a defendant may go on record as reiterating a libel, and escape all responsibility by withdrawing it at the last moment. In *Warwick v. Foulks*, 12 M. & W. 507, an action for false imprisonment, there was a plea of justification that plaintiff had committed a felony; but the plea was abandoned at the trial. The jury were instructed that the putting of such a plea on record was a persisting in the charge and was to be considered by them in assessing damages; and this instruction was upheld.

To the same effect is *Smith v. Compton*, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480, decided by the Court of Errors and Appeals. In that case, which was a suit for breach of promise, the defendant, in response to a demand for a specification of defenses under section 116 (now 104) of the practice act (P. L. 1903, p. 567), served notice that he proposed to show, among other things,

that he had lawfully rescinded the contract because of discovering that plaintiff was not of good moral character. This notice was not filed before the opening of the trial, and at about that time defendant's counsel informed the plaintiff's counsel that the particular specification would not be relied on. Plaintiff's counsel was nevertheless permitted to offer it in evidence in aggravation of damages; and this was sustained by the court of review on the theory that the specification had a tendency to humiliate plaintiff in the estimation of her counsel and made it necessary to inform her witnesses that her character would be attacked—a precise parallel to the present case, and stronger, in that the paper in question was not a court record open to the world, but a mere notice as between the parties, so far as related to any act of defendant or his counsel.

We think it is clear that the placing on record of the second plea reiterating the truth of the charges contained in the petition was a fact that the plaintiff was entitled to place before the jury as evidence of malice. The fact that it was withdrawn by leave of court does not help the defendant. All that that withdrawal accomplished was to modify the record on which the case was to be tried, by depriving the defendant of any right previously existing by virtue of this plea of putting in evidence the truth of the statements of the petition. The effect would have been practically the same had defendant simply announced that he would offer no evidence in support of the second plea, and plaintiff dismissed his witnesses. In either case the fact would remain for the consideration of the jury that defendant had formally, in writing, and of record, reiterated a statement which by his withdrawal of it at the trial he conceded to be false.

It is urged for defendant that the plea was invalid in form as a plea of justification, in that it simply alleges generally the truth of the charges, without stating specific facts; and no doubt this is true. 1 Chitty, Pl. 494; Fodor v. Fuchs, 77 N. J. Law, 92, 71 Atl. 108. But we fail to see that the question of the legal sufficiency or otherwise of the plea as a pleading has any relation to the libelous character of the statement it contained.

We conclude, then, that the trial court should have permitted the plea that was withdrawn to be put in evidence and read to the jury, and that injurious error resulted from its exclusion.

This disposes of the only assignment of error requiring a reversal. We find no other injurious error either in the charge or in the course of the trial that is properly brought up for review.

The judgment will be reversed to the end that a venire de novo issue.

CITY OF ELIZABETH v. CENTRAL R.
CO. OF NEW JERSEY.

(Supreme Court of New Jersey. Nov. 1, 1911.)

(Syllabus by the Court.)

TRIAL (§ 169*)—TAKING CASE FROM JURY—
DIRECTION OF VERDICT.

In order to warrant the direction of a verdict for a defendant, it should appear that the evidence offered by the plaintiff to sustain his case was clearly insufficient to justify a verdict in his favor, and that a verdict rendered for the plaintiff thereon would be set aside as unsupported by the evidence or against the weight of it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 378-380; Dec. Dig. § 169.*]

Case Certified from Circuit Court, Union County.

Action of ejectment by the City of Elizabeth against the Central Railroad Company of New Jersey. Heard on case certified from the Union county circuit court. Rule to show cause why verdict for plaintiff should not be set aside ordered discharged.

See, also, 79 N. J. Law, 542, 77 Atl. 529.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

James O. Connolly and Frank Bergen, for plaintiff. Frederic J. Faulks and Richard V. Lindabury, for defendant.

BERGEN, J. The plaintiff brought this action in ejectment to recover possession of a tract of land which it claims is a part of a public highway in the city of Elizabeth, now called Elizabeth avenue, of which the defendant now has the possession. The highway is a very ancient one, having been established by the colonial Legislature in 1765 (Allinson's Laws, p. 269), and then and now runs across a tract of land designated as the "Old Point Tract" to the "edge of the Sound"; i. e., Staten Island Sound. The present dispute is the location of the high-water mark of the Sound when the highway was laid out. The defendant claims to hold the land under a grant from the riparian commissioners made to it in 1874 of a tract of land lying between the original high-water line of the Sound and the exterior wharf line as established by the commissioners, and insists that this conveyance embraces the locus in quo within its boundaries, if the original high-water mark in 1685 was as far north of the present shore line as it claims, and therefore that the entire tract in dispute lies between the original "edge of the Sound" and the present shore line. It is not necessary to pass upon the legal sufficiency of defendant's grant, because the questions certified can be properly disposed of on other grounds, and therefore no opinion is expressed on that matter. The issue at the trial and the one submitted to the jury was the location of the high-water mark when the highway was laid out, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that is the only phase of the case we are called upon to consider in the present proceeding. The jury returned a verdict for the plaintiff, and the trial court allowed a rule to show cause why the verdict should not be set aside upon the ground that it was contrary to the weight of the evidence, reserving all bills of exceptions taken at the trial, which rule was later so amended as to require the plaintiff to further show cause why the judgment entered on the verdict, before the rule was allowed, should not be vacated. Subsequently the defendant applied for an order, which was allowed, permitting it to waive all bills of exceptions sealed to the refusal of the court to direct a verdict for the defendant as to the whole, or a part of the locus in quo. The trial court, conceiving that difficult and doubtful questions of law were raised founded on its refusal to direct a verdict for the defendant, either as to the whole, or a portion of the locus in quo, certified to this court for its advisory opinion the following questions: "(a) Whether a new trial should be granted because of the refusal of the court to direct a verdict for the defendant for the whole of the locus in quo? (b) Whether a new trial should be granted because of the refusal of the court to direct a verdict for the defendant for so much of the locus in quo as lies to the southeast of a straight line drawn across the same from northeast to southwest distant from the northwesterly side thereof 66 feet on the northeasterly line and 92 feet on the southwesterly line."

In order to warrant the direction of a verdict for a defendant, it should appear that the evidence offered by the plaintiff to sustain his case was clearly insufficient to justify a verdict in his favor, and that a verdict rendered for the plaintiff thereon would be set aside as unsupported by the evidence or against the weight of it. *Hartman v. Alden*, Ex'rs, 84 N. J. Law, 518; *McCormack v. Standard Oil*, 60 N. J. Law, 243, 245. 37 Atl. 617. So, if there be any evidence from which the jury could properly infer that the original high-water mark was south of the locus in quo in 1765, then contradictory testimony offered by the defendant would raise a disputed question of fact, and not a doubtful question of law. The defendant claims that, not only did the plaintiff fail to show any title to the land in controversy, but, on the contrary, defendant's case conclusively demonstrated that, when the road was laid out, its terminal point, the edge of the Sound, was north of the locus in quo, and that all of the locus in quo was an alluvial formation, which the defendant argues is subject to the right of the state to grant, and that, if the evidence was not absolutely conclusive, it so overweighed that offered by the plaintiff as to require the setting aside of the verdict in its favor. The burden of showing the location of the original high-water mark is on the defend-

ant (*Elizabeth v. Central R. R. Company of New Jersey*, 79 N. J. Law, 542, 77 Atl. 529), and, in order to entitle it to a directed verdict on that ground, it must establish that fact so clearly as to place it beyond reasonable doubt.

The plaintiff, in order to support its case, produced at the trial an ancient map made in 1797 called the "De Camp map," on which was protracted, but without courses or distances, the ancient highway, showing that it ran to the Sound. It appears from this map that on the westerly side of the avenue there is a monument, placed there in 1690 or 1691, the date marked thereon appearing to be 1691. This monument is still in existence, well preserved, and the accuracy of its location is not disputed. This map, called in this case the De Camp map, is drawn to a scale, and the distance from the monument along the ancient highway to the Sound, ascertained by scaling the map, is substantially the distance at the present time between the two points, so if the map is accurately drawn, according to the scale stated on it, it would be quite persuasive that the original high-water mark is now where it was in 1765, which is south of the locus in quo. In 1797 the land belonged to John Stites, Aaron Ogden, and Jonathan Dayton, as tenants in common, and in 1802 Dayton conveyed his interest in the tract lying on the east of the avenue to Thomas Gibbons, which is described in the deed as "beginning on the northeast side of the Old Point Road six rods, north fifty two degrees, twenty minutes east, from the stone marked R. T. 1690, which is a corner of land belonging to Thomas Crowell, from said beginning, running along the northeast side of the road south thirty two degrees and forty five minutes east, thirty four chains and sixty eight links more or less to the edge of the Sound, and one chain more into the Sound," and then, following numerous courses and distances, to a large white oak tree, "being the northerly corner of the Old Point Farm." It thus appears that in a deed made in 1802, the distance from the old monument to the Sound substantially corresponds with the present distance from the monument to the Sound, and that the same result is reached by scaling a map made five years earlier. In addition to the above there were other deeds and maps from which an inference may be drawn that the measured distance from the old monument to the high-water line has remained practically the same for over a century, so, if the proofs offered by the plaintiff have any evidential force, they tend to show that, contrary to the claim of the defendant, the entire locus in quo has always been located above the present high-water mark of the Sound, and, if this be true, the plaintiff has conclusively established its right to the land in dispute. But the defendant claims that it has met this testimony by such a preponderance of evidence

as to justify the disregarding of the finding of the jury for the plaintiff, and the setting aside of the verdict, upon the ground that it is against the weight of the evidence. The accuracy of the De Camp map is assailed, and, it is claimed, its evidential value is destroyed, by the testimony of Mr. Quien, who made a survey of the tract in the year 1870, which he claims demonstrates that De Camp had located the white oak tree about 70 feet south of its proper place. He did not find the oak tree, for that had disappeared many years ago, nor anything to indicate its location, at the point fixed by him, except a depression in the ground about 70 feet north of the place where the De Camp map locates it, and, if he be correct, then the distance along the highway between the Sound and the old monument would be 65 feet less than the De Camp map and the deed of 1802 calls for, and this would bring the original high-water mark through the locus in quo at a point, about 70 feet north of the present shore line. If this error is not clearly demonstrated, then the inaccuracy of the map is not conclusively shown. As the De Camp map substantially follows the field notes made for the commissioners of whom De Camp was one, appointed in 1790 to partition the land adjacent to the highway, it is assumed by the defendant that the map was made from such field notes, but the map and notes do not exactly correspond, and as the map is indorsed, "surveyed Novem. 1797," at the request of the owners, and the partition was reported in 1790, no conclusive presumption arises that the defendant's assumption is correct. The field notes of the 1790 survey and which the Supreme Court justice who appointed the commissioners directed should be recorded in the office of the clerk of the county of Essex contains the description of a large tract of land across which the highway ran to the Sound, which begins at the stone monument and runs from thence westerly and easterly four courses to the Elizabeth Town creek, and then, returning to the beginning point, runs easterly two courses, and then "(3) north forty eight degrees west eleven chains and thirty six links to James Rickett's land; thence (4) north fifty six degrees and thirty minutes east forty seven chains and ninety links * * * to a white oak tree, a reputed old corner."

The errors which Mr. Quien claims to have discovered are that the fourth course above set out measures about a chain less than that called for by the notes and map, and he finds such a variance in the bearings of the fifth course that its proper termination at the oak tree is about 70 feet north of that called for in the ancient documents. That the survey made by Mr. Quien is not indisputably correct, or even entitled to much consideration as evidence, is exhibited by his testimony, which is that when measuring the third course he started it from a point which

he assumed had been correctly located by another surveyor, and, when he was asked whether he knew that it was correctly located, answered, "Well, the surveys made at various times shows there must have been some accuracy to it because they do not vary." It does not appear that he measured to the point called for in the original field notes, but to what he assumed to be the original line of the Old Point tract as established by other surveys. Then, again, in the fifth course he did not follow either the bearings contained in the field notes of 1790, nor the course called for therein as modified by making the proper allowance for the period that had elapsed between 1790 and 1870. It cannot be said as a matter of law that the accuracy of such survey has been so clearly demonstrated as to remove that question from the consideration of the jury, or to entitle it to so much weight as to justify the conclusion that a finding in favor of the old records is against the weight of the evidence.

It is also urged that the deed of 1802 has no force because it was prepared from the De Camp map, and that the distance called for by the deed along Elizabeth avenue, where no figures appear on the map, was undoubtedly obtained by scaling the map, but that inference has no fact to support it. If we enter the realm of probabilities, it is more likely that the distance was measured, and that the deed accurately describes the length of the line. It is quite contrary to common experience to prepare a deed from the scaling of a map, rather than from actual measurements which can conveniently be made. Mr. Harrison was called as an expert, but much of his testimony is rested upon the correctness of the conclusions reached by Mr. Quien, and the testimony with reference to the coast survey is far from convincing. The case is one of fact, the jury heard the evidence offered by both parties, and have drawn the inference which they declared by their verdict, which we think is justified by the evidence, and in our opinion the defendant has not overcome the plaintiff's case by any such preponderance of evidence as to support a finding that the plaintiff failed in making out its case, or that the defendant so established the location of the original high-water mark at either of the places claimed by it as to require us to say that the verdict is contrary to the weight of the evidence.

As in our opinion the verdict of the jury, that the whole of the locus in quo is the property of the plaintiff, is supported by testimony, and such testimony has not been met by any such preponderating evidence as to justify us in concluding that the jury had not sufficient evidence upon which to rest their verdict, it becomes unnecessary to consider the second question certified, namely, that the verdict should have passed for

the defendant as to a part of the locus in quo.

The trial court is therefore advised that there was no error in refusing to direct a verdict on either of the grounds certified, and that the rule to show cause should be discharged.

CHANCELLOR OF STATE OF NEW JERSEY v. MORRIS.

(Supreme Court of New Jersey. Oct. 27, 1911.)

(Syllabus by the Court.)

VENUE (§ 19*)—PLACE FOR TRIAL IN GENERAL—STATUTORY PROVISIONS.

Under section 202 of the practice act (P. L. 1903, p. 590), the venue may be laid by the plaintiff in any one of four counties according to the fact, but, if one only of the contemplated situations in fact exists, the venue must be laid accordingly which will be the place of trial, unless changed by the court under section 203.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 19.*]

Action by the Chancellor of the State of New Jersey against Benjamin P. Morris. Heard on demurrer and motion for change of venue. Judgment for plaintiff on the demurrer, and motion for change of venue granted.

Argued June term, 1911, before GARRISON and TRENCHARD, JJ.

William M. Clevenger, for plaintiff. Hugh B. Reed, for defendant.

GARRISON, J. To the declaration filed in the name of the Chancellor in an action on a receiver's bond the defendant demurred, and also moved to strike out the assignments of breach. Without passing upon the propriety of this joinder, we have, since no objection was interposed by the plaintiff, considered the several grounds urged against the declaration, with the result that judgment is given for the plaintiff on the demurrer, and the defendant takes nothing by his motion.

The defendant also moved that the venue, which was laid in Atlantic county, be changed to Monmouth county, where the defendant resides. The venue as laid is sought to be justified upon the ground that the receiver's creditors in whose interest the action is brought are residents of Atlantic county. Such creditors are, however, not parties to the action, hence the place of their residence was not to be considered in laying the venue, which under the two hundred and second section of the practice act might be either (1) the county in which the plaintiff resides, or (2) in which the defendant resides, or (3) in which the cause of action arose, or (4) in which process was served on a nonresident defendant.

In the present case the venue should have been laid in the county in which the defend-

ant resides, since none of the other contingencies existed. Neither the residence of the Chancellor as an individual nor the state capital is within the meaning of the statute; moreover, no one has moved to have the place of trial in either Morris or Mercer county. The cause of action cannot be said to have arisen in any particular county; and the defendant is not a nonresident. There being therefore but one place where the venue could properly be laid under the statute, there was no right of choice in the plaintiff, and no room for the discretion of the court under the two hundred and second section. Assuming that the convenience of the persons for whom the action is brought will be considered under the two hundred and third section as if they were plaintiffs, the convenience of the defendant is equally entitled to consideration; and where the conveniences offset each other, the statutory venue should prevail. The venue must be changed to Monmouth county, not for the convenience of the defendant, but because there was no authority to lay it elsewhere, and no sufficient reason has been shown for a change of the venue in conformity with the statute.

DUNBAR v. BOARD OF EXCISE OF ELIZABETH et al.

(Supreme Court of New Jersey. Oct. 20, 1911.)

1. INTOXICATING LIQUORS (§ 71*)—MALT LIQUOR LICENSES—CANCELLATION—GROUNDS.

Under Inns and Taverns Act, § 36 (2 Gen. St. 1893, p. 1793, § 35), making denial of a license final for one year is limited to the kind of license refused, and a malt liquor license issued to A. cannot be set aside because a license to keep an inn or tavern at the same place was refused within the preceding year to B.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 71.*]

2. INTOXICATING LIQUORS (§ 64*)—STATUTORY PROVISIONS—APPLICABILITY.

Malt Liquors Act, § 2 (2 Gen. St. 1895, p. 1797, § 61), requires an applicant for a license to state that he will keep a quiet and orderly house. Malt Liquors Act, § 14 (2 Gen. St. 1895, p. 1799, § 73), provides that such act shall not apply to cities in which laws are in force regulating the sale of the liquor mentioned. *Held*, that cities in which such laws became effective after the act was passed are included by section 14, as well as those in which such laws were in force when the act was passed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 64.*]

Proceeding by Alexander P. Dunbar against the Board of Excise of Elizabeth and another to set aside a malt liquor license. Writ dismissed.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

William D. Wolfskill and William F. Groves, for prosecutor. John J. Stamler, for defendants.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

SWAYZE, J. [1] The prosecutor seeks to set aside a malt liquor license granted by the board of excise to James Focarile. The first reason alleged is that a license to keep an inn or tavern at the same place was refused within the preceding year to Michael Focarile. This objection cannot prevail. Section 36 of the inns and taverns act (2 G. S. p. 1793, pl. 35) is expressly limited to the very kind of license that is refused. *Cramer v. Sooy*, 67 N. J. Law, 107, 50 Atl. 685. In the present case the character of the license is entirely different from the one that was refused when applied for by Michael Focarile. It is a malt liquor license, not a license to keep an inn and tavern. And the present applicant is not the person whose application was rejected, nor shown to be connected with him.

[2] The second objection is that the applicant did not swear that he would keep a quiet and orderly house, as required by section 2 of the malt liquors act (2 G. S. p. 1797, pl. 61). It is argued that this section applies to Elizabeth, notwithstanding the fourteenth section (2 G. S. p. 1799, pl. 73), which enacts that the provisions of this act shall not apply to any city in which laws are in force regulating the sale of the liquor mentioned. This argument can only be valid if section 14 excludes only municipalities in which such laws were in force at the time the act was passed. Such a construction is too narrow. The intent evidently is to exclude municipalities in which such laws are at any time in force. We have held that even the use of the word "heretofore" in a statute does not necessarily point to a time prior to the passage of the act. *Butler v. Montclair*, 67 N. J. Law, 426, 432, 51 Atl. 494, and cases there cited. If this construction were at all doubtful, the question would be set at rest by the act of 1909 (P. L. p. 98), to establish an excise department in certain cities. Elizabeth is included within the cities affected by the act, the constitutionality of which has been sustained. *Wilson, Attorney General, v. Fromm*, 78 Atl. 193. This act empowers the board of excise to prescribe by ordinance the form of application to be used. This the board has done, and the applicant has complied with the requirements of the ordinance.

The writ must be dismissed, with costs.

TAPSCOTT et al. v. McVEY.

(Supreme Court of New Jersey. Oct. 20, 1911.)

(Syllabus by the Court.)

BROKERS (§ 48*)—RIGHT TO COMMISSION—CONTRACT OF SALE.

A contract under seal between vendor and vendee of real estate contained a provision that the plaintiffs were recognized by the vendor, the present defendant, as the brokers in the transaction, and entitled to 2½ per cent. on the amount the property sold for. Held, that the plaintiffs were entitled to recover the

specified commission, whether the contract was regarded as one made between others for their benefit, or as a contract between plaintiffs and defendant. *Stout v. Humphrey*, 69 N. J. Law, 436, 55 Atl. 281, distinguished.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 48.*]

Appeal from District Court.

Action by Clarence S. Tapscott and others against Lucy C. McVey. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued June Term, 1911, before SWAYZE and BERGEN, JJ.

Robert Newton Crane, for appellant. Vincent W. Nash, Jr., for respondents.

SWAYZE, J. The plaintiffs sued in the district court for commissions on a sale of real estate. An agreement in writing under seal was made between the vendor and vendee, which contained this language:

"And it is further agreed by the parties hereto that the said deed shall be delivered and received at the office of Tapscott Bros., who are hereby recognized by the party of the first part [the defendant] as the brokers in the transaction and entitled to 2½ per centage on the amount the property is sold for."

The agreement purports to be made in triplicate, but is in fact executed only by the parties of the first and second part. We think there can be no doubt that the provision was intended for the benefit of the plaintiffs. Properly construed, it must import an obligation on the part of the defendant to pay the commission agreed upon. If the words do not mean that, they mean nothing, and, while there is no express promise to pay, a recognition by the defendant that they are entitled to the amount can only be made effective by her making good their recognized title to the commissions. By the statute they are entitled to maintain their action, although the contract for their benefit is made between other parties, and the consideration need not move from the plaintiffs. P. L. 1902, p. 709. There was an undoubted consideration as between the vendor and vendee. If, however, the case can be regarded, not as a contract between the vendor and vendee for the benefit of the plaintiffs, but as a contract between the plaintiffs and defendant, that contract is enforceable. The difficulty in *Stout v. Humphrey*, 69 N. J. Law, 436, 55 Atl. 281, was lack of consideration for the subsequent promise. The court did not hold that such a promise would not be binding in the case of a formal contract where no consideration is needed. The distinction was suggested in *Alpern v. Klein*, 76 N. J. Law, 53, 68 Atl. 799. This case is one of a formal contract under seal, where no consideration is needed, or, to use the less accurate language of some of the text-books, where the seal imports a consideration.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contract between vendor and vendee seems to have been fully performed by the delivery and recording of the deeds. It makes no difference, as far as the rights of the plaintiffs of record are concerned, that the title to the land in Washington conveyed to the defendant in exchange may be defective. The plaintiffs are in no way responsible for that defect, and she must rely upon the covenants for title in her deed.

The objection that the title to land came in question in the district court is without force. Even if it had, the district court had jurisdiction. Section 30 of the district court act gives jurisdiction of every suit of a civil nature at law, where the matter in dispute does not exceed \$500. P. L. 1910, p. 228. This is very much broader than the statute relating to the court for the trial of small causes, which was under consideration in the cases cited by appellant.

The judgment is affirmed, with costs.

M. L. SHOEMAKER & CO. v. BOARD OF HEALTH OF GLOUCESTER CITY.

(Supreme Court of New Jersey. Oct. 20, 1911.)

(Syllabus by the Court.)

1. LICENSES (§ 6*)—BOARDS OF HEALTH—POWER TO LICENSE.

Boards of health have no power to require that wagons used for gathering and removing slaughterhouse refuse and the like be licensed by them.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.*]

2. LICENSES (§ 7*)—TAXATION FOR REVENUE—POWERS OF BOARDS OF HEALTH.

A license fee of \$50 for each wagon engaged in gathering and removing slaughterhouse refuse and the like is for revenue, and an exercise of the taxing power unwarranted by the statutory powers of boards of health.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

Certiorari by M. L. Shoemaker & Co. against the Board of Health of Gloucester city to review an ordinance to defendant board. Ordinance set aside.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

Wescott & Wescott, for prosecutors. Charles W. Letzgu, for defendant.

SWAYZE, J. [1] The ordinance of the board of health under review requires a license from that board for the gathering and removing of slaughterhouse refuse, and imposes a license fee of \$50 for every wagon. The power of the board of health is to be found in section 12 of the act as amended in 1892. 2 G. S. 1895, p. 1644, pl. 49. We find no power therein given to impose license fees of this kind. The nearest approach to such power is in paragraphs 4 and 5, which authorize the board to regulate, control, and

prohibit the keeping or slaughtering of all kinds of animals, and the accumulation of offal and all decaying or vegetable substances. But these powers do not authorize the licensing of wagons to remove offal and the like. The method provided by the act of enforcing the ordinances of the board of health is by prescribing a penalty for their violation. G. S. p. 1638, pl. 18. When the Legislature meant to authorize the board to license an employment, it said so in express language, as in the supplement of May 9, 1889 (G. S. p. 1643, pl. 46), which authorizes them to license persons engaged in the business of cleaning cesspools and privies, and to require all vehicles used in the business to be approved by the board.

[2] There is another fatal objection to this ordinance. A license fee of \$50 for each wagon is obviously imposed for revenue. It is an exercise of the taxing power, and not of the police power. License fees cannot be imposed for revenue in the absence of statutory authority. *North Hudson County Railway v. Hoboken*, 41 N. J. Law, 71, a case often cited, and approved by the Court of Errors and Appeals in *Johnson v. Asbury Park*, 60 N. J. Law, 427, 39 Atl. 693. No power to impose license fees for revenue is given to boards of health.

The prosecutor has shown sufficient injury peculiar to itself to entitle it to question the ordinance (*Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240); and since the objections to the ordinance are such that it is inherently invalid as applied to any state of facts, the prosecutor was not obliged to wait until he had been convicted of a violation. *Central R. R. Co. v. Elizabeth*, 70 N. J. Law, 578, 57 Atl. 404; *Rosencrans v. Eatontown*, 77 Atl. 88. The ordinance is set aside, with costs.

JEFFERSON v. HOTEL CAPE MAY.

(Supreme Court of New Jersey. Oct. 20, 1911.)

(Syllabus by the Court.)

PARTIES (§ 95*)—OBJECTIONS AND AMENDMENT.

After a plea of misnomer, the plaintiff may be allowed to amend summons and declaration upon payment of costs.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160-166; Dec. Dig. § 95;* Process, Cent. Dig. § 234.]

Action by Matthew Jefferson, administrator, against the Hotel Cape May. Motion to amend summons and declaration. Amendment allowed on condition.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

John W. Wescott, for the motion. John H. Backes, opposed.

SWAYZE, J. This is a motion to amend a summons and declaration by substituting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

"Cape May Hotel Company" for "Hotel Cape May" as the name of the corporation defendant. The case differs from *Maitland v. Worthington*, 59 N. J. Law, 114, 35 Atl. 759, in the fact that here there was an actual service of summons, and the only error was in naming the corporation. The proper officer must have been served, since the Cape May Hotel Company appears and files a plea in abatement of misnomer. At common law, even in the absence of a statute like ours, an amendment was permitted after a plea of misnomer. *Tidd's Practice*, 697; 1 *Chitty Pleading*, 463, 464. *Mestaer v. Hertz*, 3 M. & S. 450, notable for a clear statement by Lord Ellenborough. We decided *Maitland v. Worthington* prior to the practice act of 1903. At that time an amendment of the summons was authorized only when there had been a mistake in the service, and our opinion emphasized that fact. It was of controlling force, since the effect of the mistake was that the desired defendant had not been brought into court, and a new summons was required. By section 53 of the act of 1903, a new summons may be ordered where an error is made in the issuing or service. P. L. 1903, 549. The change was very likely due to the decision in the *Maitland Case*. The present plaintiff, however, does not need to appeal to the statute. His summons has been served upon the proper officer of the corporation, and the corporation, has pleaded to the declaration. This is very different from *Maitland v. Worthington*, in which there never was service upon any one and only an order of publication, or *Hubbard v. Montross Metal Shingle Co.*, 79 N. J. Law, 208, 74 Atl. 254, where the effort was to change the party defendant from a corporation to two individual defendants, and there was not, as indeed there could not be, a plea of misnomer. In this case the Cape May Hotel Company in the very beginning of its plea avers that the plaintiff has commenced his action against it by the name of Hotel Cape May. The plaintiff does not seek by amendment to change the party defendant or to bring in new parties, but only to describe by its proper name a defendant already in court.

The amendment is allowed upon condition that the plaintiff pay the costs of the plea and of this motion.

PAYNE v. TWITCHELL.

(Supreme Court of New Jersey. Sept. 29, 1911.)

(Syllabus by the Court.)

BROKERS (§ 63*)—RIGHT TO COMMISSIONS—EVIDENCE.

One who has agreed in writing to pay another a commission for securing a buyer for his land does not escape paying the agreed com-

mission by the mere fact that he had conveyed the land before the commission was earned.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

Appeal from District Court of Passaic.

Action by James S. Payne against William S. Twitchell. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1910, before GARRISON, SWAYZE, and VOORHEES, JJ.

Randal B. Lewis, for the appellant.

GARRISON, J. The appellee recovered a judgment for \$175 against appellant for commissions under the following written contract:

"Wortendyke, N. J. August 18th, 1909.

"I have a description of my property 20 acre farm at Wortendyke, N. J. entered on the books of James S. Payne and I agree to pay him a commission of Five per cent if he secures a buyer for the same at a price satisfactory to me. William S. Twitchell."

The pertinent facts on this appeal are that early in November, 1909, Payne secured a buyer, ready, able, and willing to buy the farm at \$3,500, and so notified Twitchell, who on October 28th had sold and conveyed the farm for \$3,500.

At the trial before the district court the defendant made motions for a nonsuit and a direction on the ground that the sale of the property prior to the production of a purchaser revoked the employment under which the commission was earned. The denial of these motions is specified as the ground for the reversal of the judgment that was rendered for the plaintiff for his commission. The appellant's contention can rest only on the notion that the employment of a person to secure a buyer implies that the principal will be able to sell to such buyer or some similar undertaking of which an essential feature is the ability of the principal to convey the land when the willing buyer is produced, whence it is argued that the inability of the principal to convey relieves him from paying what he agreed to pay for a particular service that has been fully performed.

The fallacy of this argument arises from a misconception of the nature of the employment under which the commission was promised. In such an employment the principal does not bind himself to sell or even stipulate that he will be able to convey, and he confers upon the person he employs no authority so to bind him. It is not even necessary to the validity of such contract to pay commissions that the promisor should be the owner of the land, or be able to control the title, or even that he shall contemplate its sale. The sole effect of the principal's ownership of the land is that his agreement to pay commissions must be in writing. *Sadler v. Young*, 78 N. J. Law, 594, 75 Atl. 800, is a direct illustration of such an employment by one

who was not the owner, and could neither convey the land to the buyer secured under his contract or prevent it being conveyed to a stranger. It is, of course, true that the employment of another to find a buyer of real estate is usually the act of an owner who expects to sell at a satisfactory price, but, as in *Sadler v. Young*, the agreement to pay for the required service may be the act of one who is not the owner, but is merely interested in producing a purchaser, and from the legal point of view the principal need have no interest in the land at all, may even, to suppose an extreme case, desire to get rid of a disagreeable neighbor by finding a purchaser who will buy his house. He agrees to pay for certain services. Why he wants them is his affair, and does not enter into the agreement to pay for such service as the employment calls for. The legal significance of this is that, inasmuch as an agreement to convey or even the ability to convey the land in no wise enters into the promise to pay the commission, the conveyance of the land by the principal if he be the owner, or by its owner, whoever he may be, has of itself no tendency to rescind the agreement to pay for the stipulated service. Such a conveyance may, of course, be an all-sufficient reason why the principal is no longer interested in the result of the employment he has set on foot by his agreement, and hence why he should terminate such agreement by giving notice of his change of mind, but the mere state of mind of one party to a bargain unless communicated to the other party in no wise alters the obligation of a subsisting contract between them. That the revocation of an authority normally takes effect as between the parties only from the time when the party who has determined upon such revocation makes his determination known to the other is the doctrine of the civil law.

Story deals with the question at length in his work on Agency (4th Ed.) § 470 et seq., citing fully from Pothier and Domat, and showing that the rule of the civil law was the rule of the common law, and it may be added the rule of common sense and common honesty.

As soon as we get rid of the notion that the ownership or control of the land is an essential part of the agreement by one person to pay another for performing a specified service, we see at once that such employments are in law assimilated not with agreements touching interests in land or even strictly speaking with the relation of principal and agent, but rather with those special employments by which one is engaged to seek out a particular person or a person answering to a particular description, and bring such person into communication with his employer. A person who has been injured in a collision may desire to be put into communication with those who witnessed the accident. A

solicitor may be seeking the heir to an estate, a mother may wish to have her child adopted, and a host of such cases may be imagined in all of which the character of the employment is not legally distinguishable from that of one who desires to be put in touch with a person who will pay a certain price for a certain piece of land. Yet I apprehend that no one would think of saying that the price stipulated for the service when rendered need not be paid if the plaintiff had settled his damage suit, or the solicitor had retired from the case or the mother had decided to keep her child. The rule of law, although it has been dignified by the citation of Story and the civil lawyers, is really all summed up in the homely saying that "a bargain is a bargain," and a bargain once made, remains such until a change of mind by one party known only to him has been communicated to the other party.

The fact of such communication in the present case is not found in the state of the case and is negatived by the intendments necessary to support the judgment.

The same is true as to the fact that the appellant had employed several brokers to find buyers for his farm, which is not only not found as a fact, but which standing alone would be without significance. In order to invoke the special rule that has been applied in cases where the sale was effected by one of such several brokers, the fact that the sale was so made is the crux of the rule. In the present case, not only does such fact not appear, but, on the contrary, it is expressly negatived by the state of the case which sets forth that the sale was made by the appellant himself.

This is fatal to the constructive contract suggested in *Vreeland v. Vetterlein*, 33 N. J. Law, 247, and that has been applied by courts elsewhere. 19 Cyc. p. 260; *Rowan v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Am. & Eng. Ann. Cas. 884; *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, 9 Am. & Eng. Ann. Cas. 431; 23 A. & E. Enc. p. 914.

The judgment of the Passaic district court is affirmed.

WEST SHORE R. CO. v. STATE BOARD OF ASSESSORS.

(Supreme Court of New Jersey. Nov. 3, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 376*) — ASSESSMENT — FRANCHISES — RAILROADS.

In determining the value of the franchise of an interstate railway for purposes of taxation, the value of the franchise of the railway as a whole is to be determined by deducting from the value of the capital stock and outstanding securities the value of the tangible property according to the rule in *Central Railroad v. State Board of Assessors*, 49 N. J. Law, 1, 7 Atl. 306, and, where the value of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexed

the different parts of the road is substantially in proportion to mileage, the franchise within this state may be valued at such a proportion of the total franchise value as the mileage in this state bears to the total mileage.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 629-631; Dec. Dig. § 376.*]

2. TAXATION (§ 166*)—SITUS OF PROPERTY—DOMICILE OF OWNER.

Boats owned by a foreign corporation and having no permanent situs in this state are taxable at the domicile of the foreign owner, and not in this state.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 166.*]

Certiorari on the application of the West Shore Railroad Company to the State Board of Assessors to review a tax assessment. Assessment corrected.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

Vredenburg, Wall & Carey, for prosecutor. John R. Hardin, for defendants.

SWAYZE, J. The prosecutor complains of the valuation of its franchise and of the assessment to the West Shore Railroad Company of four ferryboats and five car floats owned by the New York Central Railroad Company and taxed in New York.

[1] The railroad extends from Weehawken to Buffalo, a distance of 424 miles, of which only 19.374 are in New Jersey. It is leased to the New York Central & Hudson River Railroad Company for 475 years from 1885, with the privilege of a further term of 500 years. The rental is the amount of the interest at 4 per cent. on \$50,000,000 of mortgage bonds which are guaranteed by the lessee. The lessee owns the entire capital stock amounting to \$10,000,000, and has a claim for \$8,000,000 for advances. The bonds sell at about par, and, although there is no market for the stock, there is no proof that it is worth less than par, or that the railroad is not good also for the \$8,000,000 floating indebtedness. The West Shore Railroad is carried on the books of the New York Central at \$68,000,000. We must assume that to be its value. The rule approved by this court in *Central R. R. Co. v. State Board of Assessors*, 49 N. J. Law, 1, at page 9, 7 Atl. 306, for ascertaining the value of the franchise, is to take the market value of the stock, add the value of the debts of the company, and deduct from the sum the value of the tangible corporate property. The property of the railroad in that case lay entirely, or almost entirely, within the state. In this case most of the property of the railroad lies outside the state. The United States Supreme Court has approved a method of taxation in such a case that treats the railroad within and without the taxing state as a whole, as, in fact, it is, and distributes the value, including the value of the franchise, in proportion to the mileage within each state. *Pittsburgh, etc., R. R.*

Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Cleveland, etc., Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041. And the same method has been approved for apportioning taxes among different counties in the same state. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Columbus Southern Ry. v. Wright*, 151 U. S. 470, at pages 479, 480, 14 Sup. Ct. 396, 38 L. Ed. 238. A similar method has been approved in the case of telegraph companies (*Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Postal Telegraph & Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49), even in a case where the franchise of a corporation was created by another state, and it derived some of its privileges from an act of Congress (*Western Union Telegraph Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116). The same rule has been applied to parlor car companies. *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613. The express company cases involved an analogous question, but went much further in sustaining the state's power to fix valuations on the property of a foreign corporation within the state with regard to the value of its property as a whole, whether within or without the state. *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960. The mileage proportion rule is subject to modification where the value of the different parts of the road is not substantially in proportion to mileage. This was recognized in the *Indiana cases* in 154 U. S., above cited, and has been recently affirmed in *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. In the present case there is nothing to show that the total value of the railroad is enhanced out of proportion to the mileage by the value of the property in New York, so that a distribution based on mileage would give New Jersey the benefit of taxing the value of property outside our own jurisdiction. As far as the evidence enables us to judge, the contrary is the case. It is probable that the value of the Weehawken terminal on the Hudson river opposite the city of New York and within this state is so great that a distribution of the valuation between the two states in proportion to mileage would give New York the advantage of including in the valuation of the portion of the railroad within that state a part of the value of this great terminal. We think, therefore, that a fair method of ascertaining the taxable valuation of the franchise in this case is to deduct the value of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tangible property from the value of the capital stock and of the securities representing the debts (mortgage bonds and floating debt), and to fix the value of the New Jersey franchise at such a proportion of the remainder as the mileage in New Jersey bears to the total mileage. The value of the tangible property in New Jersey is \$9,193,058. The only evidence we have of the value of the tangible property outside of New Jersey is a statement furnished by the prosecutor that its assessed valuation is \$10,864,083. In the absence of proof to the contrary, we must assume this to be the market value, although it seems probable that it is too low, as it amounts to less than \$27,000 per mile. The total tangible property upon these figures is \$20,060,141. After deducting this from \$68,000,000, the value of the capital stock and securities, there remains a balance of \$47,939,859, which represents the adventitious value or the value of the franchise. If this is distributed in proportion to the mileage, the portion attributable to the 19.374 miles in New Jersey is \$2,190,534. This exceeds by \$300,000 the valuation of the state board of assessors. This difference may be due to the fact that they have deducted the floating debt from the total valuation or have made some allowance because in their judgment the franchise or adventitious value of the portion in New Jersey is a less proportion of the whole than the mileage in New Jersey is of the whole mileage. The statute authorizes the board of assessors to use their personal knowledge and judgment, and, as we have said in *Central R. R. v. State Board of Assessors*, already cited, we ought not to set aside their judgment unless for palpable error.

It is urged, however, that the railroad company is entitled to net a fair return on its investment, and we are referred to decisions of the United States Supreme Court in rate cases. It has we think never been decided that a railroad company was entitled under whatever circumstances and at all events to a reasonable return on its investment. On the contrary, the courts have recognized that the mere failure to produce a profit is not of itself conclusive evidence that a rate is unreasonable, for the road may have been built in advance of the public needs at an extravagant cost, and it may be run in a wasteful manner. Considerations of this kind are suggested in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, at page 412, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Even if this were a rate case, we should have to go into the inquiries that have become familiar in those cases, for the determination of which this case presents no evidence. It is clear that the railroad company earns at least for the holders of its bonds a net revenue of \$2,000,000 a year, and bids fair to earn that for centuries to come. We

need not pursue the subject, since this is not a rate case, but a tax case. We have heretofore found no suggestion that a property owner should be excused from the payment of taxes on the proper valuation of his property because he was unable to use it to advantage and with profit. The answer ordinarily is that, if the property is worth the money, it is because some one can, or thinks he can, make it produce a profit on the valuation. A similar argument was made in the *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 683. It is stated and answered by Mr. Justice Miller. Referring to the case of one of the companies, he says: "That company is insolvent and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchises at \$2,003,415, and its tangible property at \$2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses at the sum of \$4,632,782." "Concede for the present that the capital stock is sunk and is of no value, concede that the funded debt of the company has at present no market value or is unsalable, there remains what is valued as worth over \$2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value; that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property, of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or ever will sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose?"

We are not impressed by the figures of

receipts and cost of traffic presented by the prosecutor. It may well be that the earning power of the 19 miles in New Jersey may be small considered by itself, but that by no means measures the value of the franchise for a railroad connecting the 404 miles north of our state line with tidewater opposite New York City. We can form some idea of the value of the New Jersey franchise if we think of the difference between the value of a railroad from Buffalo to Tappan without an outlet and the value of the same road with the outlet which the New Jersey franchise gives. Even in rate cases it is held that it is not necessary that every mile of the road should show a profit. *St. Louis & S. F. Ry. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567. The railroad must be considered as a whole. This road is leased to and controlled by the New York Central & Hudson River Railroad, and the two roads are parallel and within a few miles of each other for their entire length. No doubt, as the prosecutor's brief says, the West Shore is "practically a side track for the accommodation of the surplus freight of the New York Central & Hudson River Railroad." Whether it could be made more profitable if used to the same advantage as the New York Central Lines we do not know, but certainly it is within the bounds of probability, that the lessee company may use this so-called "side track" for the least remunerative business, and reserve for its own lines the more profitable. This is conjecture. We know that the lessee was willing to pay a rental of \$2,000,000 per annum and to agree to pay that sum for 475 years. A property producing such a rental guaranteed for so long a period is a very valuable property, and a large part of that value is due to the franchise to run a railroad from Tappan to Weehawken.

The argument that the franchise of the prosecutor is not taxed by a uniform rule with the franchise of other roads because the West Shore running through a sparsely settled country is assessed at \$95,000 per mile, while the Central of New Jersey and the Pennsylvania running through a thickly settled portion of the state are assessed at much less per mile, has a deceptive plausibility. It overlooks the fact that the great value of the Weehawken terminal is distributed by this calculation over 19 miles of road only, while the value of the terminals of the other roads is distributed over perhaps a hundred or more miles. If two roads have terminals of equal value, and one has five times the mileage of the other, a valuation of a mile of the shorter road must greatly exceed a similar valuation of a mile of the longer road. If the value thus put upon the New Jersey franchise is too high, it is probably because the valuation of the prop-

erty in New York is too low and the balance representing the franchise or adventitious value is thus unduly enhanced. It was for the railroad company, however, to make proof of this fact, and, in the absence of such proof, we can determine the value upon the evidence before us only.

We think the prosecutor has failed to show that the valuation of the franchise is excessive.

[2] As to the ferryboats and floats, we think the state board erred. They were not the property of the West Shore Railroad, but of the New York Central, and had no permanent situs in New Jersey. They were therefore taxable to the owner at its domicile. *Ayer & Lord Co. v. Kentucky*, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082; *American Mail Steamship Co. v. Crowell*, 76 N. J. Law, 54, 68 Atl. 752. To that extent the assessment should be corrected.

DAY v. FAULKS et al.

(Court of Chancery of New Jersey. Sept. 26, 1911.)

LIFE ESTATES (§ 15*)—CORPORATE STOCK—STOCK DIVIDENDS.

Where, after corporate stock is bequeathed to one for life, a stock dividend is declared, the new stock representing more than the earnings after the death of testator, the life tenant is entitled only to a charge thereon for the proportion thereof representing such earnings.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 34, 35; Dec. Dig. § 15.*]

Suit by William T. Day, trustee, against Angeline E. Faulks and others. Heard on bill, etc. Decree rendered.

Edward A. Day, for life tenants. Clark McK. Whittemore, for remaindermen.

STEVENS, V. C. Michael W. Devine died in November, 1895, leaving a last will by which he gave to his son Michael the shares of his estate to which two of his sons and daughters were thereunder entitled, in trust, to pay them the rents, issues, profits, and income of their respective shares during their lives, and after their deaths to pay their respective shares to their issue, or, if there should be no issue, into the residue. At the time of his death testator owned 56 shares of the capital stock of the Singer Manufacturing Company. On December 19, 1900, the company declared a stock dividend of 200 per cent. on the capital stock theretofore issued of which the par value was \$10,000,000. It thus increased its capital stock to \$30,000,000. On June 17, 1910, it made a further stock dividend of 100 per cent. the effect of which was to increase the capital stock to \$60,000,000. Pursuant to a decree of the orphans' court of Union county, the first stock dividend was apportioned according to the rule of the *Lang Case*, 57 N. J.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Eq. 328, 41 Atl. 795; fourteen shares and a fraction going to the life tenants as earnings, and the rest to the trust estate as principal. The stock allotted to principal was subsequently sold and does not enter into this inquiry. The question is: To whom do the new 56 shares belong, to the life tenants, or to the trustee as the representative of the remaindermen?

Although it has been determined, generally, that stock dividends, declared out of profits made since testator's death, go to the life tenants, the precise question here raised has not been examined or passed upon.

In *Ballantine v. Young*, 81 Atl. 119, just decided by me, I have had under consideration various questions relating to the apportionment of stock dividends and extraordinary cash dividends, and I have there referred to the numerous conflicting decisions on this perplexing subject. Until the Court of Appeals sees fit to review them and alter the rule heretofore adopted, it is not open to question in this court. I must start out with the assumption that stock dividends, declared after the death of testator, go, in so far as they represent earnings made since his death, to the life tenants.

So far there is no difficulty. But in the case in hand the question, distinctly raised I think for the first time in this court, is whether under the name of stock dividends the life tenants are entitled to anything more than earnings. This question arises under the following circumstances:

At the time of the declaration of the dividend of June, 1910, the company had a surplus of about \$45,000,000. Part of this surplus was represented by their enlarged works and part by cash, merchandise, accounts receivable, and other items. They desired to capitalize this to the extent of \$30,000,000, and so they issued the new stock which, with the old, made a total capitalization of \$60,000,000. The stock of the company, before the new issue, was selling for from \$565 to \$615 a share, and even more. After it was made, Mr. Clare says that the shares "ranged from \$300, then declined to \$285, and later sold up as high as \$355." The effect of the new issue, in the stock market, was, therefore, to reduce the value of the \$30,000,000 of old stock one-half. This will be apparent from the following figures:

300,000 shares x \$600 = \$180,000,000.

600,000 shares x \$300 = \$180,000,000.

The selling price harmonized with the fact. Whereas, before, the whole property was represented by \$30,000,000 of stock, it is now represented by \$60,000,000; in other words, two shares now represent the same proportionate interest that one formerly did, and the effect of the transaction, if all the stock had been in like case with the stock in hand, and if the contention of the life tenants be sound, would have been to have transferred to the life tenants not only the \$30,-

000,000 of earnings, but an interest equal to \$60,000,000 as well. This \$60,000,000 is nearly all capital, and so, as the result of the action of the company, the life tenant would have gotten, not only its capitalized earnings, but one-third of its capital as well. Is there any rule of law heretofore declared by this court which compels this unjust result? I know of none. The principle of the *Lang Case* is to preserve the corpus of the estate intact, and such is the principle in analogous cases. In *Ballantine v. Young* it appeared that the stock of the Central Trust Company had been selling at a large premium. There was a large surplus. The directors declared a cash dividend of 200 per cent. and, contemporaneously, directed a new issue of stock which the stockholders were at liberty to take at par and pay for with that dividend. The question was to whom the dividend and the option belonged, to the life tenants or to those in remainder. It was held that the cash dividend belonged to the life tenants (subject to the apportionment prescribed in the *Lang Case*) and that the option to purchase was part of the corpus, to be disposed of as such; but that, inasmuch as the trustees had devoted the cash dividend to the purchase of the stock, the life tenant was entitled to a charge upon it for his proportion of that dividend. The result of that transaction was, for all practical purposes, like the result of the transaction under consideration; for it was morally certain that the option would be availed of. The numerous cases, therefore (*De Koven v. Alsop*, 205 Ill. 390, 68 N. E. 930, 63 L. R. A. 587; *Davis v. Jackson*, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *Eisner's Appeal*, 175 Pa. 143, 34 Atl. 577; *Richmond v. Richmond*, 123 App. Div. 117, 108 N. Y. Supp. 298; *Brown v. Brown*, 2 Buch. 667) which hold that where the option to purchase has a money value, that value goes to the principal and not to the life tenant, are strong authorities for the proposition that whatever enters into the value of the new stock besides earnings is really principal. It would be highly inconsistent to hold that the option to purchase is capital in the one case, and that the value beyond earnings is income in the other. That the policy of the courts of this state is to preserve the principal intact for the benefit of the remaindermen appears from the following cases: *Van Blarcom v. Dager*, 31 N. J. Eq. 783; *Willard v. Willard*, 21 Atl. 463; *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333.

Some confusion of thought arises from the use of the term "stock dividend." In the very resolution under consideration it is said that the "directors declare a stock dividend of \$30,000,000." What they really do is to issue certificates whose face value is \$30,000,000, and, at the same time, to put, per-

manently and irrevocably, \$30,000,000 into capital. But the certificates thus issued, from the very beginning, represent, not the \$30,000,000 capitalized, but, like the old certificates, the entire property of the corporation. If the life tenant gets all the new stock, he gets something that represents, not a share of the earnings only, but of the entire property. To the extent that the stock represents the \$30,000,000 of surplus, he gets earnings; beyond that he gets principal, except in so far as the stock represents undivided earnings still in the treasury (a comparatively small matter) to which, however, if the company do not distribute them in his lifetime, he is not entitled.

Where the beneficial ownership is in one person only, it makes little difference whether his interest is represented by one share worth \$100, or two worth \$50; but when persons take in succession—one the income for his life, and the other the principal after his death—the court must look into the substance and effect of the transaction unless it is willing to permit a distribution of capital that was never intended by testator. I have already adverted to the fact that the Supreme Court, and other tribunals whose decisions carry great weight, have repudiated the Pennsylvania rule giving stock dividends, without reserve, to the life tenant. If this rule is to prevail here, it ought not to be extended beyond its reason. The ground upon which the rule is based is that the life tenant ought to have the earnings whenever the company makes a disposition of them. Its reason will go no further than to charge the earnings on the new stock. This will at once effectuate the intention of the testator and obviate the injustice, if it be an injustice, of letting capitalized earnings go to the remaindermen.

**MT. HOLLY SAFE DEPOSIT & TRUST
CO. et al. v. DEACON et al.**

LIPPINCOTT et al. v. SAME.

(Court of Chancery of New Jersey. Oct. 6, 1911.)

WILLS (§ 566*)—CONSTRUCTION—"MONEYS."

Testatrix, after making bequests, gave the remainder of her estate to her sister B., and then provided that, if B. predeceased her, half of all "moneys" belonging to her estate should be paid to a society, and the other half should be divided among certain persons, who included all who would have taken under the intestacy laws. *Held*, that the word "moneys" was used in the sense of property, of whatever nature, without which meaning there would be a partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1238½, 1239; Dec. Dig. § 566.*

For other definitions, see Words and Phrases, vol. 5, pp. 4554-4566.]

Two suits, one by the Mt. Holly Safe Deposit & Trust Company and another, administrators with the will annexed of Sarah H.

Woolston, deceased, and the other by Annie H. D. Lippincott and husband, both against Benjamin H. Deacon and others. Heard on bill, etc. Decree advised.

The will of Sarah H. Woolston, dated September 29, 1879, provided as follows:

"Know all men by these presents, that I, Sarah H. Woolston, of the city of Trenton, in the county of Mercer and state of New Jersey, missionary to the Chinese at Foochow, China, considering the uncertainty of this mortal life, and being of sound mind and memory, do make and publish this my last will and testament in manner and form following:

"First. I do hereby constitute and appoint my youngest sister, Beulah Woolston, to be sole executrix of this my last will and testament, providing she is in the United States of America at the time of my decease; but if my said sister, Beulah Woolston, is not in the United States of America, at that time, then I do constitute and appoint Wilson Stokes of Medford, in the county of Burlington, and state of New Jersey, to be the executor of this my last will and testament, directing my said executor to pay all my just debts, and the bequests hereinafter named, out of my estate.

"Second. I give and bequeath to my sister Rebecca Ann H. Deacon, to her and her heirs, the sum of one hundred dollars.

"Third. I give and bequeath to my sister Beulah Woolston, the sum of one hundred dollars.

"Fourth. I give and bequeath to each one of the ten children of my deceased sister Caroline B. Chew, to them and their heirs, the sum of twenty-five dollars. The shares of the younger children to remain in the hands of my executrix or executor until each one comes to the age of twenty-one years, when it shall be paid to him with interest from the time of my decease.

"Fifth. As to all the rest, residue and remainder of my estate and effects, real and personal, of what kind and nature soever, I give and bequeath the same to my said sister Beulah Woolston to be for her sole use.

"Sixth. But if my sister, the said Beulah Woolston, should not be my survivor, then I will and direct that one half of all moneys belonging to my estate shall be paid to the American Bible Society to be used in printing the Holy Bible in the Chinese language.

"Seventh. And I will and direct that the other half of all moneys belonging to my estate shall be divided into twelve equal parts; two of these parts shall be given to my sister Rebecca Ann H. Deacon, to her and her heirs, and the other ten parts shall be given to the ten children, to them and their heirs, of my deceased sister Caroline B. Chew. And I do further will and direct that the shares of such of these children as are mi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nors shall remain in the hands of my executor until each one is twenty-one years of age, when it shall be paid to him with interest from the time of my decease. And I do especially direct that my executor shall see that each one of these children receives his and her full part without any diminution whatever.

"Eighth. In case the father, Ezekial Cooper Chew, of the ten children of my deceased sister Caroline B. Chew, under any pretenses whatsoever, claim any part or portion of the share or shares of any one or more of these children, then I do will and direct that they receive only twenty-five dollars each, and the remainder of these ten shares shall be given to the American Bible Society to be used in printing the Holy Scriptures in the Chinese language.

"In testimony whereof, I hereunto set my hand and seal, and publish and declare this to be my last will and testament in the presence of the witnesses named below, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

"Sarah H. Woolston. [Seal.]

"Signed, published and declared by the said Sarah H. Woolston to be her last will and testament in the presence of us, who were present at the same time and subscribed our names as witnesses in the presence of the testatrix.

"William Hall, Trenton, N. J.

"Eugene Emley, Trenton, N. J."

Testatrix died June 11, 1910. At the date of her death she owned a small amount of real estate and owned personal estate of the value of about \$12,000. The personal estate consisted of mortgages, bank stock, and railway stock, except as to certain household goods in value about \$300 and cash in hand and in bank in amount \$378.03.

Beulah, the sister of testatrix, died, unmarried, prior to the decease of testatrix. Rebecca, sister of testatrix, died prior to the decease of testatrix, leaving two children. At the date of the decease of testatrix all of the ten children of Caroline B. Chew were alive save one, who died before testatrix, leaving nine children.

Samuel A. Atkinson, for Mt. Holly Safe Deposit & Trust Co. and John P. Lippincott. Charles Ewan Merritt, for Farmers' National Bank of New Jersey at Mt. Holly. Richard B. Eckman, for Benjamin W. Zellej. George M. Hillman, for Annie H. D. Lippincott. William P. Martin, for American Bible Society.

LEAMING, V. C. (after stating the facts as above). The controversy in these two suits, which have been heard together, is determined by the ascertainment of the intention of testatrix in the use of the expression "one half of all moneys belonging to my estate."

A great number and variety of adjudicated cases are reported in which courts have been called upon to define the meaning of the term "moneys" as used in wills. An extended review of these cases seems unnecessary. It will be found that the word may be appropriately used to mean cash only, it may also be used as the equivalent of personal estate, and it may also be used as the equivalent of property, and thus include real and personal property. In the ascertainment of the intention of a testator in the use of a word of this degree of flexibility in its popular meaning, the context of the will is of peculiar force. If it clearly appears from the context that testator used the word in either of the meanings above suggested, that meaning must be adopted.

At the date of the execution of the will here in question, testatrix had a spinster sister, named Beulah, who was engaged in missionary work among the Chinese, in which work testatrix had also been engaged for a number of years. Another sister of testatrix, named Rebecca, was then alive and married. Another sister, named Caroline, was deceased, and had left ten children. After making bequests to Beulah, Rebecca, and each of the ten children of the deceased sister, Caroline, testatrix gives the remainder of her estate to her sister Beulah. She then provides that, if her sister Beulah should not survive her, "one half of all moneys belonging to my estate shall be paid to the American Bible Society to be used in printing the Holy Bible in the Chinese language," and that "the other half of all moneys belonging to my estate shall be divided into twelve equal parts; two of these parts shall be given to my sister Rebecca Ann H. Deacon, to her and her heirs, and the other ten parts shall be given to the ten children, to them and their heirs, of my deceased sister Caroline B. Chew." It will be observed that, if testatrix used the word "moneys" in the restricted sense of cash, she necessarily intended to die intestate as to the remaining part of her estate. The presumption is against such an intent. In *Leigh v. Savidge*, 14 N. J. Eq. 124, 134, it is said: "A will ought not to be so construed as to produce such intestacy. The natural and reasonable presumption is that when a will is executed the testator designs to dispose of his entire estate, and does not intend to die intestate as to any part of his property." This presumption against partial intestacy is greatly strengthened in this case by the fact that the persons to whom the "other half" was given included all of the persons who would have taken under the intestacy laws of this state. Under these conditions it seems reasonably certain that it was not the intention of testatrix, in the event of the death of Beulah prior to the death of testatrix, to leave to the persons named all of such cash as testatrix might possess at her decease, other than that disposed of by the prior provisions

of the will, and to die intestate as to the remaining part of her property, and in that manner have the very same persons to whom the cash was given take the remaining portion of her estate under the intestacy laws. Such a purpose is so far inconsistent with the purpose which would naturally exist in the mind of one similarly circumstanced that its existence cannot be easily assumed. In this view I think it reasonably certain that the sixth and seventh items of the will were intended by testatrix as a continuation of the fifth item, dealing with the residue of her estate, with the added contingency of the predecease of Beulah, and that the word "moneys" as used by testatrix was intended by her as the equivalent of property, and was intended to include all property belonging to her at the date of her decease.

I will advise a decree in accordance with the views herein expressed.

BOURGEOIS v. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY.

(Supreme Court of New Jersey. Oct. 23, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 248*)—CONTRACTS—AUTHORITY OF AGENTS—RATIFICATION.

A contract entered into on behalf of a municipality by its unauthorized agent in excess of the powers granted to the municipality, or without observing the conditions or limitations imposed on the exercise of a granted power, cannot be ratified by the corporation, nor can it by any act of recognition raise an implied promise to carry it out, for the reason that it is without power to make an express promise, and the law will not in such case raise one by implication, but, where the contract of the unauthorized agent is one which the corporation may lawfully make, it can by ratification, or by any efficient dealing with the subject-matter amounting to an affirmation of the contract and an appropriation of its benefits to public use, create a situation from which an implied promise to pay may arise.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 684-686; Dec. Dig. § 248.*]

Appeal from District Court of Atlantic City.

Action by Annie Estell Bourgeois against the Board of Chosen Freeholders of Atlantic County. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

Garrison & Voorhees, for appellant. Bolte & Sooy, for appellee.

BERGEN, J. The plaintiff, a married woman, carrying on business in her own name, sold and delivered to the county of Atlantic lumber for the reconstruction and repair of certain bridges. The contract on

behalf of the county was made by the husband of the plaintiff, who was then one of the members of the board of chosen freeholders of the county of Atlantic, and the price agreed upon was \$45 per thousand feet. It is not disputed that the quantity of lumber claimed to have been delivered was in fact delivered, it having been inspected and measured by the bridge committee of the board of chosen freeholders, and the only objection to payment when the bills were presented related to the price, the defendant claiming that the market price of such lumber was \$40 per thousand feet, and the bridge committee, after it had made its inspection of the lumber, recommended that \$5 be deducted for each thousand feet of lumber. The defendant having refused to pay at the rate charged by the plaintiff, she brought her suit and recovered the judgment, from which this appeal was taken.

The defendant assigns several reasons for reversal; the principal one being that the chosen freeholder who ordered the lumber was not authorized either by the statute or the board of chosen freeholders to make the contract. It is not claimed that the husband of the plaintiff, as freeholder, had any express authority from the board to purchase this lumber, and, as the evidence shows that he did not observe the statute in making the repairs which it permits to be made without express authority from the board, it was a purchase of materials for the use of the county by its unauthorized agent. Two classes of purchases were made—one for the repair of bridges exceeding in cost \$50, but less than \$200, and the other where the cost was less than \$50. Section 2 of the act concerning bridges (G. S. p. 305) authorizes the chosen freeholder of the township and the freeholders of two adjacent townships to make such repairs where the cost falls between \$50 and \$500, and section 3 of the same act authorizes the overseer of the highways and the resident freeholder of the township where the bridge is located to make repairs where the cost does not exceed \$50. The act of the Legislature approved in 1891 (P. L. p. 137) commits the supervision of roads to the township committee, and confers the duties of the overseer of the highways upon that committee, and repealed all inconsistent acts, so that the overseer of the highways no longer possessed any official authority, and this condition was recognized by the revisers of the township act in 1899 (P. L. p. 372), who omitted to designate the office of overseer of the highways as one which the voters might fill at the township election, although such officer had been theretofore named as elective, and the office has been held to have been abolished. *Kinmouth v. Township of Wall*, 73 N. J. Law, 440, 63 Atl. 861.

Under section 3 of the bridge act power to make repairs at a cost not exceeding \$50 without the authority of the board of chosen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

freeholders is given to the freeholder and the overseer of the highways of the township where the bridge is located; the language used in conferring the power being, "it may be lawful for the overseer of the highways within whose limits and division the same may be and the two chosen freeholders of said township, or a major part of them, to direct such bridge to be built, rebuilt, or replaced and to superintend or contract for the doing thereof," and it may be perhaps questionable whether when the Legislature abolishes the office whose occupant is empowered to exercise a power jointly with another the latter continues to be endowed with the power so jointly conferred, but it is not necessary to solve this question in the present case, for some of this lumber was purchased for repairs exceeding in cost \$50 without the express sanction of the board or the concurrent action of the freeholders of the "two next adjacent townships," and therefore unauthorized. As the chosen freeholder in the present case did not observe the statute, in the purchase of plaintiff's lumber, where the expense of the repairs exceeded \$50, his act was beyond his statutory authority, and would not bind the board unless it assented thereto and participated in the application of the material for the benefit of the county, and, if it did so, an implied promise to pay would arise if the power to purchase has been conferred by statute upon the board.

The board not having directed the purchase, and therefore not chargeable with an express promise, the only question is, Did it subsequently so deal with the material as to raise an implied promise to pay for it? In *Swackhamer v. Hackettstown*, 37 N. J. Law, 191, the municipality was without power to borrow money, but its treasurer, having borrowed funds, gave the promissory note of the corporation for the sum borrowed, which was used for the benefit of the municipality. This court held that there could be no express promise to repay, because the municipality was without the power to borrow money, and therefore such promise would be illegal, and the law would raise no implied promise because "the corporation has not the competency to make the promise thus sought to be implied."

In *Cory v. Freeholders of Somerset*, 44 N. J. Law, 445-455, the court said: "The rule of law is that it is only when the corporation has the right to enter into the given contract that it can legalize it after it has been performed under the authority of its unauthorized agents." And in the same case it was held that notwithstanding the bridge act which authorized the resident member to repair and construct bridges not exceeding in cost \$50 the board of freeholders have the supervision of all bridges, whatever the cost may be, and have competent authority to validate payments for work of this description done in good faith, the full benefit of which has inured to the public, even if there

was a defect in the authority under which such expense had been incurred; Chief Justice Beasley saying: "The opposite view would often work inconvenience and injustice, of which this case, in the aspect of it now under consideration, presents a conspicuous example, and if the defendant has done the work in question at fair prices, in the belief that it had been legally ordered, and has been paid for it, and such payment has the sanction of the board of freeholders, still, according to the construction acted on at the trial, he could not retain such moneys, and nothing short of an act of the Legislature could enable him to do so. It would be much to be regretted if these public bodies were without the power of doing ordinary justice in these affairs which must occur not infrequently." In the case now under consideration, the board of freeholders undoubtedly had the right to purchase this material, for it has supervision of all bridges and of their reconstruction and repair, and, if this material had been ordered by the board, there could be no doubt of its liability to pay for it.

In the case of *Car Spring Co. v. Jersey City*, 64 N. J. Law, 544, 46 Atl. 649, there were two classes of bills against the city for materials furnished, neither of which was ordered by the board of street and water commissioners, the proper authority, but by their agents. As to one class, the board adopted the purchase and ordered its payment which act was held to be a ratification, and the city made liable thereby. The other class was held not recoverable because the board of street and water commissioners had no knowledge of the purchase, receipt, or use of the goods. The chancellor who delivered the opinion of the Court of Errors and Appeals said that it was an open question whether, if the board which had the power to bind the city had known of the purchase, acceptance, and use of the goods, an implied promise would have arisen under the doctrine laid down in *Swackhamer v. Hackettstown*, supra, and he expressed his opinion that it would not, but this expression was obiter as the solution of that question was not required in the determination of the case under review. In *Jersey City Supply Co. v. Jersey City*, 71 N. J. Law, 631, 60 Atl. 381, it appeared that the city had no power to contract except through the board of fire commissioners, and as that board neither ordered nor had knowledge of the purchase, saving a void resolution approving payment, it was held that no express promise was shown, and that without knowledge of the purchase or lawful action by the board approving it no implied promise arose. The rule which these cases seem to establish is that a contract entered into on behalf of a municipality by its unauthorized agent in excess of the powers granted to the municipality, or without observing the conditions or limitations imposed on the exercise of a granted power, cannot be ratified by the

corporation, nor can it by any act of recognition raise an implied promise to carry it out, for the reason that it is without power to make an express promise, and the law will not in such case raise one by implication, but, where the contract of the unauthorized agent is one which the corporation may lawfully make, it can by ratification, or by any efficient dealing with the subject-matter amounting to an affirmation of the contract and an appropriation of its benefits to public use, create a situation from which an implied promise to pay may arise. Therefore it is necessary to consider whether the board of freeholders have so dealt with the lumber furnished by the plaintiff as to raise an implied promise to pay for it, notwithstanding it was ordered by its unauthorized agent. The minutes of the board show that the bridge committee reported to the board "that lumber bill of A. Estell Bourgeois for several thousand feet of lumber and charged at forty five dollars per thousand feet had been delivered at various bridges, but on some of the bridges the work was not yet completed, and the committee is of opinion that not more than forty dollars per thousand feet should be paid for bridge plank, and the committee recommend five dollars be deducted from each thousand feet of lumber delivered by Mrs. Bourgeois, if the board can legally pay the bill, and Mr. Enderlin moved that all bills be held until such time as all work on bridges is completed. Mr. Bourgeois wanted to know whether this work could be finished under the old rules of 1910, or the new rules to be adopted at this meeting. The solicitor stated that, as the work had been started on the bridges under the old rules, it was perfectly proper that the work should be completed under the same rules. The roll call on Mr. Enderlin's motion was had and the motion of Mr. Enderlin was adopted." The Mr. Bourgeois referred to in the above minutes was the freeholder who had undertaken to repair and reconstruct the bridges with the material ordered by him from the plaintiff. We think that the foregoing action of the board amounted to an approval of the repairs and reconstruction and an assent to the use of the materials furnished by the plaintiff for that purpose, sufficient to raise an implied promise to pay for the lumber such a price as it was reasonably worth. The trial court found that such reasonable worth was \$45 per thousand feet, and there is evidence which justifies that finding.

The appellant raises other objections which require consideration. It urges that the action was prematurely brought because the bridge committee, to which the bills for the lumber were referred, had not had time to investigate and report to the board the actual quantity of lumber used. The evidence shows that this committee had measured the quantity of lumber furnished by the plaintiff for the use of the county, but was unwilling to recommend payment at the price

claimed by the plaintiff, in which recommendation the board apparently concurred, and it sufficiently appears that the committee did not intend to report the bills for payment unless a deduction of \$5 per 1,000 feet was agreed to, in fact, that appears to have been the only matter in dispute, and we therefore think there is no force in this objection. The defendant had accepted the lumber and used it for the benefit of the county, but refused to pay more than \$40 per 1,000 feet, while plaintiff demanded \$45.

The next point urged by the appellant is that rule No. 10 of the board of chosen freeholders which permits a single freeholder to make repairs to bridges in their respective districts to the extent of \$50 during the interval of the stated meetings of the board, and under like conditions to make repairs to the extent of \$100, "with the approval of one member of the bridge committee or the freeholder of the adjoining district," amounts to the delegation by the board of its discretionary power, which is not permissible. It is not necessary to determine this question for the reason that the rule is a nullity, because it undertakes to confer a power not given by the statute. Section 2 of the act concerning bridges, passed in 1846, authorizes the construction and repair of bridges costing between \$50 and \$500 by the joint action of the freeholder of the township and the freeholders of the two adjacent townships, and the board has no power to empower a single member, with the approval of one freeholder, to expend more than \$50 when the statute requires the joint action of the freeholder of the township and the freeholders of the two adjoining townships to incur any expenditure in excess of \$50. A rule authorizing the construction or repairs of bridges in a manner different from that prescribed by the act conferring such power has no legal support.

The next point relied upon by the appellant is that it is contrary to public policy to allow a husband, as a member of the board of freeholders, to contract with his wife for materials to be furnished to the county, because by virtue of a supplement to "An act for the punishment of crimes," approved May 7, 1907 (P. L. p. 292), it is made a misdemeanor for any member of the board of freeholders to be directly or indirectly concerned in any agreement or contract for the construction of any bridge or other improvement made at the expense of the public, or to be directly or indirectly interested in furnishing any goods, supplies, or property of any kind to the county. The trial court found that there was no evidence to show that the husband was the agent of the wife in furnishing the lumber, but, on the contrary, that he was the agent of the county, and therefore not interested in the sale or purchase. We are of opinion that the relations existing between a man and his wife are of such a nature as to raise a seri-

ous question whether he was not a freeholder indirectly concerned in the furnishing of material to be paid for by the public, but it is not necessary to consider this, for the law appealed to does not avoid the contract. It simply renders the member of the board who makes a contract forbidden by the statute liable to prosecution for a misdemeanor, and such action by a freeholder would not deprive the wife of her right of recovery if the board of freeholders should afterwards assent to the use of the material or should accept it and appropriate it to the proper public use.

The next objection is based upon the action of the trial court in overruling all evidence tending to show that the repairs to the respective bridges exceeded \$50, the opinion of the trial court being that, under the act of 1898 (P. L. p. 437), a member or some of the members of a board of chosen freeholders are authorized to construct and repair bridges to the extent of \$200 without being first authorized by the board, and that section 3 of the act of 1846, entitled "An act respecting bridges" (G. S. p. 306), which provides that, when the expense of erecting, rebuilding, or repairing a bridge shall not exceed \$50, such improvement may be made by the overseer of the highways and the chosen freeholders of the township or a majority of them, was abrogated by the act of 1898, and that now the member representing the township, where the bridge is situated may make repairs not exceeding in cost \$200 without calling upon the chosen freeholders of the two adjacent townships to act with him. The act of 1898 is a supplement to the act respecting bridges, and provides that no bridge shall hereafter be erected, rebuilt, or repaired by any member or members of the board of chosen freeholders where the expense thereof shall exceed the sum of \$200, unless the same shall have been authorized by the board of chosen freeholders of such county. We think that this supplement does not affect section 3 of the act of 1846, providing for an expenditure not in excess of \$50, but applies to section 2 of that act, and authorizes the reconstruction or repair of bridges by the members of the board designated in that section only where the cost does not exceed \$200, instead of \$500, as permitted by the act of 1846, and that it was not the purpose to grant increased powers, but rather to limit those previously granted. The action of the trial court in this behalf was therefore erroneous, but it was harmless because it was immaterial in this case whether the cost exceeded \$50 or not, as the freeholder was acting without any intention to observe the law, but under a void rule of the board, and subsequent approval of his action and appropriation of the material by the board was within their pow-

er, whether the cost was below or above \$50.

The only other point remaining to be considered in this matter is whether the trial court was justified in including in the recovery \$39.02 for cedar lumber furnished December 31, 1910. The appellant objects to this allowance upon the ground that no bill or account for it was ever properly presented to the board; the objection being that it was not verified, and it is not claimed by the plaintiff that the bill presented was verified. The act in relation to the expenditure of public money by municipal corporations (P. L. 1871, p. 92) declares that it shall not be lawful for the board of chosen freeholders of any county in this state to disburse any of the moneys of the county to any person unless the person claiming or receiving said moneys shall first present to the party paying, a detailed bill of items with the affidavit of the party claiming payment of said bill that the same is correct. We are of opinion that under this act a bill against the county is not mature, and no right of action arises thereon until the claimant shall have presented a detailed bill of items of the demand duly verified as required by the act, without which they are forbidden to pay. *Curley v. Freeholders of Hudson*, 68 N. J. Law, 402, 49 Atl. 471. Therefore the trial court committed an error in including in the judgment the amount of this unverified bill.

For this latter reason, the judgment will have to be reversed, and a new trial ordered.

KNIGHT v. CAPE MAY SAND CO.

(Supreme Court of New Jersey. Oct. 27, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 239*)—CONSTRUCTION—STRICT OR LIBERAL CONSTRUCTION.

The act of March 23, 1881 (P. L. p. 184; 2 Gen. Stat. p. 2112), which provides "that in all cases where a bond and mortgage has or may hereafter be given for the same debt all proceedings to collect said debt shall be first to foreclose the mortgage," being in derogation of the common-law force inherent in the bond, must be construed strictly.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 239.*]

2. MORTGAGES (§ 218*)—ACTION ON DEBT.

Where an obligee who holds two bonds aggregating a sum certain due at once afterwards takes from the same obligor a bond and mortgage to secure a like sum, payable at the expiration of one year, with a provision as to default in the payment of interest and taxes, and an obligation by which the cost of insurance may be added to the debt secured by the bond, the aggregate sum of the two bonds first mentioned and the debt secured by the bond last mentioned are not so strictly identical that the first-mentioned bonds are stripped of their common-law force by the act of March 23, 1881 (2 Gen. Stat. p. 2112).

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 568-585; Dec. Dig. § 218.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Annie C. Knight against the Cape May Sand Company. Rule to show cause why judgments for plaintiff should not be vacated. Rule discharged.

On May 20, 1909, the Cape May Sand Company executed its bond with warrant of attorney to Annie C. Knight conditioned for the payment of \$18,698.03.

On the same day, the same obligor executed a like bond to J. Henry Edmunds conditioned for the payment of \$7,190.95, which bond was forthwith assigned by said Edmunds to Annie C. Knight.

These bonds were due at once, and contained no other obligation than the payment of their principal sums, which aggregated \$25,888.98. Later, on the same day, the same obligor executed to Annie C. Knight its bond conditioned for the payment of \$25,888.98, in one year, with interest, payable semiannually, with a provision that upon a default of 30 days in the payment of such interest the principal should be payable immediately, and a further obligation by the obligor to pay all taxes, with a provision that upon a default thereof for 90 days the principal should be due immediately.

For the better securing of the debt evidenced by this bond, the obligor executed to the obligee a chattel and real estate mortgage, which recited said bond and the obligations contained in it, and also further bound the mortgagor to carry insurance to the full amount of the debt secured by said bond, to assign the policy to the mortgagee, and in default thereof the expense of so doing to be incurred by the mortgagee and added to the principal debt of the bond.

On January 30, 1911, judgment by virtue of the warrant of attorney was entered by Annie C. Knight on her bond conditioned for the payment of \$18,698.03, and also on the Edmunds bond for \$7,190.95, which had been assigned to her.

The defendant in each of these judgments, i. e., the Cape May Sand Company, thereupon obtained a rule to show cause why these judgments should not be vacated; the contention of the defendant being that the judgments were entered in violation of the provision of section 2 of the act of March 23, 1881 (2 Gen. Stat. p. 2112), which reads: "That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be *first* to foreclose the mortgage."

Argued June term, 1911, before GARRISON and TRENCHARD, JJ.

Grey & Archer, for the rule. Charles R. Stevenson and Robert H. McCarter, opposed.

GARRISON, J. (after stating the facts as above). The question upon which this case turns may be decided either way accordingly as the statute is construed liberally or strictly. The first question, therefore, is in which of these modes is the statute to be construed?

[1] Upon that point, this court is concluded by its previous decisions. In *Mershon v. Castree* (1895) 57 N. J. Law, 484, 31 Atl. 602, Chief Justice Beasley said, obiter, "The statute must be construed strictly, as it is in derogation of the common-law force inherent in the bond and mortgage."

[2] In *Van Aken v. Tice* (1897) 60 N. J. Law, 377, 38 Atl. 20, it was said that the effect of the statute was that "an identical debt" was not ripe for suit otherwise than by the foreclosure of the mortgage, etc.; and it was also pointed out that "the time of the 'giving' is the test made by the statute, not the time of bringing suit or of obtaining judgment upon the bond," thereby indicating a strict construction of the language of the statute.

In *Callan v. Bodine* (1911) 79 Atl. 1057, it was expressly held, in the opinion of Mr. Justice Reed, that "the statute invoked is in derogation of the common law and must be strictly construed."

This last decision, which we consider as binding upon us, renders the determination of the present case comparatively simple, since, if any degree of strictness be observed, the debt to secure which the mortgage was given was a different debt from that which was already in existence and outstanding at the time the new bond and mortgage were given. In a legal sense, a debt consists, not only of a sum payable, but also of those incidents that enter into and determine the certainty of such sum as to amount and time of payment. Thus regarded, the debts for which separate judgments were entered, and that to secure the payment of which the mortgage was given, have nothing in common, excepting the similarity of the initial sum. In all of the incidents of the mortgage debt by which its due day and amount were determined, it is a totally different debt in the strictly legal sense.

The sums secured by the two separate bonds were due at once, thereby constituting a debt certain in time and amount. The mortgage secured a debt of like amount, plus a year's interest, and its due day was not only unlike that of the separate bonds, but was uncertain, being contingent upon defaults by the obligor in the payment of interest or taxes; the amount secured was itself uncertain, not only by reason of such default clauses, but also because it was liable to be swelled by the cost of insurance, which in case of default was to be added to the principal debt of the bond.

The debt therefore represented by the aggregate sum of the two judgments and the debt to secure which the mortgage was given were not identical in any strict sense, and as that is the sense in which the statute must be construed the result is that there was no legal barrier in the way of the obligee's taking such action upon her bonds as at common law she had an unquestioned right to do.

I am not for a moment suggesting that the

defendant owes both debts, or that what is collected upon one must not be credited on the other; what we are deciding is that the giving of the mortgage to secure the debt induced by the bond that accompanied it did not strip the previously existing bonds of any common-law force they possessed before the bond and mortgage were executed. If the present judgments are paid in full, there may still be something due on the debt secured by the mortgage, by way either of interest or insurance premiums, added to the principal debt of the bond. In fine, the debt now in judgment is not the precise debt for which the mortgage was given.

This is all that, as a court of law, we are called upon to decide, and such decision leads to a discharge of the rule to show cause in the present case.

HESS v. KIMBLE

(Court of Chancery of New Jersey. Oct. 27, 1911.)

1. MARRIAGE (§ 60*)—ANNULMENT—JURISDICTION—"BONA FIDE RESIDENT"—"RESIDENT."

The divorce and annulment act of 1907 (P. L. 1907, p. 474) provides that a decree of nullity may be rendered at the suit of the husband, when he was under 18 at the time of the marriage, unless such marriage be confirmed by him after arriving at such age. The act further provides, "for purposes of annulment of marriage, jurisdiction may be acquired by personal service of process upon the defendant within the state when either party is a bona fide resident of the state, at the time of the commencement of the action." Petitioner and defendant resided with their respective parents, who were domiciled in Philadelphia, Pa., and came to New Jersey and were married, returning at once to the homes of their parents in Philadelphia. When the marriage was disclosed a week later, the petitioner's parents would not permit him to receive defendant as his wife, and on March 9, 1910, sent him into the state to board with relatives; his earnings and some assistance from his father going to pay his board. His petition was filed March 26, 1910. *Held*, that the term "resident," as used in the act, included not only the factum of residence, but also the animus manendi, the residence required by the statute being equivalent to domicile; and that petitioner was not a "bona fide resident" of this state, and hence that the court had no jurisdiction.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6161-6166; vol. 8, p. 7788.]

2. DOMICILE (§ 5*)—DOMICILE BY OPERATION OF LAW—INFANT.

The domicile of a legitimate unemancipated minor, whose will cannot concur with the fact of residence, is, if his father be alive, the domicile of the father.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 27-30; Dec. Dig. § 5.*]

3. DOMICILE (§ 5*)—CHANGE OF DOMICILE—MINOR.

A minor cannot change his domicile of his own will.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24-35; Dec. Dig. § 5.*]

4. DOMICILE (§ 8*)—BURDEN OF PROOF—CHANGE OF DOMICILE.

The burden of proof to establish a change of domicile on the part of a minor is on him.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. § 8.*]

5. MARRIAGE (§ 60*)—ANNULMENT—JURISDICTION—RESIDENT.

Where petitioner in a suit for annulment of a marriage attempts to make himself a resident of the state, for the purpose only of procuring the benefit of the local statute, no relief can be granted.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 60.*]

Petition by William H. Hess, Jr., by his next friend, against Madaline Kimble, for annulment of marriage. Dismissed.

The petition in this case is filed in behalf of William H. Hess, Jr., a minor, by his next friend, to annul his marriage to defendant on the ground that he was under the age of 18 at the time of said marriage, and that he has not, since arriving at that age, confirmed the marriage.

The petition is filed under the divorce and annulment act of 1907 (P. L. 1907, p. 474), which act provides that a decree of nullity of marriage may be rendered "at the suit of the husband when he was under the age of 18 at the time of the marriage, unless such marriage be confirmed by him after arriving at such age."

At the final hearing, the evidence fully established the facts that petitioner and defendant were married on February 19, 1910, at Camden, N. J., at which time petitioner was between 16 and 17 years of age (the date of his birth being April 27, 1893), and that the marriage has not been confirmed by petitioner since arriving at the age of 18 years. The petitioner, therefore, is entitled to a decree of nullity, provided this court has jurisdiction.

The jurisdictional provisions of this statute are: "For purposes of annulment of marriage jurisdiction may be acquired by personal service of process upon the defendant within this state when either party is a bona fide resident of this state at the time of the commencement of the action."

The evidence discloses that at the time of the marriage ceremony petitioner and defendant resided with their respective parents in the city of Philadelphia, Pa., in which city the respective parents were domiciled; that petitioner and defendant went to Camden, N. J., on February 19, 1910, and were there married on that day, and at once returned to the homes of their respective parents in Philadelphia; that they did not acquaint their parents with the fact of their marriage until about one week later, when they disclosed that they were married, and that defendant was pregnant; that between the day of the marriage and the day their marriage was disclosed petitioner called upon

defendant in the evenings at the home of her parents and enjoyed matrimonial intercourse with her; that during the week following the disclosure of the marriage great consternation existed in the respective families of petitioner and defendant touching the course to be pursued, the parents of petitioner refusing to permit petitioner to receive defendant as his wife, and the parents of defendant insisting that their daughter should be permitted to enjoy her matrimonial rights, and threatening litigation in her behalf; that under these conditions the father of petitioner sent him to Belmar, N. J., where he has since boarded with relatives. The date of petitioner's departure from Philadelphia, Pa., to Belmar, N. J., was March 9, 1910. The date of the filing of the petition for annulment was March 26, 1910. At the time petitioner went to Belmar, he was less than 17 years of age, and entirely without funds. He has remained there until this time, and has been employed a portion of the time, and has applied his earnings to the payment of his board. From time to time it has become necessary for his father to contribute money for the payment of petitioner's board.

It is claimed, in behalf of petitioner, that his primary reason for going to Belmar was his ill health.

John H. Switzer, for petitioner. J. Fithian Tatem, for defendant.

LEAMING, V. C. (after stating the facts as above). [1] I am entirely satisfied that this court is without jurisdiction to entertain the petition filed in this suit, for the reason that neither petitioner nor defendant was a bona fide resident of this state at the time the petition was filed.

The term "resident," used in the several successive legislative acts of this state which confer jurisdiction on this court in suits for divorce and annulment of marriage, has been uniformly recognized as including not only the factum of residence, but also the animus manendi; the residence required by our statute is the equivalent of domicile. *Williams v. Williams*, 78 Atl. 693; *Coddington v. Coddington*, 20 N. J. Eq. 263; *Harral v. Harral*, 39 N. J. Eq. 279, 51 Am. Rep. 17; *McShane v. McShane*, 45 N. J. Eq. 341, 19 Atl. 405; *Firth v. Firth*, 50 N. J. Eq. 137, 24 Atl. 916; *Sweeney v. Sweeney*, 62 N. J. Eq. 357, 50 Atl. 785; *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533; *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051; *Hunter v. Hunter*, 64 N. J. Eq. 277, 53 Atl. 221; *Mason v. Mason*, 69 N. J. Eq. 292, 60 Atl. 337; *King v. King*, 74 N. J. Eq. 824, 71 Atl. 687, 135 Am. St. Rep. 731.

[2-4] It is apparent that petitioner cannot be regarded as having been a bona fide resident of this state, within the meaning of our statute, at the time of the commence-

ment of this suit. As a minor, the domicile of petitioner was presumptively that of his parents. The evidence discloses no emancipation upon the part of his parents. On the contrary, petitioner has manifestly at all times been under the control and subject to the direction of his father; he has been and now is a member of his father's family in every essential aspect, except that of physical presence; his home is his father's home; at the time the petition was filed, petitioner was boarding with relatives in Jersey at the expense of his father, and was not in this state as the result of any independent exercise of his own will; the father, at his own instance, procured a lawyer to institute this suit in petitioner's behalf, and directed petitioner to go to the lawyer and sign the petition. Under such conditions, it is impossible to regard petitioner as a bona fide resident of New Jersey within the meaning of our statute. Chancellor Runyon, in *Blumenthal v. Tanneholz*, 31 N. J. Eq. 194, adopting the view expressed in *Phillimore on Domicile*, states the law of domicile of a minor to be as follows: "The domicile of the legitimate unemancipated minor who is not sui juris, and whose will, therefore, cannot concur with the fact of residence, is, if his father be alive, the domicile of the latter. *Phillim. on Dom.* 37. It is an undisputed position of all jurists, says that writer, that, of his own accord, proprio marte, the minor cannot change his domicile. See, also, *Story on Conf. of Laws*, § 46. The burden of proof to establish the change of domicile on the part of the minor is on him. *Id.* § 47." See, also, *Dennysville v. Trescott*, 30 Me. 470; *Inhabs. of Charlestown v. Inhabs. of Boston*, 13 Mass. 469; *Overseer Washington v. Overseer Beaver*, 3 Watts & S. (Pa.) 548; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Marks v. Marks* (C. C.) 75 Fed. 321.

[5] The evidence in this case also strongly indicates that neither petitioner nor petitioner's father entertained any thought or purpose of regarding this state as petitioner's permanent home until a day or two before the petition was filed, when petitioner's father ascertained from a lawyer of this state that if petitioner were a bona fide resident of this state relief could be procured from our courts which could not be procured from the courts of Pennsylvania with that state as petitioner's residence. It seems, indeed, more than probable that the determination of petitioner and his father to regard this state as the residence of petitioner was for the purpose of procuring the benefit of our statute. It seems needless to state that if petitioner's sudden determination to regard himself a resident of this state was only for the purpose of procuring the benefit of our statute, no relief can be granted.

I will advise a decree dismissing the petition.

FAGEN v. MAYOR AND COUNCIL OF CITY OF HOBOKEN.(Supreme Court of New Jersey. Oct. 20, 1911.)
NEWSPAPERS (§ 1*)—OFFICIAL PAPERS.

On certiorari to review a resolution of the common council awarding payment for official advertising, evidence by the city clerk that some action as to the appointment of an official paper had been taken by the council since the resolution of 1903, appointing the relator's paper, but that he could not recall exactly what, with evidence that claims of another paper for official publications had been paid for six years, and the absence of any evidence that the paper designated in 1903 had continued to act or to be paid, when aided by the presumption in favor of the legality of the payments to such other paper, and of the acts of the officers of the city in making them, held to require dismissal of the writ.

[Ed. Note.—For other cases, see Newspapers, Dec. Dig. § 1.*]

Certiorari by Lawrence Fagen to review the resolution of City Council of Hoboken, awarding payment on official advertising. Writ dismissed.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

Merritt Lane, for prosecutor. John J. Fallon, for defendant.

SWAYZE, J. When this case was formerly before me and before the Supreme Court on a motion for the writ of certiorari, it seems to have been conceded that there had been no formal designation of a newspaper to publish official advertising of the city of Hoboken since the resolution of 1903. The court thought that this justified the allowance of the present writ to remove proceedings for payment to another newspaper, in alleged contravention of the act of 1892 (G. S. 1896, 2329, pl. 31). The case is now before us upon the depositions. The designation of the official newspaper on January 2, 1903, is proved, but it is also proved by the testimony of the city clerk that some action has been taken by the common council as to the appointment of the official paper since January 2, 1903; he testifies that he does not remember what the action was. The book of minutes is not before us; nor are we advised further as to this subsequent action. It is shown, however, that claims of another newspaper for the publication of notices, ordinances, etc., had been paid for six years, including some of the claims now in question, and there is an absence of proof that the newspaper designated by the resolution of 1903 has continued to act or to be paid. Since the effect of sustaining the claim of the prosecutor is to declare all of these payments to have been illegal, without affording an opportunity for explanation to the mayors and councilmen who authorized the payments, we ought not to set aside the action of the present mayor and council upon incomplete proofs, especially since it was within their power to change the designation

of the newspaper by their joint action. The presumption is in favor of the legality of their acts and against their disbursement of public money illegally; it is for the prosecutor to overcome that presumption. Certain portions of the minutes of the council were offered in evidence, but nothing that enables us to determine what the subsequent action was to which the city clerk testifies. It is unnecessary to consider whether the payment of the bills for advertising by resolution of council, to which the mayor consented at least by signing warrants, is not enough to bring this case within the first resolution of *Car Spring & Rubber Co. v. Jersey City*, 84 N. J. Law, 544, 46 Atl. 649.

The writ should be dismissed.

LARKIN et al. v. WIKOFF et al.(Court of Errors and Appeals of New Jersey.
Oct. 24, 1911.)**COSTS (§ 56*)—ALLOWANCE IN EQUITY—DISMISSAL OF BILL.**

On dismissal of a bill to enjoin trustees from selling property in disregard of the terms of the trust deed under which they held it, no question as to construction of the deed being involved, but the only question being whether the trustees were about to exceed the power given them, and the court holding that where power is given to trustees to do a particular thing, they being constituted the judges and fully authorized to decide the matter, the court has no jurisdiction to command them as to the exercise of that power, provided their conduct be bona fide in all respects, costs and counsel fees may not be allowed complainants, nor costs to the Attorney General, who, as representative of the public, was joined as defendant, instead of as complainant.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 56.*]

Appeal from Court of Chancery; Walker, Vice Chancellor.

Suit by Francis E. Larkin and others against James H. Wikoff and others. From the part of the decree of dismissal as to costs and attorney's fees (75 N. J. Eq. 462, 79 Atl. 365), defendants appeal. Reversed.

The bill in this case was filed by certain residents of Cedar Grove, in the county of Mercer, who alleged that they and their families were members of and contributors to the support and maintenance of the respective churches and denominations named in a certain deed of trust made by Paul Tulane to the trustees of the First Presbyterian Church at Princeton. By this deed the property was conveyed to the trustees, to be used for gospel preaching and religious services free to all people of the neighborhood. Mr. Tulane also placed in the hands of the trustees a sum of money to be invested; the income to be appropriated in defraying the expenses of maintaining free preaching and religious services in the church. Power was given to the trustees to decide upon the discontinuance of the church services whenever

it seemed clearly expedient so to do, with full power to sell the land and building and to hold the proceeds of sale, with other funds, for a certain other trust; the said trustees being the judges and fully authorized to decide upon the discontinuance upon all or any cause whatever. The prayer of the bill was for an injunction to enjoin the trustees from selling or conveying away any part of the property. Vice Chancellor Walker, before whom the cause was heard, advised that the prayer of the complainants for an injunction be denied, and that the bill be dismissed. He further advised that as the proceeding was in good faith, and required the construction of a trust instrument under which the property in question was held, that it was a case for the allowance of costs and counsel fees to both parties. From the decree of dismissal, the complainants appealed, and that decree has been unanimously affirmed by this court. From so much of said decree as awarded costs and counsel fees to the complainants and the costs of the defendant the Attorney General out of the trust estate, a cross-appeal was taken by the defendants James H. Wikoff et al., trustees, etc.

John V. B. Wicoff, for appellants. A. S. Appelget, for respondents.

VROOM, J. (after stating the facts as above). The only question to be decided on this appeal is whether the vice chancellor was warranted in advising the allowance of costs and counsel fees in this cause. There was a decree of dismissal, from which the complainants appealed, and, as above stated, that decree has been unanimously affirmed by this court.

There can be no doubt as to the general rule in the courts of this state that costs will be awarded a complainant out of the estate on the dismissal of his bill when, as executor, he comes into a court of equity to settle the construction of the will, or for direction as to his duty in regard to the mode of carrying its provisions into effect. *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Van Houten v. Pennington*, 8 N. J. Eq. 745; *Cox v. Wills*, 49 N. J. Eq. 573, 25 Atl. 938. The same rule prevails in the English Court of Chancery. *Rashley v. Masters*, 1 Vos. 200; *Joleff v. East*, 3 Br. Ch. Rep. 25. See, also, *Dan. Ch. Pr. 1426*; 1 Redf. on Wills, 433.

It cannot be pretended that the bill in this case was filed for the construction of a will or of a trust thereby created; it was only for an injunction to restrain certain trustees from selling property held by them, in disregard of the terms of the trust deed; it involved no question as to the construction of the deed creating the trust, the only question being whether the trustees were about to exceed the power given them; and the court below held, "where power is given to

trustees to do a particular thing, they being constituted the judges and fully authorized to decide the matter, the court has no jurisdiction to command them as to the exercise of that power, provided their conduct be bona fide in all respects."

Again, the bill was not one filed by the trustees to ask and receive the aid and direction of a court of equity in the proper exercise of their trust, but, even had it been, and reasonable ground had been shown to exist for coming into court for such direction, it by no means follows that costs would have been allowed such trustees as complainants, out of the trust funds, on the dismissal of their bill.

The English cases are all in accord with *Dan. Ch. Pr. 1426*, where, in referring to the exception to the general rule in the allowance of costs to the complainant on the dismissal of his bill, it is said that "the rule applies only to cases under wills; it does not apply where difficulties arise upon the construction of deeds." *Hampton v. Bandwood*, 1 Mad. 218; *Patheing v. Dobbins*, Kay 1, 15.

No case can be found in this state where costs have been awarded a complainant on the dismissal of his bill for the construction of any other kind of instrument than a will.

This bill not having been filed by the trustees for the construction of the trust deed, it is not necessary now to decide what course this court would take, had it been, and were the question properly before it.

The decree allowing costs and counsel fees and the costs of the defendant the Attorney General should be set aside and reversed.

DAVIDSON v. BIDDLEMAN.

(Supreme Court of New Jersey. Oct. 20, 1911.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 167*)—PAYMENT OF HUSBAND'S DEBT—RESCISSION.

Where a married woman agrees that out of her funds in the hands of a third person he may apply so much of such funds as may be necessary to the payment of a debt of her husband for goods purchased by him, if such party will credit the husband, and the goods are furnished, and the application of the necessary amount made, the wife cannot, after the agreement is so completed, abrogate it.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 654-659; Dec. Dig. § 167.*]

2. HUSBAND AND WIFE (§ 171*)—DEBTS OF HUSBAND—MORTGAGE BY WIFE.

If a married woman agrees, if credit is given her husband, she will mortgage her lands to secure the payment of it, and the credit is given, and a mortgage executed, although for a larger sum, and the difference between the husband's debt and the amount of the mortgage is paid to the wife, she cannot recover the sum retained in pursuance of her agreement, upon the ground that so much of the consideration of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the mortgage as equals the husband's debt is due and unpaid.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 671-683; Dec. Dig. § 171.*]

Appeal from District Court of Newark.

Action by Hadassa Davidson against Max Biddleman. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

William Greenfield, for appellant. E. C. & A. W. Harris, for appellee.

BERGEN, J. The agreed facts are that the plaintiff, a married woman, arranged to borrow \$1,300 from the defendant, to be secured by a mortgage on her land, and at the same time agreed that if defendant would sell to plaintiff's husband certain goods on credit the cost should be retained out of the amount to be loaned. The goods were furnished to the husband, and subsequently the mortgage was given, and the defendant paid plaintiff the \$1,300, less the amount due by the husband, and she now sues for the amount thus retained as so much due to her of the consideration of the mortgage. The defendant had judgment, and plaintiff appeals.

[1] There are several specifications assigned in support of the appeal, but all are in substance that the wife is not liable for the debt of her husband, and that a mortgage given to secure such debt by the wife is void. The specification which most succinctly states the position of the appellant is this: "The court erred in rendering a judgment in favor of the defendant and against the plaintiff, because at law a mortgage given by a married woman to pay her husband's debts is manifestly void." This last specification states a proposition entirely at variance with the well-settled rule in this state, which is that a married woman may lawfully mortgage her land to pay the debt of another. The facts in this case show an agreement to the following effect: That the plaintiff was to mortgage her lands to the defendant for \$1,300, to be paid by extending a credit to her husband, and accounting to her for the balance of the sum borrowed. It was, in substance, an agreement to mortgage her property to secure her husband's debt, and when that agreement was executed by the giving of the mortgage the wife could not avoid the legal result of her act. "The objection that the wife's property must be protected in equity from the debts of her husband is answered by saying that it is so protected, until she does, by her voluntary act, free from the threats or compulsion of her husband, make it so liable by the execution of a deed or mortgage; and when she executes a mortgage, and acknowledges it in conformity with the statute, and the husband consents to the execution by joining in the mortgage, it be-

comes a valid security, and will be enforced, both at law and in equity." *Galway et al. v. Fullerton et al.*, 17 N. J. Eq. 389; *Ferdon v. Miller*, 34 N. J. Eq. 10. A married woman may mortgage her own lands to secure the payment of her husband's debts, for the payment of which she is in no way liable. *Merchant v. Thompson*, 34 N. J. Eq. 73.

[2] In *Warwick v. Lawrence*, 43 N. J. Eq. 184, 10 Atl. 377, 3 Am. St. Rep. 299, the wife had agreed that Warwick might apply, out of the funds to be collected for her, a sum sufficient to satisfy him for moneys to be advanced to either husband or wife. The wife objected to the retention, but it was held by the Court of Errors and Appeals that if the agreement had been executed it could not be abrogated by the wife; and Chief Justice Beasley, speaking for the court said: "The result, therefore, is that, inasmuch as the moneys in suit were received by Warwick and applied by him with the consent of the complainant to the payment of the debts of her husband, they cannot be reclaimed by the complainant." The court also said that the controversy was a purely legal one, and should have been tried in a court of law. So in this case the wife agreed that out of the consideration to be paid for the mortgage, when executed, the defendant might advance to the husband moneys (for the giving of credit for goods amounted to the same thing); and when the defendant had performed according to the consent of the wife, and applied a portion of her funds, with her consent, to the satisfaction of the husband's debts, and she thereafter became entitled to the fund by the execution of a mortgage, the money so applied cannot be recovered by the plaintiff.

The judgment below is affirmed, with costs.

COLONIAL LAND CO. v. ASMUS.

(Supreme Court of New Jersey. Oct. 20, 1911.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 184*)—SECURITY FOR PAYMENT OF RENT—CONSTRUCTION OF CONTRACT.

The defendant became surety for the punctual payment of rent reserved in a lease. Two of several buildings on the demised premises were totally destroyed by fire without the fault of the lessee or his subtenant; the landlord did not repair. *Held*, that under our statute (G. S. 1895, p. 1923, pl. 35) the rent ceased, and the surety was not liable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

Appeal from District Court of Jersey City.

Action by the Colonial Land Company against Adolph E. Asmus. From a judgment for plaintiff, defendant appeals. Reversed, and record remitted for new trial.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

J. Emil Walscheid, for appellant. James R. Bowen, for respondent.

SWAYZE, J. This action is brought against a surety to recover rent for March, 1910. Upon the demised premises were several buildings, two of which were totally destroyed by fire on January 15, 1910.

The case differs from that presented in *Colonial Land Co. v. Asmus*, 77 Atl. 1022, in that there is a special finding in the present case that the fire was without the fault of the lessee or his subtenant. It is important to have in mind exactly what the contract of the surety was. By its terms, he became "surety for the punctual payment of the rent." By the terms of the lease, to which express reference is made in the contract of the surety, the premises were demised "at the yearly rent of four thousand dollars payable in equal monthly payments in advance." The learned district court judge gave judgment as the transcript certifies "for the month of March, at the rate of \$3,000 per annum." Obviously this could not be the "rent" reserved by the lease; it seems to have been the value of the use and occupation after abating the rental value of the buildings destroyed. The surety, however, never agreed to become responsible for the value of the use and occupation of a part of the property, and it may well have been that the buildings destroyed were the very thing that induced him to become surety. He may have thought that the tenant with those buildings might conduct a profitable business and earn the rent, while without them he was foredoomed to failure. What he became responsible for was the "rent." If the tenant's obligation to pay rent had ceased, the surety's obligation was at an end. By our statute (G. S. 1895, p. 1923, pl. 35), it is enacted "that whenever any building or buildings erected on leased premises shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof, the rent shall cease until such time as such building or buildings shall be put in complete repair; and in case of the total destruction of such building or buildings by fire or otherwise, the rent shall be paid up to the time of such destruction, and then, and from thenceforth, the lease shall cease and come to an end." In dealing with the latter clause, the Court of Errors and Appeals has held that the termination of the lease is not made dependent upon the rent being paid to the time of the destruction. *Carley v. Liberty Hat Mfg. Co.*, 79 Atl. 447. In the present case, it makes no difference whether the destruction of the two buildings be regarded as an injury which only suspends the rent, or as a total destruction which terminates the lease. There is a finding that the two buildings were totally destroyed, and no finding that the landlord ever repaired; we must therefore assume

that he did not repair. Such must be the fact, since an abatement from \$4,000 per annum to \$3,000 was conceded. If so, the rent ceased, and it was the rent only for which the surety was responsible. If there was a total destruction within the meaning of the statute, the lease was at an end, and there could be no future liability on the part of either principal or surety.

The judgment must be reversed, and the record remitted for a new trial.

DAY v. DEVITT et al.

(Court of Chancery of New Jersey. Oct. 24, 1911.)

1. TRUSTS (§ 100*)—RESULTING TRUSTS—CONVEYANCE TO GRANTEE NOT ENTITLED TO BENEFIT.

Where mortgaged property of an intestate vested in her children, subject to the custody of her surviving husband, a third person who, at the husband's instance, bought the mortgage, filed a bill to foreclose, in which the husband and children were parties, and purchased the land at a sheriff's sale, intending to get his own purchase money back and to hold the balance so as to protect the interests of the husband and children, was charged with a trust for their benefit.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 151; Dec. Dig. § 100.*]

2. SPECIFIC PERFORMANCE (§ 99*)—DEFENSES—LACHES.

Where a defendant in a bill for specific performance shows no hardship affecting him which would not be compensated by interest on the money due him, he is not in a position to raise the question of laches.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 299-304; Dec. Dig. § 99.*]

3. SPECIFIC PERFORMANCE (§ 14*)—DEFENSES.

Defendant in specific performance bought up a mortgage on land of an intestate, who left a husband and children surviving, agreeing with the husband to foreclose the mortgage and buy in the property, and to sell to the husband, all for the benefit of the parties interested in the property; defendant only asking that he be repaid his expenses. *Held*, that he could not defend the husband's bill for specific performance on the ground that he was thereby required to get in the outstanding interest of the children, who were also defendants in the suit.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 33, 41; Dec. Dig. § 14.*]

4. TRUSTS (§ 366*)—ACTIONS—PARTIES.

Whenever trust property is the subject-matter of litigation in a court of equity, all the parties in interest are proper, if not necessary, parties, and in such cases cestuis que trustent, unless they are so numerous as to make their inclusion burdensome, must be brought before the court.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 574-583; Dec. Dig. § 366.*]

5. SPECIFIC PERFORMANCE (§ 106*)—ACTION—PARTIES.

In a suit for specific performance, brought against one who has bought and foreclosed an outstanding mortgage on land, buying in the land at the sheriff's sale, and who holds the land for the benefit of the surviving husband and children of an intestate, and whose only inter-

est therein is a right to the purchase money paid for the sheriff's deed, the surviving husband, who has a curtesy right in the lands, and the children, who have a fee simple, subject to the curtesy right, are proper parties, under the rule that parties in a suit for specific performance must include all those who have interests in the land or rights in the purchase money to be paid.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

6. INFANTS (§ 40*)—PROPERTY—EQUITY JURISDICTION—CHANGE OF CHARACTER OF PROPERTY.

The court of chancery has the inherent power, irrespective of statute, to change the character of property in which infants are interested for the benefit of such infants, and one who holds property for infants may not dispose of the same without receiving sanction of the court; and the fact that the Legislature has provided a summary method of sale of infants' land does not interfere with or deprive the court of such inherent power, whether such proceeding applies to infants who have title or only an equitable interest.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 90, 91; Dec. Dig. § 40.*]

7. SPECIFIC PERFORMANCE (§ 32*)—CONTRACTS ENFORCEABLE—MUTUALITY—SALE REQUIRING CONFIRMATION BY COURT.

Defendant, in a suit for specific performance of his contract to sell and convey land, had bought in a mortgage on the land after the death of its owner, intestate, leaving a surviving husband and children, in whom the fee vested, subject to the husband's curtesy, and had foreclosed the mortgage and purchased at the sheriff's sale, and taken a sheriff's deed of the land to hold in trust for the husband and children, except as to his claim for money paid by him for the deed, which was only one-ninth of the value of the land, and all parties interested in the land were made codefendants. *Held*, that there was no lack of mutuality in the contract, though a sale by him would require a confirmation by the court, since at the time of the decree all the parties were before the court, and the contract was then mutually enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

Bill for specific performance by Michael C. Day against Martin B. Devitt and others. Heard on pleadings and proofs. Decree for complainant.

Merritt Lane, for complainant. Carrick & Wortendyke, for defendant Devitt. John M. Enright, for infant defendants.

GARRISON, V. C. The original bill in this suit was filed to compel the specific performance by Martin B. Devitt and wife of a contract made between the said Martin B. Devitt and wife and the complainant, Michael C. Day, which contract was dated the 24th day of December, 1906, and related to a piece of real estate in Jersey City. Upon the final hearing upon the original bill and the answer and cross-bill of Devitt and wife thereto, such facts were developed as caused the complainant to move for and obtain leave to amend his bill, and subsequently to obtain leave to file a supplemental bill

herein. An understanding of the situation will be best had by a recital of facts in narrative form:

The property in question belonged, at the time of her death, to Mary A. Fallon, who was the wife of James Fallon and the mother of the infant defendants herein. At the time of her death, the title to the property became vested in the children, subject to the curtesy right of the husband. The only incumbrance upon the property at this time was a mortgage, which originally had been \$500, but upon which there was due at that time about three hundred and thirty-odd dollars. This mortgage was held by the New Jersey Title Guarantee & Trust Company. The value of the property at that time was between four and five thousand dollars. There was no guardian acting in behalf of the children, and James Fallon, the father, was their natural guardian, under the circumstances. James Fallon conceived the idea that it was desirable to sell the property in question, and that the best way to effect this was to obtain the outstanding mortgage and foreclose it, thus cutting out the rights of the children, the owners, and to sell the thus cleared title. He had reason to believe that he could obtain at least \$4,500 for the property, if the title was cleared. Martin B. Devitt was a friend of Fallon's, and Fallon disclosed his scheme to Devitt, and Devitt consented to buy the mortgage in his own name, foreclose the same, and obtain the title and dispose of the same for the benefit of the owners, and upon the 15th day of March, 1906, the New Jersey Title Guarantee & Trust Company assigned the bond and mortgage to Martin B. Devitt in consideration of the sum of \$336.30.

On the 24th of May, 1906, Devitt filed a bill in this court to foreclose the mortgage. Fallon and the children were of course parties defendant. No defense was interposed; and, on the 26th of November, 1906, the complainant, Devitt, purchased the property at the sheriff's sale for \$500. He obtained his deed from the sheriff on the 4th day of December, 1906, and on the 24th day of December, 1906, he and his wife entered into the contract in issue in this suit, by which he agreed to sell the property in question to Michael C. Day for \$4,500, \$200 of which was then paid him. The title by the agreement was to be clear.

[1] It is perfectly plain from the testimony of Devitt himself, apart from any burden or duty which the law would cast upon him, that he acted in this matter solely to protect the interest of Fallon, the husband, and the infant children of Fallon, the owners of the property. He says he went into it "to do a little missionary work and help out"; and after he had given a full and, I believe, trustful version he was asked by the court a question which, together with his answer, I think fully discloses his attitude. He was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

asked whether he understood that his relationship toward this property was to get his own money out of it which he had put in to purchase the mortgage, and then hold the balance in some way for the Fallon family, and he said that that was exactly his understanding. The situation in which he thus voluntarily places himself is practically that in which the law would have placed him, even against his will. *Johns v. Norris*, 22 N. J. Eq. 102 (Chan. Zabriskie, 1871); *Id.*, 27 N. J. Eq. 485 (Ct. of Errors and Appeals, 1875).

After he had disclosed his relationship toward the property by this testimony, the amended and supplemental bills were filed, the other defendants were brought in as parties, and the court appointed a solicitor for the infants, so that they might have independent representation before the court. By the amended and supplemental bills, the complainant assumed this attitude: By contract between the complainant and Devitt and wife, the defendants Devitt and wife engaged to sell the property in question to the complainant for \$4,500. Being advised by the testimony of Devitt in the suit that he occupied the position of trustee, the complainant had the right, if not the duty of bringing the *cestuis que trustent* before the court; they being proper, if not necessary, parties under the circumstances. And, further, it being developed by such testimony that Devitt would probably be held to be a trustee of the land for the said infants, and therefore unable to sell the same until he should have received the sanction of this court, there was an additional reason why the complainant had the right, if not the duty, to bring the infants before the court. And it further developing by such testimony that Devitt and the Fallon children undoubtedly (and perhaps Fallon, the father of the children) had interests in the \$4,500 to be paid as the purchase price, the complainant was required, after notice of these facts, to bring all of these parties before the court, so as to protect himself, secure a good title, and have all of the rights in this subject-matter adjudicated in the one action.

As I understand the attitude of the defendant Devitt, it is this: He does not deny the facts; he frankly and commendably sets forth facts which show that he was a trustee; that his sole interest in the matter was to secure to the husband, who had the curtesy interest, and the children, who had the fee, the benefits of this property, and that all that he did was to that end; but he says, since Day made a contract to purchase the property from him, and he is now willing to give Day a deed for whatever interest he individually has in the property, that is all that Day can require, and that the other parties defendant are improper parties defendant, and no decree should be made against Devitt in the suit in which such other defendants are parties.

[2] There are some suggestions by the de-

fendant Devitt of laches, but in my view of this case they are not such as to require serious consideration. The proofs show that the parties were negotiating back and forth for a long time after the date fixed for the final settlement; and the circumstances of the purchase of this mortgage for so small a sum, the sale of the property to Devitt for what was admitted to be only one-ninth of its value, and the presence of infants when their rights were under discussion, and that the complainant, Day, was always insisting upon wishing to take the property, and never by any act or statement showed an abandonment, seems to me to settle the question, and to show that there was no laches under any of the applications of that doctrine which I have found in this state. There is no pretense that any hardship arose to the defendant Devitt by reason of the delay—that is to say, any hardship that will not be compensated by interest on his money that is due him; there is nothing to show that the lapse of time caused any loss of any papers or documents; or that the complainant ever apparently abandoned his contract and attempted to revive it when the property had risen in value; or, in fact, any of the elements of laches, as that doctrine obtains in our court. Furthermore, since I find that Devitt's only interest is to get out of the property the money which he put into it—a sum not over \$500—I cannot see how he is in any position to raise the question of laches. The infants might possibly object, if a larger price could for their benefit have been obtained during the interval of the negotiations, or what not; but I fail to see how this affected Devitt, or how he is in a position to raise this issue.

This reduces the available defenses, as I understand the defendant Devitt's attitude, to two: First, that the defendants, other than Devitt and his wife, have no place in this suit, and that no decree should be made against Devitt in a suit in which these other parties defendant are parties; and, second, that since the contract lacked mutuality, if the court considers that the infants' interests must be protected in this suit, and that its confirmation of the sale was necessary, the contract cannot now be enforced against Devitt.

[3] There is a suggested defense, presently to be mentioned, which I do not think arises under the facts and law applicable to this case. The defendants Devitt suggest that they have a defense based upon the idea that the complainant requires the defendants Devitt to go out and get in an outstanding interest, to wit, that of the infants; and that this court will not require a defendant in a specific performance case to go out and get in an outstanding interest. The reason why I do not think the facts justify this defense is because I cannot see that the complainant here is asking the defendants Devitt to go out and get in any outstanding interest. What he is doing is to say to Martin B. Dev-

itt, one of the defendants: "You have the legal title to this property, and the facts are that you hold it for certain cestuis que trustent, who are infants. That being so, under the practice of the court of equity, it is proper for me, and necessary for my protection, that not only you, in your individual capacity, but as trustee, and your cestuis que trustent, the infants, should be before the court, so that the sale which you made shall be confirmed by the proper court, and the rights of the infants, so far as I am concerned, cut off, and so that all of the people interested in the purchase money should be before the court."

Another position is also assumed by the defendants Devitt which I do not find to be available as a defense. These defendants say that since the infants were parties defendant in the foreclosure suit, and Devitt bought at a sheriff's sale in that suit, that decree cannot be attacked collaterally, and all the rights of the parties in that suit, including the rights of the infants, pass by virtue of the sale to Devitt. It is, of course, true that all the rights of all the parties in a foreclosure suit concerning the subject-matter of that suit pass to the purchaser at the sale; and it is unquestionably true that a decree of a court of competent jurisdiction, which has acquired jurisdiction, cannot be attacked collaterally. But I do not conceive that in the suit at bar the complainant takes any position which attacks the foreclosure suit, directly or collaterally, or anything that was done therein, or any decree that was entered therein. What the complainant relies on are the undisputed facts that the foreclosure was undertaken by Devitt as trustee for certain people and for their benefit, and that when he purchased he purchased for their benefit, and he himself now so states, so that, so far as attacking the foreclosure, they affirm it, and say: "Yes; that suit resulted in transmitting the title out of us, as owners in fee simple and into Martin B. Devitt, as the legal holder thereof in trust for us, subject, of course, to his right to be repaid out of the trust property his proper expenditures in its behalf."

The only two questions, therefore, which will now receive consideration are those above stated, the former of which was that the defendants, other than Devitt and his wife, have no place in this suit, and no decree can properly be made against Devitt and wife in this suit because of the presence therein of these other parties defendant.

[4] It should first be remarked that it is a firmly settled doctrine of the court of equity in this state that wherever trust property is the subject-matter of litigation all the parties in interest are proper, if not necessary, parties, and that the cestuis que trustent, unless they are so numerous as to make their inclusion burdensome, must be brought before the court, if property in which they are interested is the subject-mat-

ter of the litigation. Many of our sister states have departed from this rule (which I also understand is the rule in England), and hold that where the trustee is before the court he represents all of the interests of his cestuis que trustent, and, excepting where there is an obvious conflict of interest between the trustee and the cestui que trustent, there is no necessity or propriety in the presence in the suit as parties of such cestuis que trustent. For this reason, cases in other states dealing with a similar subject-matter must be guardedly considered because of the difference concerning the propriety and necessity of the presence in the suit of the cestuis que trustent.

The broad principle is stated by Story (Story's Eq. Pl. [7th Ed.] Notes by Redfield, § 207) as follows: "The general rule in cases of this sort is that in suits respecting the trust property, brought either by or against the trustees, the cestuis que trust (or beneficiaries), as well as the trustees, are necessary parties. * * * The cestuis que trust (or beneficiaries) have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties." (In the notes to this section will be found many cases illustrative of the principle.) And the cases in our state which follow and enforce this principle are too well known and too numerous to make citation profitable.

[5] With respect to the particular application of this doctrine or principle to specific performance cases, it will be found that in other jurisdictions the matter has been absolutely settled in favor of the propriety or necessity of including in the suit all those who have interests in the land or rights in the purchase money to be paid. And in our own state, while there is no case directly in point, the cases in which the matter is adverted to seem to treat it as settled that the presence in the suit of such persons as have interests in the lands or rights in the purchase money is in accordance with the established practice and the principle applicable thereto. The principle will be found broadly dealt with in 36 Cyc. 769; Pomeroy's Eq. Jurisp. (3d Ed.) § 114; Pomeroy on Contracts, Spec. Perform. § 493; Fry on Specific Performance of Contracts (2d Ed.) §§ 160-173, 183-188.

The English cases which hold that other parties than those to the contract, may be proper, if not necessary, parties to a suit for specific performance, and that where other parties than the parties to the contract have interests in the land, or assert rights with respect to the purchase money, they should be included in the suit, are as follows: *West Midland Railway Co. v. Nixon*, 1 H. & M. 176, 71 Full Eng. Reprint, 77; *Willats v. Busby*, 5 Beavan, 193, 49 Full Eng. Reprint, 551; *Daking v. Whipmer*, 26 Beavan, 568, 53 Full Eng. Reprint, 1017; *Buckle v. Mitchell*, 18 Ves. Jr. 100, 34 Full Eng. Reprint, 255;

Spence v. Hogg, 1 Coll. 227, 63 Full Eng. Reprint, 394; Evans v. Jackson, 3 Sim. 217, 59 Full Eng. Reprint, 87; Chadwick v. Maden, 9 Hare, 188, 68 Full Eng. Reprint, 468.

The cases in our sister states to a like effect are as follows: McDonald v. Yungbluth (C. C.) 46 Fed. 836; Robinson v. Robinson, 116 Ill. 250, 5 N. E. 118; Shreck v. Pierce, 3 Iowa, 350; Crosby v. Davis, 9 Iowa, 98; Rochester v. Anderson, 16 Ky. 143; Seager v. Burns, 4 Minn. 141 (Gil. 93); Improvement Fund v. Gleason, 15 Fla. 384; Bridgman v. McIntyre, 150 Mich. 78, 113 N. W. 776; White v. Watkins, 23 Mo. 423; Otto v. Young, 227 Mo. 196, 127 S. W. 9; Gentry v. Gentry, 87 Va. 478, 12 S. E. 966; Slaughter v. Nash, 1 Litt. (Ky.) 323.

In Kuhn v. Eppstein, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884, and in East River & Astoria Land Co. v. Kindred, 128 App. Div. 146, 112 N. Y. Supp. 540, the converse of the proposition is held, namely, that, where the contract is between the equitable owner as vendor and a vendee, the latter may specifically enforce the same in a suit in which he makes the actual holder of the title a party.

The following cases in New Jersey will be found to advert to the subject-matter that we are considering, and indicate clearly to my mind that the principle applied elsewhere, and above stated, should be applied in this state: Van Doren v. Robinson, 16 N. J. Eq. 256; Newark Savings Inst. v. Jones Ex'rs, 35 N. J. Eq. 406; Kempton v. Bartine, 59 N. J. Eq. 149, 44 Atl. 461 (Grey, V. C., 1899), affirmed 60 N. J. Eq. 411, 45 Atl. 966 (Ct. of Err. 1899); Haberman v. Kaufer, 60 N. J. Eq. 271, at page 278 et seq., 47 Atl. 48 (Grey, V. C., 1900). And in Van Keuren v. Siedler, 73 N. J. Eq. 241, 66 Atl. 920 (Leaming, V. C., 1907), the court suggested that the holder of a priorly recorded contract be made a party, so that his rights might be considered and settled.

It would thus appear that by the application of well-settled doctrine to the case at bar the latter was one in which it was proper, if not necessary, for the persons having either an interest in the land or a right to a part of the purchase money to be brought into the suit after the defendant Devitt by his testimony had notified the complainant of the trust attitude in which he stood toward the subject-matter of the suit. I therefore find that there is nothing in the defense that in a specific performance case such as this the only proper parties are those to the contract; and I find that the complainant was justified in bringing before the court these other parties who had an interest in the subject-matter of the suit, and to adjudicate their rights therein.

The defendants Devitt place great reliance in a case in the Court of Appeals of New York, Boyer v. East, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290. In that case a mother of infants, whose father was dead, became thereupon their guardian in socage,

and, under a statute of New York, became the custodian of their interests in real estate inherited from the father, in which real estate she also had interest as doweress. She purchased the property at a foreclosure sale and resold it. Eight years afterwards the infants brought an action against the then holder of the title to set aside the foreclosure sale and recover the possession of the property and have an accounting as to the rents and profits, upon the theory that they were cestuis que trustent of their mother, and that she could not convey a good title. The court held that she could convey a good title, and that the purchaser was not concerned with the application of the purchase money; and, furthermore, that a delay of eight years after the youngest of the infants attained his majority before attacking this conveyance showed such laches that a court of equity would not administer relief in their behalf. Laying aside the obvious question which at once arises as to whether this latter determination did not dispose of the case, and whether, therefore, the rest of the opinion is not obiter, I do not see that this case is dispositive at all of the case at bar, nor, in fact, that it affects it. In the New York case, there is nothing to show that the purchaser, who was certainly a bona fide one, did not purchase without notice of the infants' rights, and if this is so undoubtedly his title would be good; and, furthermore, there is no pretense that if the purchaser had been compelled to proceed by specific performance against the mother in order to obtain his title, and had known that she was the guardian in socage, and thus represented infant cestuis que trustent, it would not have been proper, and perhaps necessary, to have made such infants defendants in that suit. And I am inclined to think (but I have not stopped to ascertain whether this is so) that New York is one of those jurisdictions where the general doctrine is that the presence in a suit of a trustee is sufficient to bind the rights of all the cestuis que trust, unless their rights are obviously antagonistic.

I have therefore, under the facts of the case at bar, and the law which I find applicable thereto, determined that after the disclosure by Devitt on the witness stand it was proper for the complainants to bring the infants before this court as parties, and that the attitude which the complainant then assumed was legally proper. That attitude was that he was prepared to pay the purchase money; that he was entitled, in equity, to have before the court all persons whom the case then showed to have any legitimate claim upon said purchase money, so that he might be free from further claim with respect thereto. And that it is proper in this suit, as the decree herein provides, that the purchase money shall be paid by the complainant and held for such of the defendants as show themselves entitled thereto, in such proportions or sums as they shall demonstrate to the court are theirs. Furthermore,

since it appears that by reason of the facts the defendant Devitt was a trustee for infants, and as such could not dispose of real estate of infants without the sanction of this court, it was necessary to come to this court to get such sanction, and in such proceeding it was necessary and proper to have the infants before the court when that question was to be determined.

[8] It will be found by reference to the authorities, both in England and in this state, that the court of chancery has the inherent power, irrespective of statute, to change the character of property in which infants are interested for the benefit of said infants, and that one who holds property for infants may not dispose of the same without receiving the sanction of this court. 21 Cyc. 115 et seq.; *Snowhill v. Snowhill*, 3 N. J. Eq. 20 (Vroom, Chan., 1834; reversed, but not on this point. Opinion not reported. See *Oberly v. Lerch*, 18 N. J. Eq. 350); *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25, where the property was that of a lunatic, and not an infant.

In England, the useful authorities are *Michelsea v. Norcliffe*, 1 Vern. Ch. 435, 23 Full Eng. Reprint, 569; *Inwood v. Twynne*, 2 Ambler, 417; *Lord Ashburton v. Lady Ashburton*, 6 Ves. 6; *Ex parte Phillips*, 19 Ves. 118. And many of the English authorities will be found reviewed and the principle elaborated in *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, 251. And the doctrine has been approved in the following cases in our sister states: *Marsh v. Reed*, 64 Ill. App. 538; *Ruggles v. Tyson*, 104 Wis. 508, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 812; *Gorman v. Mullings*, 172 Ill. 353, 50 N. E. 222; *Johns v. Johns*, 172 Ill. 480, 50 N. E. 337; *Baldrige v. Coffey*, 184 Ill. 76, 56 N. E. 411; *Richards v. East Tenn., etc., R. Co.*, 106 Ga. 635, 33 S. E. 193, 45 L. R. A. 721; *Mayall v. Mayall*, 63 Minn. 514, 65 N. W. 948.

It appearing from the authorities that a court of equity has inherent power to change the character of property in the interest of the infant, the fact that the Legislature has provided a summary method of sale of infants' lands does not interfere with nor deprive the court of such inherent power (*U. S. Mtg. Co. v. Sperry*, 138 U. S. 332, 11 Sup. Ct. 321, 34 L. Ed. 969, 976); and this without consideration as to whether the summary proceeding does not apply only where the infants have title, and not, as in the case sub judice, where the infants have solely an equitable interest.

Testimony was taken as to the propriety of the sale of this property at this sum, and I find that this is the full value of the property, and that the sale is an advantageous one for the interests of the infants, and that the trustee should be permitted to make it. In reaching this determination, I likewise conclude that under the circumstances it was proper for the complainant to bring the infants before the court after notice that

they had interests in the land, so that the sale which their trustee had negotiated might be confirmed in protection of the complainant's title.

[7] This latter determination also disposes, in my view of the second defense interposed by the defendants as above set forth, namely, lack of mutuality. Their contention is that, if this court shall find that under the circumstances Devitt occupied the position of the trustee for these infants, and that this sale required confirmation by this court, then there was a lack of mutuality in the contract, and therefore the court would not enforce the contract.

John Norton Pomeroy, Jr., the son of the author of Pomeroy's *Equitable Jurisprudence*, and the author of the two added volumes which are annexed to the third edition thereof, and are termed "Pomeroy's *Equitable Remedies*," in the 769th section, says that the doctrine of mutuality "is open to so many exceptions that it is of little value as a rule"; and in sections 772 and 808 he states the principle and gives the cases which hold that, if the vendor can make a good title at the time of the decree, this satisfies the rule of mutuality. To a similar effect, see 86 Cyc. 621-623; *Fry on Specific Performance*, §§ 448, 452, 972, 974, 981, and 988; *Hawkes v. Eastern, etc., R. Co.*, 1 De Gex, M. & G. 733, 42 Full Eng. Reprint, 739 at 746; *Kuhn v. Eppstein*, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. (N. S.) 884; *Thompson v. Myrick*, 20 Minn. 205 (Gil. 184); *McDonald v. Yungbluth (C. C.)* 46 Fed. 836. And in our own state *Woodruff v. Woodruff*, 44 N. J. Eq. at page 355, 16 Atl. 4, 1 L. R. A. 380 (*McGill, Chan.*, 1888); *Cramer v. Mooney*, 69 N. J. Eq. 164, 44 Atl. 625 (*Grey, V. C.*, 1899); *Barger v. Gery*, 64 N. J. Eq. 263, at page 268, 53 Atl. 483 (*Stevenson, V. C.*, 1902); *Resnick v. Campbell*, 68 N. J. Eq. 348, 59 Atl. 452 (*Stevenson, V. C.*, 1904); *Agnes v. Koch*, 74 N. J. Eq. 528, 70 Atl. 348 (*Emery, V. C.*, 1908); *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25 (*Ct. of Err.* 1910).

I proceed upon the assumption that, if at the time of the decree (which is what the cases hold) the contract could not have been mutually enforced one against the other, then the court will not enforce it. In the case at bar, I do not think that this contract lacked mutuality, in view of the cases dealing with that subject. If it be determined that Devitt was the trustee of infants' land, and that he must receive the confirmation of this court of any sale before he could properly make such sale, there was nothing to prevent Devitt, after having negotiated this bargain, from coming to this court and obtaining its confirmation, and then enforcing his rights as against Day, if Day had refused to carry out the contract. And, as I hold in this case, a similar right rested in Day, namely, to come to this court and bring the trustee and the cestuis que trustant here,

and the bargain made between the trustee and Day, and ask the court to confirm the sale, and then enforce it. In this view, I cannot see how it can possibly be held that there was lack of mutuality in the contract. To hold otherwise than this would be to hold that all sales which are negotiated and require the confirmation of the court (of which there are very many in this state) are unenforceable, because at the time the contract was made undoubtedly the seller—whether he is an official of the court, or a trustee, or what not—is not in a position to carry out the contract, and will not be until the court confirms the sale. The opposite of this has always been held; and where such a contract has been made and subsequently confirmed the court has always enforced such contract specifically. Unquestionably, at the time of the conclusion of this case and the confirmation by this court of the sale, this contract was mutually enforceable, the one against the other; and this is all that I understand is required. Since I do not know of any case dissenting from this view, I shall not burden this opinion with citations of the authorities which are in accord with it.

The decree will be so drawn as to conclude the rights of Devitt and the cestuis que trustent in the property in question to require the payment of the purchase money by the complainant, and the bringing of it into court to be disposed of by the court, with due regard to the rights of all the parties concerned in it.

MISSISSIPPI WIRE GLASS CO. v. CONTINUOUS GLASS PRESS CO.

(Court of Chancery of New Jersey. Oct. 18, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 3*)—DESCRIPTIVE WORDS—PROPERTY IN.

Where a corporation manufacturing wire glass is the successor of one which controlled process patents for such product, the words "wire glass" are merely descriptive, and such corporation cannot restrain their use by another company manufacturing a similar glass, on the ground that their use to designate the product of the complainant while it had the exclusive right of manufacture has so identified them with its product as to give them a secondary meaning and to give it a property right therein, where there is no showing that after competition was established by the expiration of the patents the name was generally used to designate complainant's product in distinction to the product of other manufacturers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNLAWFUL COMPETITION—LIMITATION.

A corporation manufacturing wire glass has no exclusive right to use therein wire with a particular mesh, where the idea as to the construction of the glass and the use of that form of mesh is not original with it or its predecessors, and it has no patent thereon, as

to give it that right would have the effect of destroying competition in the manufacture of unpatented articles.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 67.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNLAWFUL COMPETITION—DECEPTION OF PUBLIC.

In an action to enjoin the doing of acts alleged to have been designed to mislead the public and to induce the belief that wire glass produced by defendant was that of complainant, evidence held to show no attempt by defendant to mislead the public in making and marketing a similarly appearing glass.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

Bill by the Mississippi Wire Glass Company against the Continuous Glass Press Company for an injunction. Dismissed.

Griggs & Harding, for complainant. B. V. Lindabury and Mr. Stoughton, for defendant.

STEVENS, V. C. The complainant seeks to obtain an injunction against the defendant to restrain it, first, from using the term "wire glass" in connection with its manufacture; second, from using, manufacturing, or selling glass plates with wire mesh imbedded therein identical with or like that manufactured and sold by complainant; third, from doing any act or using any artifice calculated to induce the belief that any glass plates with wire mesh imbedded therein, and not marketed by complainant, are complainant's.

Wire glass is a comparatively new product. It is useful, because it prevents the glass in which it is embedded from falling, if cracked, and because it is a valuable fire retardant. Its history, so far as this country is concerned, is as follows: In 1891, a Mr. Forrest showed Frank Shuman a small sample of wire glass having a hexagonal mesh about seven-eighths of an inch in diameter that had been found in a condemned express package, and asked him whether he could get up a machine for making this kind of material on a large scale. He made and patented a process for so doing. "Everybody," says Mr. Shuman in his evidence, "connected with the sample, and the men working at the experimental works, instinctively called it 'wire glass.'" A commercial article was produced which, Mr. Shuman says, "was practically the same in form, size, and shape of mesh" as the sample. The process patents for its manufacture were taken out in 1892. In that year the Wire Glass Company and the American Wire Glass Manufacturing Company were incorporated in Pennsylvania to manufacture the article, and the Shuman patents were transferred. They have now expired. In 1894, the complainant, the Mississippi Wire Glass Company, acquired the rights of the American Wire Glass Manufacturing Company, and has ever since been engaged in the manufacture of wire glass. Prior to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1901, three other companies began to manufacture it, but were soon absorbed by the complainant. In June, 1901, the defendant company was incorporated. It first manufactured a wire glass which it called 'Sinusoidal,' on account of the peculiar waviness of the wire. The wire went from face to face of the glass, and did not lie in one plane through its center. But its manufacture in this way was, according to Mr. Cox, its president, soon abandoned, because of a change in the rules of the National Board of Underwriters; the new rules requiring "the plane of the wire mesh to be practically midway between the two surfaces of the glass."

The glass now manufactured by defendant is very similar to that manufactured by complainant. It has, however, two distinguishing marks—the so-called ghost mark, made by the introduction of the wire into the melted glass, and the cable strand, or double wire, inserted for the purpose of identification, and appearing at intervals of nine inches. Of these, the latter is the more easily seen. Unless pointed out, they would probably not be remarked by the ordinary observer. As distinguishing marks, they enable the expert, be he manufacturer, engineer, or architect, to identify the manufacture.

[1] (1) It seems to me plain that the complainant has no property right in the name. It is accurately descriptive of the article. It has been its name in this country ever since it was made, either by complainant or by others, and in Germany (draht glass) for as long as or longer than it has been here. But it is said that, though originally descriptive, it has acquired a secondary meaning; that it means the product of complainant. As to this, I need only refer to what was said in *Cellular Clothing Co. v. Maxton & Murray* (1899) A. C. 326. There the effort was to persuade the House of Lords that the word "cellular," as applied to woven underwear, had come to be understood as meaning the manufacture of plaintiff. After referring to the case of a fancy name which is capable of exclusive appropriation, Lord Shand says: "A wholly different principle must apply in the case of goods which are sold under a merely descriptive name. If a person employing a word or term of well-known signification and in ordinary use, though he is not able to obtain a patent for his manufacture, and although he has not got the protection of a registered trade-mark for the goods he is proposing to sell, is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this descriptive term, he would really acquire a right much more valuable than either a patent or a trade-mark; for he and his successors in business would gain the exclusive right, not for a limited time, as in the case of a patent, but for all time coming, to use the word as applicable to goods which others may be desirous of manufacturing, and are entitled to sell and manufacture

as well as he." And Lord Davey says: "There are two observations which must be made. One is that a man who takes upon himself to prove that words which are merely descriptive or expressive of the quality of the goods have acquired the secondary sense to which I have referred assumes a much greater burden, and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge, a much greater burden, than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but which has been compendiously called a 'fancy' word. The other observation which occurs to me is this: That where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has of course not been used in connection with the article—and secures for himself, either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that the monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the plaintiff." These observations are directly applicable to the case in hand. The article "wire glass" was necessarily understood to be of complainant's manufacture while it alone manufactured it. But competitors soon appeared and called their product wire glass, and sold it under that name. Aside from the difficulty on the score of time, the evidence fails to convince me that it has been generally used to denote complainant's product in contradistinction to the product of others.

[2] (2) Complainant's next contention is that, while it has no exclusive right to manufacture wire glass, it has the right to enjoin defendant from manufacturing glass with a mesh similar to or identical with complainant's; in other words, that defendant cannot put into its glass a wire mesh of the same form, size, and thickness of wire as complainant puts into its. As I have already said, the mesh used by complainant was not original with it. It was copied from a sample found in a condemned express package. If complainant's contention be sound, then, although it has no patent and could not obtain one, it has the right for all time exclusively to manufacture the article in a form which has been used before, and which it only copied—a much more valuable monopoly than that which any patent could have given it. It is obviously not the law that different manufacturers may not manufacture the same unpatented article in competition.

[3] We come then to the last contention, viz., that defendant is using artifice to induce

the public to believe that its goods are complainant's, and that it is endeavoring to pass off its goods as such. The mere fact that defendant makes and sells a similar article and calls it wire glass is not, of itself, evidence of such an endeavor. I fail to find any proof of what may be called "unnecessary imitation"; imitation designed to mislead. The evidence shows that variations in the form and appearance of the product must be slight, if a merchantable article is to be manufactured at all. The rules of the National Board of Fire Underwriters make this very clear.

Rule b, as found in the edition of 1901, reads as follows: "No glass shall be accepted of less thickness than one-quarter of an inch (full) if rough plate, ribbed or figured," etc. Rule c. "No glass shall be accepted with mesh larger than one inch and with such mesh, no wire of smaller size than No. 22 B. & S. wire gauge shall be used." In the edition of 1906, rule c was altered. The maximum size of mesh was changed from one to seven-eighths of an inch, and the size of wire to "nothing smaller than 24 B. & S. gauge," instead of 22 B. & S. gauge. In other words, permission was given to use a wire whose gauge was very slightly and to the ordinary observer imperceptibly smaller than was prescribed before.

The evidence would indicate that the hexagonal shape has, in this country at least, been found to be the best in practice. Mr. Cox says that it tends to keep its shape, and that the optical effect of it is better. Be this as it may, the hexagonal shape is that of the original sample, and the complainant has no exclusive property in it.

Now, as the glass is sold largely, if not principally, as a fire retardant, it is obvious that if it is to be put upon the market compliance with the rules of the underwriters is of the first importance, for it means reduced insurance rates to the consumer. According to these rules, the glass must be at least one-quarter of an inch thick. No manufacturer is likely to waste material in making it thicker, if he is not obliged to. Then the mesh must be of no greater diameter than seven-eighths of an inch and no smaller than gauge 24 B. & S. If the manufacturer would compete successfully with his rival, he is not willingly going to use a wire thicker and harder to cut or a mesh smaller than the laboratory experiments conducted by the underwriters have shown to answer the purpose. If this be conceded, and if the hexagonal shape may be used, then the limit of variation is very small indeed. It would be hardly noticeable by the ordinary observer. In this aspect of the case, it is like that of two manufacturers selling in competition the same product, be it glass, cloth, or other staple article.

The correspondence with the Wickwire

Bros., so largely relied upon, is capable of a twofold construction. These gentlemen are manufacturers of wire mesh, and they supplied the complainant with it. They also, in the beginning, supplied defendants with it, making for them a slightly thicker wire. After a while, Mr. Cox wrote for a thinner wire (No. 24. Washburn & Moen gauge) "exactly the same mesh as the Mississippi Co. uses." Now Cox may have written this with intent to imitate, or with intent merely to characterize and explain. He says it was with the latter intent; that he had found that the jobbers were complaining that his glass was harder to cut; and that, there having arisen between himself and the Wickwire Bros. a misunderstanding as to what was meant by the appellation "24 B. & S.," he wanted to make his meaning perfectly clear. Now, I take it, that if he had the right to use the wire at all he had the right to characterize it in terms that were unmistakable. If anything was going to deceive the public, it was the wire itself, after it was put into the glass, not the description of it, intended only for its maker. If it was lawful for defendant to use that kind of mesh, I am at a loss to understand how the order so given could, in the words of the prayer for injunction, be regarded as an artifice calculated to induce in the public the belief that defendant's glass was of complainant's manufacture. The case comes down to this: Could defendant lawfully use hexagonal wire mesh of the gauge 24 B. & S.? If it could, it cannot be held that it was intending a fraud, when it described it as it did to the Wickwire Bros.

Has the defendant, then, having the legal right to make the wire glass, put it upon the market under false colors? There is no proof that it has. It labels each sheet with its own name, in the ordinary way, and it distinguishes it further by the ghost mark and by the cable strand inserted every nine inches—a method of differentiation acceptable to and accepted by the board of underwriters. There is some evidence that jobbers have occasionally substituted defendant's glass for complainant's, but the proof does not show that this kind of practice has been sanctioned or encouraged by defendant.

I think the bill should be dismissed, with costs.

DOGGETT v. TATHAM.

(Court of Appeals of Maryland. June 23, 1911.)

1. WITNESSES (§ 258*)—REFRESHING MEMORY.

A witness cannot testify from books or memoranda which are not books of original entry, nor made under the witness' direction or supervision, but by clerks not shown to be dead or unobtainable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 893, 896; Dec. Dig. § 258.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. DEPOSITIONS (§ 66*)—EXAMINATION OF WITNESS—OBJECTIONS—LEADING QUESTIONS—NECESSITY OF OBJECTION.

The rule that an objection to a question as leading must be made at the time to give the examiner opportunity to reframe the question cannot be dispensed with in taking depositions in another state, on the ground that defendant was not represented when plaintiff took the depositions because of the expense of being represented.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 66.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—IMMATERIAL EVIDENCE.

While the admission of immaterial evidence is unfortunate, as having a tendency to confuse the issues in the minds of the jury, it will not be ground for reversal where it is not apparent that any injury resulted therefrom, especially as much latitude must be allowed to the discretion of the trial court as to the materiality of the evidence sought to be elicited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

4. PLEADING (§ 382*)—PROOF—GENERAL ISSUE.

Under a plea of the general issue in assumpsit upon common counts for the value of soapstone sold to defendant, defendant could give evidence, by way of recoupment, of any damage sustained by any breach of plaintiff's contract to deliver the stone.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1280-1294; Dec. Dig. § 382.*]

5. TRIAL (§ 139*)—JURY QUESTION.

If there is any evidence, however slight, upon the material questions involved, the court should not withdraw the case from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

6. SALES (§ 161*)—REJECTION OF CASE—PLACE.

A purchaser is bound to accept or reject the goods at the place of delivery f. o. b.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

7. TRIAL (§ 199*)—INSTRUCTIONS—SUBMITTING QUESTIONS OF LAW.

An instruction in assumpsit for goods sold and delivered under contract, authorizing recoupment by defendant, provided the jury found that "defendant was not in fault under the contract," was erroneous as submitting to the jury not only what constituted the contract, but also what its proper interpretation was, which were for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467-470; Dec. Dig. § 199.*]

8. TRIAL (§ 141*)—QUESTIONS FOR JURY—ADMITTED FACTS.

An asserted right of recoupment for breach of contract by defendant in assumpsit for goods sold and delivered necessarily admitted defendant's breach of the contract, making it error to submit that question to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

9. TRIAL (§ 242*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction in assumpsit on the common counts for goods sold, in which defendant sought to recoup for breach of contract, was misleading where it submitted as a question of fact whether defendant had itself also

breached the contract, where its breach had been admitted by the attempt at recoupment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Assumpsit by Charles Tatham, assignee of the Patapsco Stone Company, against Hilton J. Doggett. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Argued before BOYD, C. J., and PEARCE, BRISCOE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Joseph N. Ulman, for appellant. J. Royall Tippet, for appellee.

STOCKBRIDGE, J. The facts out of which this litigation arises are comparatively simple. On the 14th of April, 1906, the Patapsco Stone Company, a corporation organized under the laws of New Jersey, entered into a contract with Hilton J. Doggett to furnish for his account to customers to be secured by him refuse or powdered soapstone to the extent of at least 500 tons every three months, the same to be delivered f. o. b. car at Marriottsville, at a stipulated sum per ton, and by a letter dated May 22, 1906, to furnish crude soapstone in bulk f. o. b. cars Marriottsville, at a different price. On the 21st of June the defendant notified the stone company that he had orders for 2,865 tons to be shipped during the ensuing 12 months, and by letter dated June 27th the stone company advised the defendant that they would undertake to fill orders for the amount so named by him. The contract between the parties contained this stipulation: That "the party of the first part (the stone company) shall ship all the refuse or powdered soapstone produced by it that the party of the second part can find customers for up to the limit of its operations, except in case of loss or damage by fire or water, accidents or unavoidable delays beyond the control of the party of the first part, and also except in case the said party of the first part should for any reason cease operations." The defendant appears from time to time to have sent in orders to the stone company, and the same were shipped by the company up until August, 1906, when by reason of a freshet a landslide took place at the quarry of the company, and they ceased to make further deliveries, although they do not seem as late as the month of September of that year to have abandoned the idea of carrying on business, and from that account filed with the declaration shipments appear to have been made as late as August 31st and September 3d. The present suit is brought by the assignee of the stone company against the defendant to recover for certain stone, both crude and powdered, alleged to have been delivered upon the plaintiff's order, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not paid for. The suit is in the form of an action of assumpsit upon the common counts, and not in covenant upon the sealed contract between the parties. To this the defendant filed general issue pleas, and the case came up for trial before a jury. The record presents 18 bills of exception, of which the last is to the action of the court upon the prayers, and the others to various rulings of the court upon the evidence.

[1] The bills of exception numbered, respectively, 1, 2, 3, 8, 9, 10, 11, 13, 14, 15, and 16, may all be grouped together. In each instance they are founded upon rulings by the trial court on objections to the testimony given by one or another of the witnesses from books or memoranda, or motions to strike out such evidence, when such books or memoranda were not shown to have been books of original entry, or to have been made under the direction or supervision of the witness who was testifying, but, on the contrary, to have been made by clerks who were not shown to be either dead or unobtainable. With regard to testimony of this character, the rule has been repeatedly laid down by this court that such evidence is not admissible, and that its admission constitutes reversible error. *Green v. Caulk*, 16 Md. 556; *Thomas v. Price*, 30 Md. 483; *Bullock v. Hunter*, 44 Md. 416; *Heiskell v. Rollins*, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455; *Richardson v. Anderson*, 109 Md. 641, 72 Atl. 485, 25 L. R. A. (N. S.) 393; *Hoogewerff v. Flack*, 101 Md. 382, 61 Atl. 184. The brief with regard to the first three bills of exception of the appellee contains the statement that, after having been admitted, the lower court consequently struck out the objectionable evidence, but the record does not clearly bear out this statement, and, even if such were the fact, the evidence admitted and which formed the ground of the other exceptions named was improperly before the jury.

[2] The fourth exception raises a question with regard to which there is no exact adjudication in this state. The evidence of Charles A. Williams was being taken in Virginia under the provisions of section 16 of article 35 of the Code of Public General Laws. The plaintiff was represented at the taking of this evidence, but the defendant was not, and on the reading of the deposition the fifteenth question was objected to upon the ground that it was leading, though no such objection appears to have been made or noted at the time when the testimony was taken. On behalf of the defendant, it is urged that he was entitled to the hearing to object to the question on the ground of its leading character, and that it was his first opportunity to object because of the expense to which the defendant would be subjected if compelled to be represented by counsel at the taking of foreign depositions. With this contention this court cannot agree. It has long been the recognized rule in this state that, where a question was supposed

to be objectionable upon this ground, the objection and the reason for it must be noted at the time, in order to afford the party propounding the question an opportunity to reframe it in such form that it would not be open to this objection. The rule is a most salutary and wise one if any regard is to be had for the rules of evidence, and the mere question of convenience or expense to a party litigant cannot be permitted to outweigh the enforcement of the general rule. The action of the lower court in this regard was therefore entirely correct.

The fifth exception is based upon the supposed leading character of a question propounded by the trial court to a witness under examination, and no error is perceived in the ruling of the court with regard to this exception.

[3] The sixth and seventh exceptions were taken from the action of the court in sustaining an objection to a question asked of the witness, *Tatham*, as to the difference between crude stone and powdered stone, and to the admission in evidence of a letter relating to the payments which had been made by the defendant for certain of the goods shipped upon his order. In both instances the evidence offered was immaterial to any issue presented in the case; and while the practice of admitting immaterial evidence is unfortunate, since it tends to confuse the minds of the jury as to the real issues, it is not apparent that any injury resulted from the rulings of the court upon which these exceptions were based, and considerable latitude must always be allowed to the discretion of a trial court as to the materiality of the evidence sought to be elicited.

The twelfth and seventeenth exceptions both relate to the same aspect of the case, since they deal with the effect produced by the failure of the plaintiff to make shipments of certain of the goods ordered by the defendant. It seems to have been the theory of the defendant that from the amount claimed to be due by him to the plaintiff he was entitled to recoup for losses sustained by him as the result of the nonshipment by the plaintiff of goods which he had ordered. He was relying upon his contract made with the company. From his point of view that contract had been broken by the failure of the company to make its deliveries upon his orders as therein provided, and that as the result of this violation of the contract he was entitled as against any moneys due by him to the stone company for goods delivered to offset the damages suffered by him as the result of such failure.

[4] No claim of set-off appears to have been filed, nor could one have been properly filed in the condition in which the case came to trial; but, under the general issue plea, the defendant was undoubtedly entitled to give evidence tending to show injury suffered upon which to found a claim of recoupment which was proper to be considered by the

jury, and the effect of the ruling of the court in excluding this evidence was to deny to the defendant the opportunity to place before the jury the evidence upon which he must rely for this claim. This was clearly reversible error. *Poe on Pleading*, § 616; *Abbott v. Gatch*, 13 Md. 315, 71 Am. Dec. 635; *Warfield v. Booth*, 33 Md. 63.

At the conclusion of the evidence the plaintiff offered two, and the defendant four, prayers, of which the trial court granted both prayers of the plaintiff, modified the first prayer of the defendant, and granted it in a modified form, and refused the defendant's second, third, and fourth prayers.

[5] We do not perceive any error upon the part of the trial court in its ruling upon the last three prayers of the defendant, which sought to take the case from the jury upon the ground of failure of evidence, for there was undoubtedly some evidence properly before them upon the points in those prayers referred to; and where there is any evidence, no matter how slight, the court will never sanction the withdrawal of the case from the jury.

[6] To the plaintiff's first prayer the defendant does not seem to make any serious objection; and the second prayer of the plaintiff instructed the jury that under "the undisputed evidence in this case the goods purchased by the defendant from the plaintiff were to be delivered f. o. b. at Marriottsville, Md., and that under the law the defendant was required to accept or reject all goods purchased by him from the plaintiff at that place." This has been expressly stated to be the law of this state as late as the case of *Lawder v. Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, and *Am. Syrup Co. v. Roberts*, 112 Md. 18, 76 Atl. 589, and no sufficient reason appears why a departure should be made from the rule there laid down.

The defendant's first prayer was as follows: "If the jury find from the evidence that the plaintiff's claim is for the purchase price of certain lots of powdered and unground refuse soapstone bought by the defendant from the plaintiff's assignor and delivered by the plaintiff's assignor to the defendant, and if the jury shall further find that the said stone was purchased by the defendant under and by virtue of the terms of a certain written sealed agreement between the defendant and the plaintiff's assignor dated April 14, 1906, as modified by a subsequent agreement fixing the price of unground refuse soapstone, and adopting with reference thereto the other terms of said sealed agreement of April 14, 1906, and if the jury shall further find that the defendant in pursuance of said sealed agreement as modified notified the plaintiff's assignor by letter dated June 21, 1906, that he had booked contracts to the amount of 2,865 tons

of said soapstone to be shipped as wanted during the next succeeding twelve months, and that the plaintiff's assignor had accepted said order and agreed to furnish the said soapstone, and if the jury shall further find that the plaintiff's assignor failed or refused to perform its agreement in the premises to the loss and damage of the defendant, that then the defendant is entitled to offset or recoup against the plaintiff's claim such sum, if any, as the jury may find the defendant lost by reason of such failure to perform by the plaintiff's assignor."

[7] This was modified by the court by the addition of the words, "provided, however, that the jury must also find that the defendant was not in fault under said contract." This addition to the prayer was unfortunate, because it submitted to the jury, not only to find what constituted the contract, but what the proper interpretation of that contract was, and the interpretation of a contract is always a matter of law to be ruled upon by the court.

[8] It also submitted to the jury the finding of whether or not there had been a breach of the contract when by the very nature of the defendant's case the breach was admitted since the defense was the right to recoup, and without a breach of the contract there could be no claim for recoupment.

[9] The prayer in the form in which granted, therefore, was calculated to confuse and mislead the jury, while it submitted to them questions for their determination which it was proper should have been passed upon by the court. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689.

For the reasons indicated, the judgment below will be reversed, and the cause remanded for a new trial, costs to be paid by the appellee.

Judgment reversed and new trial awarded. Costs to appellant.

WILMER v. EPSTEIN et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. JUDGMENT (§ 17*)—JUDGMENT IN PERSONAM—JURISDICTION OF PERSON.

Jurisdiction of defendant's person must be acquired by personal service of process or by his voluntary appearance, before a valid judgment in personam can be rendered against him.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

2. GARNISHMENT (§ 95*)—PROCESS—SERVICE—JURISDICTION OF PERSON.

Code Pub. Gen. Laws 1904, art. 75, § 168, permits constructive or substituted service only where direct personal service is prevented by threats, etc., or the person to be served is within a fortified place. Article 9, §§ 11, 29, require the writ in garnishment proceedings to contain a clause, commanding the officer executing it to make known to each person, in whose hands the chattels attached are, to appear on the return to show cause why such chattels shall not

be condemned and execution had. *Held*, that the court had no power to render judgment of condemnation against a garnishee, where the only service was upon an agent or employe of the firm to be garnished.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 181-188; Dec. Dig. § 95.*]

3. JUDGMENT (§ 16*)—JURISDICTION OF PERSON—EFFECT OF ABSENCE.

A judgment in personam is wholly void, if no jurisdiction of defendant's person is acquired.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 22, 24; Dec. Dig. § 16.*]

4. JUDGMENT (§ 419*)—EQUITABLE RELIEF—WANT OF JURISDICTION—WANT OF SERVICE.

Equity will restrain the enforcement of a personal judgment, void for want of jurisdiction of defendant's person because of want of personal service, even though he knew that the action was pending against him, so that, where a garnishee was not personally served, so as to give jurisdiction, and the attaching creditor was not entitled to a judgment against him, even if he had been served, because he did not hold any of the debtor's funds which were not exempt, of which the attaching creditor was informed by the garnishee's agent, equity will enjoin the enforcement of an ex parte judgment against the garnishee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 794; Dec. Dig. § 419.*]

5. EXEMPTIONS (§ 48*) — GARNISHMENT — AMOUNT DUE DEBTOR.

Under Code Pub. Gen. Laws 1904, art. 9, § 33, providing that wages or hire not actually due shall not be attachable, and that \$100 of such wages shall always be exempt from attachment by any process whatever, an attaching creditor was not entitled to a judgment against the garnishee for any amount, where the only wages due from the garnishee to the debtor was \$13.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64-72; Dec. Dig. § 48.*]

6. JUDGMENT (§ 456*)—EQUITABLE RELIEF—PROCEEDINGS—TIME TO SUE.

A letter from the attaching creditor, claiming under a void judgment of condemnation, to the garnishee, referring to the judgment against the garnishee, and stating that the time for appeal had expired, and requesting payment without delay, showed that the attaching creditor contemplated enforcing the judgment, so as to entitle the garnishee to sue to restrain its enforcement without waiting until his property was levied upon.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 456.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit by Jacob Epstein and others against Edwin M. Wilmer. From a decree for complainants, defendant appeals. Affirmed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

David Ash, for appellant. Martin Leh-mayer, for appellees.

URNER, J. The object of this suit is to restrain the enforcement of a judgment alleged to be void for want of jurisdiction. It is stated in the bill of complaint filed by the appellees in the court below that they are

copartners, trading as Baltimore Bargain House, Jacob Epstein, proprietor; that a certain John O'Grady was, in the year 1910, and still remains, in their employ, at a salary of \$13 per week, as packer in their millinery department; that his wages were always paid him weekly and never accumulated, and they at no time owed him for more than one week's services; that on or about August 2, 1910, they received a letter from the defendant, in which he claimed that on February 17, 1910, a judgment of condemnation was rendered in his favor against the complainants as garnishees of O'Grady for the sum of \$58.39, with interest and costs, by a designated justice of the peace of Baltimore city; that this was the first intimation or notice they had of the existence of the judgment; that they were never summoned in the case in which it was rendered, and the attachment was never laid in their hands; and that the judgment was not recorded and notice given them of its entry until the time for appeal had expired. The bill asserts that the judgment of condemnation is consequently void. A certified copy of the justice's record was exhibited with the bill. It shows that the attachment in question was issued on a judgment against O'Grady for \$57.81, and was docketed in the name of the appellant against "Baltimore Bargain House, Garnishee of John O'Grady"; that the writ was returned "served," as was also a subpoena duces tecum, issued by order of the judgment plaintiff; that the garnishee failed to appear on the day set for the hearing of the case, and there was a trial ex parte, resulting in a judgment of condemnation for the amount already stated. The writ was directed to a constable of Baltimore city. It contained the usual scire facias clause, commanding the officer to "make known" to the garnishee to appear on the return of the writ and show cause why the attached credits should not be condemned and execution therefor issued. The constable's return is as follows: "By virtue of this writ to me directed, laid in the hands of Baltimore Bargain House, by service on George R. Nelson, Supt., this 27th day of Jan'y, 1910, at 11 o'clock a. m., and made known this writ to said firm as garnishee as I am commanded, and served notice of day, date and hour of hearing thereof on the said garnishee who refused to receive the same." This was supplemented by the following indorsement: "I hereby certify that on January 27, 1910, I laid the within writ in the hands of the Baltimore Bargain House by service on George R. Nelson, Supt., at 11 o'clock a. m., and that the said Nelson declined and refused to receive the notice of the attachment on the ground solely that the judgment was not attachable."

The bill of complaint makes allegations to the effect that the defendant concealed from the complainants the fact that the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of condemnation had been obtained until it was too late for an appeal; that the complainants have never had any moneys, property, or credits in their hands belonging to the original judgment debtor which were liable to attachment; that by reason of the act of the defendant in concealing the existence of the judgment the complainants are without remedy at law, as the time within which they could have taken an appeal has expired; that they have not been guilty of laches or negligence in the premises; and that it would be inequitable to allow the judgment of condemnation to be enforced. There were prayers for a cancellation of the judgment, for an injunction against its enforcement, and for general relief. The defendant demurred to the bill, and this appeal is from an order of the court below, overruling the demurrer and requiring an answer to be filed.

It is contended by the appellant that the bill is deficient in not alleging want of knowledge by the complainants of the pendency of the attachment. The theory of this objection is that, even though there may have been no service of process upon the firm sought to be affected by the garnishment, yet, if its members had actual knowledge of the suit, their only remedy was to contest in that action, and on appeal, the jurisdiction of the magistrate to render judgment of condemnation. It is urged, therefore, that, inasmuch as the bill denies that the writ was served upon the complainants, but does not deny that they knew of the attachment in time to make a defense in that proceeding, the demurrer should have been sustained.

[1. 2] It is elementary law that, before a valid judgment in personam can be rendered, jurisdiction of the person of the defendant must be acquired, either by personal service of process upon him or by his voluntary appearance. 2 *Poe on Pleading & Practice* (3d Ed.) § 62; 23 *Cyc.* 684. In this case the demurrer admits in effect that the only service of the attachment and scire facias was upon an individual who was not a member of the firm intended to be made garnishees. We do not understand it to be contended that this was sufficient to give the court jurisdiction to render the judgment in question, and it is clear upon principle and authority that such a contention, if made, could not be sustained. *Smith Premier Co. v. Westcott*, 112 Md. 146, 75 Atl. 1052; *Kittrell v. Perry Lumber Co.*, 107 Tenn. 148, 64 S. W. 48; *Faul v. Beucus*, 124 Mich. 26, 82 N. W. 659. In 2 *Poe on Pleading & Practice* (3d Ed.) 62, it is said: "The service of the summons must be a personal one, and the officer charged with the duty of serving it is not authorized to leave a copy of it at the office, residence, or place of business of the defendant and return him as summoned, nor to serve it upon his wife, agent, or partner." Under our statute, it is only where direct service upon the person sued is prevented within the jurisdiction, by "threats, violence, intimidation, or superior force" interposed on his

behalf, or he is within a fortified place into which the officer cannot enter without force or personal risk, that constructive or substituted service is permitted. Code, art. 75, § 166. It is specially provided by sections 11 and 29 of article 9 of the Code that the writ of attachment, in a case like the present, "shall contain a clause commanding the sheriff or other officer, at the time of executing the said attachment to make known to each person in whose hands or possession the lands, tenements, goods, chattels and credits so attached are, if to him it shall seem meet, to be and appear on the return of such attachment before the court out of which it issued, to show cause why such lands, tenements, goods, chattels or credits so attached should not be condemned and execution thereof had and made as in other cases of recoveries and judgments given in courts of record." In view of these provisions, as well as upon the general rule of law we have stated, we can have no doubt that the service of process shown upon the face of the proceeding in this case was ineffective to give the justice of the peace jurisdiction to render the judgment here sought to be restrained.

[3] The question to be determined, when reduced to its simplest form, is whether a court of equity must refrain from interfering with the enforcement of a personal judgment rendered without jurisdiction of the person, merely because the ostensible defendant does not aver and prove that he did not know of the pendency of the action. It is a firmly established principle that a judgment in personam, where no jurisdiction of the person is obtained, is wholly void. *Hanley v. Donoghue*, 59 Md. 248, 43 Am. Rep. 554; *Horner v. Popplein*, 112 Md. 591, 77 Atl. 252; *Clark v. Bryan*, 16 Md. 171; *Clark v. Wells*, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138. In *Hanley v. Donoghue*, supra, it is said: "But it is essential to the validity of a judgment in personam that the court should have jurisdiction over the parties, and, if rendered without such jurisdiction, it is a mere nullity. Such a judgment is not merely erroneous because of some irregularity in the mode of proceeding, or error on the part of the court in the application of the law to the particular case, and for which the party aggrieved must seek a remedy by appeal or writ of error, but, being a judgment rendered without jurisdiction, it is absolutely void, and may be assailed at all times and in all proceedings by which it is sought to be enforced."

[4] In harmony with this doctrine, it is well settled that the enforcement of judgments thus invalid may be restrained in equity. *Horner v. Popplein*, 112 Md. 591, 77 Atl. 252; *Miller v. M. & St. L. R. Co.*, 119 Iowa, 41, 93 N. W. 76; *Truitt v. Darnell*, 65 N. J. Eq. 221, 55 Atl. 692; *St. Louis & S. F. Ry. Co. v. English* (Tex. Civ. App.) 109 S. W. 424; *Kochman v. O'Neill*, 202

Ill. 110, 66 N. E. 1047; Pomeroy's Eq. Jur. (3d Ed.) vol. 6, § 633 et seq.; High on Injunctions (3d Ed.) vol. 1, § 229. The right to such equitable relief rests upon the ground that the judgment is a nullity, and does not depend upon the ability of the party against whom it was rendered to show that he had no independent information as to the pendency of the suit. In *Wilcke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394, there was service of process on the daughter of the person intended to be summoned, and the latter had actual knowledge of the proceeding, but the court held that there was no jurisdiction to enter judgment against the person sought to be served by the writ, and that equity would restrain its enforcement. It was held, in *David Bradley Mfg. Co. v. Burrhus*, 135 Iowa, 324, 112 N. W. 765, that, where there was no proper service of notice or voluntary appearance as provided by the statute, it was immaterial whether the one proposed to be subjected to the judgment may have otherwise received knowledge of the action. The same principle was applied in *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863, and *Savings Bank of St. Paul v. Authier*, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498, and the general rule to this effect is stated in 28 Cyc. 685.

[5] The facts of the case before us are ample, in our opinion, to entitle the appellees to equitable relief, even upon the assumption that they were aware of the attempt to make them garnishees. It is admitted by the demurrer that the weekly wages sought to be attached were always paid as they accrued, and that they never accumulated. It thus appears that when the attachment was laid there could not have been more than \$13 due from the appellees to the original judgment debtor. By section 33 of article 9 of the Code it is provided that wages or hire, not actually due, shall not be attachable, and \$100 of such wages or hire shall "always be exempt from attachment by any process whatever." In the face of this provision, and upon the facts here conceded, the attaching creditor had no right to a judgment for any amount against these appellees. *First Natl. Bank v. Weckler*, 52 Md. 41. Yet, notwithstanding the failure of personal service apparent from the constable's return, and in spite of the declaration which it reported from the appellee's agent that they had no attachable funds in their hands, the action was pressed to the ex parte judgment in controversy. Under these circumstances, presented by due averments in the bill, we have no hesitation in holding that the demurrer was properly overruled. In the numerous cases cited by the appellant, the parties complaining of the judgments had been ac-

tually summoned, or had voluntarily appeared to the summons, and had neglected to make available defenses. The principle of these cases is entirely consistent with the doctrine upon which we base our present decision.

[6] It was urged that there is no occasion shown on this record for intervention by injunction, because the bill does not allege any attempt to execute the judgment. The appellant's letter, exhibited with the bill, calls the attention of the appellees to the judgment of condemnation, informs them that the time for appeal has expired, and requests payment without further delay. This plainly portended an enforcement of the judgment, and the appellees were not required to submit to the annoyance of a levy on their property before seeking the protection of a court of equity. *Brauer v. Refrigerating Co.*, 99 Md. 381, 58 Atl. 21, 66 L. R. A. 403, 105 Am. St. Rep. 304; *Didier v. Merryman*, 114 Md. 434, 79 Atl. 597.

Order affirmed, with costs, and cause remanded.

BETZ v. P. WELTY & CO.

(Court of Appeals of Maryland. June 23, 1911.)

1. JUDGMENT (§ 106*)—ANSWER—TIME FOR ANSWER.

Under Acts 1902, c. 409, providing that in any suit on a contract the plaintiff, if affidavit be made, shall be entitled to judgment on motion in writing at any time after 15 days from the return day, even though the defendant may have pleaded, unless such plea contains a good defense and is verified by oath, but that the court may at any time before judgment extend the time for filing such plea and affidavit, a plaintiff may take a default judgment where defendant has failed to plead within the required time, even though defendant has since requested leave to plead.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 180-197; Dec. Dig. § 106.*]

2. APPEAL AND ERROR (§ 679*)—RECORD—QUESTIONS PRESENTED.

The action of the trial court in refusing to allow a defendant to plead after the time prescribed by Acts 1902, c. 409, which also provided that the court, at any time before judgment, may, upon good cause shown, extend the time for pleading, cannot be reviewed on appeal, where the record does not show what excuse was offered for delay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878-2879; Dec. Dig. § 679.*]

3. JUDGMENT (§ 652*)—CONCLUSIVENESS—JUDGMENTS BY DEFAULT.

A judgment by default conclusively established the liability of the defendant; and hence, in a subsequent proceeding to assess the damages, defendant may not offer evidence contradicting such liability.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1164; Dec. Dig. § 652.*]

4. JUDGMENT (§ 126*)—JUDGMENTS BY DEFAULT—PROOF OF CAUSE OF ACTION.

Though a judgment by default in a contractual action establishes the liability of de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant, it is incumbent upon plaintiff to prove the amount of such liability.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 228-230; Dec. Dig. § 128.*]

5. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR.

Where, after a default judgment against defendant, plaintiff offered evidence that he did not know defendant's proper name, but that she was the party he intended to sue, and that he had sued her before by another name, but that the case had been nonprosessed, the admission of this evidence was harmless, if erroneous, because the liability of defendant was established by the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by P. Welty & Co. against Elizabeth Betz. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

J. W. S. Cochrane, for appellant. Urner G. Carl, for appellee.

PATTISON, J. This action was brought by the appellee against Elizabeth Betz, the appellant, under the provisions of the Acts of 1902, c. 409, known as the practice act, for Allegany county, to recover from the defendant the amount claimed to be due and owing upon an open account.

The declaration, consisting of the common counts, was filed at the time of the institution of the suit, and appended thereto was an affidavit of the plaintiff, and filed therewith was the open account, as required by the local statute above mentioned, in which the name of the debtor appeared as Mrs. Henry Betz. The summons was issued on October 26, 1910, and made returnable on the 14th day of November following, and under the statute the defendant was required to plead to the declaration within 15 days from the said return day.

On the 28th of December, 1910, 44 days after the return day, the defendant, by her counsel, filed the following demurrer, as it is termed in the record: "Elizabeth Roan, by J. W. Scott Cochrane, her attorney, appears in this cause as the party upon whom service of summons was made as 'Elizabeth Betz,' and demurs to the whole declaration and cause of action appended thereto."

On the following day (December 29th), he filed the following affidavit: "Personally appeared before me, the subscriber, deputy clerk of the circuit court in and for Allegany county, Md., J. W. S. Cochrane, counsel for the defendant in the above case, and made oath in due form of law that the defendant has a bona fide intention of making a defense and contesting the right of judgment in the said above case, and that he does

not resist the entry of judgment for the purpose of delay or of giving priority to others. E. R. Johnston, Deputy Clerk."

On the 30th of December, the plaintiff moved for a judgment by default "for want of a plea verified by affidavit (or for want of a sufficient plea, or for want of a sufficient affidavit)," and on January 3, 1911, judgment by default was entered. The following day (January 4th) a motion for a new trial was filed, upon which a new trial was granted on January 30, 1911.

It is disclosed by the record, although it does not appear in the docket entries, that after the granting of a new trial, and on the same day thereof, the defendant offered to file her plea of "never indebted as alleged" and affidavit, as required by the said statute, but the court, upon motion of ne recipiatur, refused to receive the same. Judgment by default was thereafter, on the same day, entered, as shown by the docket entries.

[1, 2] The first question raised by this appeal is as to the ruling of the court in refusing to receive the plea offered by the defendant on January 30, 1911, more than two months after the return day of the summons. No plea had hitherto been filed; in fact, no pleading of any character had been filed by the defendant to the suit instituted against her, other than the demurrer to the whole declaration and cause of action above mentioned, and these were filed more than 40 days after the return of the writ, and at a time when, under the statute, the plaintiff was entitled to its judgment by default, and which were evidently treated by the plaintiff in filing his motion, and by the court in entering the judgment by default, as a nullity, and, as we think, properly so. *Knickerbocker Life Ins. Co. v. Hoeske*, 32 Md. 325; *Gemmell v. Davis*, 71 Md. 464, 18 Atl. 955.

The statute upon which this suit is instituted provides that: "In any suit when the cause of action is a contract, whether in writing or not, or whether expressed or implied, the plaintiff, if affidavit or affirmation be made as hereinafter stated, shall be entitled to judgment to be entered by the court or clerk thereof, on motion in writing, at any time after fifteen days from the return day, to which the defendant shall have been summoned, although the defendant may have pleaded, unless such plea contains a good defense and unless the defendant or some one on his behalf shall, under oath or affirmation, state that every plea so pleaded by the defendant is true," etc. And in the latter clause of the section it is provided that: "The court, for good cause shown, may by its order in writing, passed at any time before judgment, extend the time for filing such plea and affidavits, which extension shall suspend until the expiration there-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of the plaintiff's rights to enter judgment under this section."

In the case of *Gemmell v. Davis*, supra, in which case the pleas had been filed without the permission of the court after the expiration of the 15 days from the return day, the court, in construing the local statute for Baltimore city from which the provisions of the statute here involved, in which we are now concerned, were copied, said: "The plaintiff has a right, at any time after the expiration of the 15 days from the return day, to apply for and obtain judgment as by default, unless there be a plea by the defendant showing a good defense, and verified in the manner prescribed by the statute. Such plea the defendant may plead at any time within the 15 days, without special leave of the court. But, if the 15 days from the return day have expired, and the plaintiff's right to judgment has accrued, in default of a good plea pleaded, in such case, the defendant cannot arrest the right of the plaintiff to demand and obtain his judgment, except in the manner prescribed by the terms of the statute. The defendant can file no plea after the expiration of the 15 days, unless it be by leave of the court first obtained, upon good cause shown, before judgment entered."

In this case more than two months had expired after the return day when the defendant asked leave of the court to file her plea, which was refused her. For what cause the defendant asked leave to file her plea after the expiration of the time allowed her under the statute is not shown by the record. Therefore, if the action of the court below in refusing to permit the defendant to file her plea after the expiration of the time allowed her by law, upon cause shown by her, be reviewable by this court, such cause or facts upon which she based her request are not before it, and therefore it cannot pass upon the correctness of the court in its ruling thereon.

[3] Upon the refusal to receive the plea, a judgment by default was entered. It was then that the plaintiff proceeded to have its damages assessed, and in the offer of evidence for that purpose the second question under this appeal arises. It will be borne in mind that the defendant was sued as Elizabeth Betz, while in the account she is referred to as Mrs. Henry Betz. The plaintiff offered the evidence of its attorney, who stated that he did not know what the defendant's proper name was, whether Elizabeth Roan or Elizabeth Betz; that he knew she was once Mrs. Henry Betz, and she was the party he intended to sue; that he had sued her before on the same cause of action as Elizabeth Roan, and that the case was nonprossed on the call of the docket by reason of the absence of the plaintiff's counsel. To the admission of this evidence, the defendant objected, but the court overruled the objection and admitted the testimony, to which ruling

the defendant excepted. Thereafter the defendant offered her own evidence, in which she stated "that her name is not Mrs. Henry Betz; that her name is Elizabeth Roan; that she is the widow of Thomas Roan, deceased; that she was formerly married to a man by the name of Henry Betz, who died some 10 or 12 years ago; that she then married Thomas Roan, now deceased; that she was not in business, and did not make nor incur in any way the bill sued on; that her son by her first marriage, Henry Betz, was in the saloon business, but that she had no interest in the business; that she knows but one Mrs. Henry Betz, and that is the wife of her said son, who was in the saloon business when the bill sued on was alleged to have been contracted." To the admission of this testimony, the plaintiff objected, and, the court sustaining the objection, the defendant excepted thereto.

[4] As stated above, the judgment by default had been entered. "The effect of the judgment by default is to establish the defendant's liability. Two points are established by the recovery of a judgment by default: (1) The jurisdiction of the court to pass it; and (2) the *liability of the defendant* to the plaintiff for something, and for these purposes such a judgment is as binding as any other." Poe, vol. 2, §§ 369 and 372. It was incumbent upon the plaintiff to prove the amount for which the defendant was liable, but it was not necessary for it to offer proof as to her liability, for this was established by the judgment, and any testimony offered, contradicting such liability, was inadmissible.

[5] Our predecessors, so early as the case of *Green v. Hamilton*, 16 Md. 329, 77 Am. Dec. 295, held that a judgment by default, if regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court *in declaring that the plaintiff is entitled*. *Mailhouse v. Inloes et al.*, 18 Md. 333; *Heffner v. Lynch*, 21 Md. 555. And Judge Alvey, in the case of *Loney v. Bailey and Caldwell*, 48 Md. 15, after quoting from *Green v. Hamilton*, supra, that which we have here above quoted said: "So far, then, as the question of the right of the plaintiff to recover is concerned, the judgment by default is decisive for that, leaving the amount to be subsequently ascertained; and, to the extent that such judgment is decisive, it stands upon the same footing of all other final judgments." This person, whatever be her name, is the one brought into this court as the defendant in this suit against Elizabeth Betz. Had she so wished, her true name could, by amendment, have been substituted for the name thus improperly used. The opportunity was afforded her to make any proper defense to the claim that she may have had, but she failed to avail herself of this opportunity, and suffered judgment by default to go against her. It was probably by reason of the existence of the doubt as to her true name, which was

made evident by the demurrer filed by her, that the plaintiff was prompted to offer the testimony tending to show that it was against her (the person upon whom the summons was served) that suit was intended to be brought. Her liability, however, was already established by the judgment, and this testimony, if wrongly admitted, could only be regarded as superfluous, and as working no injury to the defendant. But the testimony of the defendant was properly excluded, if for no other reason, because it tended to contradict the liability of the defendant after the same had been established by the judgment, which was final as to her liability.

From what we have said, the judgment of the court below will be affirmed.

Judgment affirmed, with costs to the appellee.

CATANZARO DI GIORGIO CO. v. F. W. STOCK & SONS.

(Court of Appeals of Maryland. June 23, 1911.)

1. APPEAL AND ERROR (§ 169*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW.

No question can be considered or passed upon by the Supreme Court which does not appear by the record to have been raised or passed upon by the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

2. APPEAL AND ERROR (§ 919*)—REVIEW—PRESUMPTIONS—STRIKING OUT PLEADINGS.

Where the rulings of the court are not in the record, and there is nothing except the docket entries, which do not show why the court permitted the plaintiff to strike out the replication to a plea, or why it struck out the plea, the presumption is that the court ruled and decided correctly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3713; Dec. Dig. § 919.*]

3. MONEY RECEIVED (§ 19*)—RECOVERY.

The measure of damages, in assumpsit on the common counts on open account for the value of a cargo of fruit which defendant had received and sold, is not the value of the fruit at the time of its receipt by defendant, but the amount of money received by the defendant from the sale for the use of the plaintiff, with interest in the discretion of the jury.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 19.*]

4. TRIAL (§ 253*)—REQUESTS—INSTRUCTION IGNORING EVIDENCE.

A request, in an action on the common counts on open account for the value of a cargo of fruit sold to defendant, which segregates a portion of the evidence and directs the jury to find in favor of the plaintiff upon this evidence, and not upon the whole evidence, and which ignores evidence tending to show that the defendant was a bona fide purchaser for value, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. TRIAL (§ 253*)—REQUESTS—IGNORING DEFENSES.

An instruction requested by plaintiff, which excludes from the consideration of the jury the evidence and defenses relied upon by the de-

fendant to defeat the action, is defective, and is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. TRIAL (§ 243*)—INSTRUCTIONS—CONFUSED AND MISLEADING INSTRUCTIONS.

Instructions which are so absolutely inconsistent upon the measure of damages in the action that conformity with one necessarily implies a disregard of the one or the other, and in which the theories are conflicting and directly opposed, are calculated to mislead the jury, and should not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

7. APPEAL AND ERROR (§ 179*)—INSTRUCTIONS—NECESSITY OF REFERENCE TO PLEADINGS.

Where one of the prayers in assumpsit on the common counts asked the court to instruct that "there was no evidence under any count in the declaration," and another prayer "referred to the material averments of the declaration," such reference to the pleadings is sufficient to permit an examination thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

8. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—AMENDMENT OF PLEADINGS—AMENDMENT CHANGING FORM OF ACTION.

Plaintiff, in June, 1901, brought suit in assumpsit on the common counts on an open account for the value of a cargo of fruit alleged to have been sold to defendant, and the declaration was amended in June, 1903, to state an action in trover. On April 4, 1906, a second amended declaration was filed in assumpsit, and a new cause of action filed with the declaration. Held, that the amendment, changing the form of the action from trover to assumpsit, was equivalent to a new action as of the date of the amendment, so as to be open to the defense of the three-year statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Action by F. W. Stock & Sons against the Catanzaro Di Giorgio Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCK-BRIDGE, JJ.

Eugene O'Dunne and William S. Bryan, Jr., for appellant. Clarence A. Tucker and Joseph N. Ulman, for appellees.

BRISCOE, J. This is an action on the common counts in assumpsit originally brought in the superior court of Baltimore city, on the 5th day of June, 1901, by the appellee against the appellant, on an open account, to recover for the value of a cargo of fruit, consisting of bananas, oranges, nuts, and other tropical fruits, shipped from Jamaica by steamer to Baltimore. The cargo was consigned by the bill of lading to the appellee, but on proper indorsement by them was turned over to the appellant, who subsequently sold the fruit.

The case has been tried at least five times

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the Baltimore city courts, resulting in several verdicts for the plaintiff, one in favor of the defendant, and several mistrials. To the declaration filed on the 5th day of June, 1901, the defendant pleaded the general issue and pleas in assumpsit.

On June 4, 1903, the plaintiff, by leave of court, filed the following amended declaration in trover: "For that the defendant converted to its own use and wrongfully deprived the plaintiffs of the use and possession of the goods and chattels of the plaintiffs; that is to say, of certain merchandise, consisting of bananas and oranges, and valued at \$723.25, and to this declaration the general issue plea of non cul in tort was filed. On October 27, 1903, the case was removed to the Baltimore city court, and upon trial, on the 12th of November, 1903, a verdict was rendered by a jury for \$776.96 in favor of the plaintiff, but which was subsequently set aside by the court, and a new trial granted. On March 29, 1905, a trial was begun and a jury was sworn, but, upon leave granted to amend the declaration from trover to assumpsit, the case was continued. On April 4, 1905, the appellees filed a second amended declaration, changing the form of action from trover to assumpsit on the common counts, and claimed \$1,500 damages, and to this declaration was annexed a statement of account between the Catanzaro Company and F. W. Stock & Sons. To the declaration, the appellant, on the 7th of April, 1905, filed the general issue pleas and two special pleas of limitation, as follows: "For a first plea, that it never was indebted as alleged; and for a second plea says that it did not promise as alleged; and for a third plea the defendant says that the alleged cause of action did not accrue within three years before this suit; and for a fourth plea the defendant says that the alleged cause of action did not accrue within three years prior to the commencement of this suit, to wit, March 31, 1905." On the 27th day of April, 1905, the plaintiff joined issue on the first and second pleas, and filed a replication to the third and fourth pleas. Subsequently petitions, motions, counter motions, and other proceedings almost too numerous to mention, were interposed before another trial was had, as will appear from the following docket entries in the case:

"Docket Entries.

"24th, May, 1905.—Petition of defendant to dismiss the replications to the 3rd and 4th pleas. Reasons filed.

"24th, May, 1905.—Order of court extending time for filing a rejoinder or rejoinders for 10 days after the disposition of the petition to strike out the replications to the 3rd and 4th pleas filed.

"13th, November, 1906.—Petition of plaintiffs to strike out their replications to the defendant's 4th plea and affidavit in support of said motion filed.

"13th, November, 1906.—Order of court granting leave filed.

"13th, November, 1906.—Plaintiff's replication to defendant's 4th plea struck out. Order of plaintiff's attorney filed.

"13th, November, 1906.—Motion by plaintiffs to strike out the defendant's 4th plea filed.

"13th, November, 1906.—Affidavit of Joseph N. Ulman in support of plaintiff's motion to strike out the defendant's 4th plea filed. Service admitted.

"8th, December, 1906.—Motion by the defendant that the affidavit of Joseph N. Ulman filed in support of plaintiff's motion to strike out defendant's 4th plea be stricken out. Reasons filed. Service admitted.

"24th, January, 1907.—Defendant's motion to strike out the plaintiff's affidavit filed in support of the plaintiff's motion to strike out the defendant's 4th plea 'granted.'

"24th, January, 1907.—Plaintiff's motion to strike out the defendant's 4th plea 'granted.'

"24th, January, 1907.—Defendant's motion to strike out the plaintiff's replication to the defendant's 3rd plea 'refused.' Order of court filed.

"4th, December, 1907.—Jury sworn.

"5th, December, 1907.—Notice from the defendant to the plaintiff to produce at the trial of above cause the ledger of Messrs. F. W. Stock & Sons, showing the state of accounts between the plaintiffs and the Norfolk & West India Fruit & Steamship Company. Also all books of account of any character belonging to the Norfolk & West India Fruit & Steamship Company, or containing evidence of any of its business, filed. Service admitted.

"5th, December, 1907.—Verdict in favor of defendant.

"5th, December, 1907.—Judgment on verdict nisi.

"7th, December, 1907.—Plaintiff's motion for a new trial. Reasons filed.

"19th, December, 1907.—Plaintiff's motion for a new trial 'granted.'

"10th, May, 1909.—Notice from the plaintiffs to the defendant under the 27th rule of court filed. Service admitted.

"1st, June, 1909.—Jury sworn.

"2nd, June, 1909.—The jury being unable to agree upon a verdict were discharged by the court.

"14th, September, 1909.—Notice from the plaintiffs to the defendant under the 27th rule of court filed. Service admitted.

"10th, February, 1910.—Deposition on behalf of the defendant taken before J. F. Millholland, a notary public of Kingston, Jamaica, B. W. I., filed.

"6th, October, 1910.—Notice from the plaintiffs to the defendant under the 27th rule of court filed. Service admitted.

"15th, November, 1910.—Jury sworn.

"16th, November, 1910.—Verdict in favor of the plaintiffs for \$1,070.50.

"16th, November, 1910.—Judgment on verdict nisi.

"17th, November, 1910.—Defendant's motion for a new trial. Reasons filed. Service admitted.

"3rd, December, 1910.—Petition of the plaintiffs, requiring the defendant to elect between the exceptions and its motion for a new trial, filed. Service admitted.

"17th, December, 1910.—Defendant's motion for a new trial 'overruled.'

"17th, December, 1910.—Judgment on verdict absolute in favor of the plaintiffs for the sum of \$1,070.50, with interest from date and costs."

We have thus transcribed and inserted the docket entries because it appears there are no bills of exceptions presenting the rulings of the court below, except upon the evidence and prayers, and the rulings of the court upon the motions are not set out by the record in a way so as to enable us to review them in this court.

[1] It is clear upon all the authorities that no question shall be considered or passed upon by this court which does not appear by the record to have been raised or passed upon by the court below. *Long v. Hawken*, 114 Md. 240, 79 Atl. 190; *Palmer v. Hughes*, 84 Md. 658, 36 Atl. 431; *New & Son v. Taylor*, 82 Md. 41, 33 Atl. 435; *Wilkin Mfg. Co. v. Young*, 115 Md. —, 81 Atl. 879; *Warren Bros. v. Kendrick & Roberts*, 113 Md. 603, 77 Atl. 847, 140 Am. St. Rep. 445.

[2] In this case, the rules of court are not in the record, and we have nothing except the docket entries, and these do not show why the court permitted the plaintiff to strike out the replication to the fourth plea, or why it struck out the fourth plea at all, and the presumption therefore is the court ruled and decided correctly. *Cushwa v. Cushwa*, 9 Gill, 247; *Newcomer v. Keedy*, 9 Gill, 263; *Thorne v. Fox*, 67 Md. 74, 8 Atl. 667; *Stockett v. Sasscer*, 8 Md. 375; *Hutton v. Marx*, 69 Md. 255, 14 Atl. 684.

Coming now to the rulings of the court upon the prayers and the evidence, it appears that at the trial the defendant reserved 40 exceptions, 89 to the rulings upon the evidence, and the fortieth to the ruling of the court in granting the plaintiff's first, third, fourth, and ninth prayers, and in refusing the defendant's first, fourth, fifth, sixth, seventh, ninth, fourteenth, fifteenth, sixteenth and seventeenth prayers, and in overruling the defendant's special exceptions to the third and ninth prayers of the plaintiff. There were 27 prayers submitted in all.

[8] The plaintiff's first prayer was clearly erroneous, and should have been rejected. It was error to have instructed the jury that the verdict must be for the plaintiff for the value of the goods at the time of their sale to the defendant. The proper measure of damages, in an action of this kind, for money had and received by the

defendant for the use of the plaintiff, would be the amount of money received by the defendant for the use of the plaintiff, with interest in discretion of the jury. In *Ruhl v. Corner*, 63 Md. 179, it was held that a similar prayer was correctly refused, for it claims as the measure of damages that which belongs to the action of trover, and not to the form of action adopted by the plaintiffs. In the action of assumpsit, the plaintiff can only recover for the money had and received from the sale to the use of the plaintiff. This prayer was therefore inconsistent with the form of action. *Thomas v. Sternheimer*, 29 Md. 268; *Heinekamp v. Beaty*, 74 Md. 393, 21 Atl. 1098, 22 Atl. 67.

[4] The prayer is also objectionable in other respects: First it segregates a portion of the evidence, and directs the jury to find in favor of the plaintiff upon this evidence, and not upon the whole evidence; secondly, there was evidence tending to show that the defendant was a bona fide purchaser for value, which should have been embraced in the prayer for the jury to pass upon; and, thirdly, the prayer as framed did not present a sound legal proposition. *Darwin v. Whittingham*, 107 Md. 52, 68 Atl. 269; *Poe's Pleading & Practice*, vol. 2, § 301; *Mt. Vernon Co. v. Teschner*, 108 Md. 173, 69 Atl. 702, 16 L. R. A. (N. S.) 758; *Christopher v. Christopher*, 64 Md. 585, 3 Atl. 296; *Buchanan v. Savings Institution*, 84 Md. 436, 35 Atl. 1099.

[5] The plaintiff's third, fourth, and ninth prayers were also erroneous, and should have been rejected. The third prayer was defective because it excluded from the consideration of the jury the evidence and defenses relied upon by the defendant to defeat the action, and contained an erroneous proposition on the facts of the case. The fourth prayer is subject to the same objections as stated against the first prayer, upon the measure of damages, and practically embraced the first prayer. *Ruhl v. Corner*, 63 Md. 179.

[6] The plaintiff's ninth prayer was granted in connection with plaintiff's first, third, and fourth prayers. They are so absolutely inconsistent upon the measure of damages that conformity with one necessarily implied a disregard of the one or the other. The theories of the prayers were conflicting and directly opposed, and were calculated to mislead the jury, and should have been rejected. *Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566; *Haney v. Marshall*, 9 Md. 215; *B. & O. R. R. Co. v. Blocher*, 27 Md. 277; *Farmers' Packing Co. v. Brown*, 87 Md. 13, 39 Atl. 625.

[7] This brings us to a consideration of the defendant's prayers, and, in the view we take of this case, we think the defendant's fourteenth, fifteenth, and sixteenth prayers should have been granted, as the appellant was entitled to the benefit of the

statute of limitations under its third plea. While these prayers do not refer to the pleadings, the defendant's first and second prayers do refer to them, and this, we think, is sufficient to permit an examination of the pleadings on these prayers. The first prayer asked the court to instruct the jury that "there was no evidence under any count in the declaration," and the second prayer "referred to the material averments of the declaration." In *Fletcher v. Dixon*, 107 Md. 428, 68 Atl. 875, this court said: "It is true that the prayer does not refer to the pleadings, but defendant's D prayer did specifically refer to the third and fourth counts; some prayers referred to the other counts; and defendant's H prayer referred to the pleadings generally. The court's attention to each and every count was therefore thus drawn by the prayers of the defendant to the pleadings." *Leopard v. Canal Co.*, 1 Gill, 222; *Giles v. Fauntleroy*, 13 Md. 136; *Rowe v. B. & O. R. R. Co.*, 82 Md. 504, 33 Atl. 761; *Baltimore Bldg. Ass'n v. Grant*, 41 Md. 589; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338.

[8] The defendant's third plea set up the defense that the alleged cause of action did not accrue within three years before the suit, and this plea under the facts of the present case was a bar to the action. The defendant's second amended declaration and the cause of action, filed on the 4th day of April, 1905, materially changed the character of the action, and made an entirely new case. The original suit had been instituted in assumpsit on the 5th day of June, 1901, and was changed on the 4th day of June, 1903, to trover, and on the 4th of April, 1905, the form of action was amended to assumpsit, and a new claim, demand, and cause of action filed with the declaration. These actions, one in tort and the other an action ex contractu, do not admit of the same pleas. The measure of damages in trover is the value of the goods at the time of the conversion, and in assumpsit the recovery is for the money had and received for the use of the plaintiff. In *Schulz v. Fox*, 53 Md. 37, it was held upon the filing of the amended declaration, under the circumstances of that case, the defendant had the right to interpose the plea of limitations as a defense to the new case thus made against him. In *Hamilton v. Thirston*, 94 Md. 256, 51 Atl. 42, where the original declaration was a suit upon an alleged oral agreement, and there was no count in the declaration on a quantum meruit for the value of the services,

under an amendment to the action in assumpsit to a quantum meruit, this court held it was a new suit, and the statute of limitations was a bar to the action. In *Zier v. Chesapeake Ry. Co.*, 98 Md. 41, 56 Atl. 385, Chief Judge McSherry, said: "Thus, in *Hamilton v. Thirston*, supra, it was held that a plea similar in effect to the one we are considering was proper because the amendment of the declaration changed the form of action." Mr. Poe, in his valuable work on Practice (section 189), thus states the rule: "If the defendant omits to plead the statute of limitations, and subsequently the declaration is amended by the addition of other counts, the defendant is entitled to plead limitations to such counts, and where the amendment materially changes the character of the action the plea will be available." In 25 Cyc. 1308, the rule is thus laid down, as supported by authority: "An amendment which introduces a new or different cause of action and makes a new and different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies, although the two causes of action arise out of the same transaction. And if the plaintiff introduces a new claim and cause of action by the amendment against which the statute of limitations has run, that defense is available." 25 Cyc. 1304 and 1309. The filing of the second amended declaration and cause of action was equivalent to bringing a new suit as of the date of the amendment, and the defendant cannot be deprived of the opportunity of pleading the defense of limitations. *Johnson v. District*, 1 Mackey, D. C. 428. In the present case, the change of the form of action by the plaintiff's amendment introduced a new and different claim, demand, and cause of action, and this opened the case to the bar of the statute of limitations under the defendant's third plea, and there was error in not granting the defendant's fifteenth, sixteenth, and seventeenth prayers. As this conclusion disposes of the case, it will be unnecessary to consider the other rulings raised by the remaining exceptions.

For the errors indicated, the judgment appealed from must be reversed, and as the plaintiff's demand, set out in the second amended declaration, is barred by limitations a new trial will not be awarded.

Judgment reversed, and new trial refused, with costs to the appellant.

FIOR et al. v. TAYLOR.

(Court of Appeals of Maryland. June 22, 1911.)

1. APPEAL AND ERROR (§ 324*)—SEVERANCE.

Where one of two or more parties against whom a judgment has been entered at law desires to appeal, he should apply to the Court of Appeals for a writ of summons and severance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1806-1809; Dec. Dig. § 324.*]

2. DISMISSAL AND NONSUIT (§ 26*)—JOINT TORT-FEASORS—NONSUIT.

In a suit against joint tort-feasors, plaintiff may submit to a nonsuit before the close of his case, as well as when it is concluded, as to such of the defendants as the evidence does not sufficiently connect with the tort.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48-59; Dec. Dig. § 26.*]

3. PLEADING (§ 237*)—AMENDMENT—CONFORMITY TO PROOF.

It was not error for the court, at the close of plaintiff's case, to permit plaintiff to amend his declaration to conform to the proof by limiting the allegation of negligence to two particular defendants.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

4. NEGLIGENCE (§ 119*)—ISSUES, PROOF, AND VARIANCE—DATE.

That an accident occurred on a different date from that named in the declaration is insufficient to prevent a recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 212; Dec. Dig. § 119.*]

5. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—WAGONS—NEGLECTED LOADING.

That beams being hauled over a city street projected over and beyond the edge of the wagon and came in contact with plaintiff as the wagon was being driven along the street did not of itself show that the wagon was negligently loaded.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

6. NEGLIGENCE (§ 139*)—INSTRUCTIONS.

Where, in an action against defendants F. and S. for injuries to plaintiff, there was evidence sufficient to entitle plaintiff to recover against F., a request by S. to charge that there was no evidence legally sufficient to entitle plaintiff to recover, and that the jury's verdict should be for defendant S., was properly refused, as calculated to mislead the jury to believe that there was no evidence sufficient to sustain a verdict against F.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 139.*]

7. TRIAL (§ 194*)—INSTRUCTIONS.

Where, in an action for injuries, the question whether it was due to the negligent driving of the wagon by the agents of defendant F. was for the jury, a request by another defendant to charge that the immediate cause of the injury was due to the negligent driving of the wagon by F.'s servants was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

8. TRIAL (§ 252*)—REQUEST TO CHARGE—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to plaintiff by his being struck by timbers so driven along a city street as to overlap the curb, there was no evidence legally sufficient to show that the wagon was negligently loaded by the serv-

ants of one of the defendants, as well as negligently driven by the servant of the other defendant, the court erred in charging that, if the timbers had been negligently loaded, and the wagon was also negligently driven, plaintiff could recover against both defendants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

9. TRIAL (§ 139*)—REQUEST TO CHARGE—DIRECTION OF VERDICT—QUESTION FOR JURY.

Where there was evidence sufficient to justify submission of the case to the jury as against one of the defendants, the court properly rejected prayers offered by him, instructing a verdict in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

10. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO PLEADING.

A requested charge, which did not correctly state the facts relied on as alleged in plaintiff's amended declaration, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

11. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—INJURIES TO PEDESTRIANS—NEGLECTED DRIVING—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, while standing on the curb, was injured by the overhang of timbers alleged to have been negligently driven around a street intersection, an instruction that, if plaintiff was standing so near to the curb as to render such an accident probable, and plaintiff in taking such position was not exercising ordinary care, he could not recover submitted the question of contributory negligence in as favorable a manner as defendants were entitled to.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

12. TRIAL (§ 252*)—REQUEST TO CHARGE—APPLICABILITY TO EVIDENCE.

Where, in an action by a pedestrian for injuries caused by his being struck by the overhang of timbers hauled along a city street, there was some evidence that one of the men on the wagon gave an alarm, but there was no evidence that plaintiff heard the warning, or knew that it was intended to warn him of danger from the contents of the wagon, a request to charge that, if plaintiff was warned, but was heedless of the warning, and maintained his position when an ordinarily prudent man would have moved, he could not recover was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

13. DAMAGES (§ 172*)—PERSONAL INJURIES—PROFITS.

Where, in an action for injuries, plaintiff testified that when injured he was operating a pool room, and that by reason of the injury he was unable to longer operate it, and ultimately closed it, he was properly permitted to state the amount of profits he made from the pool room while he was operating it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 172.*]

14. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—EVIDENCE.

Where plaintiff, a pedestrian, was injured by the overhang of timbers claimed to have been negligently loaded by the servants of defendant S. on a wagon alleged to have been negligently driven, evidence that defendant F. was the master of the driver, and that the accident was due solely to the driver's negligence, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 330.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

15. JUDGMENT (§ 250*)—DECLARATION.

Plaintiff sued four defendants for injuries sustained by being struck by certain timbers negligently permitted to project over a sidewalk as they were being hauled along a city street, charging that the timbers were negligently loaded by the servants of defendant S., and that the wagon was negligently driven by the servant of defendant F.; that by reason of the negligent acts of the "defendants" plaintiff was compelled to spend a large sum of money for medical attendance, etc. Plaintiff took a nonsuit against two of the defendants, and proceeded to judgment against the others. Held, that the declaration was fatally defective and insufficient to sustain a judgment against the two remaining defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.*]

16. PLEADING (§ 240*)—AMENDMENT—MODE.

Where an action was originally brought against four defendants, and at the trial two of them were dismissed and the declaration amended, the proper practice was to leave the original declaration in the case and file a new one against the remaining defendants, if it was desired to limit the allegations of negligence to them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 636-641; Dec. Dig. § 240.*]

17. MASTER AND SERVANT (§ 304*)—INJURIES TO THIRD PERSONS—CONCURRENT NEGLIGENCE.

Where a third person is injured by the concurrent negligence of the servants of different masters, the law does not draw fine distinctions in determining which negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

Appeals from Baltimore City Court; Thos. Ireland Elliott, Judge.

Action by Charles J. M. Taylor against Howard O. Firor and others. Judgment for plaintiff against defendants Firor and Saxton, and they appeal separately. Reversed, and new trial ordered.

Plaintiff's amended declaration purported to charge Howard O. Firor, E. Saxton, the Pittsburg Valve Foundry Construction Company, and the mayor and city council of Baltimore with a cause of action for injuries, and alleged that on March 21, 1910, plaintiff was rightfully on the pavement or sidewalk on the corner of Fayette and St. Paul streets, in Baltimore city, and was exercising due and proper care, and while so rightfully on the pavement or sidewalk a wagon belonging to the defendant Howard O. Firor, and in charge and control of the agents and servants of the defendant Howard O. Firor, was driven along the public highway, near to the pavement or sidewalk, in a negligent and careless manner, which wagon was negligently and carelessly loaded by the agents and servants of the defendant E. Saxton with beams or timbers which protruded over such pavement or sidewalk, and the plaintiff was struck by the said timbers and his arm and shoulder bones were broken, and he was seriously and permanently injured; and by reason of the said negligent and careless acts of the "defendants" plaintiff was compelled to expend

large sums of money for medical attendance, and was compelled to abandon the lucrative business in which he was engaged, and other wrongs then and there suffered and sustained, for which he demanded \$10,000.

During the trial, plaintiff took a nonsuit as to the defendants Pittsburg Valve Foundry Construction Company and the city, and proceeded to judgment against defendants Firor and Saxton alone.

At the close of plaintiff's case, defendants Firor and Saxton having moved for a verdict on the theory that the complaint charged negligence against all the defendants, and that such allegation was not sustained by the proof, plaintiff asked leave in open court to amend the declaration, so as to charge that the wagon by which plaintiff was injured belonged to the defendant Howard O. Firor, and was negligently and carelessly loaded by the agents and servants of the defendant Saxton. Leave to make this amendment having been granted, the motion to dismiss made by defendants Firor and Saxton was denied.

Defendant Saxton's third prayer prayed the court to instruct the jury that there was no evidence legally sufficient to prove that the loading of the wagon on the day alleged in the declaration was done in a negligent manner, and that their verdict must be for him.

Defendant Saxton's first prayer requested that the court instruct the jury that there was no evidence in the case legally sufficient to entitle plaintiff to recover, and that their verdict must be for the defendant Saxton.

Defendant Saxton's fifth prayer requested the court to charge that the immediate cause of plaintiff's injury was due to the negligent driving of the wagon in question by the agents of defendant Firor, and that their verdict must therefore be in favor of defendant Saxton.

Plaintiff's first prayer, which the court gave, requested the court to charge that, if the jury should find from the evidence that plaintiff was standing on the sidewalk at or near the corner of Fayette and St. Paul streets, in Baltimore city, and that he was exercising ordinary care, and should further find that a wagon belonging to and in charge of an agent or servant of defendant Howard O. Firor was driven along the street, near the said corner, and such wagon was loaded with boards or timbers, nailed together, that extended or projected beyond the sides of the wagon, and shall further find the boards or timbers had been so placed or loaded by the agents or servants of defendant Saxton for the purpose of having been hauled or carried for Saxton through the streets of Baltimore, and shall find that in so loading the wagon Saxton's agents and servants did not exercise such care or caution as a reasonably prudent man would ordinarily exercise under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

like circumstances, and that the agent or servant of defendant Firor in a negligent and careless manner drove the wagon along the street, at or near the corner of Fayette and St. Paul streets, and that plaintiff was struck by the boards or timbers with which the wagon was loaded and was injured, then the verdict must be for plaintiff against both defendants Firor and Saxton. Defendant Saxton excepted to this instruction, first, because there was no evidence legally sufficient to show that the wagon was negligently loaded; and, second, because even if there was evidence legally sufficient to show such fact, the loading was the remote, and not the proximate, cause of the injuries.

Defendant Firor's first, third, and fourth prayers were as follows: "First. The court instructs the jury that plaintiff has produced no legally sufficient evidence under the pleadings to entitle him to recover as against defendant Firor." "Third. The court instructs that under the whole evidence there has been produced no evidence legally sufficient under the pleadings to entitle plaintiff to recover against the defendant Firor. Fourth. The court instructs that there is no evidence legally sufficient to show that the driver of the wagon was at the time plaintiff was injured the servant of the defendant Firor, and hence the verdict must be in his favor." All of which were refused.

Defendant Firor's sixth prayer, which was granted, was as follows: "The court instructs that if the jury find that the position in which plaintiff was standing was so near to the curb of the street, and so near to the southwest intersection of Fayette and St. Paul streets, as to render an accident probable with beams passing along Fayette street and turning down St. Paul street, and that if they shall further find that plaintiff stood in that position with his back toward the curb, and shall further find that the plaintiff in thus taking that position was not exercising the care that an ordinarily prudent person would exercise under like circumstances, then plaintiff is not entitled to recover, and their verdict should be for defendants."

Defendant Firor's seventh prayer was as follows: "The court instructs that if the jury find that plaintiff was standing in the position on the sidewalk at the corner of St. Paul and Fayette streets, in Baltimore city, and in close proximity to the fire alarm box as testified by him, and further find that as the wagon mentioned in the evidence approached the corner plaintiff was warned of the danger of his position in respect to the contents of the wagon alleged to protrude over the pavement or sidewalk, and plaintiff was heedless of the warning and remained in such position, and the jury believed that an ordinarily prudent man under like circumstances, in the exercise of ordinary care, would have moved from such position, and if plaintiff had moved he would not have been injured, he could not recover."

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Joseph N. Ulman, Frederick T. Dorton, and Wm. C. Smith, for appellants. Edwin Burgess and D. Eldridge Monroe, for appellee.

BOYD, C. J. The appellee sued the Pittsburg Valve Foundry Construction Company and the mayor and city council of Baltimore, together with the two appellants (Firor and Saxton) now before us, for injuries alleged to have been sustained by him by being struck by beams or timbers which protruded over a sidewalk in Baltimore, while being carried in a wagon through one of its streets. During the course of the trial, verdicts were rendered in favor of the two corporations, but a verdict was also rendered against the two individual defendants, upon which a judgment was entered. They took separate appeals, which upon motion in this court were consolidated.

[1] The case is a peculiar one, as each of the two appellants seeks to put the responsibility upon the other. As it had been recently repeated by us that, when one of two or more parties against whom a judgment has been entered at law desires to appeal, he should apply to this court for a writ of summons and severance (*Oldenburg v. Dorsey*, 102 Md. 172, 62 Atl. 576; *P. B. & W. R. Co. v. Stumpo*, 112 Md. 571, 77 Atl. 266), it would perhaps have been better to have pursued that course, but, as the appeals were with our leave consolidated, we will treat them as a joint appeal, although the fact that some of the exceptions were taken by the one or the other of them makes the record somewhat confusing.

[2] The first exception of defendant Firor will first be briefly referred to. When the first witness mentioned in the exception was on the stand, the plaintiff called for the contract between the mayor and city council of Baltimore and the Pittsburg Company, and after examination of it one of the counsel for the plaintiff stated that they were satisfied that the city of Baltimore was not liable, and they consented to a verdict in its favor. Accordingly a verdict was rendered at once in favor of the mayor and city council of Baltimore, and judgment was entered thereon. The defendant Firor then moved to stay further proceedings, upon the ground that judgment had been entered in favor of the said defendant, but the motion was overruled. There was no error in that ruling. It is well settled that in a suit against joint tort-feasors the plaintiff may submit to a nonsuit as to such of the defendants as the evidence does not sufficiently connect with the tort in question; but, as was said in 1 Poe on Pl. & Pr. § 527, "in actions of tort against several defendants, if, at the end of the plaintiff's case, there is no evidence against one or more of the defendants, the

practice is for the court to direct such defendant or defendants to be acquitted before any part of the defense is gone into." In the recent case of *Diamond State Co. v. Blake*, 105 Md. 570, we said, on page 579, 66 Atl. 631, on page 635: "The proper practice undoubtedly was to have taken the verdict when the prayer was granted, but it was overlooked." That referred to a prayer which had been granted at the conclusion of the plaintiff's case, instructing a verdict to be entered for one of the defendants. Such being the practice, there can be no possible reason, when the plaintiff is satisfied that one of the defendants cannot be held liable, why such a verdict cannot be rendered before the conclusion of the plaintiff's case, as well as when it is concluded. No objection to the verdict in favor of the mayor and city council of Baltimore or of the Pittsburgh Company, which was also acquitted at the end of the plaintiff's case, can therefore affect the right of the plaintiff to recover against the other defendants, if otherwise entitled to do so.

[3] Nor do we think that these appellants could validly object to the allowance of the amendment of the declaration; and hence there was no error of which Firor can complain in the rulings in his sixth and seventh bills of exceptions.

[4] We deem it proper at this point to pass on some of the prayers offered by the defendants, instead of considering the other exceptions in their regular order. The defendant Firor offered twelve and the defendant Saxton eight. Saxton's third prayer asked the court to instruct the jury "that there is no evidence legally sufficient to prove that the loading of the wagon on the day set forth in the declaration was done in a negligent manner, and their verdict must be for the defendant E. Saxton." If that prayer had relied simply on the fact that the accident occurred on a different day from that named in the declaration, that, of course, would not have been sufficient to defeat recovery, but that was not the point, as there was no question about the date; the day alleged in the declaration (March 21, 1910) was the one on which the accident occurred, as shown by the plaintiff's own testimony and the other evidence. Without relying on the fact that in a number of other prayers the court's attention was called to the pleadings, which was sufficient to require the court to examine them, as we decided in *Fletcher v. Dixon*, 107 Md. 428, 68 Atl. 875, this prayer specifically referred to the declaration. In the declaration, as amended, the ground of recovery as against Saxton was based on the distinct and only allegation that the "wagon was negligently and carelessly loaded by the agents and servants of the defendant E. Saxton with beams or timbers which protruded over said pavement or sidewalk," etc.

[5] There is no evidence in the record

which tends to show negligence on the part of Saxton's servants in loading the wagon. Surely the mere fact that the platform protruded over the wagon is not evidence of negligence. If that be so, it might be impossible to haul a platform or other article which was wider than a wagon on which it is carried without being guilty of negligence, while it is a fact known to every one that many articles are hauled through the street of cities and towns which project over and beyond the edge of the wagons on which they are hauled. The testimony shows that this platform projected a foot, or at most a foot and a half, beyond the wagon, and that it was loaded, not only in the usual, but the only, way it could have been. It may be true that if it had not projected beyond the wagon at all the accident would not have happened, but that fact does not make it negligence on the part of Saxton's servants in loading the wagon. The evidence offered on the part of the plaintiff is to the effect that it was the carelessness of the driver which caused the injuries. He could see that the platform projected, and some of the evidence shows that before he started the wagon he examined it to see how the platform was placed on it, and if there was occasion to drive up to the curb he ought to have at least warned any one standing as the plaintiff was, with his back to the wagon, of the approach of the wagon, and have stopped his team, if the warning was not heeded. Inasmuch, then, as there was no evidence of negligence on the part of Saxton or his servants in loading the wagon, his third prayer should have been granted, as that was the only charge of negligence in the declaration on his part.

[6-8] As his first prayer asked the court to say there was "no evidence legally sufficient to entitle the plaintiff to recover," it was properly refused, as there was evidence against Firor, and, although he only asked for a verdict in his favor, the jury might have been misled. As the right of the plaintiff to recover against Saxton was not based on the facts set out in the fourth prayer, the court could not grant that, under its theory of the case as shown by its rejection of the third. The fifth assumed that the cause of the injury was due to the negligent driving of the wagon by the agents of Firor, and, as that was a question for the jury, it was properly rejected. What we have said as to the fourth applies to the sixth. The same thing may be said as to the seventh, with the additional statement that he got quite as much under the eighth as he could ask under the pleadings. It also follows from what we have said that his first exception to the plaintiff's first prayer should have been sustained. The second exception to that prayer was not well taken, as will be seen by what we say in passing on the demurrer to the declaration.

[9-12] The first, third, and fourth prayers

of defendant Fior were properly rejected. There was, in our judgment, sufficient evidence to require the court to submit the case to the jury against him. The second does not correctly state the facts relied on as alleged in the amended declaration, and hence was properly rejected. It alleged that the wagon belonged to Fior, and not to all of the defendants. We think the sixth as favorable to the defendants as could have been asked under the evidence as to contributory negligence. The testimony does not sustain the seventh. It is true that there was some evidence that one of the men on the wagon gave an alarm, but there is nothing to show that the plaintiff heard the warning, or knew that it was intended to warn him of the contents of the wagon, or that he was in danger. The undisputed evidence is not such as is stated in the eighth prayer, and hence it was properly rejected. His ninth, tenth, eleventh, and twelfth having been granted, we are of the opinion that he cannot complain as to the rulings on his prayers, or to overruling his exceptions to the plaintiff's first prayer.

As the plaintiff's first prayer submitted the question of negligence of Saxton's agents in loading the wagon, and concluded with the right to recover against both defendants, there was error in granting it, as we have said there was no such evidence. As we have seen, there was a special objection to it on that ground. No objection has been urged against the plaintiff's second prayer, which refers only to the measure of damages.

[13, 14] It would serve no good purpose to discuss in detail the exceptions to testimony not already referred to. Fior's second and ninth, as to profits, included questions which properly went to the jury. His third, fourth, and fifth are not now very material under our view of the case; but it is clear that by the questions included in them the defendant Saxton was endeavoring to show that Fior, and not he, was responsible for the acts of the driver, which was relevant, under the position taken by the lower court. The eighth is not stated very clearly, but apparently the court ordered stricken out what was objected to, as it was hearsay.

[15, 16] It only remains to refer to the demurrers. The one to the amended declaration presents a rather novel question. By that declaration, the plaintiff declared against the four defendants mentioned at the beginning of this opinion, but the allegations of what was claimed to be negligence were confined to these two appellants, and then concludes, "and by reason of the said negligent and careless acts of the defendants the plaintiff was compelled to expend large sums of money for medical attendance, and was compelled to abandon a lucrative business in which he had been engaged." It was perhaps intended to refer in the clause just quoted to the appellants alone by the words

"the defendants," as the other two had already had verdicts in their favor, but in the first part of the amended narr. the four are named as "defendants." It was doubtless the result of making interlineations in the narr. at the trial table, but technically the narr. was defective. It would not do to permit a plaintiff to sue four persons, and then show on the face of the declaration that only two of them, according to his claim, were responsible. It is true that the other two had been discharged; but, if for any reason it was deemed proper or desirable to continue their names in the declaration, there ought to have been some statement showing that they had been acquitted, or some reason given for not alleging that they were joint tortfeasors with the appellants. The proper practice was to leave the original narr. in the case and file a new one against the two, if it was desired to limit the allegations of negligence against the appellants; and it could then have been stated that the suit was originally against the four, but the other two had been discharged by the verdicts in their favor. It may be that no injury was in point of fact done the appellants by including the other two in the amended narr., but it might cause confusion, and is not justified by any principle of pleading that we are aware of.

The narr. ought also to have more definitely alleged that the plaintiff was struck by the said timbers by reason of the said negligent and careless acts of the agents and servants of the two defendants, or something to that effect. It might be that the servants of Saxton did negligently and carelessly load the wagon, but that such negligence and carelessness had nothing to do with the accident. Or the servants of Fior may have driven along the public highway, near to the sidewalk, in a negligent and careless manner, but such negligence and careless driving may not have contributed to the injury, as the timbers might have fallen off the wagon by reason of the negligent way in which they were loaded, and have struck the plaintiff. We have stated above the conclusion of the narr., but that applied to the claim of damages, and not to the statement of the case, and, as we have seen, the four parties were named as "defendants."

[17] If it had been shown that Saxton's servants negligently and carelessly loaded the wagon, and by reason of that negligence and carelessness and the negligent and careless driving of Fior's servants combined the injuries were sustained, we would have no difficulty about the question as to whether the negligence of Saxton's servants was the proximate cause, provided the two were properly connected in the narr. It might be that the negligence of the one would not have caused the injury; but if the negligence of both contributed to it the law does not in such cases make fine distinctions in determining which was the proximate cause. That

is illustrated by *Conowingo Bridge Co. v. Hedrick*, 95 Md. 669, 53 Atl. 430, and *Penn. Steel Co. v. Wilkinson*, 107 Md. 574, 69 Atl. 412, 16 L. R. A. (N. S.) 200. So, without further discussion of it, we are of the opinion that the demurrer to the amended declaration should have been sustained. In view of what we have said, it is unnecessary to pass on the rulings to the demurrer to Saxton's pleas to the amended declaration, excepting to say that he could have gotten the benefit of what they alleged under the general issue plea, and he was not injured by the rulings of the court.

Although we are of the opinion that the third prayer offered by Saxton should have been granted, we will not reverse the judgment without awarding a new trial as to him, but, as there was a joint judgment against the two, we will follow the practice of this court in such cases and award a new trial as to both.

Judgment reversed and new trial awarded; the appellee to pay the costs.

MODEL HEATING CO. v. MAGARITY.

(Supreme Court of Delaware. Oct. 16, 1911.)

1. CORPORATIONS (§ 672*)—PLEA IN ABATEMENT—AUTHORITY OF FOREIGN CORPORATION TO SUE.

The question whether a contract made within the state by an agent of a foreign corporation, which has not complied with the laws of the state, can be enforced, is properly raised by a plea in abatement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

2. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS—CONTRACTS—VALIDITY.

Under Const. 1897, art. 9, § 5, providing that no foreign corporation shall do any business in the state, through or by branch offices, agents, or representatives located in the state, without having an authorized agent or agents on whom process may be served, and Act March 23, 1903 (22 Del. Laws, c. 395), making it unlawful for any corporation created by the laws of any other state or by the laws of the United States to do business in the state, through or by branch offices, agents, or representatives located in the state, until it shall have filed a certified copy of its charter, and the name of its authorized agent in the state, with a sworn statement of its assets and liabilities, and paid \$50 to the Secretary of State for the use of the state, and imposing penalties on the corporation and its agents violating the provision, a contract of sale by a foreign corporation, which has not complied with the provisions, through an agent located in the state, can nevertheless be enforced against the purchaser, who retains the benefits of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2543, 2552-2554; Dec. Dig. § 657.*]

3. CONSTITUTIONAL LAW (§ 32*)—CONSTRUCTION AND OPERATION—SELF-EXECUTING PROVISIONS.

Const. 1897, art. 9, § 5, providing that no foreign corporations shall do any business in the state through or by branch offices, agents, or representatives located in the state, without having an authorized agent or agents on whom

legal process may be served, is not effective, independent of statutes passed pursuant thereto, to deprive a foreign corporation, which has not complied therewith, of the right to enforce a contract against a purchaser who retains the benefits thereof; such section not being self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 33; Dec. Dig. § 32.*]

4. CORPORATIONS (§ 631*)—FOREIGN CORPORATION—COMITY.

By comity a corporation created by one sovereignty is permitted to make contracts in another and sue on its contracts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2489-2494; Dec. Dig. § 631.*]

5. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—POWER TO REGULATE.

Each sovereignty may, by express statute or settled policy, exclude corporations created by another sovereignty, or prescribe terms with which they must comply, except such as are engaged in interstate commerce, or otherwise protected by provisions of the United States Constitution and statutes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509; Dec. Dig. § 636.*]

Error to Superior Court, New Castle County.

Action by the Model Heating Company against Thomas Magarity. Judgment (1 Boyce, 240, 75 Atl. 614) for defendant, and plaintiff brings error. Reversed, and demurrer to special plea in abatement sustained.

Argued before CURTIS, Ch., and CONRAD and WOOLLEY, JJ.

Christopher L. Ward and John P. Nields, for plaintiff in error. Artemas Smith and Alexander M. Daly, for defendant in error.

CURTIS, Ch. (delivering opinion of court). The writ of error is taken by the plaintiff below to a judgment of the Superior Court overruling a demurrer of the plaintiff to a special plea in abatement to the declaration. The action was in assumpsit to recover for goods sold and delivered. By a special plea the defendant alleged that the plaintiff was a corporation under the laws of Pennsylvania; that at the time the contract was made the corporation was doing business in Delaware through and by branch offices, agents, or representatives located here, without having complied with the provisions of law, constitutional and statutory, hereinafter mentioned respecting foreign corporations, and that the contract was made by the agent of the plaintiff located in this state.

It is provided by section 5 of article 9 of the Constitution, adopted June 4, 1897, as follows:

"No foreign corporation shall do any business in this state through or by branch offices, agents or representatives located in this state, without having an authorized agent or agents in the state upon whom legal process may be served."

At the time the contract was made and the suit brought there was and still is a statute, approved March 23, 1903 (22 Del. Laws, c.

395, p. 824), referred to in the declaration, which contained the following provision:

"Section 1. That it shall not be lawful for any corporation created by the laws of any other state or by the laws of the United States, to do any business in this state through or by branch offices, agents, or representatives located in this state, until it shall have filed in the office of Secretary of State of this state a certified copy of its charter and the name or names of its authorized agent or agents in this state, together with a sworn statement of the assets and liabilities of such company or corporation, and paid to the Secretary of State, for the use of the state, fifty dollars (\$50); and the certificate of the Secretary of State under his seal of office, of the filing of such charter, shall be delivered to such agent or agents upon the payment to said Secretary of State of the usual fees for making certified copies; the said certificate shall be prima facie evidence of such company's right to do business in this state."

By section 2 it is made the duty of the Secretary of State to deliver to the prothonotary of each county a certificate of the name of the agent, and by section 3 it is made the duty of each prothonotary to record the certificate. By section 4 it is enacted that service of process may be made on such agent and that it shall be as effectual as if served on the corporation. It is enacted in section 6 that any corporation doing business here without having first complied shall be guilty of a misdemeanor and be subject to a fine for each and every offense, and also that any agent of such foreign corporation who shall transact any business here for any foreign corporation, before it has complied, shall be guilty of a misdemeanor and fined for each and every offense.

At the time of the adoption of the present Constitution on June 4, 1897, there were in force two statutes relating to this same subject-matter. These two statutes taken together contain in substance the same requirements of foreign corporations as are contained in the act of 1903, above referred to, and impose fines for violation thereof, and make service on the agent good, the only substantial difference being the requirement that the certificate naming an agent be filed in each county by the corporation, and not in the office of the Secretary of State, to be by him filed with the prothonotary of each county. These statutes are chapter 703, vol. 19, Laws of Delaware, p. 900, passed April 28, 1893, and chapter 513, vol. 20, Laws of Delaware, p. 544, passed May 12, 1897.

It appears, therefore, that at the time of the adoption of the Constitution there were in force laws of substantially the same import as now exist respecting foreign corporations doing business here. In substance this legislation forbids foreign corporations to do business here by branch offices, or agents located here, without having filed a certificate

naming an authorized agent in the state upon whom process may be served, and also a copy of its charter and a sworn statement of its assets and liabilities, and imposes penalties for each and every offense by fine upon both the corporation and the agent violating the laws, and makes service of process on the designated agent equivalent to service upon the corporation.

[1] In this case, then, is presented in this court for the first time the question whether by such legislation a contract made here by an agent in this state of a foreign corporation which had not complied with the laws of Delaware, whereby goods were sold and delivered to a citizen of Delaware, can be enforced here so that the vendor may collect payment for the property so parted with by it and received and retained by the vendee. As rightly held in the case of *Sewing Machine Co. v. Frame*, 2 Pennewill, 430, 48 Atl. 188, the question is properly raised by a plea in abatement, and the vendee can take advantage of the noncompliance of the vendor in this way only, if at all.

[2] In its opinion, reported in 1 Boyce, 240, and 75 Atl. 614, the court below stated that it felt bound by the decision of the Superior Court, rendered in the case of *Beeber v. Walton*, 7 Houst. 471, 32 Atl. 777, and expressly based its conclusion thereon; but as herein indicated this court does not consider that the principles applicable to that case apply to the case now before it, and hold that other and different rules are applicable. With the view of following any well established, pertinent and controlling doctrine, or even policy, of the law of this state, as evidenced by the Constitution, statutes, or decisions, a careful examination has been made of the laws and reported decisions, and as a conclusion it is found that there is no such pertinent doctrine or policy established here, and, therefore, that this court must reach conclusions independent of any decision of the courts of Delaware. The case of *Gregory v. Bailey*, 4 Har. 256, seems to be pertinent, and, if so, as a decision of the Court of Errors and Appeals, is controlling, in its influence at least. Without careful reading it seems to hold "that a seller of lottery tickets, having no license to sell them, may recover the price of tickets sold, though the sale be prohibited by statute." But in reality the court did not so hold, and it was not necessary to do so, because there the sale was not of lottery tickets in retail, but by wholesale and as part of a sale of the whole lottery scheme, including tickets, and the court held that the statute regulating the sale of lottery tickets did not apply. In *Cook v. Pierce*, 2 Houst. 499, a usurious contract was declared unenforceable because prohibited and therefore invalid and void. By statute the rate of interest for the use of money lent was fixed, and money loaned at a greater rate of interest was forfeited to any one who would sue for it, though the

statute did not expressly render the contract void or unenforceable. The court considered that both by the words and policy of the law a contract for a greater rate of interest was a forbidden one, and being made unlawful was void. But obviously there is a difference in the effect of statutes which expressly, or by necessary implication, and as part of a commercial policy of the state, made a particular kind of contract unlawful and one which prohibits under penalty a foreign corporation from carrying on business generally, without reference to a particular kind of business, until one carrying on business maintains an agent on whom process against it may be served. In *Cook v. Pierce*, a well-established principle was applied correctly. Prohibited contracts are unenforceable because rendered void by the prohibition to make them, whether the statute so declares or not and whether the act be *malum in se* or *malum prohibitum*. A legislative intent to make the contracts unenforceable is evident in such cases. A usurious contract is a typical instance. So contracts for the sale of intoxicating liquors are unenforceable when the sale of such article is prohibited. But this principle is not applicable where there is no prohibition to carry on the particular business in which the plaintiff is engaged, in the course of which the contract in question was made.

In *Johnson v. Mason, etc.*, Lodge, 106 Ky. 838, 51 S. W. 620, the court distinguished between statutes regulating corporations in general and those intended to protect the public against sellers of worthless fertilizers, and those which prohibited the sale of intoxicating liquors without license, and also statutes to regulate insurance corporations. Concerning such prohibited contracts the court said:

"As the vice was in the contract itself they [the statutes] are therefore distinguishable in this respect from this case, which only involves the idea of disability to sue."

The principle applied in *Reeder v. Jones* (1902) 6 Pennewill, 66, 65 Atl. 571, is equally well established. A person carrying on the business of real estate broker without having a license to carry on that particular business was not allowed to recover commissions for making a sale of real estate. The purpose of this statute is to obtain revenue, and it is made unlawful for all unlicensed persons to act as real estate brokers, and so, necessarily, their contracts for acting as such are unenforceable. But that is not applicable to the legislation under consideration here, the primary object of which is not to exclude foreign corporations, or to license them to carry on particular kinds of business, but to bring them within the reach of the process of the courts of Delaware.

In almost all (if not all) the states, including Delaware, corporations issuing policies of insurance, assurance and suretyship are

regulated by statute. Here the statutes respecting such corporations have as their primary object, whether it be so expressed or not, to protect people of the state from being injured or defrauded by corporations, fraudulently or dishonestly conceived or managed, or financially unsound. With this in view they require not only of such foreign corporations to put on record here evidence of their authority to transact such business, of their ability to carry out their contracts, and of their financial stability. To insure this they require that the Insurance Commissioner shall examine their affairs annually and give certificates to those qualified. All others are prohibited from doing business of those kinds here. Incidentally, it is required that foreign corporations maintain agencies upon whom process can be served validly. Licenses are subject to revocation for cause and the power of the state officer over such kinds of corporations is constant and continuous. It is a fair construction of such a statute considering its primary object, to hold that a suit to enforce payment of a note given here for a premium on a policy issued by a foreign corporation not qualified to do such business here, cannot be maintained here by the corporation or its receiver. Such was *Beeber v. Walton* (1877) 7 Houst. 471, 32 Atl. 777, which by its express declaration controlled the court below. The foreign insurance company sued on a note given for premiums on a policy, and at the time the note was given the corporation had not complied with the laws of Delaware, but had done so before the suit was brought. It was held in *Beeber v. Walton*, quite entirely on the authority of *Cook v. Pierce*, supra, that the contract was void and unenforceable, though not so declared by the statute. The court considered that the object of the statute was to protect the citizens of the state from spurious, insolvent and dishonest insurance companies, and so held that the contracts made by such here in the course of that business to be unenforceable here. It is obvious that such is not the object of any legislation in Delaware under consideration, and, therefore, the same result should not follow.

In *Franklin Insurance Co. v. Louisville, etc., Co.*, 9 Bush (Ky.) 590, the Kentucky court took the same position as the court in *Beeber v. Walton*, respecting similar statutes regulating foreign insurance corporations, and considered that by such regulations the Legislature intended the act to be not only a means to raise revenue but to prohibit the particular business itself so far as carried on by those unqualified to do so. *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221, was a similar case.

From this examination it is evident that the courts of Delaware have not heretofore adopted a policy of judicial construction of statutes like those now under consideration which would be applicable to the latter. Dif-

ferent principles are applicable where the primary object of legislation is not to regulate particular kinds of contracts or license particular kinds of business, or to raise revenue, but the primary object is to secure to the state and the people thereof a way to serve process on corporations organized in other states, when they come here to do business by branch offices and agents located here. Such is the primary object and purpose of the laws of Delaware, constitutional and statutory, under present consideration. The revenue feature is distinctly a subsidiary one, unimportant to the discussion. There is no continuous supervision of the financial standing of the foreign corporations, and no discretion to refuse to give certificates of compliance when the simple requirements of the statute are complied with, whether the initial statement of its assets and liabilities be satisfactory to the Secretary of State, or not. Contracts made by noncomplying corporations, or by noncomplying agents, are not declared to be either void or unenforceable, generally, or until compliance. To insure the presence in Delaware of some one on whom valid service of process can be served in suits against foreign corporations coming here to transact business by branch offices or agents located here, the state has prohibited foreign corporations from doing business here through or by branch offices, agents or representatives located here, without having such agent authorized to receive such service and makes valid a service of process on such agent, and to enforce it imposes, not only on the corporation, but also on the individual representing it, a fine in case a corporation shall so do business without having so complied.

Are contracts made with people of this state by a foreign corporation, which has not so complied, either invalid in Delaware, or unenforceable here?

When the statute is silent on the subject of the enforceability of contracts made by unqualified foreign corporations, the whole statute should be considered and its purpose ascertained, in determining the unexpressed legislative intent respecting the enforceability of such contracts. This is not only reasonable, but has judicial support. *Harris v. Rannels*, 12 How. 79, 13 L. Ed. 901; *Washburn, etc., Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544; *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Dunlop v. Mercer*, 156 Fed. 545, 96 C. C. A. 435. This is the established rule of the federal courts respecting statutes in general, where the act prohibited under penalties is not *malum in se*. In the case of *In re T. H. Bunch Co. (D. C.)* 180 Fed. 519, there is a large collection of authorities to that effect.

In the several states there is a variety of legislation, constitutional and statutory, concerning foreign corporations doing business by branch offices or resident agents. In

some (a) there is simply a prohibition; in others (b) a prohibition and penalty; in others (c) in addition the contracts made by such agents are declared to be void for noncompliance; (d) in others, they are declared unenforceable; (e) in others, they are unenforceable until compliance; and various rules have been adopted respecting them in the several jurisdictions. But only those in class (b) are analogous to the Delaware law, and the decision of the courts of states with other provisions are necessarily not useful in reaching a conclusion in the case before this court.

Where there is solely a prohibition without a penalty, it may be sound reasoning to hold that the prohibition was intended to effect the desired protection by making unenforceable contracts made by corporations which had not complied, for in that way only could the prohibition be enforced. Some courts have so held, though it is not uniformly so held. *Bank v. Page*, 6 Or. 431; *Assurance Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626. *Contra*, *Washburn, etc., Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

[3] It is claimed that this is the effect of the Constitution of Delaware. If it solely prohibited foreign corporations from doing business in Delaware, and the above principle be considered sound, it might be applied in this case. But the Constitution is much narrower in its prohibition, in that it forbids foreign corporations to do business in Delaware, not generally, but by branch offices or agents located here, without an authorized agent here upon whom process may be served. Its clear purpose is to make all such corporations amenable to the process of the courts here. Is it effective to do so in itself, and without legislation?

Probably it is not, because not self-executing, in that it does not provide either the method of establishing and authorizing agencies, or make service of process on them valid, but leaves it to the Legislature to supply these deficiencies. Until these features are supplied, it is not capable of being obeyed, and so its prohibition is ineffective. This was strongly argued by the counsel for the plaintiff in error, and in support he cited *Cooley on Const. Lim.* 98, 99, 9 Cyc. 752, 753, 759, *Eau Claire v. Benson*, 105 Wis. 624, 82 N. W. 604, *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249, and *Hyatt v. Allen*, 54 Cal. 353, on the general proposition that constitutional provisions which require subsequent legislation to enforce them are not self-executing, and in addition, *St. Louis, etc., Ry. Co. v. Fire Ass'n*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83. In the last-cited case a provision of the Constitution of Arkansas, similar to that in Delaware, was held not to be self-executing or enforceable.

"The appellant contends that the evidence failed to show that the Commercial Company complied with section 11, art. 12, of the Con-

stitution. This section declares that no 'foreign corporation shall do business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served.' It is not self-executing. It does not provide how the agent shall be designated, or how the place of business shall be made known. The Commercial Company had no right to say upon what agent process may be served. The Legislature alone has the right. Until it exercised it, there was no penalty for the violation of the Constitution in that respect." *Armor, etc., Co. v. Vinegar, etc., Co.*, 149 Ala. 205, 42 South. 866.

It may be that the constitutional provision in Delaware is only a limitation on the powers of the Legislature to authorize foreign corporations to do business here by branch offices, etc., without requiring such corporations, as a condition of the privilege, to maintain agents here upon whom process shall be served in a manner to be designated by the Legislature, the method of registration of such agents and other necessary administrative details being left to the Legislature and subject to change by it.

As already shown, the same legislation was in force in Delaware at the time of and since the adoption of the Constitution in 1897. Clearly the provision of the Constitution, and the statutes of 1893 and 1897, in force when the Constitution was adopted, are in pari materia, in that they relate to the same subject-matter, viz., a prohibition of foreign corporations from doing business here by branch offices, etc., without having an agent here on whom process could be served. Not being repugnant or inconsistent, they are to be construed together. The conclusion is inevitable that the members of the Constitutional Convention of 1897, whatever they may have said in the debates there (and we are not sure that we have examined all that was there said on the subject) must, in formulating the provision of the Constitution in question, have had regard to the existing statutes, which would in fact supplement and make effective the contemplated constitutional provision, probably otherwise ineffective; for these then existing statutes provided a method of establishing agencies and of serving process on them with the same effect as though service had been made on the corporation itself. In other words, it was considered that the Constitution, whether otherwise ineffective or not, would certainly be made operative by the existing statutes on the same subject, which established a method of registering agencies, and a legal method for an effective service of process on them. This court is not daunted to so hold, because it may be argued that it would logically result that the interpretation and effectiveness of the Constitution would vary according as the Legislature varied the statutes on the same subject-mat-

ter. Therefore, whether or not the constitutional provision be regarded as inoperative, except as a limitation on the power of the General Assembly, or whether or not it be considered with the acts of 1893, 1897 and 1903, relating to the same matter, the result is the same, for the statute of 1903, in force when the contract in question was made, and now still in force, is in harmony with the Constitution and contains all that it contains on the subject and more. Hence in deciding this case, regard may be given only to the present existing statute, that of 1903.

[4, 5] By comity a corporation created by one sovereignty is permitted to make contracts in another, and sue on its contracts. *Bank of Augusta v. Earle*, 13 Pet. 588, 10 L. Ed. 274. Each sovereignty by express statute or settled policy of the state may exclude corporations created by another sovereignty, or prescribe terms with which such foreign corporations must comply, except such as are engaged in interstate commerce and otherwise protected by valid provisions of the Constitution and statutes of the United States. The primary purpose of the legislation in Delaware being so obvious, it certainly was not intended to exclude foreign corporations from the state. It does not in terms render invalid the contracts made here by noncomplying foreign corporations. As has repeatedly been said elsewhere, if such consequences were intended it was very easy for the Legislature to have said so. Without undertaking to review all the many cases which have been cited or decided in construing the variously worded statutes of other states on the same subject, it is here asserted that the better reason, the wiser and fairer policy and the greater weight, lies with those decisions of other courts which hold, that where, as here, there is a prohibition with a penalty, with no express or implied declaration respecting the validity or enforceability of contracts made here by unqualified foreign corporations, the contracts made here by corporations created elsewhere and doing business here by branch offices or agents located here without complying with the laws of Delaware as to registration of agents, etc., are enforceable in the courts of Delaware on the ground that the purpose of the statute was not to prohibit business, but accomplish a collateral object, viz., to bring such corporations within the reach of process of the courts here, and to effect this the penalty provided is deemed to be exclusive of all other consequences, and, therefore, the further penalty of forfeiture of rights under the contract otherwise valid and enforceable, will not be added by the court when suit is brought on the contract. The courts of the following states where the laws are substantially like those of Delaware, have so held:

Colorado: *Utley v. Mining Co.*, 4 Colo. 369; *Kindel v. Beck, etc., Co.*, 19 Colo. 310,

35 Pac. 538, 24 L. R. A. 311; *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 121, 47 Pac. 848; *Helvetia, etc., Ins. Co. v. Allis, etc., Co.*, 11 Colo. App. 284, 53 Pac. 424. Kentucky: *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620; *Hallam v. Ashford*, 70 S. W. 197, 24 Ky. Law Rep. 870. South Carolina: *Galletley v. Strickland*, 74 S. C. 394, 54 S. E. 576. Washington: *Dearborn, etc., Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Edison v. Canadian, etc., Co.*, 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315, 40 Am. St. Rep. 910; *La France, etc., Co. v. Mt. Vernon*, 9 Wash. 144, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; *Horrell v. Homebuilders' Ass'n*, 40 Wash. 531, 82 Pac. 889. West Virginia: *Toledo, etc., v. Thomas*, 83 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925. Rhode Island: *Garratt, etc., Co. v. Vermont, etc., Co.*, 20 R. I. 187, 37 Atl. 948, 38 L. R. A. 545, 78 Am. St. Rep. 852.

In North Dakota, where by statute foreign corporations were prohibited from transacting business until compliance, but no penalty was provided for violations, it was held, that contracts of unqualified corporations were not void or unenforceable, but could be enforced in North Dakota. A person who contracted with a foreign corporation and received and retained the benefits of such contract was not permitted to raise the question of noncompliance. *Washburn Mill. Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

In New Jersey, in the case of *Alleghany v. Allen* (1903) 69 N. J. Law, 270, 55 Atl. 724, the suit was on a note made by a South Carolina corporation and the plea alleged that the plaintiff was doing business in New York, where the note was given in the course of business, without complying with the laws of New York, and that by the laws of New York no suit could have been brought there. Held, that New Jersey would not enforce a contract made void by the law of New York, the place where the contract was made, but as New York courts had decided that such contracts were not void, the New Jersey court would enforce it.

"The tendency of judicial decisions on this subject where the statute does not declare the contract to be void, is to strict construction, maintaining the validity of the contract, and holding that the only effect of such legislation in the State where it is enacted is to impose the prescribed penalties and the expressed disabilities. Outside of such state, until its courts give it a wider scope, no greater latitude will be attributed to it."

In Iowa foreign corporations not qualified are denied, by the statute, rights and privileges conferred on corporations so complying, and yet the failure of a foreign corporation to comply does not render void or unenforceable in Iowa contracts made by the noncomplying corporation. *Spinney v. Miller*, 114 Iowa, 212, 86 N. W. 317, 89 Am. St.

Rep. 351; *Beach v. Wakefield*, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197.

In the following states a contrary interpretation is given to statutes similar to those in Delaware:

In Alabama noncomplying foreign corporations were denied the right to sue to recover by suit money loaned in Alabama. *Hanchey v. So., etc., Loan Ass'n*, 140 Ala. 246, 37 South. 272; *Dudley v. Collier*, 87 Ala. 433, 6 South. 304, 13 Am. St. Rep. 55; *Telegraph Co. v. Telegraph Co.*, 67 Ala. 26, 42 Am. St. Rep. 90; in which latter case the Supreme Court said that the prohibition of the Constitution without a penalty, was "just as much a police regulation for the protection of property interests of the citizens of the state as the law forbidding vagrancy among its inhabitants." *Armor, etc., Co. v. Vinegar, etc., Co.* (1906) 149 Ala. 205, 42 South. 866.

In Pennsylvania, contracts made in Pennsylvania by unqualified foreign corporations are unenforceable there. *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552; *Delaware, etc., Co. v. Bethlehem, etc., Ry. Co.*, 204 Pa. 25, 53 Atl. 533.

In the case of *Delaware, etc., Co. v. Bethlehem, etc., Co.*, supra, the plaintiff had built a road for the defendant at a cost of \$31,000. The plaintiff was a New Jersey corporation and did not register in Pennsylvania until after the contract was completed but before suit was brought. Without citation of authorities, or much discussion, the court held that the plaintiff could not recover.

"The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of these with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made, can give it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object by affording protection to the corporation and denying it to the public."

In *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743, the court held contracts by a noncomplying foreign corporation, by which it furnished labor and materials for building in Tennessee, were not enforceable there. This was based on the case of *Stevenson v. Ewing*, 87 Tenn. 50, 9 S. W. 230, where the suit was by one who had not taken out a license to transact the business in which engaged. Other cases in Tennessee are: *N. Y. B. & Loan Ass'n v. Cannon*, 99 Tenn. 344, 41 S. W. 1054; *Gilmer v. U. S. Savings Bank*, 103 Tenn. 272, 52 S. W. 851; *Harris v. Columbia, etc., Co.*, 108 Tenn. 245, 67 S. W. 811. All followed the above amplification of reasons.

In *First Nat. Bank v. Coughran* (Tenn. Ch.) 52 S. W. 1112, the Tennessee court went to the extreme limit in holding that even in the hands of an innocent purchaser for value, without notice, a note given to a foreign noncomplying corporation was invalid and uncollectible.

In the federal courts the principle now adopted in the case under consideration has been with great vigor and emphasis uniformly adhered to. It is thus stated in *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435:

"The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the law making power intended to make such contracts void. And if from all these considerations it is manifest that the Legislature had not such intention, the contracts should be sustained and enforced; otherwise they should be adjudged void. * * *

"There is no declaration in the statute that contracts of unqualified corporations doing business in the state without complying with the prescribed conditions shall be void. So far as we are able to ascertain, the Supreme Court of the state has never held that such was the meaning or the effect of the law. If that had been the purpose of the Legislature, it would have been easy to have made it manifest. A single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose, and it is not the province of the court to inflict more by construction. * * *

"The object of the statute, the evil it was intended to remedy, the plain language of the entire act, the inequitable effect of the avoidance of contracts in violation of it, make it manifest that the law making power of the state never intended that contracts of unqualified corporations doing business in the state should be void."

No further authority need be cited than the case of *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, and the cases therein referred to. Judge Sanborn, in *Blodgett v. Lanyan, etc., Co.*, 120 Fed. 893, 58 C. C. A. 79, speaking of such statutes, said:

"The object of these statutes was to subject foreign corporations doing business in the state to the jurisdiction of the courts and to its inspection, and the supervision of its officers, not to the end that the citizens of the state might avoid their contracts and perpetrate injustice, but to the end that justice might be administered to both the corporation and the citizens."

The federal courts follow the construction placed on a state statute by the highest court of the state, and if it has been there clearly established, by such decisions, that contracts made by noncomplying foreign corporations

are illegal and void in the particular state, such contracts are unenforceable in the federal courts. It is thus stated in *Groton Bridge, etc., Co. v. American Bridge Co. (C. C.)* 151 Fed. 871:

"If the highest court of the state has given construction to its statutes fixing the conditions on which a foreign corporation may do business within the state, and held they may make all contracts entered into by it without complying with such conditions void, and they do not directly relate to interstate commerce, or discharge citizens from their contract obligations, or are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense, then the courts of the United States are bound by and give effect to such construction, but such contracts are not necessarily void because of noncompliance with such conditions, and the Court of Appeals of the state of New York has not given such construction to the statute referred to."

Where, however, the contract is not made void by the statute, or declared to be such by the state courts, but the statute merely prohibits unqualified corporations from maintaining an action thereon in any court in the state, the corporation may, nevertheless, maintain an action in the federal courts, since the federal court will not refuse to enforce a valid contract, harmless in itself, which is not enforceable in the state courts merely on account of noncompliance with the state administrative regulations. The states are powerless to limit the jurisdiction of the federal courts in this respect. *Blodgett v. Lanyan, etc., Co.*, 120 Fed. 893, 58 C. C. A. 79; *Eastern Building, etc., Ass'n v. Bedford (C. C.)* 88 Fed. 7; *Sullivan v. Beck (C. C.)* 79 Fed. 202; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *Butler, etc., Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167; *Groton, etc., Co. v. American Bridge Co. (C. C.)* 151 Fed. 871; *Johnson v. N. Y. Breweries Co.*, 178 Fed. 513, 101 C. C. A. 639; *Richmond Cedar Works v. Buckner (C. C.)* 181 Fed. 424.

With unusual uniformity the writers of text books, who presumably consider such questions philosophically, approve the position herein taken. Beale on Foreign Corporations, §§ 212, 213, says: "This represents the prevailing and it would seem the better doctrine." Murfree on Foreign Corporations, § 75, says the weight of authority is in favor of the position. Morawetz on Private Corporations (2d Ed.) § 665, thus states the rule:

"The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions, such as filing copies of their charters, making statements of their finan-

cial conditions, appointing agents upon whom process can be served, etc., is to protect parties dealing with these companies from imposition, and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations, in the particulars provided for. It is clearly not the primary purpose of the Legislature, in passing these statutes to render the contract and dealings of corporations which have not complied with the statutes void and unenforceable. Hence, where the Legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to obtain the primary object for which the statute was passed."

Thompson on Corporations, § 5274, thus states the general view:

"The modern doctrine is coming to this: That one who enters into a contract is, when sued by the corporation upon such contract, estopped to deny that the corporation had power to make the contract. The obvious reason of the rule is, that such a person ought not to be allowed to oppose such a dishonest defense to a bargain which is fair so far as he is concerned. The rule of public policy which aims to keep corporations within the limits of their chartered powers, yields to the justice of the particular case; and the wrong which the corporation had done to the public, by transcending its powers, is left to be redressed in a public prosecution against the corporation."

The writer in 19 Cyc., in reviewing the various decisions, refers to "the shocking immorality involved in decisions that a citizen should be judicially encouraged to repudiate his contract, fairly made with a foreign corporation, and keep the fruits of such contract while repudiating the obligation on his part, and so keep the goods without paying for them."

There is, then, ample and convincing authority, as well as good, wholesome reason, for adopting the rule now established in this state respecting those general administrative statutes concerning foreign corporations doing business generally here, and the conclusions here announced are not reached by overturning principles, precedents or policies established by the legislation of the state, relating to corporations doing particular kinds of business, or judgments of its courts thereon; but rather by adopting a broad, fair and liberal view, better fitted to changed conditions of the commercial life of the state in its relations to other states, and tending to promote rather than hinder fair dealing and commercial honesty.

The demurrer of the plaintiff below to the special plea in abatement will be sustained and the judgment below reversed.

STATE v. FERSCHKE.

(Superior Court of Delaware. New Castle.
Sept. 28, 1911.)

1. PARTNERSHIP (§ 64*)—REGISTRATION OF MEMBERS—CONSTITUTIONALITY.

The act providing for the registration of persons composing partnerships and associations is not an unreasonable exercise of the police power.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.*]

2. PARTNERSHIP (§ 64*)—REGISTRATION OF MEMBERS—STATUTORY PROVISIONS—CONSTITUTIONALITY.

The act providing for registration of persons composing partnerships and associations does not violate the rights guaranteed under the Constitution respecting private property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.*]

3. STATUTES (§ 64*)—PARTIAL INVALIDITY—TITLE—SUFFICIENCY.

Under Const. art. 2, § 18, providing that bills generally shall not embrace more than one subject, to be expressed in the title, the act entitled "An act providing for the registration of persons composing partnerships and associations" (25 Del. Laws, c. 146) is unconstitutional, so far as it relates to the registration of individuals who are not members of partnerships or associations.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 195; Dec. Dig. § 64.*]

4. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION—VALIDITY.

All reasonable doubts and presumptions are to be solved in favor of the validity of a statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

Augustus Ferschke was indicted for violating an act for the registration of persons composing partnerships, etc. On motion to quash indictment. Indictment quashed.

Argued before PENNEWILL, C. J., and WOOLLEY, J.

Josiah O. Wolcott, Deputy Atty. Gen., for the State. Leonard E. Wales, for defendant.

PENNEWILL, C. J. (delivering the opinion of the court). A motion has been made by the defendant in the above-stated case that the indictment be quashed for the following reasons, viz.:

"For that the act [25 Del. Laws, c. 146] under which said indictment has been found is unconstitutional.

"First. Because said act is in contravention of section 18, art. 2, of the Constitution of this state.

"Second. Because said act is an unreasonable and unwarranted exercise of the police power.

"Third. Because said act is in violation of the rights guaranteed under the Constitution with respect to private property."

The court, after carefully considering the questions raised and argued, have reached the following conclusions:

[1] First. That the said act is not an un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
81 A.—26

reasonable and unwarranted exercise of the police power.

[2] Second. That the said act is not in violation of the rights guaranteed under the Constitution of the state with respect to private property.

The court, therefore, hold that the act in question is not unconstitutional on either of the last two grounds urged by the defendant.

[3] Third. But the court are of the opinion that the said act is in contravention of section 16, art. 2, of the Constitution of the state, which provides that: "No bill or joint resolution, except bills appropriating money for public purposes, shall embrace more than one subject, which shall be expressed in the title."

The title of the act is as follows: "An act providing for the registration of persons composing partnerships and associations."

Section 1 of the act provides: "That on and after the first day of July, A. D. 1909, no person, firm or association shall engage in, prosecute or transact any business within the limits of this state by using any trade name or title which does not disclose the Christian and surname of such person, or in case of a firm or association, the Christian and surname of each and every person comprising said firm or association without, in addition to what is now required by the laws of this state, first filing a certificate under the hand of such person, or in case of a firm or association under the hand of one of the members of such firm or association in the office of the prothonotary of each county in which it is prosecuting or transacting such business, designating the trade name or title and Christian and surname of such person, or, in case of a firm or association, the Christian and surname of each and every member comprising such firm or association, and all such certificates shall show the date when such partnership or association was organized, to which said certificate there shall be attached the affidavit of the person signing it to the effect that the facts therein stated are true and correct."

The title of the act is a very restrictive one. It clearly indicates that the subject of the act is the registration of persons comprising partnerships and associations, and by necessary implication excludes, or excepts, all other persons.

Unquestionably the principal object of said constitutional provision is that the title of an act, when published, shall be sufficiently comprehensive to give to the people, as well as the members of the Legislature, fair and reasonable notice of the subject-matter of the legislation proposed.

Certainly no one would be fairly apprised, nor could he reasonably infer, from the title of the act in question, legislation that required the registration of a person trans-

acting business as an individual. But the act is broad enough in its scope to include such person as well as persons comprising partnerships and associations. While the subject of the act is the registration of all persons engaged or transacting business in the state, the title restricts such registration to certain classes of persons, and does not, therefore, express the subject of the act as required by the constitutional provision.

We are unable to distinguish this case, in principle, from that of *Equitable Guarantee and Trust Co. v. Donahoe*, 3 Pennewill, 191, 49 Atl. 372, and the case of *Hyman v. State*, 87 Tenn. 109, 9 S. W. 372, 1 L. R. A. 497, upon which the court so much relied in the *Donahoe* Case.

We fully agree with the reasoning of the court in the *Tennessee* case, and think the following language is especially applicable to the question before us:

"We are not at all disposed to construe said constitutional provision strictly. On the contrary it should be given a liberal construction, so as not to embarrass legislation by a construction unnecessary to accomplish the beneficial purposes for which it was adopted. Yet the Legislature may make the title to an act as restrictive as they please. It is obvious that they may sometimes so form it, as to preclude many matters being included in the act, which might with entire propriety have been embraced in the enactment with the matter indicated in the title, but which must not be extended because the bill has been made unnecessarily restrictive. The court cannot enlarge the scope of the title; they are vested with no dispensing power. The Constitution has made the title the conclusive index to the legislative intent, as to what shall have operation. It is no answer to say that the title might have been made more comprehensive if in fact the Legislature has not seen fit to make it so."

In order that the act in question might be entirely valid the title should have been comprehensive enough to have included individuals as well as persons comprising partnerships and associations.

But while we think that under a liberal construction of our constitutional provision it is manifest that the subject of registration of individuals is not within the title of the act in question, which is confined to the registration of persons comprising partnerships and associations, we are nevertheless of the opinion that said act is not wholly unconstitutional, but only so far as it relates to the registration of individuals who are not members of firms or associations.

It will not be questioned that the same act of legislation may be unconstitutional in some of its provisions and yet constitutional in others, provided the parts so held respectively constitutional and unconstitutional are wholly independent of each other, and not so mutually connected with, and dependent on, each other as to warrant a belief that the

Legislature intended them as a whole, and that, if all could not be carried into effect the Legislature would not pass the residue independently.

The test of the law is conceded to be this: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley on Const. Law (6th Ed.) 211.

[4] Judged by such test the act before us must be declared constitutional in so far as it requires the registration of persons comprising partnerships and associations, and unconstitutional and void so far as it relates to the registration of other persons. We are clearly of the opinion that that part of the statute which relates to the registration of persons comprising partnerships and associations is complete in itself and capable of being executed in accordance with the legislative intent, wholly independent of that which we hold to be invalid. But even if we were in doubt upon that question, there is a well established and recognized rule, applicable alike to the whole or a part of a statute, though stronger in favor of the former than the latter, that all reasonable doubts and presumptions are to be solved in favor of the validity of a statute.

Our construction of the statute is entirely consistent with the decision in the Donahoe Case, above referred to, wherein the court recognized the principle, that an act might be unconstitutional as to one part and constitutional as to others, but were forced to hold that the different parts or provisions of the statute in that case were so dependent one upon the other as to be incapable of separation.

We direct that the indictment be quashed.

STATE v. HASTINGS.

(Court of General Sessions of Delaware. Sussex. Oct. 13, 1911.)

1. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTIONS—EVIDENCE.

In a prosecution for the sale of spirituous liquor, the defendant, to avail himself of the defense that the Jamaica ginger sold by him was not a spirituous liquor, but was a medicine, and was sold in good faith as such, must prove it to the satisfaction of the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.*]

2. INTOXICATING LIQUORS (§ 165*)—OFFENSES—SALES FOR MEDICINAL PURPOSES.

A person has the right to sell Jamaica ginger, the same being a medicine, for medicinal purposes; but he has no right to sell Jamaica ginger, a spirituous liquor, even if it be a medicine, to be used as a beverage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 181; Dec. Dig. § 165.*]

3. INTOXICATING LIQUORS (§ 165*)—OFFENSES—SALES FOR MEDICINAL PURPOSES.

To convict one of a sale of spirituous liquor, it is necessary for the jury to find that accused sold the liquor with intention that it be used as a beverage, irrespective of the subsequent uses to which the purchaser put it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 181; Dec. Dig. § 165.*]

4. INTOXICATING LIQUORS (§ 226*)—CRIMINAL PROSECUTIONS—EVIDENCE.

In determining the purpose for which accused sold Jamaica ginger, the jury must consider all the evidence concerning the facts and circumstances surrounding the sale, including the amount sold and statements made by the purchaser, as well as any actual knowledge the accused had.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 232-236; Dec. Dig. § 226.*]

5. INTOXICATING LIQUORS (§ 165*)—OFFENSES—SALE FOR MEDICINAL PURPOSES.

A person selling spirituous liquor as medicine must make the sale in good faith as such, and he must use reasonable care and prudence to ascertain for what purpose it is to be used.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 181; Dec. Dig. § 165.*]

6. INTOXICATING LIQUORS (§ 168*)—OFFENSES—SALES BY AGENTS.

Where a clerk, acting as agent for accused, sells spirituous liquor with the authority or consent or under the direction of the accused, his act is the act of the accused, and the accused is as criminally liable as though he himself made the sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 189-192; Dec. Dig. § 168.*]

7. CRIMINAL LAW (§§ 306, 327*)—EVIDENCE—BURDEN OF PROOF.

A person charged with a crime is presumed to be innocent till he is proven guilty to the satisfaction of the jury beyond a reasonable doubt, and the burden of proof is on the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 720, 731; Dec. Dig. §§ 306, 327.*]

Levin Hastings was indicted for selling spirituous liquor, the same not being for medicinal or sacramental purposes. Verdict, not guilty.

Argued before WOOLLEY AND RICE, JJ.

Josiah O. Wolcott and Frank M. Jones, Deputies Atty. Gen., for the State. Robert C. White and Daniel J. Layton, Jr., for defendant.

Indictment for selling spirituous liquor, to wit, Jamaica ginger, the same not being for medicinal or sacramental purposes (No. 27, June Term, 1911).

The facts sufficiently appear in the charge of the court.

At the trial the state proved the sale of three bottles of Jamaica ginger to one B., the same not being bought for medicinal or sacramental purposes, and that the said ginger was a spirituous liquor containing 95 per cent. alcohol.

State's Prayers.

(1) The seller of spirituous liquor is not absolutely bound to know that such liquor was being sold for medicinal or sacramental purposes, but he is bound to use all reasonable means for ascertaining the fact whether such sale is for such purposes. It is for the jury to determine whether the defendant used all reasonable means necessary under the circumstances to ascertain whether the sale was for medicinal or sacramental purposes, or otherwise. *State v. Fahey*, 5 Pennewill, 585, 65 Atl. 280.

(2) The defendant admits every allegation contained in the indictment, without this: He denies that he committed the act complained of unlawfully; on the contrary he contends that he committed the act lawfully, in that the sale was of the liquor in question as a medicine. In passing upon this contention the question for your investigation and determination is whether under all the evidence produced before you the defendant did exercise reasonable diligence to ascertain whether the liquor in question was being sold for medical use by the prosecuting witness. And this was a fact concerning which the defendant or his servant or agent might not inquire either carelessly or with indifference, for the statute in this case was enacted to prohibit all sales of spirituous, vinous or malt liquors unless for the purposes excepted by the statute. The vendor, his agent or servant, is bound to use all reasonable means to ascertain whether the person desiring the liquor is in fact purchasing it for medicinal or sacramental purposes, and if such a vendor sells spirituous liquor and the same is not sold for medicinal or sacramental purposes without due and reasonable effort to ascertain the fact so as not to defeat the very object and purpose of the statute, then he violates the act.

(3) In many cases, at least, a vendor of spirituous liquor would not meet the requirements of the act by simply asking a person applying for such liquor if he or she desires it for medicinal or sacramental purposes and relying upon an affirmative answer, make a sale to such person. For if nothing more should be required than to ask if the spirituous liquor were desired for such purposes and have such person answer in the affirmative, then the purpose of the act could be, and doubtless would often be violated. *State v. Salkowski*, 6 Pennewill, 472, 69 Atl. 830; *State v. Blair*, 72 Iowa, 591, 34 N. W. 432.

Defendant's Prayers.

(1) That the court instruct the jury to render a verdict of not guilty.

(2) That the court charge the jury that Jamaica ginger is not a spirituous liquor within the meaning and contemplation of section 11, c. 35, vol. 24, Laws of Delaware.

(3) That if the jury shall believe that the defendant sold Jamaica ginger, scientifically produced, their verdict should be "not guilty."

(4) That if the jury shall believe that the defendant sold Jamaica ginger, honestly believing it to be a standard drug, and sold it as a standard drug, and not as a beverage, the verdict should be "not guilty."

RICE, J. (charging the jury). Gentlemen of the jury: Levin Hastings, the prisoner, is charged in this indictment with selling, in this county, on June 11, A. D. 1911, spirituous liquor, to wit, Jamaica ginger, to one Arris Kinney, the same not then and there being sold for medicinal or sacramental purposes.

The indictment in this case is based on what is commonly known as the local option law, it being chapter 65, volume 24, Laws of Delaware, and approved March 21, 1907, which law in part provides: "It shall be unlawful for any person or persons, firm, company, association or corporation or the agent, officer or servant of any firm, company, association or corporation, to sell spirituous, vinous or malt liquors, except for medicinal or sacramental purposes" within certain districts in this state; Sussex county now being one of these districts.

The state produced evidence to prove that a clerk in the store of Levin Hastings, at Delmar, in this county, at that store on the 10th day of June, of the present year, sold spirituous liquor, to wit, Jamaica ginger, to Arris Kinney for purposes other than medicinal or sacramental.

[1] The prisoner does not deny that a sale of Jamaica ginger was made at that place and at that time to Arris Kinney, but under the defense of not guilty he contends that the Jamaica ginger sold was not a spirituous liquor but was a medicine and that it was sold in good faith as such and therefore he is not guilty of the charge alleged in the indictment. To avail himself of this special defense he must prove it to the satisfaction of the jury.

The accused has requested the court to give the jury binding instructions to find a verdict of "not guilty." This we decline to do for reasons appearing later in the charge.

[2] We will say to you that, if otherwise authorized, the accused had a right to sell Jamaica ginger, the same being a medicine, for medicinal purposes; but at the same time we say that he had no right in law to sell "Jamaica ginger," a spirituous liquor, even though it was a medicine, to be used as a beverage.

We find the law in this respect well stated in King's Case, reported in 58 Miss. 740, 38 Am. Rep. 344. The court in that case said: "One authorized to sell medicines ought not to be held guilty of violating the laws against retailing, because the purchaser of a mixture containing alcohol misuses it, and becomes intoxicated; but, on the other hand,

these laws cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks or seeds which have medicinal qualities. If the other ingredients are medicinal, and the alcohol is used as a necessary preservative or vehicle for them, if, from all the facts it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage, the seller is protected; but if the drugs or roots are mere pretences of medicines, shadows and devices under which an illegal traffic is to be conducted, they will be but shadows when interposed for protection against criminal prosecution."

[3] In other words if from the evidence in this case you find that the Jamaica ginger sold by the accused to Arris Kinney was a spirituous liquor, then before you can convict in this case it is necessary for you to find that it was by him or his agent then and there sold with the intention that it be used as a beverage, irrespective of the subsequent uses to which the purchaser put it.

[4] In determining this question as to the purpose for which the prisoner sold the Jamaica ginger on this occasion to Kinney, you are to consider all the evidence in the case, concerning the facts and circumstances surrounding the sale. It is your duty to take into consideration the amount sold to the purchaser at that time, any statements made by Kinney at the time as to the purposes for which it was to be used, as well as any actual knowledge the accused had as to the purpose for which it was to be used.

It would not be a sufficient defence in every case for a person accused of selling spirituous liquor, contrary to the provisions of the statute, to say that he has asked the purchaser for what purpose he was buying the same, and that the purchaser replied it was for medicinal purposes. For if such was the case the provisions of the law could easily be evaded by a person having a mind to do so.

[5] A person selling spirituous liquor as a medicine in this county must make the sale in good faith as such, and it is necessary for him to use reasonable care and prudence to ascertain for what purposes it is to be used, and such legal duty is upon him.

[6] There is some evidence in this case to the effect that the sale in question was made by a clerk in the store of Levin Hastings. In this connection we will say, that if the clerk, in the conduct of acting as agent for and selling the goods and wares of the accused, sells what is determined to be a spirituous liquor, contrary to the provision of the statute, with the authority or consent or under the direction of the accused, then the act of the clerk is the act of the accused, and he, the accused, is as criminally liable as though he himself made the sale.

[7] A person charged with a crime is in law presumed to be innocent until he is by

the evidence proved to be guilty to the satisfaction of the jury beyond a reasonable doubt, and the burden of proof is upon the state.

If you are satisfied from the evidence beyond a reasonable doubt, that the accused is guilty of the offence charged against him, within the interpretation of the statute as we have made it to you, your verdict should be guilty, while on the other hand, if you believe from the evidence that the defendant is not guilty, or entertain a reasonable doubt as to his guilt, your verdict should be not guilty.

Verdict, not guilty.

DAY v. TOWNS.

(Supreme Court of New Hampshire. Cheshire. Oct. 3, 1911.)

1. EVIDENCE (§ 456*)—ADMISSIBILITY TO EXPLAIN WORDS.

Extrinsic evidence is admissible to explain the meaning of the word "home" in a covenant by a grantee to provide a home for a named person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2105, 2106; Dec. Dig. § 456.*]

2. MORTGAGES (§ 119*)—CONSTRUCTION—LIABILITY SECURED—"HOME."

A mortgagor's covenant to furnish a "home" upon the premises for a named person will be construed, according to a practical construction given by the parties, as requiring the grantee to furnish board and lodging; the beneficiary contributing such service as she can, and bearing the expense of her own clothing and doctor bills.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 234; Dec. Dig. § 119.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3322-3325.]

3. MORTGAGES (§ 119*)—BREACH OF COVENANT—DAMAGES.

On bill to establish plaintiff's rights under defendant's covenant to furnish her a home on land conveyed to him, on his selling the same, defendant was not entitled to set off the value of plaintiff's future earning capacity; he being entitled merely to her labor in his household.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 119.*]

Transferred from Superior Court, Cheshire County; Mitchell, Judge.

Bill by Flora S. Day against William M. Towns. Transferred from superior court. Case discharged.

In 1889, Moody Towns, father of the plaintiff and the defendant, conveyed his farm to the defendant and took back a mortgage conditioned to "provide for both in sickness and in health, for the said Moody Towns and his wife, * * * during their natural life, or either of them, furnish them with clothing, care, nursing, and doctoring, and at their decease give them a Christian burial, and shall furnish and give Flora S. Towns a home upon said premises so long as she

shall want or desire one." Moody and his wife died a few years later.

The plaintiff, Flora, is blind. She was a member of her father's household when the mortgage was given. Her general health was good, and she rendered service about the household, receiving no compensation except her support. Until 1909 she continued to live with the defendant in the same manner, except when she was away on account of physical disability. At these times he did not pay any of her doctor's bills. Her clothing was to a certain extent provided by her sisters. She has no property aside from her rights under the contract. In 1909 the defendant sold the farm without her consent. Thereupon this bill was filed, and it was agreed that the money value of her rights should be determined and paid to her.

The court found that the plaintiff was entitled to recover for board and lodging, less the value of her services in the household, and assessed the damages at \$1,400. It appeared that the plaintiff has some earning capacity over and above the value of her services rendered to the defendant. The defendant excepted to a refusal to allow him for the full value of her earning capacity, and to the ruling that he was obliged to furnish board as well as lodging. The plaintiff excepted to the refusal to allow her for clothing and medical attendance.

Cain & Benton, for plaintiff. John E. Allen, for defendant.

PEASLEE, J. [1] The chief question here presented is the construction of the defendant's agreement to "furnish and give Flora S. Towns a home upon said premises." The defendant's claim is that he is merely obliged to furnish lodging, while the plaintiff seeks to recover for both lodging and sustenance. It is manifest that the word "home" has not such a fixed meaning that it would accurately and precisely limit an obligation like the one here in question. Recourse may therefore be had to other evidence to ascertain the intent of the parties. *Kendall v. Green*, 87 N. H. 557, 42 Atl. 178.

[2] It appears that for nearly 20 years the parties acted upon a well-defined construction of the language used. The defendant furnished the plaintiff board and lodging, while she contributed such service as she could perform in the household, and bore the expense of her own clothing and doctor's bills. "This is a practical construction which the parties themselves put upon the deed, and that construction, after long acquiescence, the court will adopt when the language of the deed is ambiguous." *Newmarket Mfg. Co. v. Pendergast*, 24 N. H. 54, 66. The defendant's contention that an acute analysis of all the language in the provision

for support might tend to sustain his position is not of controlling importance. The question being what the language meant to the persons using it, their understanding, as evidenced by their acts, which cover nearly a score of years, furnishes a much more satisfactory answer than one drawn from a fine balancing of the words and phrases of the deed. "As a rule, when the parties to a contract have so acted in relation to any of its provisions as to show their understanding of them, and this course of action has continued for a long time, the court will adopt that understanding, unless the language of the contract is clearly incapable of such construction." *Morrill v. Weeks*, 70 N. H. 178, 180, 46 Atl. 32. The ruling of the superior court that the defendant is liable for board and lodging, but not for other necessities, was correct.

[3] The defendant also seeks to set off against the plaintiff's claim the value of her future earning capacity. The ground for this claim is not apparent. He was entitled to the value of such services as the contract contemplated she should render for him—that is, her labor in his household. But no reason appears why he should claim title to some added earning capacity she might possess. It may be that, if she forsook the work in his home to engage in some profitable labor, she would be liable to him in damages; but the measure of those damages would be what he lost by the breach—not what she gained thereby.

The rule of damages applied by the presiding justice was the correct one. On one side was the value of the support to be furnished; on the other side, that of the services to be rendered in the household. The difference between the two represented the plaintiff's net loss. The defendant's claim, that in the assessment no deduction was made for the value of the services to which he was entitled, seems to be contrary to the reported facts; but, to enable him to remove all doubt, the order of judgment will be stayed until the case is returned to the superior court, where application can be made to the presiding justice for further findings.

The plaintiff's exceptions are disposed of by what has been said of those taken by the defendant. If the contract is capable of a construction imposing upon the defendant the duty to furnish the plaintiff clothing and medical attendance, it might also be thought to have the contrary meaning; and, having been construed by the parties in the latter way for many years, it is much more probable that they always so understood its provisions. Unless the findings are changed upon further hearing in the superior court, there should be judgment for the plaintiff for \$1,400.

Case discharged. All concurred.

VIGNEAULT v. WINCHESTER TANNERY CO.

(Supreme Court of New Hampshire. Cheshire. Oct. 3, 1911.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO EMPLOYÉ — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

In an action for injury to an employé struck by a revolving ventilating fan which he was oiling, evidence held to sustain a finding of negligence of the employer in failing to instruct against the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 288*)—INJURY TO EMPLOYÉ — ASSUMPTION OF RISK — JURY QUESTION.

In an action for injury to an employé struck by a revolving ventilating fan which he was oiling, evidence held insufficient to show as a matter of law that he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EVIDENCE.

In an action against a tannery company for personal injury to an employé, any error in asking the superintendent if the company belonged to Armour or Swift was harmless where the question was withdrawn.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1048.*]

4. TRIAL (§ 121*) — ARGUMENT — CREDIBILITY OF WITNESSES.

In a personal injury action against a company, it was proper for plaintiff's counsel to remind the jury that certain witnesses were heads of departments of the company, and responsible for their proper management.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-300; Dec. Dig. § 121.*]

Exceptions from Superior Court, Cheshire County; Mitchell, Judge.

Action by Peter Vigneault against the Winchester Tannery Company. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

During the cross-examination of the defendants' superintendent the plaintiff's counsel asked the following question: "Is this tannery company of yours one of the Armour or Swift Company's?" An exception was taken, whereupon the court excluded the question, counsel withdrew it, and the jury were instructed to disregard it. The defendants also excepted to remarks of the plaintiff's counsel in closing argument and to the denial of their motions for a nonsuit and the direction of a verdict in their favor. The evidence tended to prove the facts hereinafter stated.

The plaintiff was injured October 30, 1909, while oiling a ventilating fan situated on the third floor of the defendants' tannery. He entered their employment July 2d of that year, and was engaged to do carpenter work. On the day before he received his injury, the regular oiler being absent, he was ordered by the defendants' foreman to oil the shops.

After he had oiled a portion of them, it was ascertained that the fan in question was not in operation, and he was then told that he need not oil it. On the following day he was again directed to oil the shops and to oil everything he saw. The fan was set in the northerly wall of the mill and toward its easterly end. Its function was to blow the air out of the mill through a hole in the wall. It was five feet in diameter, and the shaft upon which it ran was about 35 inches from the floor. Power was transmitted to the shaft by a belt which came up through the floor and passed over a pulley upon the shaft. Between this pulley and the fan was another pulley from which power was transmitted to a fan at the west end of the mill. Just north of the latter pulley was a box or bearing for the shaft, which was supported by an iron standard and steadied from above by two pieces of iron which extended in a V-shape from the box on the shaft up over the blades to a circular iron box surrounding the rim of the fan. In that part of the box on the shaft north of the iron braces were two oil holes, one on the east and one on the west side of the shaft; and in that part of the box south of the braces were also two oil holes similarly situated. On the fan were six blades of sheet steel extending from the shaft to the rim or circumference of the fan. These blades project by an increasing ratio from a short distance at the shaft to 15 inches at the rim. They were over 11 inches from the iron braces measuring along the shaft, while at distances of 19 and 18 inches from the shaft and towards the circumference of the fan they were distant from the braces from 1¼ to 3¼ inches. When the fan was in motion, all parts of it appeared to be from 10 to 12 inches from the iron braces, and the steel blades could not be seen. Inside each end of the box on the shaft was a reservoir into which the two oil holes on the respective ends of the box entered. It was not necessary in order to oil the shaft to put oil into the holes, except on one side. There was a railing on the west and south sides of the shaft shutting off an approach to the fan, but on the east side the approach was unobstructed. By standing at a jog in the railing on the west side of the shaft oil could be safely put in the holes in the box on that side of the shaft, both inside and outside the iron braces, when the fan was in motion. This was the customary way of oiling the shaft when the fan was in motion. When it was at rest, it was customary for the oiler to go between the power belt and the fan on the easterly side of the shaft, and oil all the holes in the box on both sides of the shaft. The holes on the east side could not be seen or oiled from the jog in the railing on the west side.

No instructions were given the plaintiff as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to where he should go to oil the fan, nor how he should oil it. When he came to the fan, it was in motion. As he approached the space east of the shaft, he saw the two oil holes on that side, and supposed he had to oil them. The fan appeared to be 10 or 12 inches back from the iron braces beyond which he had to oil one of the holes, and there was apparently plenty of room. The plaintiff approached the shaft, raised the oil can to the hole, and was struck by the fan on the elbow and injured. He was 62 years old and had worked to some extent both inside and outside of mills, but had never worked in a tannery, and knew nothing about ventilating fans. He had never been in that portion of the mill where the fan was located before, but had seen it when in motion from the outside of the mill. The jury had a view and saw the fan at rest and in motion.

Cain & Benton, for plaintiff. Clarke C. Fitts, Harold E. Whitney, and John E. Allen, for defendant.

BINGHAM, J. The plaintiff bases his right of recovery upon the defendants' failure to instruct him as to the safe and proper method of oiling the fan, and to warn him of the dangers attendant upon the performance of his duty in case he undertook to oil it when in motion from the easterly side of the shaft.

[1] The defendants in support of their exceptions to the denial of their motions for a nonsuit and a verdict contend that there was no evidence from which it could reasonably be found that they were negligent and that the plaintiff was in the exercise of due care; also, that the dangers attendant upon the oiling of the fan were so apparent that he must be held to have assumed the risk as a matter of law. Upon the question of the defendants' negligence and the plaintiff's care, the evidence was that the safe and customary way of oiling the fan, when in motion, was for the oiler to stand at the jog in the rail west of the shaft and oil the westerly holes in the box with the can provided for the purpose. The holes in the box on the east side of the shaft could not be seen or oiled by one standing in that position. There was an oil reservoir inside each end of the box into which the oil flowed when the holes were oiled on either side, so that it was only necessary to oil the holes in the box on one side of the shaft. The plaintiff was not informed and did not know of the safe and customary method of oiling the box, and did not know that both sets of holes did not require oiling. When one stood easterly of the shaft, the oil holes on that side could be readily seen. There was an unobstructed approach to the shaft from that side; and the fan, which revolved very rapidly, appeared to be 10 or 12 inches north of and away from the irons supporting and staying the box, and a sufficient distance north of the northeasterly

hole in the box to permit of its being safely oiled. This was the situation as it presented itself to the plaintiff when he went to oil the fan. The appearances, however, were deceptive. The fact was that there were steel blades on the fan which were unobservable when the fan was in motion, and which projected such a distance southerly from the frame of the fan that their extreme ends came within an inch and three-quarters or thereabouts of the iron braces at the box, and rendered the work of oiling from the east side so hazardous that it was not customary to do so, except when the fan was at rest.

The instructions to the plaintiff were general—to oil the shops. He was not told how to oil the fan, or where he should go to do the work. There was no rail obstructing the approach to the oil holes on the east as there was on the west side. The plaintiff, observing these surroundings and relying upon them, approached the shaft from the east side; and, while in the act of raising the can to oil the northeasterly hole in the box he was struck by the invisible knives on the fan and injured. From this evidence it could be found that the defendants were negligent in failing to properly instruct the plaintiff, that their failure was the proximate cause of his injury, and that he was without fault.

[2] Moreover, it cannot be said that the danger was so open and apparent that the plaintiff must be held as a matter of law to have assumed the risk. In addition to the evidence above narrated, it appears that the plaintiff had never been in that portion of the mill where the fan was located until he went there to oil it at the time he received his injury, and that he had not seen the fan at rest. It is true he had worked about box factories to some extent and fed boards into a planing machine, but this is only evidence bearing upon the question whether a man of his experience might not know and appreciate the danger to which he was subjected if he attempted to oil the fan from the east side. It is not conclusive, however.

[3] If the question asked the defendants' superintendent was improper, the defendants took nothing by their exception; for the question was withdrawn, the jury instructed to disregard it, and it has been found that it did not render the trial unfair. *Lee v. Dow*, 73 N. H. 101, 50 Atl. 374.

[4] The argument of the plaintiff's counsel would seem to be based upon the evidence and unobjectionable. The defendants were a corporation. The general supervision of their business was intrusted to a superintendent, and there were different departments in charge of foremen. Mr. Smith was the superintendent, and Mr. Handy was the foreman of the mechanical department, under whom the plaintiff worked. Both of these men were called as witnesses for the defendants, as were other employes of theirs. As bearing upon their credibility and the weight

to be given their testimony, it was competent for counsel to remind the jury that these men were employed by the corporation as heads of one or of all its different departments and were responsible for their proper management. *Genest v. Company*, 75 N. H. 509, 77 Atl. 77. This was all the argument came to.

Exceptions overruled. All concurred.

BUSH v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. July 6, 1911.)

1. RAILROADS (§ 350*)—OPERATION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for the wrecking of an automobile at a crossing in a nighttime collision on a borough street, evidence *held* to present questions for the jury as to whether the driver, before going upon the track, stopped a sufficient time to inform himself of conditions, and whether he advanced with due caution from that point.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—OPERATION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In determining whether one was guilty of contributory negligence in attempting to cross railroad tracks, the act of stopping to look and listen is opposed to the idea of negligence, and unless, notwithstanding a stop, the whole evidence shows negligence so clearly that no other inference can properly be drawn, the court must submit the case to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Northampton County.

Action by S. R. Bush against the Philadelphia & Reading Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

James W. Fox and Edward J. Fox, for appellant. H. J. Steele and Robert A. Stotz, for appellee.

STEWART, J. This action was for the recovery of damages for the wrecking of plaintiff's automobile by a passing train on the defendant's road. The collision occurred at nighttime, on a public crossing on one of the streets in the borough of South Bethlehem. The machine was being driven by an employe of the plaintiff on the business of the latter. The finding of the jury is conclusive on the question of the defendant's negligence. No question is raised as to the sufficiency of the evidence to support such finding; nor are the instructions of the court on this branch of the case complained of.

[1] The only question is whether the court should have held, as matter of law, that the negligence of the driver contributed to the accident. In his opinion filed, refusing judg-

ment non obstante, the learned trial judge speaks of the case as a close one, and so it is, upon its general facts; but with respect to the question we are now considering we regard the case as falling clearly within a long line of cases which vindicate the final conclusion of the court. The testimony of the driver, if believed, shows literal compliance on his part with those rules of duty, the nonobservance of which this court has repeatedly said must be adjudged negligence per se. He stopped, looked, and listened before entering upon the tracks with his machine. While none of the other witnesses called on behalf of the plaintiff would positively confirm all that the driver testified to, none of them testified directly to the contrary of what he said, while all admitted that appearances as they were there presented to bystanders supported the driver's testimony. The place where he stopped his machine was about nine feet from the first track. Admittedly, before reaching this point, he had passed no place where he could have had a view of an approaching train. Whether he stopped a sufficient length of time to inform himself of conditions, and whether he advanced with due caution from that point, were questions to be determined, not by hard and fast rules of positive duty applicable in all cases, but by the jury upon a consideration of all the circumstances in the case, not the least important of which was the fact appearing here that the time required to pass from the place where the driver stopped his machine to the place where the collision occurred was but three or four seconds at most, and that through open gates implying to the ordinary traveler an invitation to advance. The evidence shows that these gates, though operated in daytime for the avoidance of accidents, were, by some regulation of the company, the wisdom or necessity for which is left unexplained, never lowered after 8 o'clock in the evening. But the driver testified that he was not familiar with the neighborhood and knew nothing of the rules of the company in this regard.

[2] The law with respect to such cases as this is so clearly expressed in *Ely v. Railway Co.*, 158 Pa. 233, 27 Atl. 970, by the late Chief Justice, that no other citation of authority is required. It is there said: "The mere act of stopping does not, it is true, of itself show that he stopped at a proper place, or that there was not another and better place where he should have stopped again, or that his duty of looking and listening was performed with the proper care and attention; but stopping is opposed to the idea of negligence, and unless, notwithstanding the stop, the whole evidence shows negligence so clear that no other inference can properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury." While upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the whole evidence the jury might well have hesitated before reaching their conclusion that this driver stood clear of negligence, yet the question was exclusively for them, since the evidence to establish negligence on his part was not so clear or positive as to exclude other inference. The case was one for the jury, and was submitted under proper instructions.

The assignments of error are overruled, and the judgment is affirmed.

BROWN v. TITLE GUARANTY & SURETY CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. PRINCIPAL AND SURETY (§ 59*)—SURETY COMPANIES—CONSTRUCTION OF CONTRACT.

The rule of strictissimi juris in favor of an individual surety does not apply to a contract of suretyship by a corporation, underwritten for a money consideration for profit, and in such case the company can be relieved from its obligation only where a departure from the contract is shown to be a material variance.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 103; Dec. Dig. § 59.*]

2. EMINENT DOMAIN (§ 145*)—MEASURE OF COMPENSATION—VALUE OF PROPERTY.

Where land is taken for railroad purposes under the power of eminent domain, though only an easement is taken for a public use, no deduction is made in the assessment of damages because of the reversionary right.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

3. PRINCIPAL AND SURETY (§ 99*)—SURETY COMPANIES—CONSTRUCTION OF CONTRACT.

Where a surety company contracts to secure payment to a landowner of damages from the taking of his land by a railroad under the power of eminent domain, stipulating that it would pay him, if the railroad did not, the amount to which he might be entitled because of the construction of the railroad, and where the amount was agreed upon by him and the railroad company, or assessed under the statute, it is not a material departure from the bond, and such as would relieve the surety company, that an agreement is entered into fixing the value of the land and damages to the property, and providing for conveyance of the land to the railroad company in fee.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 99.*]

Appeal from Court of Common Pleas, Bradford County.

Action by John H. Brown against the Title Guaranty & Surety Company and another. From a judgment for plaintiff, defendant Title Guaranty & Surety Company appeals. Affirmed.

Judgment against the Pittsburg, Binghamton & Eastern Railroad Company for want of an appearance. Verdict and judgment for the plaintiff for \$2,228 against the Title Guaranty & Surety Company by direction of the court, with question of law reserved, on which final judgment was entered for the plaintiff on the question of law reserved.

The Title Guaranty & Surety Company appealed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

Wm. A. Skinner, Wm. Maxwell, and Stone & Brooks, for appellant. T. S. Hickok and Lilley & Wilson, for appellee.

BROWN, J. The route of the Pittsburg, Binghamton & Eastern Railroad Company, as surveyed and laid out, ran through lands of the appellee. He accepted its bond, with the appellant as its surety, to secure the payment of the damages to which he might be entitled. The condition of the obligation was as follows: "If the said Pittsburg, Binghamton & Eastern Railroad Company shall pay or cause to be paid unto the said John H. Brown such amount of damages as the said John H. Brown shall be entitled to receive, in consequence of the location and construction of said railroad after the same shall have been agreed upon by the parties or assessed by and under the provisions of the acts of the General Assembly, in such case made and provided, whether the same exceed the amount of the penalty in this bond mentioned, or not, without fraud or further delay, then this obligation to be null and void; otherwise to be and remain in full force and effect." Some months after the bond was given to the appellee, he and the railroad company agreed, in writing, that the value of the land and the damages to his property by reason of the location and construction of the railroad through and over it amounted to \$5,500; and the agreement provided that upon the payment of the said sum, with interest, he would execute and deliver a deed to the railroad company for the right of way and the land occupied, free and clear of all incumbrances. The unsuccessful contention of the appellant in the court below, renewed here, is that the agreement of the appellee with the railroad company, made without notice to or consent by it, released it from liability on the bond, because "the amount agreed to be paid by the railroad company included not only the damages contemplated by the bond, but, in addition thereto, the value of the land itself, which, for the consideration agreed upon, the obligee agreed to convey to the railroad company in fee simple."

[1] The appellant is engaged in the business of becoming surety. It assumes its undertakings for a consideration, and the rule of strictissimi juris which applies to an individual surety is relaxed as to it. "The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case, the

rule of strictissimi juris prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance. "The doctrine that a surety is a favorite of the law, and that a claim against him is strictissimi juris, does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves "surety companies," their business is in all essential particulars that of insurance. Their contracts are usually in the terms prescribed by themselves, and should be construed most strictly in favor of the obligee." 32 Cyc. 306, and the authorities there cited in support." *Young v. American Bonding Company*, 228 Pa. 373, 77 Atl. 623. See, also, *City of Philadelphia v. Fidelity & Deposit Company of Maryland*, 232 Pa. 208, 80 Atl. 62, decided at present term.

[2] The appellant's contract of suretyship with the appellee was that it would pay him, if the railroad company did not, the amount of damages to which he might be entitled in consequence of the location and construction of the railroad, after said amount had been agreed upon by him and the railroad company, or assessed under the provisions of the statute. The appellee and the railroad company agreed "that the value of the land and the damages to the property by reason of the location and construction of the railroad through it" amounted to \$5,500. If the agreement had stopped there, it is to be assumed that the appellant would not be questioning its liability on the bond, for this agreement was simply what viewers would have been required to find and report, if they had been appointed to assess the damages. Section 11 of the general railroad act of February 19, 1849 (P. L. 84) provides that it shall be the duty of the viewers, inter alia, "to estimate and determine the quantity, quality and value" of the lands taken or occupied, and "to estimate and determine whether any, and, if any, what amount of damages has been sustained." The sole question to be determined is whether the agreement to convey the land in fee to the railroad company was a material departure from what was contemplated by the terms of the appellant's bond. If it was not, the appellant has not been prejudiced, and cannot therefore successfully contend against its liability.

[3] If an entire lot of ground, and not merely a portion of it, is taken for railroad purposes, the value of the entire lot at the time of the taking determines the amount of damages. *Spring City Gas Light Company v. Pennsylvania Schuylkill Valley R. R. Co.*,

167 Pa. 6, 31 Atl. 368. No allowance is made for any reversionary interest in the owner, for the fee, subject to the easements or right of way, is absolutely worthless. *Junction Railroad Company v. Philadelphia*, 88 Pa. 424. The interest acquired by a railroad company under the right of eminent domain, while not a fee, is not a mere easement or right of way. It is more. It is the right to the actual and exclusive possession of the property at all times and for all purposes, except where a way crosses it. *Pittsburgh, Ft. Wayne & Chicago Ry. v. Peet*, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467; *Reading v. Davis*, 153 Pa. 360, 26 Atl. 62; *Dilts v. Plumville R. R. Co.*, 222 Pa. 516, 71 Atl. 1072. "Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over the whole surface, to raise and maintain any appropriate superstructure, including necessary foundations, and to deal with it within the limits of railroad uses as absolutely and as uncontrolled as an owner in fee. * * * It would seem to be rather a fee in the surface and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But whatever it may be called, it is in substance an interest in the land special and exclusive in its nature." *Mitchell, J.*, in *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 Pa. 18, 24 Atl. 205. Land taken from an owner under the right of eminent domain for railroad purposes has no further practical value to the owner, in view of the rights of the railroad company in it and over it, and the records may be searched in vain to find where any one has purchased as a thing of value the ultimate reversionary right of the owner of the fee upon the cesser of the railroad company's use of the land, and therefore it is that, though only an easement is taken for the public use, no deduction is made, in practice, in the assessment of damages for the reversionary right. *Pierce on Railroads*, 159. While authorities in support of this need not be multiplied, one directly in point may be cited. In *Murray et al. v. County Commissioners*, 12 Metc. (Mass.) 455, a turnpike road was changed into a public one, and the owners of the fee in the bed of the turnpike claimed that the land reverted to them on the discontinuance of the road by the turnpike company, and asked for the appointment of a jury to assess their damages as if the road were being originally laid out. In holding that they were entitled to no damages, *Shaw, C. J.*, in delivering the opinion of the court, said: "The proprietors have already been paid for a perpetual easement over their land, for all the actual uses and purposes of public travel; a payment commonly estimated in practice at the value of the land itself." The agreement between the railroad company and the appellee as to the amount of damages to which he was entitled was substantially such as is contemplated by

the act of 1849, and the covenant of the appellant was to pay the damages so ascertained and agreed upon. If the railroad company got a deed for the land, it acquired nothing in effect under the same that it had not acquired in the exercise of its right of eminent domain, and for what it so acquired the appellant agreed to pay, if it did not. In giving the deed, the appellee did nothing to the prejudice of the appellant.

Both assignments of error are overruled, and the judgment is affirmed.

DAVIS v. FLESHMAN et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. PLEADING (§ 418*)—WAIVER OF OBJECTION—RULING ON DEMURRER—PLEADING OVER.

Where, after judgment on demurrer is given against a party, he amends his pleading under leave of court, he acquiesces in the judgment, and will not be permitted to assign it as error, especially when he takes no exception.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.*]

2. APPEAL AND ERROR (§ 916*)—RECORD—PLEADING.

Where the Supreme Court cannot say that the facts as shown on the record are plain, or that the statement of claim and affidavits of defense raise a pure question of law, or that the defendant was obliged to furnish a more specific statement of the facts constituting his defense, the trial court's action in discharging a rule for judgment for want of a sufficient affidavit of defense will not be held error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 916.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Joseph A. Davis against James B. Fleshman and another, trading as J. B. Fleshman & Co. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The statement of claim avers that the amount in question represents the sum total of a number of payments made by the plaintiff to the defendant copartnership on gambling transactions entered into between the plaintiff and the defendants; that these transactions were made by way of wagers that certain securities or commodities listed upon the market would rise or fall above or below given figures; that all the wagers were "open, undetermined, and unexecuted transactions" on November 28, 1904, "when the defendants ceased doing business, and the contingent event, to wit, the rise or fall of the prices of the various stocks or commodities, * * * sufficient to determine the bet or gamble, had never taken place, and the unknown event or casualty upon which the plaintiffs or defendants were to win or lose never happened"; that the bets were made

and the money paid in New Jersey; that under the act of assembly of that state all money paid in such illegal transactions could be recovered back; and that a demand had been made for a refund of the money, which demand had been refused. A copy of the New Jersey statute expressly declared upon was attached to and made a part of the statement of claim.

The defendant Power demurred that the New Jersey statute was contrary to the law and public policy of the commonwealth of Pennsylvania, in that it permitted the courts to be used to recover money lost on a wager after the gambling transaction was a closed event. This demurrer was sustained, with leave to the plaintiff to amend. The plaintiff took no exception to the judgment of the court sustaining the demurrer, but proceeded to amend his statement by adding an averment to the effect that the defendants "were liable under the law of Pennsylvania to the plaintiff" in the sum named. After amending his statement, the plaintiff entered a rule upon the defendants to file an affidavit of defense. An affidavit and a supplemental affidavit of defense were filed by the defendant Power, in which he averred that while he was a member of the defendant firm he took no personal part in the conduct thereof and had no knowledge of the transactions in question; that his copartner and the manager of the office in which the bets were made were both dead, and that he had not possession of and had never seen any of the books or records of the firm, and did not know where they could be found; that the plaintiff had given testimony in another action at law involving the same matters referred to in the present suit, in which he had admitted that certain of these bets or wagers were not open and undetermined transactions on the date aforesaid, and had asserted that such transactions were then closed; that "in reliance upon the said testimony of the plaintiff the defendant denies that all of the transactions above mentioned were open, undetermined, and unexecuted transactions on November 28, 1904, and that the contingent event which was to determine the bet or gamble had never taken place, and the unknown event or casualty upon which the plaintiffs or defendants were to win or lose never happened." And the defendant averred, further: "Defendant is advised by counsel, and therefore avers, that no affidavit of defense is necessary to so much of the plaintiff's statement of claim as makes the statute of New Jersey * * * the basis of the plaintiff's right to recover. Defendant is advised by counsel that a demurrer heretofore filed to the plaintiff's statement of claim has been sustained."

The plaintiff entered a rule for judgment for want of a sufficient affidavit of defense,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which rule was discharged, whereupon he secured an exception. This exception is the only one upon the record, and the sole assignment of error is that "the court below erred in discharging the plaintiff's rule to show cause why a judgment should not be entered against the defendant for want of a sufficient affidavit of defense."

Argued before FELL, C. J., and MESTREZAT, POTTER, and MOSCHZISKER, JJ.

Trevor T. Matthews, for appellant. B. F. Pepper and G. W. Pepper, for appellee Power.

MOSCHZISKER, J. The appellant states two questions involved: "First, is the New Jersey statute set forth in the plaintiff's statement of claim enforceable in the state of Pennsylvania under article 4, § 1, of the Constitution of the United States, and the acts of Congress passed in pursuance thereof?" and, "second, is the New Jersey statute against the policy of the law of the commonwealth of Pennsylvania, and, if so, can the courts of this state refuse to enforce it?"

[1] It is not necessary to determine either of these questions, as they are not properly before us. Both of them were decided adversely to the plaintiff by the court below in disposing of the demurrer to the statement of claim, and instead of excepting to that ruling, and standing upon the points at issue, the plaintiff amended his statement in such a manner as enabled him to base his claim for recovery upon the law of Pennsylvania, rather than upon the New Jersey statute. Had the plaintiff desired to raise the question of the propriety of the ruling of the court below to the effect that the New Jersey statute declared upon by him was contrary to the public policy of the law of Pennsylvania and would not be enforced in this state, he should have taken an exception, so that he might at a proper time assign the ruling for error. Since he did not pursue this course, but took advantage of the leave to amend, we must view his statement as though the plaintiff had acquiesced in that ruling and had elected to rely upon the law of this state alone. "If a party, after judgment upon demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to, he acquiesces in the judgment upon the demurrer, and will not be permitted to assign it for error in the appellate court." 2 Cyc. 643. See, also, Sheppard v. Shelton, 34 Ala. 652; Ellison v. Allen, 8 Fla. 206. Particularly is this so when no exception has been taken.

[2] We cannot say that the facts as shown upon the record before us are plain, or that the statement of claim and affidavits of defense raise a pure question of law; nor can we say, under the peculiar circumstances of

this case, that the defendant was obliged to furnish a more specific statement of the facts constituting his defense. Hence it cannot be held that the court below committed error in discharging the rule for judgment for want of a sufficient affidavit of defense. Whether this is a case where the evidence will show that the illegal gambling transactions were closed and the accounts stated between the parties, and where the original deposits still remain with the broker so identified that they can be recovered back, or an instance where the plaintiff is endeavoring to reclaim losses paid on illegal gambling transactions, which the law will not aid him to recover, or one where the plaintiff dealt with the defendants as principals, and where the conduct of the parties demonstrates that as between themselves they treated the matter as closed, settled, and ended, and where, all being *sui juris*, the law will look at the plaintiff as one who has paid his bet, the loss from which he will not be assisted to recover, cannot be satisfactorily ascertained from the information contained in the statement of claim and the affidavits of defense. We shall not attempt to adjudge any of these issues at this time. They can best be determined at trial, where it will be possible to secure all the relevant facts in regard to the dealings between the parties and to reach a correct decision as to their rights.

The appeal is dismissed, at the costs of the appellant, without prejudice, and the record is remitted, with a *procedendo*.

IMPERIAL ROLLING SCREEN CO. v. STEINFELD BROS.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. SALES (§ 384*)—REMEDIES OF SELLER—ACTION FOR DAMAGES—MEASURE OF DAMAGES.

In an action against a purchaser of screens for refusal to take a portion of them, the measure of damages is the contract price, less the value of the undelivered screens in the hands of the sellers when the breach takes place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

2. SALES (§ 381*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—BURDEN OF PROOF.

In an action against a purchaser of a quantity of screens for refusal to take a portion of them, the burden is on the plaintiff to show the value of the screens remaining in his hands.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1095; Dec. Dig. § 381.*]

3. SALES (§ 382*)—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

In an action against a purchaser of a quantity of screens for a refusal to take a part of them, the amount received on the resale is not the only evidence of the value of the screens not delivered; but other evidence, even if vague and unsatisfactory, may be considered, and if it appears that the buyer declined to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

accept the screens at a price at which the seller offered them, a finding of the value at that price, confirmed by the court, will not be set aside on appeal.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 382.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Imperial Rolling Screen Company against Samuel Steinfeld and another, trading as Steinfeld Bros. From a judgment for plaintiff, defendants appeal. Affirmed.

Assumpsit by foreign attachment to recover damages for breach of contract. The case was referred by agreement of the parties to Frank P. Prichard, Esq., as referee. From the record it appeared that the suit was brought upon a contract dated March 9, 1907, whereby plaintiff agreed to sell and defendants to buy at least 20,000 Imperial roller screens at 80 cents each, to be taken, 5,000 by May 1, 1907, 5,000 by May 15, 1907, and at least 10,000 by June 15, 1907. Under this agreement defendants took and paid for 3,384 screens. Plaintiff, claiming to have manufactured and offered delivery of the balance of 16,342 screens, brought suit on the ground that the acceptance was refused.

The referee found that plaintiff was willing and ready to supply the minimum quantity of screens, and that defendants refused to take and pay for the minimum; that the screens were substantially as contracted for; that there was no agreement to pay demonstrators; that the balance of screens not taken were reasonably worth in the market 20 cents apiece; that the screens were not practically or commercially a success, but that defendants were not at fault in the failure to market them. The referee awarded to plaintiff the sum of \$10,834.74. Exceptions to his report were dismissed by the court.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCH-ZISKER, JJ.

Francis Chapman and S. Spencer Chapman, for appellants. Sheldon Potter, for appellee.

POTTER, J. [1, 2] The law of this case is not doubtful, and appellants have substantially no complaint to make of its application by the referee to the facts as found by him. The measure of damages which he applied was "the contract price, less the value of the undelivered screens in the plaintiff's hands at the time of the breach." He also rightfully assumed that the burden was on plaintiff "to show that value, and thus establish the measure of damages." The rule thus enunciated and applied is undoubtedly correct, and is sustained by an abundance of authority. See *Guillon v. Earnshaw*, 169 Pa. 463, 32 Atl. 545; *Puritan Coke Co. v. Clark*, 204 Pa. 556, 54 Atl. 350.

The referee found specifically that the plaintiff and defendants entered into a written contract under which plaintiff was ready and willing to furnish to defendants the minimum quantity of 20,000 screens; that defendants refused to take more than a portion of the amount agreed upon; that the screens manufactured were in substantial compliance with the agreement, and were accepted as such by defendants; that at the time of the breach the remainder of the minimum quantity of the screens, which defendants refused to accept and pay for, were reasonably worth in the market 20 cents apiece. These findings of fact cover the case, and the findings of the referee have the weight of the verdict of a jury. *Ridge Ave. Pass. Ry. Co. v. Philadelphia*, 181 Pa. 592, 37 Atl. 910; *Snyder v. Rainey*, 198 Pa. 356, 47 Atl. 998. The result is hard upon appellants, and it is evident that they got the worst of a bad bargain. Apparently they entered into the contract without sufficient investigation, and failed to guard themselves by proper specifications and guarantees. But the result is of their own doing, and the legal consequences of their action must be accepted.

[3] The question of damages was a difficult one for the referee. As he says, the proofs were "vague and unsatisfactory." He adds, further: "While the burden is on the plaintiff to show, either that the screens which defendants refused to receive had no selling value at that time, or, if they had such value, to show what that value was, the law does not limit the evidence of such value to an actual sale with notice, and if there is any evidence of value which can be considered by a jury, it is the duty of a jury (and in this case the referee) to determine as best they can what was such value. In the present case the referee is unable to say that there is no evidence from which a jury would be allowed to ascertain the value." Counsel for appellants contend that a resale of the goods is the usual and better method of establishing value. But it is plain that, owing to the peculiar character of these articles, a public sale would only have resulted in great sacrifice. Counsel admit that, under the authorities, the damages may be ascertained from other evidence than a resale, if it presents a better means of getting at the truth. It appeared that defendants declined to accept the screens at 20 cents each, and in fixing that amount as their value the referee took the price at which plaintiff offered to sell, and gave the defendants the advantage of a price beyond that which they were willing to give. Under all the evidence, we think the referee did the best that could be done in getting at the value of the screens. At least, no method is pointed out by appellants which seems likely to have produced results any more favorable to them. The

question of value was one of fact, and the referee has disposed of it as such.

The assignments of error are overruled, and the judgment is affirmed.

JOHNSON v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

RAILROADS (§ 350*)—ACCIDENTS AT CROSSING—SUFFICIENCY OF EVIDENCE.

In an action to recover for death of plaintiff's intestate, struck by a train at a public crossing, evidence held sufficient to take the question of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Lillie Johnson against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wm. Clark Mason, for appellant. Augustus Traak Ashton and Victor Frey, for appellee.

ELKIN, J. While walking over the tracks of appellant company at a grade crossing in the city of Philadelphia, the husband of appellee was struck and killed by a tender pushed ahead of the engine. The questions for decision here are: First, was there sufficient evidence of negligence to submit to the jury? and, second, whether the deceased husband should have been declared guilty of contributory negligence as a matter of law.

As to the first question there is but little doubt. The engine was running backward, with the tender ahead. There were a couple of small lights on the tender, but no headlight. As to danger signals the evidence is conflicting. Several witnesses, listening for the signals and in a position to hear, testified that none were given, or that they did not hear any. On the other side, there is the positive testimony of several witnesses that the signals were given. The witnesses who testified that they did not hear any warning of the approach of the engine were on the street close to the railroad, and had either crossed or were about to cross the tracks when the accident occurred. They were listening for the approach of trains, and were in a position to hear if warning had been given. Under these circumstances it cannot be said that the testimony of these witnesses was of such an indefinite and negative character as to amount only to a scintilla. We think the evidence of negligence was sufficient to carry the case to the jury.

While the other branch of the case may not be entirely free from doubt, we have con-

cluded, after a careful examination of the whole record, that the question of contributory negligence was also for the jury. In this connection the surrounding circumstances at the time of the accident are the controlling factors. It was almost, if not entirely, dark. The evening was dark and misty. The range of vision was limited. A number of freight cars were standing on the westernmost track a little distance north of the crossing. These cars necessarily obstructed the view for a considerable distance in the direction of the approaching engine. As he approached the crossing the view of the deceased husband was further obstructed by an elevation in the intervening ground covered with tall weeds. Under such circumstances he might have looked and not have seen the approaching engine. At least the facts are not so clear as to require the court to say as a matter of law that he failed in the performance of an imperative duty. In the absence of evidence to the contrary, the decedent is entitled to the presumption that he did his duty as he approached the crossing. We see nothing in the evidence to rebut this presumption. Indeed, the testimony rather strengthens than weakens it. There is positive testimony that he stopped before attempting to cross, but it does not clearly appear at what place this stop was made. It tends to show, however, that he was proceeding carefully. The witness Brooks testified that he saw decedent standing on the crossing and then take a step forward, when he was struck by the tender. This is relied on to show contributory negligence, and it was proper for the jury to consider it for this purpose. The question is: Should it have been so declared by the trial judge? Under the circumstances we think not. It was practically dark. The tender carried no headlight. The small lights were not intended for this purpose, and may have misled the pedestrian, so far as giving notice of a moving engine is concerned. The freight cars standing about ten feet from the crossing obstructed the view until within a few feet of the track upon which decedent was struck and killed. The space between the overhang of these cars and the engine which caused the injuries is very small at best, and it is evident that it did not afford decedent sufficient opportunity to protect himself against an impending danger. At least it was for the jury to say whether he exercised the care the law requires under the circumstances.

We agree with the learned court below that this was a case for the jury. There are no assignments complaining of the manner of its submission. Appellant rests its case upon the contention that binding instructions should have been given in its favor, or that judgment non obstante veredicto upon the whole record should have been entered. With this contention we cannot agree, for the rea-

sons hereinbefore stated. In answer to the suggestion of appellant that a new trial should be granted, even if the other contentions are not sustained, it may be said that no new trial was asked in the court below, and there is nothing in this record to warrant us in awarding a new venire. There is not even an assignment of error upon which to base a new trial.

Judgment affirmed.

POWER v. GROGAN.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. COURTS (§ 200½*)—ORPHANS' COURT—JURISDICTION—APPOINTMENT OF RECEIVER.

Since an orphans' court neither has general chancery powers nor is given the authority by statute, it cannot appoint an administrator c. t. a. as receiver of testator's estate to bring ejectment for realty devised to a life tenant with a limited power of alienation, and conveyed by the latter to a third party in fee.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 476, 477; Dec. Dig. § 200½.*]

2. EXECUTORS AND ADMINISTRATORS (§ 121*)—ADMINISTRATOR WITH WILL ANNEXED—RIGHT OF ACTION.

Since an executor whom a will directs to sell real estate, by virtue of Act Feb. 24, 1834 (P. L. 70), takes an estate in the land as fully as if it had been devised to him to be sold, he may maintain ejectment for its possession; and an administrator c. t. a. has all the rights that would have been possessed by the executor named in the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 493, 493½; Dec. Dig. § 121.*]

3. PARTIES (§ 59*)—AMENDMENT—REPRESENTATIVE CHARACTER OF PARTY.

An amendment as to parties being allowable when a change in the cause of action is not involved, where an administrator c. t. a. has the right to maintain ejectment, but erroneously brings the action as receiver, he may be substituted as plaintiff in his capacity as administrator c. t. a., where the statute of limitations does not prevent.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 90-94; Dec. Dig. § 59.*]

4. WITNESSES (§ 149*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED—SURVIVING PARTY TO CONTRACT.

Act May 23, 1887 (P. L. 159) § 5, cl. "e," providing that, where any party to a thing or contract in action is dead and his right thereto has passed to a party on the record, the surviving party whose interest shall be adverse to the right of deceased shall not be a competent witness to any matter occurring before the death, does not exclude the testimony of defendant in ejectment by an administrator c. t. a., where the defendant relies on an alienation of the premises to herself by a life tenant, with power of alienation for support and maintenance under the will of the administrator's testator, where the interest of the life tenant, since her death, has not passed to any party to the record adverse to defendant.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 149.*]

5. EXECUTORS AND ADMINISTRATORS (§ 450*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In ejectment by an administrator c. t. a., where defendant relies on an alienation of the

premises to herself by a life tenant, with power of alienation for support and maintenance, under the will of plaintiff's testator, in consideration of the maintenance and support of the life tenant by defendant, evidence on behalf of plaintiff as to the value of the property and the value of the services of defendant in pursuance of the contract of maintenance was admissible.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

6. EVIDENCE (§ 78*)—PRESUMPTIONS—EFFORT TO SUBORN WITNESS.

In an action of ejectment, testimony offered to show an attempt by defendant to suborn one of plaintiff's witnesses was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 100; Dec. Dig. § 78.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William J. Power, receiver of the real and personal estate of John Loughran, deceased, against Catherine Grogan. From a judgment for defendant, plaintiff appeals. Reversed, with venire facias de novo.

Ejectment to try the title to house and lot at northeast corner of Fifteenth and Catherine streets, Philadelphia.

John Loughran died May 3, 1890, leaving a widow, Bridget, but no surviving issue. By his will, he gave to her, after payment of debts and various legacies, all of his residuary estate "for life, it being my wish and will, however, that she shall use whatever of the principal of such residue as may be necessary for her proper maintenance and support." Upon her death he gave the residue to such Catholic charities as she might designate in her last will. The testator then provided that, should his wife fail to designate charities to take the ultimate residuum, it should go to certain institutions specified by him. He appointed his wife executrix of his will, and provided: "I do hereby authorize, empower and direct my said executrix to mortgage, sell, transfer or convey any or all of my real estate, whenever she may think proper."

The widow died March 29, 1902, leaving five or more alleged last wills under successive dates, each of which was claimed by the beneficiaries thereunder to be the only lawful will. The last in date of these wills became the subject of contest immediately after her death, which contest, on July 14, 1909, reached a conclusion favorable to the will. *Trainer v. McGarrity*, 40 Pa. Super. Ct. 57. In June, 1906, when the issue devisavit vel non had been awaiting trial for several years, the present plaintiff, upon his own petition as the administrator c. t. a. of the estate of John Loughran, deceased, was appointed by the orphans' court receiver of all the assets of the said estate. The petition set forth that if the alleged will then in contest were rejected the next prior will would immediately become the subject of a new contest, and so with each of the other wills. The petition further averred that

Catherine Grogan, the defendant here, had entered into a transaction with the testator's widow, Bridget Loughran, when the latter was upwards of 70 years of age, whereby, for an expressed consideration of one dollar, the widow had undertaken to convey to the defendant the real estate in question, which was part of the estate of John Loughran, and that the defendant was in possession of and claimed the property in fee simple; that she was without means, and would be unable to respond in mesne profits; that by reason of the pending will contest, and those in prospect, no action of ejectment could be brought for an indefinite period without the appointment of a receiver for that purpose. The petition prayed that a receiver be appointed to take possession of the real and personal property belonging to the estate of John Loughran. On July 19, 1906, the plaintiff, William J. Power, was appointed such receiver, and he thereupon instituted this action of ejectment.

At the first trial of the cause in the court below, the plaintiff was nonsuited because he had not been expressly empowered by the orphans' court to institute the litigation; but, on May 24, 1910, the orphans' court ratified and confirmed the act of the plaintiff in bringing the suit, and the nonsuit was taken off. When the case was again tried, the plaintiff proved title in John Loughran, and rested. The defendant then introduced evidence to show that Bridget Loughran had conveyed the property to her in pursuance of an agreement to compensate her for nursing and caring for said Bridget Loughran so long as she lived. After rebuttal testimony, the issues were submitted to the jury, and a verdict was rendered for the defendant. The plaintiff has appealed from the judgment entered upon that verdict.

The trial judge charged, *inter alia*, as follows: "John Loughran, after he had made certain legacies, * * * made this provision: 'I give, bequeath and devise all the rest * * * of my estate * * * to my wife, Bridget Loughran, for life, it being my wish and will, however, that she shall use whatever of the principal of such residue as may be necessary for her proper maintenance and support.' My construction of that clause is that it did not give to Bridget Loughran power to absolutely dispose of that property, unless it was necessary for her maintenance and support. * * * She had not the right to arbitrarily dispose of the property. * * * Whether or not Bridget Loughran was justified in making provision for her support and maintenance to the end of her life, by employing some one to take care of her and keep her until the end of her life and agreeing to convey the property to her, * * * will be a question of fact for you. There will be another question of fact for you to determine—Did she make such a bargain? * * * If she, from motives of affection, or from

any motive at all, simply gave this property to Catherine Grogan, * * * she was exceeding her power under the will. Her husband * * * meant that she should have the property or the use of it for her life, and that she should use so much of it as was necessary for her maintenance and support." After referring to the testimony relating to the negotiations between the widow and the defendant concerning the bargain for the services to be rendered by the latter to the former, and the subsequent conveyance of the property as alleged by the defendant in fulfillment of that bargain, the court went on to say, "Was that done in good faith? Was it the act and deed, was it the voluntary act—assuming that you come to the conclusion that it was necessary, that she thought it was necessary, and it was necessary for her support and maintenance—was it her free act and deed? Or did Catherine Grogan, the younger woman, exercise such an influence on the mind of the older woman as to amount to a fraud? Or did Catherine Grogan (and this you will have to determine) in furtherance of a selfish—I say no more than selfish—design to get hold of the woman's property, get her to deed the property to her? * * * The question you will have to determine is, Was it a fair and equitable transaction? Or did Catherine Grogan impose on the old woman? Did she impose her will on that old woman's will? Did she make a sharp bargain with the old woman, and use fraud to carry it out? * * * " Then, after referring to the evidence in a general way and to the deed to the defendant, the court said: "That is all testimony for you to consider, first, as to whether it was necessary for her support and maintenance, and, if so, whether the bargain was made as Catherine Grogan says it was made. And, if it was made, then consider whether it was made under duress. * * * That is, under force which the superior will acting upon an inferior one exerts, which the strong, vigorous, healthy person has upon the sick and infirm; or, to put it in another way, whether there was fraud. Because, if there was fraud, this deed should be swept aside." And, in answer to a point, the court again said, "Unless the jury find that it was necessary for the proper maintenance and support of Bridget Loughran to make use of the property in question by conveying the same away from the estate, they must find for the plaintiff." Verdict and judgment for defendant. Plaintiff appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

E. Spencer Miller, James Fitzpatrick, and Anthony A. Hirst, for appellant. Henry A. Hoefler, for appellee.

MOSCHZISKER, J. [1] The plaintiff was appointed receiver by the orphans' court, and

brought this action of ejectment in that capacity. Since, for reasons which will be hereinafter stated, the case must be retried, before considering the several formal assignments of error, we shall first dispose of the question of the right of the orphans' court to appoint and authorize a receiver to institute and prosecute such an action, and determine, in this respect, how the action should be proceeded with in the court below.

"The appointment of a receiver is a remedy of purely equitable origin, having originated in the English Court of Chancery, where it has been employed from a very early time. It * * * grows out of the inherent power of a court of equity to afford relief where the remedies to be obtained in the courts of ordinary jurisdiction are inadequate." 23 Am. & Eng. Ency. of Law (2d Ed.) 1002; Kerr on Receivers (5th Ed.) 1. "The jurisdiction exercised in the appointment of receivers has always been treated as a purely equitable one, and the remedy has been generally regarded, next to that of injunction, as the most efficient and salutary of the extraordinary remedies known to the courts of equity." High on Receivers (4th Ed.) § 4. "The appointment of a receiver is the exercise of a power in aid of a proceeding in equity. * * * The court must be convinced that it is needful, and is the appropriate means of securing a proper end." Chicago & Allegheny Oil & Mining Co. v. U. S. Pet. Co., 57 Pa. 83, 91. The Act of May 19, 1874 (P. L. 207) § 7, vests the orphans' court with power to issue preventive orders "in the nature of injunctions," but neither that nor any other statute expressly gives it the right to appoint receivers. Since the orphans' court does not possess general chancery powers, it is difficult to conceive by what authority it made the appointment in this case. Further, we fail to see the necessity for the appointment.

In *Commonwealth v. Judges of the Court of Common Pleas*, 4 Pa. 301, 302, we said: "Our orphans' court is essentially * * * [a court of chancery] in its proceedings and decrees within the limited sphere of its jurisdiction;" in *Guler v. Kelly*, 2 Bin. 293, 298: "The orphans' courts, in matters within their jurisdiction, proceed on the same principles as a court of chancery;" and in *Black's Ex'rs v. Black's Ex'rs*, 34 Pa. 354, 357, and *Horner v. Hasbrouck*, 41 Pa. 169, 180: "It [the orphans' court] is possessed of chancery powers, and can proceed according to chancery practice * * * in the administration of its appropriate duties." But, while in this sense the orphans' court is a court of equity, the limitations upon its chancery powers are clearly marked. "The chancery jurisdiction is the model, and contains the principles most congenial to this institution, and the Legislature has in very many instances sanctioned and enjoined the application of these principles to proceedings in the orphans' court. * * * The orphans' court is sometimes called a court of limited jurisdiction. This is

true, if regard be had to the *derivation* of its powers, for it possesses none inherently, and exercises such only as are conferred by or implied from legislation; and it is true, also, as to the *subjects* of its jurisdiction, for these are set down in the statutes." Shollenberger's Appeal, 21 Pa. 337, 340. This thought was brought out even more strongly in *Brinker v. Brinker*, 7 Pa. 53, 55, where we said: "Although the orphans' court has been called a court of equity in respect to the few subjects within its jurisdiction, the ancillary powers of such a court have not been given to it. It is a special tribunal for specific cases; and its resemblance to a court of equity consists in its practice of proceeding by petition and answer containing the substance but not the technical subtleties and nice distinctions of a bill in equity, by which, however, justice is obtained more conveniently and as certainly as in courts of equity, purely so called. * * * The orphans' court * * * has not the general powers of a court of equity. * * * Finally, in *High on Receivers* (4th Ed.) § 42, we find it stated: "The appointment of receivers being a power pertaining to courts which are vested with chancery jurisdiction, a court of probate powers only cannot appoint a receiver in aid of the collection of the estate of a deceased person. And, since a probate court has no power to appoint a receiver, an action by a receiver thus appointed cannot be maintained." And in *Anderson's Law Dictionary*, 815, a "probate court" is defined as "a court exercising jurisdiction over the estates of deceased persons, possessing, as to personal assets, nearly all the powers formerly exercised by the courts of chancery and the ecclesiastical courts of England. * * * Other names are orphans' and surrogate courts." We conclude that the orphans' court had no power to appoint the plaintiff a receiver, or to authorize him as such to bring this action of ejectment.

[2] It appears by the petition for the appointment of the receiver that the plaintiff was then, and presumably still is, the administrator c. t. a. of the estate of John Loughran, deceased. The will of the decedent authorizes, empowers, and directs his executor to sell, transfer, and convey his real estate. "The will gives the executor the power to sell the real estate in question. By operation of the act of February 24, 1834 (P. L. 70), the executors took the estate in the land as fully as if it had been devised to them to be sold. They may therefore maintain ejectment to recover the possession." *Chew's Ex'rs v. Chew*, 28 Pa. 17, 20. Also see *Kirk v. Carr*, 54 Pa. 285, 288, 289. "The administrator c. t. a. had all the rights that would have been possessed by the executor named in the will." *Sears v. Scranton Trust Co.*, 228 Pa. 126, 135, 77 Atl. 423, 426. Since the original executor had the right to institute the ejectment, the plaintiff could have brought the action as administrator c. t. a.,

and there was no necessity for the appointment of a receiver for that purpose.

[3] In view of the fact that the administrator c. t. a. and the receiver are in point of fact the same individual, can the record be amended? Although a change of parties which involves a change of the cause of action is not within the province of amendments (*Wildermuth v. Long*, 196 Pa. 541, 46 Atl. 927; *Garman v. Glass*, 197 Pa. 101, 46 Atl. 923), they may be allowed in the substitution of parties plaintiff, where a change in the cause of action is not involved; and in such instances amendments may be permitted, where the proper individual is on the record as plaintiff, but is erroneously designated as to the capacity in which he has a right to sue. *Clifford v. Prudential Life Ins. Co.*, 161 Pa. 237, 28 Atl. 1085; *Jamieson v. Capron*, 95 Pa. 15. On this subject also see *Adams v. Edwards*, 115 Pa. 211, 8 Atl. 425. Here the plaintiff, if he should recover by showing a right of possession against the defendant, would hold the property for whomsoever entitled, no matter whether the plaintiff be designated as receiver or as administrator c. t. a. (*Warden v. Eichbaum*, 14 Pa. 121, 127); and, inasmuch as the statute of limitations has not run, there can be no objection to an amendment in this respect, when the record is returned to the court below.

While we take the view that the plaintiff might have brought this action of ejectment as administrator c. t. a., we do not wish to be understood as expressing any opinion upon his right to recover in that or any other capacity; we only decide such questions as are properly raised by the assignments of error, which we will now proceed to consider.

[4] Clause e, § 5, of the act of May 23, 1887 (P. L. 159), would not exclude the testimony of the defendant. The other party to "the thing or contract in action," viz., the title conveyed to the defendant, was not John Loughran or his estate, but Bridget Loughran, a life tenant with the right to consume; and, although the latter was dead, her right had not passed to any party on the record, and the litigation was not against her estate or any one representing her estate. Again, the testimony was not as to anything that occurred in the lifetime of John Loughran or between him and the defendant, but as to matters which took place after his death between his widow and the defendant. The first assignment of error is overruled.

[5] The court below fell into error when it declined to allow the plaintiff to prove the value of the property or the value of the defendant's services as a nurse. Neither one of these values would have been conclusive upon any of the issues involved in a proper determination of the case, but both of them were evidence to assist the jury in passing upon the issue as to the good faith of the transaction depended upon by the defendant, viz., the alienation of the property for the maintenance and support of Bridget Loughran and the consideration paid by the defendant for the conveyance. From this standpoint, the testimony concerning the wages which the defendant had been previously earning was of importance beyond the mere effect it might have had upon the question of her credibility as a witness. The second, third, and eighth assignments are sustained.

The fourth, fifth, and seventh specifications of error were not pressed by counsel for the appellant, and it is sufficient to say that we see no merit in any of them; these assignments are all overruled.

[6] The testimony offered to show an alleged attempt to suborn one of the plaintiff's witnesses should have been admitted, under the principles laid down in *McHugh v. McHugh*, 186 Pa. 197, 40 Atl. 410, 41 L. R. A. 805, 65 Am. St. Rep. 849, and *Commonwealth v. Brown*, 23 Pa. Super. Ct. 470, 502. The sixth assignment is sustained.

The issue suggested in the tenth specification of error was properly submitted to the jury; the assignment is overruled.

We see no error in the affirmance of the defendant's point covered by the eleventh specification; particularly is this so when we consider the elaboration in the general charge of the plaintiff's side of all the matters referred to in the point in question. The eleventh assignment is overruled.

The case was placed before the jury in a thoughtful and careful charge, in which the governing principles of law, as laid down in *Tyson's Estate*, 191 Pa. 218, 226, 43 Atl. 131, were properly stated, and the will of John Loughran was correctly construed, so far as essential to a determination of the questions involved; the issues were for the jury, and we cannot say that the evidence was insufficient to justify their submission, or to sustain the verdict. The ninth, twelfth, and thirteenth assignments are overruled.

For the reasons hereinbefore stated, the judgment of the court below is reversed, with a venire facias de novo.

In re PLEASONTON'S ESTATE.

Appeal of CADWALADER.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. GUARDIAN AND WARD (§ 163*)—SETTLEMENT OF ACCOUNT—CONCLUSIVENESS OF DECREE OF ORPHANS' COURT.

An orphans' court decree confirming an account of a guardian is conclusive in a collateral action of all the matters contained therein.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 544; Dec. Dig. § 163.*]

2. GUARDIAN AND WARD (§ 163*)—ACCOUNTING BY GUARDIAN—EFFECT.

Where under a will a fiduciary institution receives a sum in trust to invest for testator's niece, and, after testator's death, a guardian is appointed for the niece, and at her majority the guardian files a final account in which he debits himself with the entire income from the trust fund, which the company had paid over to him, and a cash balance shown as due the ward is duly paid over on final confirmation, the ward being duly represented by counsel and being personally present, she has no standing on a subsequent adjudication of the fiduciary company's account as trustee to object to its taking credit for payment to the guardian of the same items with which the guardian had debited himself.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 540-544; Dec. Dig. § 163.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Elizabeth Pleasonton, deceased. Appeal by John Cadwalader, executor of Elizabeth Hoge Pleasonton La Mothe, substituted appellant, from a decree dismissing exceptions to adjudication. Affirmed.

Argued before FELL, C. J., and MES-
TREZAT, POTTER, STEWART, and
MOSCHZISKE, JJ.

John Cadwalader, Jr., for appellant,
John G. Johnson and Maurice Bower Saul,
for appellee.

STEWART, J. Under the will of Elizabeth Pleasonton, deceased, probated August 6, 1894, the Pennsylvania Company for Insurances on Lives and Granting Annuities, the appellee here, received the sum of \$20,000 upon the following trust: "To invest and keep the same invested and receive the interest and income thereof and apply the same, or so much thereof as shall be needed, for the support, maintenance and education of my great niece, Elizabeth Hoge Pleasonton, until her age of twenty-one years or marriage whichever shall first happen; and from and after her full age aforesaid, or marriage, to apply the net income for her sole and separate use, without the control or interference of any husband whom she may marry, and so that she shall not have power to dispose thereof by anticipation." A power in said Elizabeth Hoge Pleasonton to dispose of the said principal sum by tes-

tamentary act follows, a power which she exercised in full accordance with the directions of the trust. This circumstance does not enter into the present controversy, and we have quoted from the will only what is here pertinent. On the petition of the father of Elizabeth Hoge Pleasonton, who was then 12 years of age, the court appointed J. M. Stone, Jr., guardian of the minor's person and estate. On September 25, 1905, the minor having several months before arrived at full age, the guardian filed a final account of his guardianship, in which he debited himself with the entire income received from the \$20,000 trust fund in the hands of the Pennsylvania Company for Insurance on Lives, etc., and which at regular stated periods that company had paid over to him. The account included nothing besides. The credits claimed were for sums expended for the support, maintenance, and education of the ward. A cash balance due the ward of \$1,763.77 was shown, and this upon final confirmation of the account was duly paid over. In the adjudication proceeding on this account, the ward was duly represented by counsel, and was herself personally present. The account was confirmed December 9, 1905, no exceptions having been filed. On March 21, 1910, at the request of counsel for appellant, the Pennsylvania Company for Insurance on Lives, etc., filed its account as trustee under the will of Elizabeth Pleasonton, in which it debited itself with all the income derived from the principal sum of \$20,000, and took credit for payment of the sums to the guardian of the cestui que trust during the latter's minority, embracing the same items with which the latter had debited himself in his final account. These credits were objected to on behalf of the appellant, on the ground (1) that the accountant was itself the testamentary guardian of Elizabeth Hoge Pleasonton, and that with respect to this particular fund the appointment of any other person was a nullity; (2) that under the terms of the trust it was the duty of the trustee to apply the income, or so much thereof as should be needed, for the support, maintenance, and education of the cestui que trust, and that by paying over the entire income and accumulation to a third person, without inquiring into the necessity of the payments or seeing to the application thereof, the trustee had disregarded its duties and should be surcharged. These objections did not prevail with the auditing court. The account was confirmed, and we have this appeal from the final adjudication. The same objections which were relied upon below are urged upon us here. While it is incorrect to say that the appellee was testamentary guardian of appellant, it is unquestionably true with respect to this par-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ticular trust fund and its increment that the legal guardian was without authority or responsibility in connection therewith. The power and duty of the appellee with respect to it were defined in the will of Elizabeth Pleasonton. It was to its legal discretion, within defined limits, that the will committed the employment of the income derived from the fund. The utmost limit to which the legal guardian's interference could have gone would have been to ask the intervention of the court in case of abuse of discretion on the part of the trustee in failing to perform a manifest duty. This, however, is a minor consideration in the determination of the appeal.

[1] The real question is, What effect is to be given the final confirmation of the guardian's account in the present controversy? Admittedly the money expended for the support, maintenance, and education of his ward, and for which the guardian is credited in that account, was the interest and income which the appellee derived from the trust fund it had in its keeping. Were these expenditures proper and legal? Unquestionably they were proper subjects of a guardianship account, and, that being so, the confirmation of the account, until a rehearing or a review be allowed, must be held to be conclusive on all the world. The confirmation is in itself an adjudication that the expenditures for which credit was allowed were both proper and legal. If proper and legal for the guardian, why not for the trustee; their duties and obligations being the same? In the earlier proceeding appellant had full opportunity to contest these credits, and she knew that the expenditures on which they were based were from the income of the trust fund. She remained silent and assented to the decree of confirmation. Had the credits been disallowed at her instance, her trustee would have remained liable to her pro tanto notwithstanding the fact that it had paid the money over to the guardian. On the face of the facts, as we are given to understand them, in paying the money to the guardian the trustee was without excuse, and it paid at its own risk that the guardian would apply it in a way that would be subsequently approved. The payments were subsequently approved, and, having been adjudicated, the end of the controversy with respect to them was reached. It is a settled principle that a decree of the orphans' court confirming an account is in all cases conclusive of the matters contained in it, when attempted to be drawn in controversy in a collateral action. *Clark v. Callaghan*, 2 Watts, 259.

[2] But it is said the trustee has been derelict in its duty in failing to exercise its own judgment and discretion in expend-

ing the money, and committing this duty absolutely to the guardian. The answer to this is, conceding it to be true, if harm or loss has resulted, it is due to the silence and acquiescence of appellant when she should have spoken and resisted. She had her day in court when these matters of expenditure were being adjudicated. That adjudication is a judicial finding that no harm or loss did result from the particular expenditures here complained of. We quite agree that it was the bounden duty of the appellee, under the terms of this trust, to study for itself the conditions calling for the expenditure of the money, and to acquaint itself with the situation of the cestui que trust, so as to be able to exercise a sound discretion in the matter of disbursement. The confidence reposed was in the judgment and discretion of the trustee, and not in that of an unnamed guardian. Apparently the trustee wholly neglected this duty and committed it to the guardian. While no actual loss because of this is shown, it was nevertheless such a plain and manifest dereliction of duty that, had a forfeiture of right to commissions been decreed on this account, the appellee would have had little reason to complain. The allowance of commissions to the trustee is, however, not assigned for error, and, since it is not complained of, we shall not interfere.

In what we have said above all the assignments of error have been considered. They are overruled, and the decree of the court is affirmed, the costs on the appeal to be paid by the appellee.

CONWAY v. PHILADELPHIA HARDWARE & MALLEABLE IRON WORKS.

(Supreme Court of Pennsylvania. July 6, 1911.)

MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT — DEFECTIVE MACHINERY — EVIDENCE.

In an action to recover damages for personal injuries received by an employé from defects in certain machinery, evidence held to sustain nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Michael Conway against the Philadelphia Hardware & Malleable Iron Works. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John M. Vanderslice and Oscar H. Price, for appellant. F. B. Bracken, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

STEWART, J. The defendant company in its foundry business operates a series of tumblers, or more properly speaking rumblers, for the cleaning and polishing of small iron castings of its own manufacture. These rumblers are of cast iron, constructed after the manner of a barrel, and barrel-shaped; the staves being about a fourth of an inch apart. One of the staves is bolted at either end in a way that admits of its removal when the castings are either to be introduced or discharged. The other staves are fixed permanently in place, spaced sufficiently apart to allow the sand within the rumbler, when it has served its purpose, to escape while the machine is revolving. Plaintiff was not in charge of any of these machines, but was a general helper, employed frequently in gathering up and removing the sand after it had been used, and assisting as well in charging and discharging the machine. The day the accident occurred, while engaged in removing the sand, a coemployé in charge of one of the rumblers called for his assistance in opening a machine and taking therefrom its load of castings. While advancing to reach the place where his assistance was required, his clothing was caught by a cleat projecting from between the staves of a revolving rumbler, and he was thrown between that rumbler and the one next to it, and seriously injured. The projecting cleat was a small awning fixture, one of a mass that was undergoing the polishing process within the rumbler. It seems clear enough that at the point where the cleat protruded the space between the staves exceeded the ordinary or regulation width. Had the width been uniformly one-quarter of an inch, the cleat would have been securely confined within the rumbler. Since its partial escape was the alleged cause of the accident, the burden rested on the plaintiff to show that the cleat was where it was through the negligence of the defendant. How came it there? It must have been either because of a break in one of the staves at that point, or because at that point the staves had been gradually worn away by the sand that had passed between them. The staves were of cast iron, and it would seem almost incredible that the amount of sand that would pass through a crevice of a quarter of an inch over such a surface could by mere attrition appreciably reduce it. On the other hand, it is matter of common observation that cast iron will under certain uses and tests crack and break into parts. We are not stating the case too strongly when we say that the average person, with nothing before him but the facts we have stated, and it not appearing that the rumbler showed any change whatever in any of its parts at any other point, would without hesitancy refer the increased aperture between the staves to breakage, rather than as the result of attrition. Had the plaintiff assigned breakage as the cause, since

it might have been the accident of a moment and of which the defendant could not have been advised, his case as presented would have been totally insufficient. Instead, he referred the separation of the staves to gradual attrition, which upon proper inspection of the machine would have been revealed.

We now reach the question of the case: Was the evidence offered sufficient to warrant a reasonable inference that the widened space resulted from a gradual wearing through attrition? If so, it was a case for the jury. We repeat here, because most appropriate in this connection, what was said by Mr. Justice Sterrett in *Longenecker v. Penna. R. R. Co.*, 105 Pa. 328: "The preliminary question of law for the court undoubtedly is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; on the other hand, if the evidence is wholly insufficient to justify the jury in this finding, and the court would feel bound to set aside their verdict if they did so find, the testimony should be withdrawn from the consideration of the jury." The plaintiff himself was the only witness who testified to the occurrence. As he passed the machine he knew it was revolving, but knew nothing of the projecting cleat until it had fastened on his coat. In answer to the question, "What did you see when your jacket was caught?" he replied, "One of these cleats that protruded between the two staves, the worn-out old staves." This question followed from the court: "I cannot hear you—the cleat protruded where?" To this he replied: "Between those two staves, your honor. A space was between them—seemed to be worn out." Again by the court: "You said something about being worn?" Answer: "The staves were worn out. There was a space between them about a half foot long or a foot, between half a foot and a foot." We have given the whole of his testimony in chief so far as it relates to the cleat and the machine. He attempted the most feeble description of the rumbler, and we are left wholly to conjecture with respect to the size of the cleat and the extent of its projection. He is silent as to any knowledge of this particular machine before the accident occurred, and yet he speaks of the staves as being old and worn out. So far as appears he had never looked at the machine until the moment the accident occurred. Indeed, upon his cross-examination, he testified that, in describing the conditions where the cleat projected, he spoke from a mere glance he gave when he was caught, a matter of a second of time, and the machine then revolving. He states not a single fact with respect to the machine which gives support to his statement that the

machine was worn out in any of its parts. From a rapid glance, in a moment of excitement and peril to himself, he reached a conclusion which at best could be nothing more than a conjecture. In saying that the widened space between the staves at this particular point was the result of wear, he was expressing, not a fact warranting an inference, but a mere opinion. We repeat that the extent of this increased space where the cleat protruded, an inch in width and eight inches in length, indicated rather that it resulted from a break, and not from a general wearing away, since it is only reasonable to suppose that the attrition at that particular point would be neither more nor less than any other between the same staves. The evidence furnished nothing upon which a jury could have based a conclusion that the accident occurred in one way rather than another. Upon a review of the evidence we are of opinion that it was not sufficient to carry the case to the jury, and that the non-suit was properly ordered.

Judgment affirmed.

COMMONWEALTH v. MARION.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. JURY (§ 187*)—CHALLENGES—TIME FOR PEREMPTORY CHALLENGES.

Under Act July 9, 1901 (P. L. 629), prescribing the number of peremptory challenges to which the commonwealth and defendant are entitled, and providing that they shall be made when the juror is called, provided that, in cases not triable exclusively in the courts of oyer and terminer and general jail delivery, the court may by general rule fix a different manner and time for exercising peremptory challenges in impaneling a jury, while ordinarily there can be no peremptory challenge after a juror has been accepted, yet, in the absence of a statute otherwise providing, or of a rule of court, the action of the court, on a trial for murder, in permitting the commonwealth to challenge a juror peremptorily, after he has been examined in the first instance by the district attorney and turned over unchallenged to the defense, cross-examined, and accepted by the defense, will not be held error, where new facts appeared on the cross-examination and re-examination.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 619-623; Dec. Dig. § 187.*]

2. CRIMINAL LAW (§ 351*)—EVIDENCE.

The admission in evidence in a trial for murder of a letter written by a friend of defendant, at his request, to secure the possession of damaging letters which defendant had written to a third party was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 351.*]

3. CRIMINAL LAW (§ 452*)—EVIDENCE—OPINION EVIDENCE—SANITY OF ACCUSED.

Under the general rule that opinions of nonprofessional witnesses as to sanity are competent only when given in connection with the facts on which the opinions are based, the exclusion of testimony as to the sanity of defendant by witnesses who had not seen him until after the shooting, or had not seen him within two years, and who had no personal

knowledge of the facts on which to base an opinion, was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053-1055; Dec. Dig. § 452.*]

4. CRIMINAL LAW (§ 354*)—EVIDENCE—OPINION EVIDENCE—SANITY OF ACCUSED.

The admission of evidence of nonexpert witnesses in a trial for murder which was not offered as an expression of opinion as to the sanity of accused, but to prove that the witnesses observed his conduct and appearance after the killing, and saw nothing to indicate that he was of unsound mind, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354.*]

Appeal from Court of Oyer and Terminer, Luzerne County.

George L. Marion was convicted of murder in the first degree, and appeals. Affirmed.

On August 20, 1909, George L. Marion, the defendant, shot and killed his common-law wife, Francis Lee, in an office in the city hall, at Wilkes-Barre, Pa. The opinion of the Supreme Court states the case. Verdict of guilty of murder of the first degree, upon which judgment of sentence was passed.

At the trial Harry Brown testified as follows: "A. I asked him at that time anything I could do for him, any letters I could write. He said, 'Yes;' there was one; and he took me to one side, as though to tell me something more secretly, and he said: 'I would like you to write'—talked in quite an audible tone of voice. I said, 'A little quietly.' He said, 'I want you to write'—I can't remember the name; I think Captain A. A. Walker, of Lake county, Ill.; Zion City was the city. He spoke as though the Captain had been a great friend of his, and he spoke of a letter he had written this captain, or chief of police, I believe Captain Walker is. He said he would like to have this letter. Q. Back? A. Back; he would like to have this letter back, as it might help him at this trial. I wrote to Captain Walker for the letter. Q. In pursuance of his request, you wrote to Captain A. A. Walker, asking him to send back this letter that the prisoner had written to him before? Defendant's counsel: I object to the district attorney leading the witness. The Court: Objection sustained. Q. At all events, you wrote to the Captain and asked him to return the letter? Defendant's counsel: Objected to, if your honor please. The Court: He said he did. Q. (Witness shown letter in envelope.) State whether or not that is the letter and envelope which you sent to Captain A. A. Walker, Zion City, Ill., at the request of the prisoner? Defendant's counsel: Object as to whether or not he did write the letter and send a letter; it is immaterial, unless it is written in the presence of the prisoner and submitted to him and sanctioned by him. The mere fact the defendant had requested him to write a letter to a particular person,

it is immaterial whether or not he did write a letter. The Court: He may answer the question. (Exception noted for defendant and bill sealed.) Q. (Read by stenographer.) State whether or not that is the letter and envelope which you sent to Captain A. A. Walker, Zion City, Ill., at the request of the prisoner? A. I believe so. Q. (Witness shown letter again.) State whether or not that is your signature? A. That is my signature, I believe. The Court: Speak out loud, so the jury can hear. The witness: Yes; that is my signature."

The letter was as follows: "Wilkes-Barre, Pa., August 21, 1909. Captain A. A. Walker, Zion City, Ill.—Dear Sir: I am sending you a newspaper clipping which will explain itself. It was Mr. Marion's desire that the copy of the paper be sent you. As a special favor to him, he would be very grateful if you would send me that last letter he wrote you. He claims that having that letter in his possession would help his case considerably. He begs of you not to fail in this. I am doing everything in my power to help the poor, unfortunate fellow. He surely is in a horrible predicament and needs assistance if mortal man ever did. I hope to hear from you in a few days and trust you will grant him the favor asked. I am, very truly yours, Harry A. Brown."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Charles B. Lenahan and Edwin B. Morgan, for appellant. W. Alfred Valentine, Dist. Atty., for the Commonwealth.

ELKIN, J. [1] Appellant was indicted, tried, and convicted on the charge of having committed a willful, deliberate, and premeditated murder. The defense was insanity, which evidently did not impress the jury. There are 30 assignments of error, many of them without merit, and only a few need be considered to properly dispose of the case. The first assignment raises the question as to the right of the prosecuting officer to peremptorily challenge a juror under the following circumstances: When the juror was called, the district attorney proceeded to examine him on his voir dire, but concluded his examination in the first instance without exercising his right to challenge, either peremptorily or for cause. At the conclusion of his examination, he said to counsel for defendant, "Take the juror." Counsel for defendant after cross-examination said, "Swear the juror," to which the district attorney objected, saying: "Wait; I object. I ask the privilege of re-examining this juror. I did not understand he was opposed to capital punishment." The trial judge granted the request and permitted the juror to be re-examined. The questions were intended to develop the fact that the juror was opposed to capital punishment. The answers did not

convince the court that there was cause for challenge, which was not sustained. The answers of the juror indicated an adverse feeling on the question of capital punishment, but that this would not influence him in arriving at a proper verdict under the evidence. When the challenge for cause was refused, the district attorney peremptorily challenged the juror, and this challenge was sustained by the court. The right to challenge peremptorily was put upon the ground that the juror had been passed after the first examination under a misapprehension of his answers to the questions propounded by the district attorney on the subject of capital punishment. Counsel for appellant contended in the court below, and contends here, that it was too late to exercise the right of peremptory challenge after the juror had been passed by the commonwealth and accepted by the defense. In other words, that when a juror is passed by the prosecuting officer the right to challenge peremptorily is absolutely and finally waived, and no matter what may be subsequently developed upon cross-examination, or otherwise, indicating that the juror may not have an open mind on all the questions involved, and yet not sufficient to sustain a challenge for cause, the commonwealth and the court are powerless to prevent such a juror being sworn, because he was not peremptorily challenged when first examined. This position denies to the trial judge any discretion whatever as to the time when the right of peremptory challenge must be exercised. *Commonwealth v. Evans*, 212 Pa. 369, 61 Atl. 989, is relied on to support this contention.

A superficial examination of that case gives some support to the argument pressed upon us by appellant here, but we are not convinced that the two cases are identical, either in their facts or in the rules of law which should govern. In that case this court held, where counsel for defendant in a criminal case, after having examined a juror turns him over to the commonwealth for cross-examination, and the commonwealth accepts the juror without cross-examination, the defendant will not then be allowed to challenge him peremptorily. Under the rules of court, or the practice in such cases, prevailing in the county from which that appeal was taken, the commonwealth examined the first juror on his voir dire, then turned him over to the defendant for cross-examination; the right to challenge peremptorily being exercised by the parties at the conclusion of their respective examinations. The second juror was first examined by the defendant, then turned over to the commonwealth for cross-examination, which was waived, and the juror ordered to be sworn, and thus the jurors were examined alternately by the commonwealth and defendant until the challenges were exhausted and the jury impaneled. The trial judge in that case ruled in substance, under the practice

prevailing in the jurisdiction of his court, that the turning over of the juror by the defendant to the commonwealth for the purpose of cross-examination, was equivalent to an acceptance, and when the juror was accepted by the commonwealth without any cross-examination, it was too late for the defendant to peremptorily challenge. That ruling was affirmed here, and there is no disposition to disturb it. It should be noted, however, in that case the learned trial judge followed what we must assume was the practice prevailing in his court in the challenging of jurors in such cases. There was therefore no abuse of discretion in ruling that the defendant under the circumstances should be treated as having waived the right to peremptorily challenge the juror in question. Again, after the defendant had concluded the examination of the juror and indicated an acceptance by turning him over to the commonwealth for cross-examination, nothing occurred to indicate that either party was misled, or misapprehended what the juror said on his first examination. There was no cross-examination, nor were any new facts developed, but the juror was accepted without cross-examination by the commonwealth and directed to be sworn. The trial judge very pertinently remarked in that case that to have permitted a peremptory challenge under the circumstances would have given defendant the advantage of speculating on the chance of saving a challenge. In other words, he would save his challenge with the expectation that the commonwealth might do so, and if the commonwealth did not challenge he would then assert his right to exercise the privilege. Such a fast and loose course of procedure in the selection of jurors finds no warrant in law, or in practice, and this is the thought intended to be emphasized in *Commonwealth v. Evans*, supra.

The right to peremptorily challenge cannot be denied either party, but it must be exercised at a proper time, and this in our state depends upon statutory requirements, supplemented by rules of practice. The Act of July 9, 1901, (P. L. 629) fixes the number of peremptory challenges to which the commonwealth and defendant are entitled in criminal cases, and provides when they shall be made in the following language: "All of which challenges shall be made and assigned by the commonwealth and defendant respectively when the juror is called." It will be observed that the act is silent as to the examination and cross-examination of the juror on his *voir dire*, and as to the order in which the examination shall be made by the respective parties. In many counties rules of court regulating these details of practice have been adopted, and frequently a method of procedure has been established by long-continued custom, understood by all parties, which answers the same purpose. The practice is not uniform throughout the commonwealth and frequently varies as to

details. In some counties the rules require the commonwealth to first examine, and then exercise the right of peremptory challenge, before passing the juror to defendant for cross-examination and challenge. In other counties the practice is for the commonwealth and defendant to examine and challenge alternately, while in some jurisdictions the examination and cross-examination are both concluded before either party challenges the juror called, and then the right of challenge is exercised alternately by the commonwealth and defendant until the jury is impaneled. These details may be regulated by rules of court, or by customary practice, if the rules or the practice be not inconsistent with the statute. In the absence of a statute, the general rule in other jurisdictions is that the right of peremptory challenge remains until the juror is sworn, or that the court in its discretion may allow such challenges to be made, even after a juror has been accepted, if the subsequent facts developed upon cross-examination or in re-examination warrant the exercise of the discretionary power. 24 Cyc. 864. In many states the absolute right of peremptory challenge is allowed at any time before the juror is sworn, even if there has been an acceptance by the party challenging, or by both parties. *Rogers v. State*, 89 Md. 424, 43 Atl. 922; *Hamper's Appeal*, 51 Mich. 71, 16 N. W. 236; *State v. Spaulding*, 60 Vt. 228, 14 Atl. 769; *People v. Kohle*, 4 Cal. 198; *Mann v. State*, 23 Fla. 610, 3 South. 207; *State v. Wren*, 48 La. Ann. 803, 19 South. 745; *State v. Pritchard*, 15 Nev. 74; *United States v. Davis* (C. C.) 103 Fed. 457. In other states the absolute right of peremptory challenge after acceptance is not allowed, but the court in its discretion may allow the right to be exercised until the jury is sworn, even if there has been an acceptance. *Daniels v. State*, 88 Ala. 220, 7 South. 337; *Allen v. State*, 70 Ark. 337, 68 S. W. 28; *State v. Potter*, 18 Conn. 166; *Wiggins v. Commonwealth*, 104 Ky. 765, 47 S. W. 1073; *State v. Scott*, 41 Minn. 365, 43 N. W. 62; *Dunn v. Wilmington & W. R. R. Co.*, 131 N. C. 446, 42 S. E. 862; *State v. Crea*, 10 Idaho, 88, 76 Pac. 1013; *Curnow v. Insurance Co.*, 46 S. C. 79, 24 S. E. 74. It has been frequently held that a peremptory challenge should be allowed after acceptance when the acceptance was inadvertently made. *Murray v. State*, 48 Ala. 675; *Brewer v. State*, 72 Ark. 145, 78 S. W. 773; *State v. Vestal*, 82 N. C. 563.

In Pennsylvania there is no established rule of general application regulating the time and order of challenging jurors. Rules of court, or the established practice in the different counties control the method of procedure. When the jurors are called singly, the act of 1901 requires the right of peremptory challenging to be exercised before each juror is sworn, and failure to exercise the right has been held to be a waiver of it.

The time of exercising this right of challenge depends upon the rules of court, or upon the established practice in the jurisdiction in which the case is being tried. Ordinarily there can be no peremptory challenge after the juror has been accepted, but this rule is subject to modification where the juror has been inadvertently passed and upon cross-examination facts are developed and cause shown sufficient to satisfy the trial judge that in the exercise of sound discretion the challenge should be allowed. In the case at bar, there was no rule of court regulating the practice; nor does it appear that there was any established method of procedure as to the time of exercising the right of peremptory challenge. In several respects the present case differs in essential particulars from *Commonwealth v. Evans*. In that case there was no cross-examination and no new facts developed, and hence nothing upon which to base a challenge that did not exist when the examination in the first instance closed. In that case the trial judge refused to allow the challenge, and we think under the facts there was no abuse of discretion in so ruling. In the present case new facts were developed upon cross-examination, as a result of which the court below in the exercise of its discretion allowed the challenge. In the absence of a statute otherwise providing, or of a rule of court, or of an established practice, fixing a different time and order for exercising the right of peremptory challenge, it was within the discretion of the court to allow the challenge under the circumstances. The act of 1901 not only contemplates that the practice should be regulated by general rules, but authorizes the trial courts to promulgate such rules. It would be a much more satisfactory practice if courts would adopt general rules regulating the challenging of jurors under the provisions of the statute, but this is a matter for the courts below, and not for us.

[2] The letter, the admission of which is made the subject of the second assignment of error, is evidentiary in character, and in the light of the uncontradicted testimony of Brown we think was properly admitted in evidence. The defendant authorized and directed Brown to write the letter, and suggested the purpose for which it was written. He made Brown his agent for this purpose, and is presumed to have approved what his agent did within the scope of his authority. The letter shows on its face that Brown carried out his instructions. It was only a link in the chain of circumstances relied on by the commonwealth to ask a conviction, and we see no reversible error in its admission as evidence. Appellant was attempting to suppress evidence—that is, to secure the possession of damaging letters which he had written to a third party—and he was making use of Brown to accomplish this purpose.

[3] While there may be some doubt as to the exclusion of the testimony of several witnesses about which complaint is made, we have concluded there was no reversible error in excluding the testimony of these lay witnesses upon the question of insanity. All of these witnesses, except one, had not seen appellant until after the shooting, and the one had not seen him within two years of the killing. The witnesses had no personal knowledge of the facts upon which to base an opinion as to the sanity or insanity of the accused. The general rule is that the opinions of nonprofessional witnesses as to the sanity or insanity of a person are competent only when given in connection with the facts upon which such opinions are based. The excluded witnesses in the present case can scarcely be said to have had such acquaintance with or knowledge of appellant as to enable them to form a correct opinion as to his mental state. Under the facts the trial judge did not abuse his discretion in excluding these witnesses.

[4] The admission of the testimony complained of in the eleventh to the twenty-fourth assignments, inclusive, raises another question. Appellant contends that when his witnesses were excluded these should not have been permitted to testify. These witnesses were not offered for the purpose of expressing an opinion as to the sanity or insanity of the appellant, but to prove that they observed his conduct and appearance after the shooting, and saw nothing to indicate that he was of unsound mind. *Commonwealth v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029, is authority for the admission of this kind of testimony. While the distinction is not very clear, it has been recognized, and the trial judge evidently made it in the exclusion and admission of testimony in the present case. We do not feel warranted in convicting him of error in making a distinction under the authority of our own cases. The other assignments are without substantial merit and need no discussion.

We have examined with care the entire record, and are satisfied the appellant had a fair and impartial trial upon the merits of his case, and that the jury returned a proper verdict.

Judgment affirmed, and record remitted for the purpose of execution.

FERRY v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—DANGEROUS APPLIANCES—EVIDENCE.

In an action to recover for death of a workman killed by an elevator, where the evidence tends to show that it was not equipped with warning signals, though defendant had

been warned by the city inspector to supply them, that it worked by electricity quietly in a space not guarded, where workmen were at liberty to walk or stand, and in the line of their approach to a doorway, that the decedent was found at the doorway, crushed by the elevator, and that experts testified that it was dangerous, the question of the master's negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 288.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Catharine Ferry against the Philadelphia Rapid Transit Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, STEWART, and MOSCHISKER, JJ.

Michael J. Ryan, for appellant. Thomas Leaming and William M. Stewart, Jr., for appellee.

POTTER, J. In this action Catharine Ferry sought to recover damages for the death of her husband, alleged to have been due to the negligence of the defendant company. Daniel Ferry, the husband of plaintiff, was employed by the defendant company as foreman of laborers. On the morning of the accident the men were employed in piling material in a storehouse. Mr. Ferry was seen with his men, and a few moments later was found crushed under a freight elevator, at the side of the building and in front of an opening or passageway through the wall, where the elevator was located. No one saw the accident, and there was no evidence as to how the deceased happened to be caught under the elevator, or as to what he was doing at that place. At the close of the testimony for the plaintiff, the trial judge entered judgment of compulsory nonsuit, and from the refusal to take it off this appeal has been taken.

The defendant company was charged with negligence in failing to guard the space in the floor of the building upon which the elevator descended, so as to prevent employes and others from walking unawares under the elevator when it was raised. Neglect of duty was also charged, in the failure to provide the elevator with a gong or bell or some device to give warning in advance of the descent of the elevator to any one who might be under it. In the absence of these precautions, it was alleged that the operation of the elevator was dangerous, and rendered the place unsafe for the workmen and others. In actions of this character, there must, of course, be affirmative proof of negligence before recovery can be had. But it is not always essential that there should be an eyewitness of the occurrence. The proof may be furnished by the circumstances them-

selves. The test is whether they are such as to satisfy reasonable and well-balanced minds that the accident resulted from the negligence of the defendant. The discussion of this principle by Judge Agnew, in *Allen v. Willard*, 57 Pa. 374, is instructive. The doctrine there laid down was cited with approval and applied by our Brother Stewart in the late case of *Tucker v. Railway Co.*, 227 Pa. 66, 75 Atl. 991, where he said with reference to the facts then before him: "No one witnessed the occurrence, and, therefore, no one can testify how it did actually happen. The case is not very peculiar in this respect. Accidents in which life is lost not infrequently occur unwitnessed. Such fact in itself does not operate to protect one whose negligence can be shown from the general situation and circumstances to have been the operative cause. When these are such as to satisfy reasonable and well-balanced minds that the accident resulted from the negligence of the party charged, liability attaches." Other late cases in which, while there were no eyewitnesses of the accident, it was held that the circumstances were such as to require the submission of the question of negligence to the jury, are *Henderson v. Refining Co.*, 219 Pa. 384, 68 Atl. 968, 123 Am. St. Rep. 668, and *Millum v. Coal Co.*, 225 Pa. 214, 73 Atl. 1106. See, also, the opinion in *McManamon v. Hanover Township*, 81 Atl. 440, and authorities there cited.

Turning now to the evidence upon the part of the plaintiff in this case, to gather the facts that shed light upon the accident, it appears that at the time the defendant owned and occupied for storage purposes a large two-story brick building at the northwest corner of Fifteenth and Huntingdon streets, Philadelphia. The building was divided into two compartments by a brick wall running north and south, on each side of which was a car track parallel with the wall. In this wall, a short distance from the Huntingdon street wall, was an opening or doorway, which extended from the floor upward. Guideposts were erected at each side of this opening, which were joined together about 3½ feet from the floor by an iron bar. On the guideposts a freight elevator, with a platform 8 or 10 feet square, ran to the second story, 18 or 20 feet above. When lowered, the elevator reached the floor, where the west track ran, but did not go below it. A witness described it as "nothing more than a plain platform elevator, a frame elevator—all open." There were no guards to prevent people from passing into the space under it, when the elevator was raised. No gong was provided, nor was there any other device to give notice when the elevator was descending. The evidence showed that the only way such notice was given was by some one on the elevator call-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing out, as it came down, "Look out at the bottom." The elevator was operated by electricity, and ran very quietly. The plaintiff showed by a city inspector, that he had inspected this elevator on January 14, 1907, and had reported that it should have a gong attached to it, in order to warn persons below when it was about to descend. There was evidence to show that a copy of this report was sent the same day to the president of the defendant company; but no gong had been attached before March 2, 1907, the date of the accident. Expert witnesses testified that an elevator such as this, uninclosed and without gong or rope attachment, was not a reasonably safe device or apparatus. One witness testified that among the trade such an elevator would be called a "trap." The opening in the wall was at times used by the employes in the building as a passageway from one side of the building to the other. The only other way of reaching the east side, where the office was located, from the west side or vice versa, was by going out on Huntingdon street and around. Between the place where the men were working and the opening in the wall, where the elevator was located, there was a pile of rails, 15 or 20 feet high, which prevented the workmen from seeing the place. There was no load on the elevator, nor was there any person on it, when Ferry was discovered. He was found fastened between the elevator and the iron bar across the opening in the wall. According to one witness he appeared to have been actually under the platform of the elevator, and had tried to get out.

Presumably the deceased was acting in the discharge of his duty as foreman of the laborers at the time. There is also the presumption, in the absence of any proof to the contrary, that he exercised due care under the circumstances for his own protection. Something called him to the opening or doorway through the wall. It is a fair inference that, while there, the elevator, operated by electricity and moving quietly, descended unnoticed upon him and caught him. What brought the elevator down did not appear. But it is argued that, if due warning by means of a gong or bell or other suitable equipment had been given, the deceased could have escaped. We have, then, the fact of an elevator, not equipped with warning signals, permitted to work quietly up and down in a space not guarded from access, but where workmen were at liberty to walk or stand, in the use of the floor, and which space was apparently directly in the line of their approach to an opening or doorway leading to another portion of the building. Then the decedent was found in this space, and at the doorway, crushed by the elevator. From a consideration of all circumstances disclosed by the evidence, we cannot say that

reasonable and well-balanced minds might not fairly conclude that the accident resulted from negligence by the defendant. Whether it did or not was for the jury to say, as it was for them also to determine the question of contributory negligence upon the part of the person who was killed.

The motion to take off the nonsuit should have been granted. The second assignment of error is sustained, and the judgment is reversed, with a procedendo.

HOLDEN v. BERNSTEIN MFG. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. PATENTS (§ 219*)—ACCOUNTING FOR ROYALTIES—JURISDICTION OF EQUITY.

A person to whom letters patent were granted may invoke equity jurisdiction to procure an accounting for royalties, under the terms of an assignment of the patents, on the sale of articles manufactured by the assignee, four different patents being involved, each containing several claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 339-349; Dec. Dig. § 219.*]

2. EQUITY (§ 39*)—JURISDICTION—RETENTION OF JURISDICTION REQUIRED.

A court of equity, having properly taken jurisdiction of one subject of a contest, will dispose of the whole matter in controversy, and thus avoid a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

3. EQUITY (§ 39*)—JURISDICTION—RETENTION OF JURISDICTION REQUIRED.

Where equity takes jurisdiction of an accounting for royalties, on patented articles, it will, to avoid a multiplicity of suits, proceed with the settlement of other points in controversy, such as the amount of salary due to the plaintiff, and the amount of commissions due him on sales for any new business developed by him while in defendant's employ in accordance with the terms of the contract.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by George Holden against the Bernstein Manufacturing Company. From a decree dismissing the bill, plaintiff appeals. Reversed, bill reinstated, and cause remanded.

Bill in equity for discovery and account.

The plaintiff's bill was as follows:

"(1) That your orator, upon June 21, 1907, entered into a written contract with the Bernstein Manufacturing Company, a corporation, defendant, whereby said defendant corporation engaged your orator as superintendent in defendant's factory upon the terms therein stated. Said written contract was duly executed by your orator and defendant, and is as follows: 'June the twenty first, 1907. Mr. George Holden. Dear Sir: We, the undersigned do hereby agree to engage your services as superintendent of construction with the view of lessening the cost

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of manufacture, and at the same time retain the present high standard of quality of our product and to improve upon any methods of construction that are at present not of the most approved modern practice. You shall have full control of the force of mechanics and laborers. It is understood that you will give your undivided attention to our business and always work to the interest of the company. Any letters patent that may be granted for inventions by you, are to be issued in your name and assigned to the Bernstein Mfg. Company. For all of which we will pay you an annual salary of \$3,500, thirty-five hundred dollars, payable in monthly installments, and we further agree to pay you two per cent. (2%) on the amount of sales for any new business you may develop in the manufacture of lockers, shop and office fixtures; your services to begin August first, 1907, and to continue for three (3) years. Each to give the other two (2) months' notice prior to August first, 1910, of any intention of terminating this agreement, otherwise to continue in force from year to year thereafter. If this agreement is terminated at its expiration then we will agree to pay you one per cent. (1%) for all goods of your invention that shall be manufactured by us for the full term of such patents. Bernstein Mfg. Co. Wm. F. Bernstein, President. Accepted, Geo. Holden.'

"(2) That your orator duly performed all his duties under the aforesaid contract with defendant. That, in pursuance of said contract, your orator invented a certain new and useful improvement in end rails for bedsprings, which he duly secured by letters patent of the United States, No. 889,007, which he assigned to defendant; and a certain new and useful improvement in cots or bedsteads, which he duly secured by letters patent as aforesaid, No. 919,865, which he assigned to defendant; and a certain new and useful improvement in utensil sterilizers, which he duly secured by letters patent as aforesaid, No. 929,307, which he assigned to defendant; and a certain new and useful improvement in metallic cabinets, which he duly secured by letters patent as aforesaid, No. 943,350, which he assigned to defendant.

"(3) That defendant did not permit your orator to have full control of the force of mechanics and laborers of defendant during the time of his employment, but the officers of defendant gave orders directly to employees properly under your orator's control. That your orator did develop new business in the manufacture of lockers, shop and office fixtures during the period the aforesaid contract with defendant was in force, and the defendant has made sales of said lockers, shop and office fixtures. That since the expiration of said written contract defendant has manufactured and sold goods of the invention of your orator. That said defendant has retained, and still does retain, the possession and ownership of the patents assign-

ed to it by your orator, as aforesaid. That upon May 27, 1910, your orator notified defendant of his intention to terminate his services as superintendent, under the aforesaid written contract, upon the last working day of its term, viz., July 30, 1910, in accordance with the provisions of said agreement; and thereafter, on June 21, 1910, the defendant refused to permit your orator to continue his services as superintendent, and excluded him from their factory although your orator was ready and willing to, and did offer to, do and perform his work as superintendent, as required by said contract. That defendant has not paid your orator the portion of his salary provided for in said contract at the rate of \$3,500 per annum, for the period from June 20, 1910, to July 30, 1910.

"(4) That your orator does not know and is unable to ascertain, except from said defendant, the amount of sales of lockers, shop and office fixtures, and goods of your orator's invention sold by the defendant, and your orator has demanded of defendant an accounting for sales of lockers, shop and office fixtures, and for sales of goods of his invention, and for payment of the sums respectively due on such sales, and for payment of his salary due as aforesaid from June 20, 1910, to July 30, 1910, as agreed to be paid according to said written contract, but the said defendant has neglected and refused, and still does neglect and refuse, to render your orator the accounts and make the payments as aforesaid.

"(5) Wherefore your orator needs equitable relief, and prays that it may be ordered by your honorable court that: (a) Said defendant may make discovery to your orator of all sales of lockers, shop and office fixtures sold by them. (b) Said defendant may make discovery to your orator of all sales of goods of his invention since July 31, 1910. (c) Said defendant make a full and complete accounting to your orator of all lockers, shop and office fixtures sold by them, and of all goods of his invention sold by them since July 31, 1910. (d) Said defendant pay to your orator his salary from June 20, 1910, to July 30, 1910, at the rate of \$3,500 per annum, and 2 per cent. on all sales of lockers, shop and office fixtures sold by them, and 1 per cent. on all sales of goods of your orator's invention since July 31, 1910. (e) Your orator have such other and further relief as to your honors may seem meet in the premises."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Paul Reilly, T. Truxton Hare, and Henry B. Hodge, for appellant. Paul C. Hamlin and Julius C. Levi, for appellee.

POTTER, J. [1] It appears from the record here that the court below sustained a demurrer to the plaintiff's bill. The reason is not given, but presumably it was because it

was thought there was an adequate remedy at law. If this was the reason, we cannot agree that it is good in this case. The plaintiff sought for an accounting for royalties claimed under the terms of an article of agreement, upon sales of certain articles manufactured by the defendant, under the specifications of certain letters patent of the United States granted to plaintiff and afterwards assigned by him to the defendant. The character of the accounting required, in order to give to the plaintiff the relief to which he is entitled, is such as to place it beyond the fair reach of a jury. The inventions for the use of which an accounting is sought pertain to improvements in parts of articles, as, for instance, in end rails for bedsprings, and to other devices in which the inventions were set forth in various written claims. Four different patents seem to be involved, and it is suggested that one of these patents has six claims. Another patent has five claims, and another contains three claims. An accounting for royalties upon articles manufactured under some one or more of these various claims would involve an examination of the various articles manufactured, and a comparison of their structure with the elements of the inventions set forth in the claims of the various patents, and it would require also the fixing of the proportionate value of the parts of the articles included within the scope of the claims to the value of the whole article. These processes would be far too complicated to be submitted to a jury with any reasonable expectation of an intelligent solving by them of the problems involved. Such work requires the services of a chancellor or of a master in chancery. In *Adams's Appeal*, 113 Pa. 449, 6 Atl. 100, it was held that a bill in equity for an accounting is the proper remedy to recover royalties upon a patented article.

[2] It is a familiar doctrine that, where a court of equity properly takes jurisdiction of one of the subjects of a contest, it will dispose of the whole matter in controversy between the parties, and thus avoid a multiplicity of suits. *Myers v. Bryson*, 158 Pa. 246, 27 Atl. 986; *Gwinn v. Lee*, 6 Pa. Super. Ct. 646.

[3] This would justify a court of equity, after having taken jurisdiction in this case of the complicated matter of the accounting for royalties, to proceed with the settlement of the other points in controversy between the parties, as to the amount of salary, if any, due to the plaintiff, and as to the amount of the commission due him on sales for any new business developed by him while in the employ of the defendant, in accordance with the terms of the contract.

The judgment of the court below is reversed, the bill is reinstated, and the cause is remanded to the court below for further proceedings in accordance with this opinion.

PAGE v. CARR et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. STATUTES (§ 117*)—TITLES—MECHANICS' LIENS.

Act June 4, 1901 (P. L. 437) § 13, giving priority to mechanics' liens over advance money mortgages, is violative of Const. art. 3, § 3, relating to subjects and titles of statutes.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 153-157; Dec. Dig. § 117.*]

2. STATUTES (§ 109*)—SUBJECT AND TITLE—REQUISITES OF TITLE.

The title to a statute need not be a general index to its contents, but it is sufficient if it relates to one general subject, no matter how the details may be multiplied, provided they are subordinate to the general purpose of the act and germane to its provisions.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 136-139; Dec. Dig. § 109.*]

3. STATUTES (§ 85*)—VESTED RIGHTS—VIOLATION.

Act June 4, 1901 (P. L. 437), § 13, giving priority to mechanics' liens over advance money mortgages, is violative of Const. art. 3, § 7, providing that the General Assembly shall not pass any general or special law providing or changing methods for the collection of debts or the enforcing of judgment, or prescribing the effect of judicial sales of real estate, since the act in question gives to mechanics' liens a preference and priority to which they were not entitled prior to the present Constitution.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 94, 95; Dec. Dig. § 85.*]

4. CONSTITUTIONAL LAW (§ 38*)—CONSTRUCTION—VALIDITY OF STATUTE.

If a statute is plainly in conflict with the organic law, mere lapse of time cannot cure the defect.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 36; Dec. Dig. § 38.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harlan Page, mortgagee, against John H. Carr, mortgagor, and another. From an order awarding distribution, James J. Finn and others, claimants, appeal. Affirmed.

Distribution of a fund raised by sheriff's sale under a judgment upon a scire facias sur mortgage. Exceptions to report of George DeB. Myers, Esq., auditor.

From the record it appeared that Harlan Page, mortgagee, issued a scire facias sur mortgage against John H. Carr, mortgagor, and Charles C. Norris, Jr., real owner. Judgment for want of an affidavit of defense was entered on April 3, 1909, in the sum of \$34,167. Under this judgment the mortgaged premises were sold by the sheriff, on May 3, 1909, to Warren F. Martin for \$25,000. The mortgaged premises which were sold under the levavi facias consisted of 24 dwellings and a large lot of ground adjoining them. Against the 24 dwellings a number of materialmen had filed mechanics' claims, and upon the petition of one of them (Reuben A. Fowler) the court below ordered the fund realized at the sheriff's sale to be paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

into court for distribution. Pursuant to this order, upon September 27, 1909, the sheriff paid into court the sum of \$23,559.22, being the balance of the \$25,000 paid by the purchaser at the sheriff's sale, less city taxes and costs of suit.

The court appointed George DeB. Myers, Esq., auditor. The claimants appearing before him were Harlan Page, mortgagee, and a number of mechanics' lien creditors, as follows: John M. B. Morrow, Reuben A. Fowler, Reliance Manufacturing Company, James Moore, and the present appellants, Finn & Jennings, and the Germantown Woodworking Company. After the testimony was taken by the auditor, some of the mechanics' lien claimants filed petitions to have an issue awarded, in order to have certain disputed questions of fact raised by the testimony determined by a jury. Subsequently these petitions and the rules thereon allowed by the court to show cause were withdrawn. On January 25, 1910, the auditor filed an interlocutory report, setting forth that the total amount of the claims of the mechanics' lien creditors amounted to a trifle over \$8,500, and that the claim of Harlan Page was for the entire fund under his judgment of \$34,167. The court, upon February 11, 1910, upon petition and rule allowed Harlan Page, ordered that \$10,000 of the fund in court be paid to Mr. Page, as mortgagee.

The auditor, upon April 7, 1910, completed his report, awarding the balance in court, amounting to \$18,559.22, less the expenses of the audit, to Harlan Page, mortgagee. Exceptions to the auditor's report were filed by Harlan Page, Reuben A. Fowler, Finn & Jennings, Germantown Woodworking Company, John M. B. Morrow, and the Reliance Manufacturing Company. The auditor dismissed all the exceptions in his final report. The court dismissed the exceptions and confirmed the auditor's report.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Stanley Folz and Leon H. Folz, for appellants. Sheldon Potter and Alfred S. Miller, for appellee.

POTTER, J. Two appeals from the same judgment, involving the same question of law, are here presented by different appellants. The question arises upon the distribution of a fund realized from the foreclosure of a mortgage, which represented purchase money, although it was postponed to the lien of advance money mortgages in aid of a building operation.

[1, 2] The principal question raised is the constitutionality of the thirteenth section of the mechanic's lien act of June 4, 1901 (P. L. 431), which gives priority to mechanics' liens over advance money mortgages. The learned auditor appointed by the court below to make distribution of the fund held that the thirteenth section above referred to was un-

constitutional and void, and awarded the fund to the holder of the mortgage. He based his conclusion upon two grounds; the first being that the subject of the statute was not clearly expressed in the title, and therefore it was in violation of article 3, § 3, of the Constitution. We are not impressed with the strength of this proposition. As was said in *Gilbert's Estate*, 227 Pa. 648, 76 Atl. 428: "It has been decided, over and over again, that the title need not be a general index to the contents of an act, but that it is sufficient if it relates to one general subject, no matter how the details may be multiplied, provided they are subordinate to the general purpose of the act and germane to its provisions." And in *Bridgewater Borough v. Bridge Co.*, 210 Pa. 105, 108, 59 Atl. 697, 698, our Brother Brown said: "If the title fairly gave notice of the subject of the act, so as to reasonably direct inquiry into its body, the constitutional requirement was not violated. *State Line & Juniata R. Co.'s Appeal*, 77 Pa. 429; *Carothers v. Phila. Co.*, 118 Pa. 468 [12 Atl. 314]; *Dalley v. Potter County*, 203 Pa. 593 [53 Atl. 498]." The evil of loading the title of an act with details, in the effort to express the subject clearly, was pointed out in *Commonwealth v. Broad St. Ry. Co.*, 219 Pa. 11, 17, 67 Atl. 958, 960, by Chief Justice Mitchell, where he says: "It has always been held that the title of an act need not be a complete index to its contents. The time has come to say that it not only need not, but ought not." The auditor felt that the title indicated that it affected only "parties to" building contracts, and gave no notice to any one, other than "parties to" such contracts, that they might be affected by the legislation. But the title gives notice of more than this when it describes the act as regulating the effect of contracts for work and labor to be done, and labor and materials to be furnished to any building, etc. When this statute was enacted, there was other legislation in existence upon the subject of the priority of mechanics' liens over advance money mortgages, and the notice in the title of this act as to repealing, consolidating, and extending existing laws in relation to building contracts was sufficient to put parties interested in the effect of such contracts upon notice. It is plain that the act was intended to be a codification of the law relating to claims under contracts for work done and materials furnished to buildings. Such work may be done and such materials may be furnished by others than mechanics, so there can be no special significance in the fact that the phrase "mechanics' liens" does not appear in the title, so long as descriptive words are used which include, not merely mechanics' but others who are entitled to protection for their claims under the act.

[3] Our difficulty in this instance is not with the title, but is with the second propo-

sition, as to whether the thirteenth section offends article 3, § 7, of the Constitution, which provides: "The General Assembly shall not pass any general or special law * * * providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate." The scope of this provision with respect to various sections of this statute of 1901 has been so thoroughly discussed in several late opinions of this court that little remains to be said by way of amplification. Thus the twenty-eighth section, which gave to a subcontractor or materialman the right to issue an attachment execution against the owner or other party indebted to the contractor for labor or materials furnished, was held unconstitutional in *Vulcanite Cement Co. v. Allison*, 220 Pa. 382, 69 Atl. 855. Section 36, which provided for the enforcement of the judgment on the lien by a special *fi. fa.* under the act of April 7, 1870 (P. L. 58), was, in *Vulcanite Paving Co. v. Transit Co.*, 220 Pa. 603, 69 Atl. 1117, 17 L. R. A. (N. S.) 884, held to violate the Constitution. Section 38, which permitted mechanics' liens to be filed against a building, without reference to the land, and provided for the sale and removal of the building for the benefit of lienholders, was held to be within the ban, in the opinion in the case of *Henry Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 74 Atl. 357. Section 35, which gave the right to enter a personal judgment against a contractor who has been served with the original *scire facias*, or any *scire facias* to revive, was held to violate the same provision of the Constitution, in *Sterling Bronze Co. v. Improvement Ass'n*, 226 Pa. 475, 75 Atl. 668. Turning to the question now before us, it appears that, prior to the Constitution of 1874, advance-money mortgages had priority over mechanics' liens. In *Henry Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 493, 74 Atl. 357, 359, this court said: "The whole act of 1901 is legislation for a special class of creditors, some of the provisions of which are permissible, because the Constitution of 1874 did not intend to wipe out the

system to which they relate; but those providing special methods or changing old ones for the collection of debts due the special class of creditors, or for the enforcement of judgments recovered by them, are prohibited by the organic law."

[4] The result of the decisions above noted is to make it clear that any provision of the act of 1901 which is clearly divergent from and is an advance upon the law as it stood prior to the Constitution of 1874 is to be regarded as invalid. As the effect of section 13 is to grant to mechanics' liens a preference, and to give to them a priority of payment that they did not have, and to which they were not entitled prior to the present Constitution, it must be held invalid. As the learned auditor says: "The plain and practical result of the act is that the mechanic has in the enforcement of his liens higher rights and greater privileges under the statute than he had prior to the Constitution, which forbids the extension of the lien." It was urged in the argument of counsel for appellant that the section in question is substantially a re-enactment of the earlier act of 1881, and that long acquiescence in the similar provisions of the former statute should have controlling weight now in favor of the constitutionality of the section. The answer to this suggestion may be found in the late opinion of this court, in *Kucker v. Oil Co.*, 230 Pa. 528, 79 Atl. 747, where an argument similar in that respect was made. If a statute is plainly in conflict with the organic law, mere lapse of time cannot cure the defect.

We agree with the conclusion reached by the auditor, as set forth in his able report, and affirmed by the court below, that the thirteenth section of the act of June 4, 1901 (P. L. 431) violates the provisions of article 3, § 7, of the Constitution, in that it gives to mechanics' liens a higher dignity and greater priority than they possessed before the adoption of the present Constitution. Distribution of the fund realized was therefore properly made to the mortgage creditor. The assignments of error are overruled, and the decree of the court below is affirmed.

VAN RIPER v. DUBRON.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

JUDGES (§ 31*)—POWERS AFTER EXPIRATION OF TERM.

The rule laid down by sections 3 and 21 of the district court act (P. L. 1898, p. 556), when read together, is that an outgoing judge of that court shall carry to final determination all causes upon the actual trial of which he had entered during his term of office, but shall not enter upon the trial of any new cause, merely because it was instituted during his term, which causes, under section 3, are not to abate, but to be tried before the incoming judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 153-157; Dec. Dig. § 31.*]

Appeal from District Court of Passaic.

Action by John T. Van Riper against Samuel Dubron. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

Andrew Foulds, Jr., for appellant. Whitehead & Appleton, for appellee.

GARRISON, J. This was an action for the conversion of a negotiable promissory note. The theory of the action and the facts on which it was based were that the defendant obtained a promissory note, made by the plaintiff to the defendant's order, for the payment of \$187.50 in six months; that said note was given as a commission in a real estate transaction, and was obtained by the defendant by the false representation that he was not getting a commission from the other party; that such other commission was in fact received by defendant, and that when plaintiff discovered the falseness of the defendant's representation he demanded the return of the note he had given him, which was refused, on the ground that the note had been transferred to a third party, whose name the defendant refused to divulge. On the trial, the defendant, as plaintiff's witness, testified that he had transferred the note to David Kantor, who, when called as a witness, said that he had transferred the note to Abraham Heller, who testified that he had transferred it to one Mamled, of Passaic street, Passaic, but could give no more complete name or address. Plaintiff testified that in conversations with both Kantor and Heller they had refused to divulge the name of the person to whom the note was transferred, or even to say whether or not it was transferred. The note being traced to defendant's hands, and its present holder not being found, the court admitted secondary proof of its contents, and gave judgment for the plaintiff for its face; the defendant offering no defense.

No question was raised in the district court as to the form of the action, and none is raised by any specification in this court.

There being testimony to support the finding of the trial court as to the inability of plaintiff to produce the original note, the admission of secondary evidence of its contents is not a ground for reversal; and the same is true as to the finding of the trial court, sitting without a jury, that the defendant had fraudulently obtained and converted the note. There were no errors in rulings upon evidence. The adjournments granted to the plaintiff in his attempts to trace the note and the denial of an adjournment to the defendant were exercises of a discretion that was not abused.

The most serious specification is that which challenges the qualification of the trial judge to proceed to the final determination of the cause, in view of the fact that his term of office expired during the period occupied by the taking of testimony.

Section 3 of the district court act (P. L. 1898, p. 556) provides that "when any judge thereof shall cease holding his office every suit and proceeding pending in said court * * * shall be continued and proceeded with by and before the succeeding judge thereof;" and section 21 of the same act provides that "any judge of any district court whose term of office may hereafter expire shall proceed to the final determination of any cause or proceeding then undetermined before him * * * in the same manner as if his term of office had not expired."

It is impossible to give to the twenty-first section the explicit force given it by this legislative language, without giving to the third section as restricted a meaning as its language will permit. The duty to harmonize, if possible, the two sections calls upon us to do this. We think, therefore, that section 3 should be restricted to suits and proceedings instituted in the district court, upon the determination, i. e., the trial, of which the court had not actually entered. The two sections would then, if read together, lay down the reasonable rule that the outgoing judge should carry to a final determination all causes upon the trial of which he had actually entered, but not enter upon the trial of any new cause, merely because it had been instituted during his term, which cause, under section 3, would not abate, but be brought on for trial before the incoming judge.

The only other construction that would at all harmonize these sections is that all that section 21 permitted to the outgoing judge was to declare a conclusion reached by him in a case, the trial of which had been concluded during his term of office. This is a tenable construction; but it fails to remedy the lost motion, so to speak, involved in requiring the parties to retry before the new judge a case that had been entered upon and all but completed before the outgoing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judge. The question is not free from difficulty; but the construction that commends itself to us is that which permits the judge, before whom an action is in course of actual trial when his term of office ceases, to continue such cause to its final determination.

Finding that none of the grounds specified should lead to a reversal, the judgment of the Passaic district court is affirmed.

SCHAFFER v. LEVENSON WRECKING CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. NAMES (§ 6*)—PLEADING—MISNOMER.

In an action on a book account, where it appeared that the plaintiff's proper name was H. Allen Schaffer, and that he sued in that name, a motion to nonsuit, upon the ground that he had not sued in his true name, was properly denied.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 5; Dec. Dig. § 6.*]

(Additional Syllabus by Editorial Staff.)

2. NAMES (§ 2*)—REQUISITES—"CHRISTIAN NAME"—"SURNAME."

By the common law since the Norman Conquest, a legal name has consisted of one "Christian name," or that which is given one after his birth or at baptism, or is afterwards assumed by him in addition to his family name, and of one "surname," or family name, which is that derived from the common name of his parents, or borne by him in common with other members of his family.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 1; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 2, p. 1149; vol. 5, pp. 4657-4660; vol. 8, p. 6816.]

3. PARTIES (§ 66*)—DESIGNATION—NAMES.

As a general rule, actions must be commenced and prosecuted in the proper Christian and surname of the parties, and initials cannot be used for the Christian names of parties, except in cases of parties described by initial letters in bills of exchange, promissory notes, or other written instruments, as authorized by Practice Act (P. L. 1903, p. 541) par. 27.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 108, 110; Dec. Dig. § 66.*]

Appeal from District Court of Hoboken.

Action by H. Allen Schaffer, trustee in bankruptcy of the Northampton Cement Company, against the Levenson Wrecking Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

William B. Stites, for appellant. William H. Parry, for appellee.

TRENCHARD, J. [1] This is the defendant's appeal in an action on a book account, brought in the district court of the city of Hoboken, in which the plaintiff had judgment. The action was brought by H. Allen Schaffer, trustee in bankruptcy of the North-

ampton Cement Company. At the trial the defendant made a motion to nonsuit, upon the ground that the plaintiff had used the initial "H," instead of his Christian name. We are of the opinion that the motion was properly denied.

[2] By the common law since the time of the Norman Conquest, a legal name has consisted of one Christian, or given name, and of one surname, patronymic, or family name. The surname, or family name of a person, is that which is derived from the common name of his parents, or is borne by him in common with other members of his family. The Christian name is that which is given one after his birth, or at baptism, or is afterward assumed by him in addition to his family name. 29 Cyc. 264.

[3] In this state, as a general rule, actions must be commenced and prosecuted in the proper Christian and surname of the parties. Seely v. Schenck, 2 N. J. Law, 75. Initials cannot be used for the Christian names of parties to actions, except in cases of parties described by initial letters in bills of exchange, promissory notes, or other written instruments, under paragraph 27 of the practice act. Elbertson v. Richards, 42 N. J. Law, 69; Dittmar Powder Co. v. Leon, 42 N. J. Law, 540.

But this is not a case where no Christian name is mentioned, nor where the Christian name is designated simply by its initial letter. The uncontradicted testimony was that the plaintiff's proper name was H. Allen Schaffer. His given name having been used to describe him, the motion to nonsuit was, of course, properly denied. U. S. v. Winter, 13 Blatchf. 276, Fed. Cas. No. 16,743.

The judgment of the court below will be affirmed.

NEVIN v. PUBLIC SERVICE CORP. OF NEW JERSEY.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

TRESPASS (§ 19*)—TREES—TITLE AGAINST STRANGER.

Where a plaintiff, to prove her legal title to land, offers her deed for premises, extending by force of the description contained therein to the center of a highway, and, by her own testimony, shows that she is in the actual possession of the premises, subject to the public easement in that part comprised within the street limits, her title to and proprietorship of trees standing in said street, within the curb line and in front of her premises, is thus sufficiently shown to enable her to maintain an action against a stranger for wrongfully destroying the trees.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

Error to Circuit Court, Camden County.

Action by Mary G. Nevin against the Public Service Corporation of New Jersey. Judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment for plaintiff, and defendant brings error. Affirmed.

Argued June term, 1911, before GUM-MERE, C. J., and PARKER and VOORHEES, JJ.

Lewis Starr, for plaintiff in error. William Early, for defendant in error.

VOORHEES, J. Review of the judgment entered for the plaintiff is sought by this writ of error. An action in the form of trespass on the case was brought against the defendant, a gas light company, to recover damages for the destruction of five shade trees, planted immediately inside the curb line of a public street in the city of Camden, in front of the plaintiff's property, alleged to have been destroyed by illuminating gas escaping from the defendant's mains, existing under the surface of the street.

The first count of the declaration charged that the defendant did not construct its gas main so that the joints were tight, and the second count averred negligence, in that the defendant, by failing properly to inspect its pipes, negligently allowed the gas to escape. The charge of faulty construction was not pressed at the trial. It was admitted that the destruction of the trees was in consequence of escaping gas.

At the conclusion of the case, a motion to direct a verdict for the defendant was made. The first ground in support of the motion was that the plaintiff had failed to show the ownership of the trees, or title to the lands wherein they were standing.

The plaintiff's deed for the property was in evidence, and it was admitted that by it the boundary ran to and was coincident with the center of the highway, and it was shown that the plaintiff was in the actual possession of the property described therein, other than that part of it constituting the highway. The possession of the owner of the legal title will be presumed to be coextensive with the description contained in his deed. *Ilen v. Hunt*, 20 N. J. Law, 487; *Foulke v. Bond*, 41 N. J. Law, 527; although subject to the public easement in the street, it follows that the proprietorship of the trees was in the plaintiff. *Winter v. Peterson*, 24 N. J. Law, 524, 61 Am. Dec. 678; *Weller v. McCormick*, 52 N. J. Law, 473, 19 Atl. 1101, 8 L. R. A. 798.

There is no substance to the argument that title in the plaintiff has not been shown, because there was no proof of possession by her grantor, and that the plaintiff's testimony of her own possession was insufficient. In support *Troth v. Smith*, 68 N. J. Law, 36, 52 Atl. 243, is cited. It is not pertinent. That was an action of ejectment, and, the defendant being in possession, his title by possession had to be overcome. Here the plaintiff's possession is prima facie evidence of her title. *Rollins v. Atlantic City R. R. Co.*, 70 N. J. Law, 664, 58 Atl. 344. See, also, *Lehigh & Hudson R. R. v. Antalics*, 80 Atl.

469. The plaintiff, to prove her legal title to the land, produced her deed for the premises, extending by force of the description contained therein to the center of the highway, and by her own testimony showed that she was in the actual possession of the premises, subject to the public easement in that part comprised within the street limits; she thus proved her title to and proprietorship of the trees standing in the highway in front of her premises sufficiently to enable her to maintain an action against the defendant for their wrongful destruction.

A second reason urged for the direction is that the defendant's negligence had not been shown. A sewer had recently been constructed which was likely to cause a depression in the gas main, perhaps resulting in a leak. There had been an odor of gas in front of the plaintiff's premises for some six weeks before any repairs had been made, and there was also some evidence of a lack of inspection, and a delay to repair, after actual notice had been served upon the company that there was a leak. Vegetation in and about the trees had died—ocular proof that there might be an escape of gas. It is clear, therefore, that a jury question was thus presented, and that, in view of the facts thus adduced, a direction to find for the defendant would have been improper.

Error is assigned upon the admission of testimony with reference to the destruction of grass, trees, and other vegetation in close proximity. This was clearly admissible as a circumstance calculated to put the defendant upon its guard against an imperfect main, and to give cause for a particular inspection to ascertain if escaping gas was causing the death of the vegetation. There is therefore no error in its admission.

Another ground for reversal is put forth in an exception taken to the charge made upon the plaintiff's request. It was in this language: "If you find that the company had notice of a leak, * * * and did not repair the leak promptly, and the plaintiff's trees were damaged thereby, you may find for the plaintiff." The objection made is that there is no limitation put upon the word "promptly," and that the jury should have been instructed that reasonable promptness only was required. The court had already instructed the jury that, if the company repaired leaks within a reasonable time, it would not be liable, and had also, at the defendant's request, instructed the jury that the defendant was to be allowed a reasonable time after notice to make repairs. Moreover, several of the requests submitted by the defendant, which were charged, contained the words "prompt" and "promptly," with reference to the defendant's action in making reparation. Under these circumstances, the defendant, thus uniting with the plaintiff in requesting the court to employ this word, without modification, perhaps became equally responsible for its use. Taking the

whole charge, it is not perceived that the jury could have been misled by the use of the word "promptly."

The other assignments of error have been examined, and appear to be without merit.

The judgment under review will be affirmed.

DELAWARE, L. & W. R. CO. v. JOSEPH ENGLISH CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 526*)—RECORD—SCOPE AND CONTENTS—REPORT OF REFEREE.

The report of a referee to whom a cause has been referred, and the depositions and evidence taken before such referee form no part of the record upon which error can be assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2380; Dec. Dig. § 526.*]

2. APPEAL AND ERROR (§ 748*)—ASSIGNMENT OF ERROR—DEMURRER—MOTION TO STRIKE OUT.

It seems that a demurrer lies at common law to an assignment of error; but in the case sub judice, it is unnecessary to determine whether this procedure has been recognized in New Jersey, for it may be treated as a motion to strike out the assignment as frivolous.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 748.*]

Action by the Delaware, Lackawanna & Western Railroad Company against the Joseph English Company. From the judgment, plaintiff brings error. Heard on demurrer to assignment of error. Assignment of error ordered stricken.

Argued June term, 1911, before GUMMERE, O. J., and PARKER and VOORHEES, JJ.

Frederic B. Scott, for plaintiff in error.
Michael Dunn, for defendant in error.

VOORHEES, J. While this action was pending in the Passaic circuit court and after issue joined, the attorney of the plaintiff in error applied for a reference, and the cause was accordingly referred. The referee made his report, which was duly confirmed, and judgment ordered to be entered thereon in favor of the plaintiff for the sum of \$398.25.

After the entry of judgment, the plaintiff issued his writ of error, and has assigned error in common form upon the record, alleging that "it is manifest that the judgment is based upon the report by the referee, which report, on its face and by its terms, wherein an allowance is made to the said defendant below of a credit for all the days charged in the plaintiff's declaration, except as otherwise stated in said report, because of a custom understood and accepted by the plaintiff below, is in contravention of the federal statute (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]),

entitled "An act to regulate commerce," and the acts amendatory thereof, remove the matters of demurrage charges from and out of the scope and realm of custom and private agreements."

To the assignment of error thus made, the defendant has demurred: First. Because the report is no part of the record, and error cannot be assigned on any statements therein. Second. That the rulings of the court in giving judgment upon the said report of the referee are not open to exception on error. Third. That no error can be assigned upon the rulings of the referee in making allowances of credit as being manifest upon the face, and by the terms of the said report of said referee. Fourth. That the judgment cannot be reviewed on the writ of error, and no error can be assigned. Fifth. That they are frivolous.

[1] The principal question thus brought under review is what constitutes a record, and whether the report of the referee is part of that record. In *Clifford v. Hudson Oyer*, 61 N. J. Law, 493, 39 Atl. 909, Justice Garrison says: "The record of a court contains only those things that are essential to the validity of the proceeding, such as the nature of the issue, the presence of a judge, and, in respect to the jury, that it was of the proper number of proper men, properly qualified and returned by the proper officer—a venire at common law. From this point down to the return of the verdict, the record is silent. The occurrences of this interval appertain to the conduct of the trial by the court, and of these the record does not speak; they are made to appear by methods provided for that purpose at common law and by statute. Hence all objections to the array that have not been pleaded, all inquiry into the way in which it was selected, all exceptions to the panel, all challenges to individual jurors, all questions touching the service of the list, as well as all other similar matters, form no part of the record, and would be no part of it, even if inserted by the clerk from his minutes of the trial. The history of the trial in these respects could, at common law, be certified only by a bill of exceptions, sealed by the trial court, which is still the rule, save as the mode of certification has been modified by the Legislature. This rule of practice is illustrated in the case of *Peak v. State*, 50 N. J. Law, 179 [12 Atl. 701], and in *Moschell v. State*, 53 N. J. Law, 498 [22 Atl. 50], where a criminal cause was tried by a struck jury."

In *Hoboken v. Lavery*, 60 N. J. Law, 86, 37 Atl. 437, there were two assignments of error, both of which were special, and pointed to supposed errors of law committed by the referee. It was stated there that, before the adoption of rule 84, the court would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

control the report as the verdict of a jury, but that since the rule, in the absence of a stipulation to the contrary, the report would be treated as a verdict, and that a report could be objected to only by opposition at its confirmation, or by motion to set it aside, and that the rulings are not open to exception, nor subject to review, by writ of error. The court adds, "the referee's report and the evidence taken before him are no part of the record."

The practice act (P. L. 1903, p. 537) § 155, under which references are made, provides that "the report shall be final between the parties and judgment may be entered thereon." Now a judgment is entered on a verdict, but the evidence before the jury is no part of the record, unless a bill of exceptions be asked for and sealed. So the referee's report, having been filed, judgment is entered upon it, but what occurred before the referee, or how the amount was arrived at, becomes no part of the record.

The statute further provides that at the time of such reference either party may reserve his right to trial by jury, and may demand such trial; and on such trial the report shall be *prima facie* evidence of the facts therein found and reported, and the report may be excepted to, and no other exceptions shall be considered on the trial.

An entry of judgment on a *postea*, containing a finding on a report, cannot be opposed, because the referee erred in the legal principles adopted by him in his finding. *Clayton v. Levy*, 49 N. J. Law, 577, 9 Atl. 735; *Runyon v. Hodges*, 46 N. J. Law, 359; *Harper Machine Co. v. Sinclair*, 76 N. J. Law, 100, 68 Atl. 890. In *Childrens' Home v. Hall*, 47 N. J. Law, 152, Justice Van Syckel made the same ruling. Nor is a party thus deprived of any substantial right to which he is entitled under the Constitution.

The Court of Errors, in *Newark Pass. Ry. Co. v. Kelly*, 57 N. J. Law, 655, 676, 32 Atl. 223, 224, in reviewing the question as to whether a trial by a circuit judge in certain cases deprived the party of his rights, said: "He may therefore consent to a mode of trial which may deprive him of an opportunity to except, or have a review of such exceptions, otherwise than by rule to show cause, which the act of 1893 [P. L. 1893, p. 158] provides for." The report and the depositions and evidence taken before the referee form no part of the record upon which error can be assigned. Moreover, if the law were otherwise, we would be precluded in this case from considering the error assigned, because the report has not been brought here, and therefore is not before us.

[2] It seems that a demurrer lies at common law to an assignment of error. See *Tidds' Practice*, 1173, where it is said, "To an assignment of errors, the defendant may

plead or demur" (Corbins' Court Rules [Ed. 1906] p. 42; 2 Cyc. 1007, 1009); but it is unnecessary to determine whether this procedure has been recognized in New Jersey.

The case may be treated as a motion to strike out the assignment as frivolous, and tending only to embarrass and delay the judgment creditor. *Donnelly v. State*, 26 N. J. Law, 481; *Hoboken v. Lavery*, *supra*; *Ruckman v. Demarest*, 32 N. J. Law, 523, where the court, upon its own motion, ordered such an assignment stricken out.

An order may be entered, striking out the assignment of error, with costs.

BOYAJIAN v. BLACK.

(Supreme Court of Rhode Island. Nov. 13, 1911.)

FRAUDULENT CONVEYANCES (§ 208*)—SALES IN BULK—VALIDITY—SUBSEQUENT CREDITORS.

Pub. Laws 1909, c. 387, providing that a transfer of a stock of merchandise, not in the ordinary course of trade, shall be void as against creditors of the transferor at the time of the transfer, unless the transferee receives a sworn list of creditors, does not invalidate a bulk sale, except as to creditors at the time of the transfer, and the act does not apply to one becoming a creditor of the transferor at any time after a transfer.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631-633; Dec. Dig. § 208.*]

Action by Andrew Boyajian against James P. Black. Certified from the district court, under Gen. Laws 1909, c. 298, § 4, on agreed statement of facts. Judgment ordered for plaintiff, and decision certified back to the district court.

James A. Williams, for plaintiff. Terence M. O'Reilly, for defendant.

BLODGETT, J. This is an action of replevin, brought by the plaintiff against the defendant in the district court of the Sixth judicial district, to recover possession of certain goods and chattels attached by the defendant as a constable and which are described in the writ of replevin. In the district court certain questions of law were raised, and upon an agreed statement of facts the cause is brought to this court for determination, under the provisions of section 4, c. 298, Gen. Laws 1909, which is as follows: "Whenever a civil action, pending in a district court or in the superior court, is at issue on its merits, and the parties shall file in the clerk's office an agreed statement of the facts in such action, the court shall certify the action to the Supreme Court to be there heard and determined. After having decided the action the Supreme Court shall send back the papers therein, with its decision certified thereon, to the court from which the action was certified, which shall enter final judgment upon the decision."

An examination of the agreed statement

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of facts discloses the following facts: The plaintiff in this case purchased a cobbler shop, consisting of machinery, tools, fittings, and stock usually used and kept on hand in a cobbler shop from one Charles Baligian, who transferred the same to this plaintiff by a bill of sale warranting the title, except as to a machine mentioned therein. The plaintiff asked said Charles Baligian, at the time of the purchase of said shop, whether or not he owed any money, and Baligian said that he did not, except as stated in the bill of sale. The plaintiff did not demand or receive a sworn statement from said Baligian, containing a list of the names and addresses of Baligian's creditors. After the transfer Baligian left the state, and a creditor of Baligian, Nicholas G. Smith, had a writ issued from the district court of the Sixth judicial district for the attachment of the personal property of said Baligian. Whereupon, after attachment, this writ of replevin was brought against the defendant constable to recover possession of the property.

Two questions of law are sought to be raised by the plaintiff in his contention that he has the right under his writ of replevin to possession of the property replevied, and these questions are stated as follows: First, the plaintiff contends that he received a good title to said property by the bill of sale from Charles Baligian, because it was not necessary, under the provisions of chapter 387 of the Public Laws, to require of Charles Baligian a sworn statement of the names of his creditors, inasmuch as the said Baligian declared that he had no creditors; and, second, chapter 387 of the Public Laws does not contemplate such a business as Charles Baligian was engaged in, and for that reason the plaintiff in this case, being a bona fide purchaser for value, received by the bill of sale from Baligian a good title.

It is evident that the questions sought to be determined cannot be raised or determined upon this statement of facts. The provisions of Pub. Laws, c. 387, passed April 14, 1909, are as follows: "Section 1. The transfer of the major part in value or the whole of a stock of merchandise and fixtures, or merchandise or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the transferor's business, whether in one or more parcels or to one or more persons, provided the transfer is all part of substantially one transaction or proceeding or occurs substantially at one time, shall be fraudulent and void as against all persons who are creditors of the transferror at the time of such transfer unless the transferee demands and receives from the transferror a written list of the names and addresses of the creditors of the transferror and certified by him, under oath, to be, to the best of his knowledge and belief, a full, accurate, and complete list of his

creditors; and unless the transferror shall, at least five days before such transfer, notify personally, or by registered mail, every creditor whose name and address are stated in said list of the proposed transfer."

It will be observed that the statute declares the transfers aforesaid to be "fraudulent and void as against all persons who are creditors of the transferror *at the time of the transfer*, unless," etc. It does not appear by the agreed statement of facts that Smith, the attaching creditor, was a creditor at the time of the transfer; the only allegation being that he brought his suit against Baligian shortly thereafter. But if Smith became the creditor of Baligian, even one day after the transfer, the act does not apply. Inasmuch as it does not appear that Smith was a creditor when the bill of sale was given, on the case as submitted, it follows that the sale to Boyajian was a valid sale, and that the decision of this court must be in favor of the plaintiff for possession, 10 cents damages, and costs.

The papers in the cause, with the decision of this court certified thereon as aforesaid, will be sent back to the district court of the Sixth judicial district, and said court is directed to enter final judgment in accordance therewith.

ALLEN & REED, Inc., v. RUSSELL. (Supreme Court of Rhode Island. Nov. 10, 1911.)

EXCEPTIONS, BILL OF (§ 55*)—ESTABLISHMENT OF TRUTH—JURISDICTION.

Where the transcript of the testimony and the bill of exceptions were not filed until after the time fixed therefor, a petition to establish the truth of the exceptions, under Gen. Laws 1909, c. 298, § 21, will be dismissed on motion of the adverse party.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 90-93; Dec. Dig. § 55.*]

Action by Allen & Reed against Ernest Russell. Petition by defendant to establish the truth of his exceptions, under Gen. Laws 1909, c. 298, § 21. Dismissed.

Defendant, filing notice of his intention to prosecute a bill of exceptions, obtained an extension of time for the filing of the transcript of the testimony; but such transcript was not filed until after the termination of such time, and his bill of exceptions was filed thereafter, and he then petitioned the Supreme Court to establish the truth of the exceptions.

James B. Littlefield, for plaintiff. Peter J. Quinn, for defendant.

PER CURIAM. The plaintiff's motion to dismiss the defendant's petition to establish the truth of his exceptions in this court is granted. McLean Co. v. Wheelwright, 31 R. I. 563, 78 Atl. 261.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CARPENTER et al. v. JOHN M. MILLER & SON.

(Supreme Court of Pennsylvania. July 6, 1911.)

EXPLOSIVES (§ 7*)—DEPOSITING REFUSE IN DUMPING GROUND—INJURY TO CHILD—PROXIMATE CAUSE.

A wholesale dealer in fireworks put the refuse of his business into barrels and deposited it on a dumping ground, paying the lessee of the ground for the privilege; the refuse then becoming the property of the lessee. *Held* that, where a 12 year old boy went on the dumping ground and picked out a piece of fireworks, and later in the day lit it at his home and was injured, the dealer was not liable; his acts not being the proximate cause of the injury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 8; Dec. Dig. § 7.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Andrew Carpenter and Charles F. Carpenter, by his father, Andrew Carpenter, against John M. Miller, trading as John M. Miller & Son. Verdict for defendant, and plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John Weaver, for appellants. Morton Z. Paul, for appellee.

BROWN, J. The material facts in this controversy are not in dispute. The appellee was a wholesale dealer in confections, and, in connection with that business, dealt in fireworks. The refuse which accumulated at his place of business was put into barrels, and taken to and deposited on a dumping ground leased by a man named Ludlow, who charged for the privilege of depositing it upon his lot. Children in the neighborhood of the lot used it as a playground, against the protest of the lessee, who testified that, notwithstanding all he had done to keep them off, they were continually upon it. On July 24, 1902, an employé of the appellee took a wagon load of refuse from his store to this dumping ground, and deposited it there, after paying the usual price for doing so. Charles F. Carpenter, the injured appellant—then 12 years of age—and two companions picked out of this deposit candy and fireworks. Young Carpenter took from it a piece of fireworks known as a "flowerpot." He carried this to his home some distance away, and later in the day, after he had eaten his supper and it had become dark, accompanied by a younger brother, took it to a stone wall and lighted it. An explosion followed, which resulted in the injuries for which compensation is sought in this action. A verdict was directed for the defendant, and from the judgment upon it there followed this appeal.

The dumping by the appellee of refuse containing fireworks on a lot where boys gathered to play is the negligence of which the

appellant complains. Whether his doing so was negligence is a question upon which we need not pass, as it clearly appeared that the direct, proximate cause of the injuries sustained was something else. Under the uncontradicted testimony, the refuse, as soon as deposited upon the ground, became the property of Ludlow. In addition to receiving a stipulated sum for the privilege of depositing it, whatever was in it became his property as soon as it was deposited on the lot. Counsel for the appellee contends, and with reason, that, after the refuse was thus sold to Ludlow, he alone was responsible for what was done with it. But on this we need not dwell. In dumping the refuse on the lot, no injury was done to the boy. After it had been dumped on the lot, nothing in it injured him there, and nothing in it would have injured him elsewhere, if he had left it alone. Instead of doing so, he and his companions dug out of it candy and fireworks; but in digging these out no injury was done to any one of them. Nothing done or left undone by the appellee caused injury to the boy on the lot where the alleged negligent act was committed. After taking out the flowerpot he carried it to his home, without informing his parents that he had it, and, without their knowledge, later in the day took it to a stone wall for the purpose of lighting or setting it off. This he did, and the very serious consequences complained of followed from his act.

There was nothing unlawful or unusual in appellee's dumping refuse upon the public dumping ground. He did what is and has been constantly done in all thickly settled communities. In all rubbish heaps on dumping grounds there are to be found rusty iron, broken knives, bottles, and glass, and innumerable other useless articles, always likely to cause injury to boys who may dig them out and handle them; but it has never yet been held that one who thus does what is usual and customary is guilty of any negligence. Though there were unexploded fireworks in the refuse deposited by the appellee, they could have caused no injury unless fire was applied to them, while all the other articles enumerated might have caused injury without any intervening agency. The appellant and his companion might have handled the flowerpot on the premises without the slightest danger of any injury to them unless they lighted it. The injury to young Carpenter was not the immediate consequence of the deposit of the refuse on the dumping ground, but resulted from his independent, intervening act in taking the flowerpot from his home, to which place he had safely carried it, and setting fire to it sometime afterwards. His injury could not reasonably have been contemplated as the result of the appellee's act in placing the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rubbish on the lot. The boy's own act was the direct, proximate cause of his injuries. *Marsh v. Gilles*, 211 Pa. 17, 60 Atl. 315.

The assignments of error are overruled, and the judgment is affirmed.

McMANAMON v. HANOVER TP.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. HIGHWAYS (§ 213*)—USE FOR TRAVEL—ACTION FOR DEATH—QUESTION FOR JURY.

Evidence in an action against a township for the death of plaintiff's husband by a fall over an unguarded vertical cut on the main street of the township held to present a question for the jury as to the negligence of the township, though no one saw decedent fall, and the manner of the accident could only be determined by inferences from the known facts.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 213.*]

2. HIGHWAYS (§ 213*)—USE FOR TRAVEL—ACTION FOR DEATH—QUESTION FOR JURY.

Though one uses a highway which is open for public travel knowing that there is a safer route, the trial court cannot say as a matter of law that he is guilty of contributory negligence, unless the danger of the route he chose is so great and apparent that an ordinarily prudent person would avoid it, and, if the alternative route has dangers of its own and the dangers of the route taken are not so obvious as to deter the general public and ordinarily prudent people from using it, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

3. NEGLIGENCE (§ 122*)—ACTIONS—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action for negligence, the plaintiff is not required to prove that he was free from any negligence contributing to the result, but the burden of proof on that question is on defendant, unless plaintiff adduces testimony disclosing contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Mary McManamon against the Township of Hanover. From a judgment on a directed verdict for defendant, plaintiff appeals. Reversed, with venire facias de novo.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thomas F. Farrell and S. J. Strauss, for appellant. Abram Salsburg and Peter J. McCormick, for appellee.

MOSCHZISKER, J. On February 1, 1908, at about 9:30 o'clock in the evening, Patrick McManamon was killed. His widow brought an action on behalf of herself and the children of the deceased to recover damages for the loss of his life, claiming that his death was due to the negligence of the defendant township. The court below gave binding instruc-

tions for defendant, judgment was entered accordingly, and the plaintiff has appealed. The sole question is: Was there sufficient evidence to justify the submission to the jury of the issues as to the negligence of the defendant and the contributory negligence of the decedent?

[1] Had the evidence been submitted and had the jury taken a view favorable to the plaintiff, drawing the inferences contended for by her, they might have reached the following conclusions: That the decedent was killed by falling over an unguarded vertical cut on the main street of the defendant township; that this cut had existed in its unguarded state for some years; that it was about 12 feet in height at the point where the decedent fell; that on the top of the cut there was a footpath about 200 feet in length running up from and back to the level portions of the street; that this path had been open to the public and used as a way for travel or sidewalk by the residents of the community for a long period of years, even prior to the date of the cut; that at the point of the accident the path was about 6 feet in width from the fence line to the edge of the cut; that the street in question was plotted of a width of 50 feet, and actually measured from fence line to fence line 49 feet, the roadway between the curbs being 33 feet, and the curb being set "right up against the bank" of the cut; that the decedent had lived with his family for about three years in a house on the top of the cut, and had been in the habit of using the pathway to and from his home; that the only other way to the home of the decedent was by a roundabout course of nearly twice the distance, used by wagons with heavy loads, much of it over unpaved, unopened and unlighted streets and alleys, which course for these reasons was beset by its own dangers, and was not the one customarily used by pedestrians for the purpose of reaching the houses on the cut; that on the night in question the decedent left his home at about a quarter of 9 o'clock; that he was seen by a friend returning to his home by way of the path over the embankment a half hour afterwards, and he was found dead at the foot of the embankment 10 or 15 minutes after that; that the position and condition of his body plainly indicated that he had broken his neck by falling over the embankment into the cut; that upon the night of the accident there was snow and ice upon the ground in the vicinity; and that there was no evidence to show that the decedent was in other than a sober condition. No one saw the decedent fall; and how the accident happened can be determined only by inferences to be drawn from the known facts. As before stated, the jury might have found the facts as we have outlined them, and hence it could not be said as a matter of law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the defendant township was not guilty of negligence in failing to guard this vertical cut on a populated main street.

[2] The remaining question is, Under the circumstances, could it be ruled as a matter of law that the decedent was guilty of contributory negligence in using this unguarded path along the edge of the cut? The path was the usual way for the people in the community to reach the houses on the embankment, and the mere fact that there was another way, or that the way chosen had points of danger which must have been known to the decedent, would not be enough necessarily to convict him of contributory negligence. "A pedestrian in a city on a dark night well acquainted with the unsafe condition of the sidewalk is not guilty of contributory negligence in taking it as the direct way to his home, instead of some other way also unsafe, if he acted with that care with which a prudent man should act; and this is a question of fact for the jury." 5 Thompson on Negligence (2d Ed.) 734, § 6273. In *Altoona v. Lotz*, 114 Pa. 238, 7 Atl. 240, 60 Am. Rep. 346, the defects in the sidewalk were well known to the plaintiff at the time he was injured, and the defense was that he had failed to show a case clear of contributory negligence; it being suggested there, as it is in the present case, "that the plaintiff could have conveniently found a safer way" to reach his home. We held the defense insufficient, and affirmed a judgment for the plaintiff. In *Musselman v. Hatfield Borough*, 202 Pa. 489, 52 Atl. 15, reversing a judgment of nonsuit, we said: "She [the plaintiff] knew of the break on each side of the board walk, and was watching for it, but, the night being dark, she did not see it, and consequently stepped outside the board walk and fell. There was one other way by which she could have reached her home."

* * * Defendant averred contributory negligence on the part of the plaintiff in choosing for her way home a pavement which she knew was unsafe. * * * It is often difficult to apply the law to the varying facts of the different cases and say which case is for the court and which for the jury, but here the risk was relative. Whether she should in the exercise of care have walked in the middle of the street, or have gone by the turnpike, or have walked on Market street pavement, * * * depended on a comparison of risks." In *Steck v. Allegheny*, 213 Pa. 573, 62 Atl. 1115, we said: "A person who uses a street or highway that is thrown open for public travel, knowing at the time that there is a safer route which he may take to reach his destination, * * * is not necessarily guilty of negligence because he does not take the safer route. It is only when the danger is so great and apparent that an ordinarily prudent person would regard it as dangerous, and therefore avoid it, that a trial court can say as matter of law that the person

using the more dangerous route is guilty of contributory negligence. If the alternative route has dangers of its own, * * * and the dangers of the route actually taken are not so great and obvious as to deter the general public and ordinarily prudent and careful people from using it, the question of the contributory negligence of a person injured in using it is a question for the jury." It is only where the facts plainly show that the injured person had a choice of two ways, one of which was safe and the other of which was subject to risks and dangers, and that he voluntarily chose the latter, that it can be said as a matter of law that he was guilty of contributory negligence. Such were the cases of *Hill v. Tionesta Tp.*, 146 Pa. 11, 23 Atl. 204, and *Purcell v. Riebe*, 227 Pa. 503, 78 Atl. 212, depended upon by the defendant.

[3] It is necessary for one to observe all the precautions required of an ordinarily prudent person before he can hold another for an act of alleged negligence, but positive evidence that he observed such precautions is not required. *Lehigh Valley R. R. Co. v. Hall*, 61 Pa. 361. "Generally, the direction is that the jury is to judge from the surrounding circumstances whether the plaintiff exercised the caution which ought to mark the conduct of a prudent person." *Beatty v. Gilmore*, 16 Pa. 463, 55 Am. Dec. 514. "As the love of life and the instinct of preservation are the highest motives for care in any reasoning being, they will stand for proof of care until the contrary appears." *Cleveland & Pittsburgh R. R. Co. v. Rowan*, 66 Pa. 393. "It was never intended * * * that the plaintiff * * * must * * * prove negatively that he himself was not guilty of any negligence which contributed to the result." *Bradwell v. Pittsburg, etc., Ry. Co.*, 189 Pa. 404, 20 Atl. 1046. "That burden is on the defendant, unless the evidence adduced by her (the plaintiff) discloses contributory negligence." *Coolbroth v. Penna. R. R. Co.*, 209 Pa. 433, 58 Atl. 808. "From the fact that a person, injured upon a defective highway, was so well acquainted with its condition that he might be able to pass over it safely by the use of ordinary precaution, it does not necessarily follow as a matter of law that he was conclusively guilty of contributory negligence. The circumstances of the case may make this a question for the jury." *Forker v. Sandy Lake Borough*, 130 Pa. 123, 18 Atl. 609.

We find two Pennsylvania cases in which death resulted from an unseen fall and a recovery was allowed. First, *Allen v. Willard*, 57 Pa. 374, where we said: "That he fell into the pit, * * * thereby breaking his neck, and that the excavation was unguarded at the place where he fell, * * * is without contradiction or doubt. But it is argued that his fall is not accounted for, and that the fact that his death was caused solely by the negligence of the defendant is

not established by sufficient evidence. * * * Now all of these facts certainly tend to prove that Willard lost his life by falling accidentally into this open, unprotected pit. * * * The natural instinct which leads men in their normal senses to avoid injury and preserve life is an element of evidence. In all questions touching the conduct of men, motives, feeling, and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries. Adding these to the circumstances of this case, we cannot say that the evidence was insufficient to go to the jury." Next, in *Scranton v. Dean*, 2 Wkly. Notes Cas. 467, "the body of Dean was found below a bridge along the side of which there was no fence; there being no evidence of the manner or circumstances of his death. Held, that the presumption of law is, in the absence of proof to the contrary, that the deceased exercised ordinary care." We there said: "The strain of the case * * * fell upon the manner of the accident, leaving the question one of probability whether Dean fell over the wall or abutment by accident, and whether he contributed to the fall by any negligence of his own. These were questions to be decided by the jury from the circumstances attending the place where the body was found, its position and condition, and from the character, habits, and general conduct of the man himself. * * * It is for them to weigh the probabilities of an accidental fall as Dean went home, the darkness of the night, his knowledge of the way, the effect of a blunder, or a misconception of his position as he was entering upon the abutment, the probable condition of his senses, his instinct of self-preservation, and all the circumstances attending the place where he was found." Also see *Ferry v. Phila. R. T. Co.*, 81 Atl. 426, decided at this term, and authorities there cited.

We conclude that there was enough in the evidence produced to justify the submission of the issues to the jury, and that error was committed in giving binding instructions for the defendant.

The assignments are sustained, and the judgment is reversed, with a venire facias de novo.

ASHLEY BOROUGH v. LEHIGH & WILKES-BARRE COAL CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. INDEMNITY (§ 13*)—IMPLIED CONTRACTS—LIABILITY FOR TORTS—INDEMNITY FROM PERSON PRIMARILY LIABLE.

Where a sidewalk had been in a very dangerous condition for several years prior to an accident for which a judgment was rendered against the borough, and the abutting owner had been notified by the borough to repair, and had failed to do so, the borough can recover of the owner the amount of the judgment, though

the premises were leased at the time of the accident, and at the beginning of the lease the sidewalk was in good condition.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

2. INDEMNITY (§ 13*)—IMPLIED CONTRACTS—LIABILITY FOR TORTS—INDEMNITY FROM PERSON PRIMARILY LIABLE.

That a borough had not, as prescribed by an ordinance, repaired a sidewalk at the expense of the abutting owner after the latter had been notified to repair, but had failed to do so, will not defeat the borough's right to recover from the owner the amount of a judgment it is compelled to pay to one injured by reason of the defective sidewalk.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

3. LIMITATION OF ACTIONS (§ 56*)—ACCRUAL OF CAUSE OF ACTION—ACTION FOR INDEMNITY.

Limitations do not begin to run against a borough's right to recover of an abutting owner damages which the borough has been compelled to pay for injuries from a defective sidewalk from the date of the accident, but only from the date of the judgment, or payment thereof.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 307-311; Dec. Dig. § 56.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Ashley Borough against the Lehigh & Wilkes-Barre Coal Company. From a judgment on a verdict for plaintiff, defendant appeals. Affirmed.

On motion for defendant n. o. v., Fuller, J., filed the following opinion:

"This action of trespass was brought August 24, 1907, by the borough of Ashley to recover the amount of a certain judgment and expenses connected therewith, which judgment had been recovered and collected from it on May 23, 1906, for damages sustained by one Anthony Ginley and wife, on August 2, 1902, from a defective sidewalk in front of the defendant's property situate in that borough.

"By the present motion for judgment non obstante veredicto, as upon the trial, defendant urges these points, viz.: (1) That the occupancy of its lessee exempted it from liability; (2) that the action is defeated by contributory negligence of the borough, in failing to exercise its municipal power and duty to make repair at cost of defendant; (3) that the action is barred by limitation, not having been begun until August 24, 1907, although the accident occurred August 2, 1902.

[1] "1. Did the occupancy of its lessee exempt the defendant from liability?

"The uncontradicted evidence bearing upon this point showed that the property was leased to one Dubol in 1891, and continued to be in his occupancy as lessee from that time until after the accident, the lease probably being from year to year, although this does not appear; that the sidewalk, at the time of the lease in 1891, was in good condition, but that nothing was done to it after-

ward; that the lessee was liable for repairs; that an ordinance of the borough, enacted in 1890, expressly imposed upon owners of property the duty of repairing sidewalks, or on default the borough would do so, charging expense and penalty; that on June 6, 1902, the defendant, under resolution of the borough council, was notified to repair the bad condition of the sidewalk in question, but failed to do so until after the accident, when it removed the boards composing the walk altogether.

"As the foundation for discussion on the subject, we will quote from *Lindstrom v. Pennsylvania Company for Ins. on Lives & Granting Annuities*, 212 Pa. 391, 61 Atl. 940, followed in *Chroust v. Bldg. & Loan Ass'n*, 214 Pa. 179, 63 Atl. 595, which defines the governing general principles, viz.: "The plaintiff was injured by stepping into a hole in the pavement in front of property owned but not occupied by the defendant. At the time of the accident, the premises were in the occupancy of a tenant under a lease from it. There was no evidence that the defect in the sidewalk had existed for any length of time. No one testified to having seen it before the day the plaintiff was injured. The hole was apparently due to the removal of a single brick. The case as presented is not one of a landlord who leases his property with a defect existing in the pavement at the time of the execution of the lease, nor is it one in which, during the term the pavement becomes out of repair, and though notified of its condition, the landlord neglects to repair it, in disregard of his covenant in the lease to do so. The action is against a landlord which had neither actual nor constructive notice of the defect in the pavement in front of the premises in the occupancy of its tenant. A municipality, though having the exclusive control of public streets, is not liable for injury resulting from an obstruction or defect in them, unless it has had actual or constructive notice of the existence of the danger. * * * An owner of property, not occupied by him, but in the exclusive possession of a tenant under a lease from him, ought not to be and is not held to stricter accountability. The general rule is that when premises are in good repair at the time they are let, and the landlord is not bound by the lease to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from failure to repair the pavement in front of the premises. * * * A tenant in possession may reasonably be held, from his going in and out of the premises, to have notice of an obstruction in the pavement in front of them as soon as it exists; but not so with the landlord, who may not even live in the same town or city, or, if living in it, far away from the property occupied by his tenant. From all that appears in the present case, the brick may have been removed so shortly before the accident that even the tenant may not have noticed the hole, and

therefore was not negligent in not filling it up. The gist of plaintiff's case is the alleged negligence of the defendant, and she can establish this, if at all, only by showing that it had not filled up the hole after notice of its existence. No such negligence appears, and, unless an owner of property out of possession of it, and while it is actually occupied by a tenant under a lease from him, is bound to keep constant watch over the pavement in front of it, and the instant the same becomes out of repair to repair it, the plaintiff cannot recover. No such harsh and unreasonable rule can be applied to this landlord, for no such rule exists."

"And again (from *Chroust v. Association*, 214 Pa. 179, 63 Atl. 595): 'Even if the obstruction was one which an owner in any event was bound to remove, an owner out of possession of premises which are in the actual occupation of a tenant cannot be held liable without proof of an obligation to repair, and notice of the necessity of doing so.'

"Thus it appears that obligation and notice must concur, in order to hold the landlord.

"The obligation may spring from private contract or from public duty.

"For defects which arise during the lease, the lessor may be liable, either by private agreement with his lessee or by public requirement, provided in each case he have notice, actual or constructive, of the defects. The public duty of the lessor is not divested by making the lease, but only qualified in respect to the notice, which, on account of his nonoccupancy, he should in all fairness receive.

"In the present case, these features appear, viz.: (a) An ordinance of the borough expressly imposed upon the defendant, as owner, the duty of making repairs. (b) The culpable condition of the sidewalk consisted of more than a particular isolated defect, and amounted in fact to a general state of decay, which gave its own constructive notice. (c) The borough gave to the defendant express notice of the condition, with direction to repair, eight weeks before the accident. (d) The defendant disregarded the notice.

"In our opinion, it is a case in which obligation and notice concur to hold the defendant liable, notwithstanding the lease, if the other questions involved do not prevent such a conclusion.

[2] "2. Is the action defeated by contributory negligence of the borough?

"The principle underlying the right to be reimbursed for damages paid by a municipality in cases of accident is that the owner or occupier of the property as the case may be is primarily liable to the person injured.' *New Castle v. Kurtz*, 210 Pa. 183, 59 Atl. 989, 69 L. R. A. 483, 105 Am. St. Rep. 798.

"The rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity or contribution does not

apply to a case where one does the act, or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. In such cases the parties are not in *pari delicto* as to each other, though as to third parties either may be held liable. The claim is not for contribution, but to recover from the property owner the amount the borough was compelled to pay in consequence of his neglect to do what he should have done. If the injury resulted from the property owner's neglect, the injured party has the right to elect as to which he will proceed against. Under the recent decision of the Supreme Court, in *Dutton v. Lansdowne Borough*, 198 Pa. 563, 48 Atl. 494, 53 L. R. A. 469, 82 Am. St. Rep. 814, the municipality and property owner cannot be sued jointly.' *Fowler v. Jersey Shore Borough*, 17 Pa. Super. Ct. 366.

"Hence, notwithstanding the secondary liability of the municipality against which the person injured may at option proceed, and notwithstanding the principle of noncontribution among joint tort-feasors, which would ordinarily shut off recourse, the negligent municipality is permitted to seek reimbursement from the negligent owner or occupier. While both may be equally responsible for the wrongful condition in their relation to the person injured thereby, they are not so in relation to each other; but the municipality stands upon a superior plane, on account of the primary duty resting upon the owner or occupier.

"The liability of the municipality in these cases under ordinary circumstances is of a technical character, not involving positive delinquency on its part; but there are exceptional cases in which positive delinquency of the municipality is involved, so that its right of reimbursement may be extinguished on the principle of contributing or participating negligence.

"Illustration of this may be found in the case of *New Castle v. Kurtz*, 210 Pa. 183, 59 Atl. 989, 69 L. R. A. 488, 105 Am. St. Rep. 798, *supra*. Judgment there had been recovered against the city for damages sustained by a fall upon the sidewalk due to a ridge of ice, and the city sought reimbursement from the owner. There was a municipal ordinance which required the owner or occupier to remove ice and snow within 48 hours and provided that upon their failure the municipality would do the work and collect the expense, with a penalty. The premises were occupied by a tenant, and the owner was undoubtedly not liable for want of notice, but the Supreme Court held him not liable for the further reason that the municipality itself, having undertaken by its ordinance to remove the defect, and having failed to do so, was guilty of wrong which debarred it from being reimbursed.

"In the case at bar, the ordinance provides 'that when any * * * sidewalk gets out of proper repair so as to become dangerous

or a nuisance * * * it shall be the duty of the owner or owners of such lot or lots where such danger or nuisance exists to have the said sidewalk put and kept in proper repair at his own proper cost and expense, and in case of neglect or refusal it shall be the duty of the burgess to cause a notice to be served upon the person or persons so neglecting or refusing to have said repairs made forthwith and if not done within forty-eight hours after the service of such notice then it shall be the duty of the burgess to have or cause the same to be done and charge the full cost of such repairs, together with twenty per centum advance thereon and collect the same as such claims are by law collected.'

"The defendant contends that the clear effect of the decision in *New Castle v. Kurtz*, 210 Pa. 183, 59 Atl. 989, 69 L. R. A. 488, 105 Am. St. Rep. 798, is to defeat reimbursement, where such an ordinance exists, and therefore to defeat recovery in the present case. It is plain, however, that the controlling consideration in that case was the absence of notice to the owner, which 'negatived an equal liability basis upon which to build a right in equity for subrogation against the owners of the property, not in occupancy, and without the slightest knowledge or information in regard to the condition of the pavement,' while the distinguishing consideration in this case is the presence of that very notice which preserved between borough and owner the 'liability basis.'

"We are unable to believe that the Supreme Court intended to assert a proposition which would simply make municipalities the victims of their own case in adopting ordinances to secure performance of private duty for public benefit. Hence we hold that the action is not defeated by contributory negligence.

[3] "3. Is the action barred by limitation?

"The accident occurred August 2, 1902; the action against the borough was instituted on December 16, 1903; the notice to defend was given on May 5, 1904; final judgment was recovered on April 30, 1906; actual payment by the borough was made on May 23, 1906; and the present suit was begun August 24, 1907.

"The defendant urges that the limitation is two years from the date of accident (August 2, 1902), citing the act of June 24, 1895 (P. L. 236), and claiming that the municipality's right of subrogation can only be coextensive with the liability upon which it is predicated.

"The said act, however, in terms applies only to the claim of the person injured, and does not apply at all to the cause of action which belongs to the municipality for reimbursement. That cause did not arise and could not arise until final judgment at least (April 30, 1906), or perhaps not until payment (May 23, 1906); and the right of subrogation, if it may be properly designated

such, could not come into existence before one or the other of those dates, both within two years of this action, brought August 24, 1907, if two years indeed, and not six years, be the limitation in actions of this character. It should be observed, also, that the notice to defend was given May 5, 1904, within two years of the accident (August 2, 1902).

"We think the borough did all that the law requires to preserve the right of recourse, and we therefore hold that the action is not barred by limitation.

"The motion for judgment non obstante veredicto is denied, judgment upon the verdict is directed in favor of the plaintiff, and an exception to this action of the court is granted to the defendant."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Arthur Hillman, Thomas W. Hart, and Andrew H. McClintock, for appellant. George L. Fenner, for appellee.

PER CURIAM. We concur in the conclusion stated in the opinion of the learned judge of the common pleas in discharging the rule for judgment non obstante veredicto.

RITTENHOUSE et al. v. NEWHARD.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WATERS AND WATER COURSES (§ 158½*)—WATER SUPPLY—INJUNCTION AGAINST SHUTTING OFF.

Where the agreement between plaintiff and defendant for the maintenance of a water supply, on which the plaintiff's right to enjoin defendant from shutting off the flow of water in a pipe was based, is not established, the bill for injunction is properly dismissed.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 158½.*]

2. EQUITY (§ 427*)—PLEADING—ISSUES AND PROOF.

Where an agreement, on which is based the plaintiff's claim for equitable relief, is not proven, a contention that the bill should be sustained on the grounds of ratification and estoppel cannot be maintained, in the absence of averments of such grounds in the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

Appeal from Court of Common Pleas, Columbia County.

Bill in equity by Tillmon Rittenhouse and others against Peter H. Newhard. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Fred Ikeler, for appellants. Grant Herring and W. E. Elmes, for appellee.

PER CURIAM. This bill was for an injunction to restrain the defendant from shutting off the flow of water in a pipe that extended from a spring on his land to the land of an adjoining owner, and thence to the plaintiffs' properties in a village near by. The rights claimed by the plaintiffs were based on the allegation that a verbal agreement had been made between them and the defendant for the construction and maintenance of the line of pipe. This allegation was not sustained by proof.

The material findings of fact are that prior to 1888 the water from a spring on the defendant's land ran in an open channel some 1,500 feet in length to the property of the Mountain Grove Camp Meeting Association where it was collected in a small reservoir for the use of the association. From that reservoir, a pipe extended to the houses of the plaintiffs. In 1888, the association, wishing to obtain a purer supply of water, entered into a verbal agreement with the defendant by which it was permitted to enter on his land and dig a ditch and lay a pipe from the spring to the line of its property and it agreed to lay a branch pipe from the main line on defendant's land to his buildings and to provide a hydrant and keep it in repair. This agreement was to last as long as the association continued to hold camp meetings on its land, and no longer. The association purchased the materials necessary, and subsequently entered into an agreement with the plaintiffs, under which they assisted in the installation and maintenance of the pipes and hydrant. To this agreement the defendant was not a party, and he had no knowledge of it at the time it was made. The association was dissolved and went out of existence in 1901.

[1,2] The bill was properly dismissed, because of the failure to establish the agreement on which the right to equitable relief was based. The contention that the bill should have been sustained on the grounds of ratification and estoppel is without merit. There was proof of neither, nor of any facts from which either would arise. But, if there had been proof, the bill could not have been sustained. Relief cannot be granted for matter not alleged. *Luther v. Luther*, 216 Pa. 1, 64 Atl. 868.

The decree is affirmed, at the cost of the appellants.

VANDERSLICE v. IRONDALE ELECTRIC LIGHT, HEAT & POWER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

JUDGMENT (§ 606*)—BAR OF CAUSE OF ACTION—CONTINUING TRESPASSES.

Where a landowner recovers of a corporation for the entire destruction of the beneficial use of land flooded by the seepage of water from

a raceway operated by the corporation, a subsequent grantee of the land cannot recover either compensatory or punitive damages for the later loss of crops or injury to the use and occupation of the same land, where no change in the condition of the raceway or increase in the seepage therefrom or of the amount of land flooded is shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1120; Dec. Dig. § 606; * Nuisance, Cent. Dig. § 100.]

Appeal from Court of Common Pleas, Columbia County.

Action by George Vanderslice against the Irondale Electric Light, Heat & Power Company. From a judgment for defendant non obstante veredicto, plaintiff appeals. Affirmed.

The facts appear in the opinion of McClure, P. J., specially presiding, as follows:

"There is no rule of law which will permit one man to take possession of another's property, and then force him to accept damages in lieu of his right to recover the possession of it. He cannot compel him to part with his property even for a full price. *McCoy v. Danley*, 20 Pa. 85, 57 Am. Dec. 680. Accordingly, one who has been deprived of the use of his land by the casting of water or other substance upon it may bring successive actions for damages to the use, and thus compel the abatement of the nuisance. He is not bound to assume that the structure which causes the injury will be a permanent one, and therefore sue for all damages for past and future injury to his land; but he can regard the nuisance as of a transient character, and, instead of bringing an action for the whole injury to the value of his property, he may sue for the amount of such injury as he suffers from the continuance of the nuisance. *C., B. & Q. R. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239. An owner has the right, however, to elect to treat an obstruction in a stream which backs water upon his land, or, as here, a raceway which casts water upon it, as permanent in character, and gauge his recovery accordingly. If he so elects, declares for a permanent injury to his freehold, offers evidence in support of it, has his damages assessed on the basis of a total loss of the land flooded, and receives satisfaction at the hands of the defendant, how can he again recover damages for a continuing injury to the same land, caused by the same dam or raceway, without evidence of aggravation? If he can, then what is the measure of damages? Can he compel the defendant to pay him the market value of his land a second time, or will the recovery be limited to the value of the crops he might have raised upon it since the former action? If the latter, upon what principle should a wrongdoer be forced to pay for the use of that for which he has paid the owner full value? If a party for an injury to his property elects to proceed by an action of trespass for its value, he in

effect abandons his property to the wrongdoer; so that when judgment is obtained, and satisfaction made, the property is vested in the defendant by relation as of the time of the taking or conversion. 1 Herman on Estoppel, 214. So, also, the doctrine as to realty is that, where the injury is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and no other action can be maintained for the continuance of the injury. 1 Herman on Estoppel, 235. And the rule is the same where the injury to the property resulted from a cause which may not be permanent in its character, if it was treated as permanent by the parties to the action. *Hartman v. Incline Plane Co.*, 11 Pa. Super. Ct. 438.

"Albertus W. Welliver, the plaintiff's grantor, in his action against the defendant, declared that the water seeping through the banks of the defendant's raceway destroyed his crops, flooded his system of underdrains, and permanently rendered about eight acres of his land unproductive and unfillable; that his fields were permanently damaged, rendered boggy, swampy, and unfit for cultivation, depriving him of the use of the same for agricultural purposes, etc. Welliver offered no proof of loss of his crops, or the cost of restoring his system of underdrains, nor of the cost of draining off the water which was then upon his fields, but he treated the race as a fixture, and the percolation through its banks and the flooding of his land of a nature that would continue for all time to come, and by proving the cost of the prevention of the flooding to exceed the market value of his land he thereby established the market value as the measure of his damages.

"Had the defendant preferred to reconstruct its raceway so as to prevent future percolation rather than to pay damages for a permanent injury to the plaintiff's land, it could have objected to his evidence of the cost of prevention, driven him to proof of the cost of restoration alone, and thus limited his recovery to damages which had accrued prior to the trial (*Aldworth v. Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608), in which event the judgment would have been no bar to the present action. But the defendant interposed no objection to the introduction of this evidence, and the plaintiff on the basis on which he staked his claim, viz., a permanent injury to his freehold, was permitted to recover damages for the entire destruction of the beneficial use of all his flooded land. This should, and in our opinion did, end further liability to Welliver (*Hartman v. Incline Plane Co.*, 11 Pa. Super. Ct. 438); and Vanderslice, his grantee, cannot be heard to say that he received no compensation for future injuries. He took the land burdened with the seepage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from the race. In this action the word "permanent" does not appear in the declaration, and the proof went to the loss of the crops or injury to the use and occupation of the same land since the former trial. No change was shown in the condition of the raceway, nor increase in the seepage thereupon; and, while the water had risen a little higher on plaintiff's land, no more of it was flooded. We are accordingly of the opinion that the defendant's second point ought to have been affirmed, and the plaintiff should not have been permitted to recover compensatory damages, because his predecessor in title elected to treat the seepage as permanent in character and had already recovered at the hands of the defendant full compensation for past and future injuries to his flooded land. It follows that exemplary damages should not have been allowed, for the defendant had done the plaintiff no wrong. Judgment is now directed to be entered for the defendant non obstante veredicto."

Argued before FELL, C. J., and MES-
TREZAT, POTTER, ELKIN, and MOSCH-
ZISKER, JJ.

Fred Ikeler, T. J. Vanderslice, and H. Mont. Smith, for appellant. William H. Sponsler and Albert W. Duy, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge McClure, specially presiding.

HARVEY v. WEITZENKORN.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CORPORATIONS (§§ 83, 84*)—STOCK—SUBSCRIPTIONS—CANCELLATION.

A corporation may release a subscriber for stock so as to estop it from suing thereon; the contract, like any other, being subject to waiver, cancellation, or dissolution by mutual consent of all the parties interested.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-328; Dec. Dig. §§ 83, 84.*]

2. JUDGMENT (§ 106*)—RULE FOR JUDGMENT—AFFIDAVIT OF DEFENSE.

An order discharging a rule for judgment for want of a sufficient affidavit of defense will not be reversed, except where a pure question of law is raised, and clear error has been committed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 188-192; Dec. Dig. § 106.*]

3. JUDGMENT (§ 159*)—RULE FOR JUDGMENT—AFFIDAVIT OF DEFENSE.

In an action by a trustee of a bankrupt corporation for the amount of a subscription to its stock, an order discharging a rule for judgment for want of a sufficient affidavit of defense will not be reversed, where the affidavit alleges that the subscription was conditional and under a collateral agreement, by which he was given three months to decide whether he would take the stock, and that when he refused to take it the corporation canceled the subscription while still a solvent, going concern.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 159.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Olin F. Harvey, Jr., trustee of the Dion Manufacturing Company, bankrupt, against Joseph K. Weitzenkorn. From an order discharging a rule for judgment, the plaintiff appeals. Affirmed.

Assumpsit on stock subscription. Rule for judgment for want of a sufficient affidavit of defense. The material portions of the affidavit of defense were as follows:

"Defendant avers that prior to July 16, 1907, the date set forth in plaintiff's statement of defendant's purported subscription of shares of the capital stock aforesaid, he was approached on two separate occasions by W. E. Steelman and H. B. Payne, who solicited defendant to become a subscriber for said stock; that on both occasions he refused to subscribe, and told said Steelman and Payne that, owing to alterations and changes then in contemplation and being made in the business establishment of his firm, which required a large outlay of money, it would be impossible for him (the defendant) or his partners to subscribe for any stock; that on July 16, 1907, Messrs. Steelman and Payne again solicited defendant for a subscription, and he again refused, repeating to them the reasons therefor; that Mr. Steelman, who represented himself as vice president and general manager of the Dion Manufacturing Company, then stated that they wanted defendant's subscription to the stock for the influence his name might have towards helping them to get other subscribers, and proposed to defendant that he should subscribe conditionally, and if he decided later on that he did not want the stock, the Dion Manufacturing Company would release him (the defendant) from any obligations, and permit him to cancel said subscription without cost to him.

"Defendant then stated to Steelman and Payne that if the proposal last aforesaid was put in writing he would agree to subscribe upon the conditions named. On the same day defendant received from said W. E. Steelman, vice president and general manager of the Dion Manufacturing Company, a letter in words and figures following: 'July 16, 1907. Mr. Joseph K. Weitzenkorn, Wilkes-Barre, Penna.—Dear Sir: Confirming our verbal proposition of this morning, we beg to advise that we will take your subscription to our capital stock and if at the expiration of three months you decide that you cannot take the stock subscribed for, we will release you of the obligation without cost to you. Thanking you for any consideration you may give us, we are, Yours very truly, Dion Manufacturing Company. [Signed] W. E. Steelman, Vice Pres. & Gen. Mgr.' And thereupon he (the defendant)

subscribed for 15 shares of the stock aforesaid, said subscription being made by the defendant upon the expressed condition named in said above-quoted letter; it being fully understood and agreed between said Steelman and himself that the said subscription should not become binding and effective, unless it was subsequently ratified and consummated by the defendant in accordance with the terms of said written proposal.

"Defendant avers that afterwards no further communication was had between himself and any one else in relation to the matter until, on October 18, 1907, he received a letter from the Dion Manufacturing Company in words and figures following: 'October 18, 1907. Mr. J. K. Weltzenkorn, No. 4 S. Main St., City—Dear Sir: We hand you herewith notice of your subscription to the capital stock of this company, and will appreciate it very much if you will send us a check for the same. We are operating our plant, and need the money in order that we may put our product on the market. Yours very truly, Dion Manufacturing Company. [Signed] E. C. Wagner, Treasurer.' That immediately upon receipt of the letter last aforesaid he replied thereto in a letter to Dr. E. C. Wagner, treasurer (a copy whereof is hereto attached and made part hereof), wherein he declared his decision not to take the stock conditionally subscribed for, and asked that his name be stricken from the subscription list. And defendant avers that from that time on up to May 25, 1909, when he received a letter from O. F. Harvey, Jr., which letter was in words and figures following: 'May 25, 1909. In re Dion Mfg. Co. Joseph K. Weltzenkorn, Weltzenkorn Bldg., City—Dear Sir: I was duly elected trustee of the Dion Manufacturing Company, bankrupt, and upon going through the books of the company, I find that you made a subscription to the capital stock of the company in the sum of fifteen hundred (1,500) dollars, which has not been paid. As this is an asset of the company, I am obliged to call upon you for payment, and trust that you will favor me with your check at an early date for the above amount. Yours very truly, [Signed] Olin F. Harvey, Jr.'—no demand, verbal or written, of any kind or character, was ever made upon him for any payment, nor was notice of any call or assessment upon such subscription of stock ever given him by the said Dion Manufacturing Company, or any one representing or claiming to represent said company; that he was never notified to attend a meeting of the Dion Manufacturing Company; never did attend any meeting thereof; never had any knowledge of its business; and never at any time regarded himself, nor was any notice brought to him that he was regarded by said company, or its officers, as a stockholder thereof or therein.

"And defendant further avers that he had

been informed, verily believes, and expects to be able to prove upon the trial of this cause that the Dion Manufacturing Company, by its constituted authorities, upon receipt of defendant's letter declaring his decision not to take the stock thus conditionally subscribed for, canceled the said subscription, and while a solvent going concern, never entered the defendant's name upon its books or account as a subscriber, or treated said subscription as an asset of the company."

The court discharged the rule for judgment for want of a sufficient affidavit of defense.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Andrew Hourigan and Thomas Butkiewicz, Jr., for appellant. Joseph D. Coons, for appellee.

POTTER, J. The appellant here alleges that the court below erred in discharging a rule for judgment for want of a sufficient affidavit of defense. The action was assumpsit to recover the amount of a subscription to capital stock. In his affidavit of defense, the defendant alleged that his subscription was conditional, and was made under a collateral agreement, by which he was allowed three months' time in which to decide whether he would take the stock or not. Neither the statement of claim nor the affidavit of defense makes it clear whether the company had been incorporated at the time the subscription was taken. While our cases seem to make a distinction between conditional subscriptions to the capital stock of a corporation, made before incorporation, and those made afterwards, yet the rights of co-subscribers are not to be injuriously affected by any secret agreement. Where other subscriptions are made upon the faith of a signature, it would be unjust to permit a secret arrangement to prevail. See *Miller v. Hanover Junction R. R. Co.*, 87 Pa. 95, 30 Am. Rep. 349. This case was cited in *Moore v. Railroad Co.*, 94 Pa. 324, 328, where it was said: "The defendant Miller set up a secret parol condition in order to defeat his subscription, but it was held that he could not be permitted so to do, on the ground that it would be unjust and a fraud upon his co-subscribers to permit him, on such grounds, to escape responsibility, and thus throw upon them an additional burden." See, also, *Phila. & Del. County R. R. Co. v. Conway*, 177 Pa. 364, 35 Atl. 716; *Marles Carved Moulding Co. v. Stulb*, 215 Pa. 91, 64 Atl. 431. In *Real Estate Trust Co. v. Manufacturing Co.*, 223 Pa. 350, 356, 72 Atl. 695, it was held that a subscriber to the stock of a corporation could set up a secret parol agreement in defense to an action by the assignee of the company, to recover the amount of the subscription, only because,

under the terms of the subscription agreement, if he should be relieved of liability, all the other subscribers would also be released.

[1] Under these and other general authorities which might be cited, the right of the defendant to successfully set up a collateral agreement seems doubtful. But in his affidavit of defense he goes further, and avers that after he had declined to take the stock, and while the company was still a solvent, going concern it canceled his subscription. The general rule is that "a corporation may release a subscriber, so far as to estop it and its assignee in insolvency from suing thereon." 4 Thompson on Corporations (2d Ed. 1909) § 3869. "A subscription contract, like any other contract, may be waived, canceled, or dissolved by the mutual consent of all the parties interested. The interested parties are the subscriber himself, the other stockholders, and the corporate creditors existing at the time of the cancellation." 1 Cook on Corporations (6th Ed. 1906) § 168. "Such cancellations are good when permitted by the governing statute, where there are no creditors, and provided all the stockholders assent." 10 Cyc. 452.

[2] The affidavit is not as specific as it might be in setting out the facts as to the alleged cancellation, and does not set out the manner in which it was done; but it does aver, on information and belief, that the corporation, "by its constituted authorities," canceled the subscription. An order discharging a rule for judgment for want of a sufficient affidavit of defense, will not be reversed, except where a pure question of law is raised, and clear error has been committed. *Wilson v. Trust Co.*, 225 Pa. 143, 73 Atl. 1071, and cases there cited.

[3] The present case is by no means so clear as to warrant us in reversing the order of the court below. The specification of error is overruled, and the judgment is affirmed.

HOULEHAN v. INHABITANTS OF KENNEBEC COUNTY.

(Supreme Judicial Court of Maine. Nov., 1911.)

1. FINES (§ 19*)—PAYMENT—RIGHT TO RECOVER.

Plaintiff having been convicted of offenses, and sentences of fines and imprisonment imposed, the sentences were subsequently amended, in vacation, after adjournment of a term held subsequent to that at which the sentences were awarded, at plaintiff's instance, to impose \$1,000 fine or 30 days imprisonment in one case, punishment in the other case being suspended. The \$1,000 was paid. *Held*, that plaintiff cannot recover the payment; it having been made voluntarily and pursuant to an unlawful arrangement.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 20-22; Dec. Dig. § 19.*]

2. PAYMENT (§ 84*)—MISTAKE—RIGHT TO RECOVER.

Money paid under mistake of law, with full knowledge of the facts, is not recoverable, un-

less the payment was induced by fraud, or imposition, or undue influence.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 267-271; Dec. Dig. § 84.*]

3. FINES (§ 19*)—PAYMENT—MISTAKE—RIGHT TO RECOVER.

A fine, illegally imposed, but voluntarily paid under mistake of law, is not recoverable.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 42, 43; Dec. Dig. § 19.*]

Report from Supreme Judicial Court, Kennebec County, at Law.

Action by Peter Houlehan against the Inhabitants of Kennebec County. On report. Judgment for defendants.

Action of assumpsit for money had and received, brought in the Supreme Judicial Court, Kennebec County. An agreed statement of facts was filed, and the case reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

George W. Heselton, for plaintiff. Williamson, Burleigh & McLean, for defendants. Joseph Williamson, Co. Atty., filed a brief for the State.

BIRD, J. [1] This action for money had and received is before us upon report on agreed statement of facts. From the statement it appears that, at the January term, 1910, of the superior court of Kennebec county, verdicts of guilty were rendered upon sundry indictments against plaintiff, and subsequently, at the same term, sentence was imposed upon each of the indictments; that upon two of the indictments the sentences involved a pecuniary fine and imprisonment; that exceptions were taken in all the cases, and bond given for their prosecution; that on the 27th day of April, 1910, after the final adjournment of the April term, 1910, of said court, and in vacation, in the presence of plaintiff, his counsel, his bondsmen on exceptions, and the clerk of courts, and without knowledge of the county attorney, the justice of said court "amended the said sentences," and in one of the cases imposed a sentence of \$1,000 fine or 30 days in jail, and ordered the entry: "Exceptions withdrawn. On file"—to be made in the other cases; that the "amended sentence" was made on condition that it should be immediately performed, and, in addition, that a bond with sureties should be given by plaintiff, then defendant, to violate none of the provisions of the law under which the indictments had been found; that defendant, now plaintiff, requested a nol. pro. of all the cases upon the payment of the fine of \$1,000 and the giving of the bond; that the justice of the court refused, stating that, if the bond was performed, nothing further would be heard from the cases, but that the filing of the other cases after payment of the fine of \$1,000 would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be an additional assurance that the bond would not be broken; that the defendant, "thus assured that the cases were disposed of and would never be called up, unless he violated his peace bond, and having the alternative to pay or go to jail" on the indictment in which the "amended" fine of \$1,000 had been imposed, paid the clerk of courts the fine of \$1,000, and on the same day the clerk of courts paid it to the treasurer of defendant county, who made due entry of the amount upon his books as received in payment of the fine; that on the 27th day of June, 1910, all the cases were certified to the law court, and there entered as in order for hearing upon the original exceptions, where they are now pending; that in August, 1910, demand was made on defendant county, through its county commissioners, for the return of the \$1,000 so paid, which the commissioners on the 16th day of September, 1910, declined to make. The writ is dated September 16, 1910.

[2] The payment made by plaintiff was not only not made under mistake of fact, but with full knowledge of the facts. And the authorities are abundant that both at law and in equity money paid under mistake of law, with full knowledge of the facts, is not recoverable, unless the payment was induced by the fraud or imposition or the undue advantage of him who received it, or was made under duress. *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Norris v. Blethen*, 19 Me. 348, 351; *Parker v. Lancaster*, 84 Me. 512, 517, 24 Atl. 952; *Marcotte v. Allen*, 91 Me. 74, 39 Atl. 346, 40 L. R. A. 185; *Coburn v. Neal*, 94 Me. 541, 48 Atl. 178; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361, 365.

There is no suggestion even in the agreed statement that the payment was induced by fraud, imposition, or undue advantage. Nor was there duress. There was no imprisonment, or threatened imprisonment. Unquestionably none of the parties present when the sentence was "amended" contemplated anything in execution of the "amended" sentence but payment of the fine. The agreed statement shows that the present plaintiff must have so regarded it when he requested the justice to nol. pros. all the indictments upon the payment of the fine of \$1,000 and the giving of the bond. We cannot infer force or threat in fact from the facts of the agreed statement (*Trafton v. Hill*, 80 Me. 503, 15 Atl. 64); still less that any force or threat induced the payment (*Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76).

It is true that the agreed statement alleges that, when the sentence and docket had been "amended," the plaintiff had the alternative to pay the fine of \$1,000 or go to jail. But, as we have seen, the payment of the fine only was contemplated. No

mittimus was issued, nor was its issue suggested. The conference was held for the purpose of relieving the plaintiff from imprisonment under the lawful sentences which would be in effect if his exceptions were heard and overruled. The whole transaction was improper, illegal, and in defiance of law, and in it the plaintiff was a prominent and the most interested actor. He must be left where his illegal act placed him. To hold otherwise would be in violation of every consideration of public policy.

[3] The proposition that a fine illegally imposed, but voluntarily paid under mistake of law, cannot be recovered back, is supported by ample authority. *Harrington v. New York*, 40 Misc. Rep. 165, 81 N. Y. Supp. 667, Comm. v. Gipner, 118 Pa. 379, 12 Atl. 306; *Bailey v. Paullina*, 69 Iowa, 463, 29 N. W. 418; *McKee v. Anderson*, Rice (S. C.) 24. See, also, *Houtz v. Uinta County*, 11 Wyo. 152, 70 Pac. 840.

If the plaintiff considers it a case of hardship, in the event that judgment be finally entered for the state upon the indictments, redress cannot be afforded the plaintiff by the judicial courts.

Judgment for defendants.

STATE v. CRAY.

(Supreme Court of Vermont. Chittenden.
Oct. 9, 1911.)

HEALTH. (§ 37*)—OFFENSES—DISTRIBUTING SAMPLE DRUGS—LIABILITY.

Under P. S. 5902, punishing one who distributes or causes to be distributed a trial sample of a medicine, by leaving the same exposed, so that children may become possessed thereof, a master is liable for the acts of his servant in distributing a free sample of medicine by handing the same to a child four years old, though the servant acts in violation of the express instructions of the master; the question of intent being immaterial.

[Ed. Note.—For other cases, see *Health*, Dec. Dig. § 37.*]

Exceptions from City Court of Burlington; E. C. Mower, Judge.

Eugene J. Cray was convicted of distributing free samples of medicine, and he brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Henry B. Shaw, State's Atty., and Guy B. Horton, for the State. Max L. Powell, for respondent.

WATSON, J. The respondent is complained against for distributing and causing to be distributed at Burlington, on the day named, a free sample of a certain medicine known as "De Witt Kidney and Bladder Pills," by handing the same to one Rosie Parrotti, a child of the age of four years, in violation of the provisions of P. S. 5902. By that section,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"a person, firm or corporation that distributes or causes to be distributed a free or trial sample of a medicine, drug, chemical or chemical compound, by leaving the same exposed upon the ground, sidewalks, porch, doorway, letterbox, or in any other manner, that children may become possessed of the same, shall be fined," etc.

No question is made but that on the facts presented this statute was violated at the time and place and in the manner set forth in the complaint, not by the respondent in person, but by his agent or servant, acting with him in distributing at houses in Burlington free samples of the pills named. The record shows that, before sending this agent or servant out to make such distribution, the respondent expressly cautioned and instructed him against delivering the sample boxes to children. The sole question, therefore, is whether the master is liable under the statute for the acts of his servant in violation thereof against his general instructions.

This statute is in exercise of the police power, for the general protection by the state, as *parens patriæ*, of children within its domain; they being incapable of protecting themselves. At common law infants, as well as idiots, are under the care and protection of the sovereign, as persons equally unable to take care of themselves. *Eyre v. Countess of Shaftsbury*, 2 P. Wm. 102. Lord Hardwicke said that, "in respect of lunatics, idiots, and infants, the king is bound to take care of them." *Smith v. Smith*, 3 Atk. 304. This legislation does not prohibit the distribution of free or trial samples of such articles as are therein named, but it does undertake to regulate their distribution in the interests of humanity, by making it a technical crime to leave the article exposed in the places named, or in any other manner, whereby the possession thereof may be had by children, persons of limited understanding, perhaps to their own injury, or to the injury of others of the same class. It pertains to their physical well-being, and hence to the interest of the state.

The action given for its violation, though criminal in form, is in substance more particularly civil in nature, designed to prevent the recurrence of that which constitutes a public nuisance. No private action can be had by a person to recover damages for a public nuisance, nor for an injunction to abate such nuisance, unless he has suffered an injury peculiar to himself beyond that by the rest of the public. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84; *Sargent v. George*, 56 Vt. 627. It is the general rule that common nuisances against the public are punishable only by indictment. In *State v. Vermont Central R. Co.*, 27 Vt. 103, the railroad company was indicted for a nuisance in obstructing a public highway, by building and maintaining their depots within its limits, and by "unlawfully and injuriously suffering their engines and cars,

and also horses, carts, wagons, etc., to remain in said highway, a great and unreasonable length of time." It was contended that the corporation was not liable to indictment because its agents and officers had erected and maintained a common nuisance, but that the only remedy was against such officers and agents; that it cannot be indicted for positive misfeasance of its agents, inasmuch as such persons are not the company's agents for any such purpose. Holding the corporation liable, the court said an indictment for a nuisance is only a mode of trying the right, in a public form, the same right that is involved in every private action, for the same reason.

In *Reg. v. Stephens*, Law Rep. 1 Q. B. 702, the respondent was indicted for obstructing the navigation of a public river by casting and throwing, and causing to be cast and thrown, slate, stone and rubbish in and upon the soil and bed of the river, etc. The respondent was the owner of a slate quarry, but because of his great age was unable personally to superintend the working of it. Quantities of rubbish from the quarry were from time to time shot by respondent's workmen on a certain spot, from which it slid into the river, by means of which navigation was obstructed. Respondent was prepared to offer evidence that the workmen had been prohibited by him and his sons from thus depositing the rubbish, and that they had been told to place it in a certain other place provided for that purpose. The trial judge intimated that this evidence was immaterial, and instructed the jury that, as the respondent was the proprietor of the quarry, the quarrying of which was carried on for his benefit, it was his duty to take all proper precautions to prevent the rubbish from falling into the river, and that if a substantial part of the rubbish went into the river, from having been improperly stacked so near the river as to fall into it, the respondent was guilty of having caused a nuisance, although the acts might have been committed by his workmen, without his knowledge and against his general orders. A rule having been obtained for a new trial, on the ground that the judge misdirected the jury that the respondent would be liable for the acts of his workmen in so depositing the rubbish as to become a nuisance, though without his knowledge and against his orders, Judge Mellor said that, though an indictment, it was in substance in the nature of a civil proceeding; that the only reason for proceeding criminally was that the nuisance affected the public at large, and no private individual, without receiving some special injury, could have maintained an action; that the respondent found the capital and carried on the business which caused the nuisance, and it was carried on for his benefit; that the respondent could not say that,

because he had given direction so to carry on the business as not to allow the refuse from the works to fall into the river, he was not liable on the indictment for a nuisance caused by the acts of his servants; that he must have given to his servants or agents all the authority that was incident to the carrying on of the business; and that it was necessary to prove only that the nuisance was caused in the carrying on of the works of the quarry. In this opinion Judge Shee concurred. Judge Blackburn said it was only necessary to say that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon the public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. This was not regarded as any infringement upon the general rule that a master is not criminally answerable for the act of his agent. The rule was discharged.

In *Brown v. Foot*, 68 L. T. (N. S.) 649, the appellant, a seller of milk, was convicted in the court below for violating a statute creating a penalty for the sale of adulterated milk to a purchaser to his prejudice. The milk sold was adulterated, without the cognizance of the master, by his servant, employed in the general business of selling milk for the master. Affirming the conviction, it was said by Judge Wills that the master was bound, not only not to sell an adulterated article himself, but to take care that other people do not sell it for him; that, if he does not take that care, he breaks the act of Parliament; that, as the servant was acting within his orders in selling, what he did wrongly in the scope of his employment was a matter for which the master was liable, because it was his business to see that within the scope of the delegated authority the servant carried out the act of Parliament, just as much as he did himself. To the same effect are *Rex v. Medley*, 6 C. & P. 292, 25 E. C. L. 439, and *Parker v. Allen* [1899] 1 Q. B. D. 20.

In *State v. Gilmore*, 80 Vt. 514, 68 Atl. 658, 18 L. R. A. (N. S.) 786, the statute prohibiting a licensee from selling or furnishing intoxicating liquor to a minor for his own use or for the use of any other person was involved. The servant of the respondent, a first-class licensee, contrary to his principal's instructions not to sell to minors, sold intoxicating liquor to a minor, taking pay therefor. The liquor sold was taken from the respondent's stock of liquors, kept by him for sale under his license. It was held that the respondent could not delegate the conduct of the business to an agent, with instruction not to sell

to minors and himself escape liability if the agent violates the law in this regard; that the offense was complete when such sale was made under and by virtue of the license, and in the line of the respondent's business as licensee, and it was immaterial whether the act was done by the licensee himself or by his servant; that when he engaged in the business he assumed all the risk of his employes violating the conditions of his license, and their acts were his acts, when done in carrying on the licensed business.

Under these authorities the question of intention is immaterial. The statute looks at and punishes the act constituting the offense, without regard to the intention of the person by or for whom the distribution was made. A person may lawfully distribute such articles as are named in the statute, if he observes its provisions. If he employs an agent for that purpose, it is his duty to know that the law regulating the manner of distribution be not violated, and in case of its violation by such agent in the performance of the duties of his agency the principal is not absolved from responsibility by showing that in the manner of the work the violative acts were contrary to his previous general instructions. It follows that, notwithstanding the distribution alleged was in fact by the respondent's agent, and contrary to his general instruction against delivering to children, yet, as it was done by the agent in distributing samples furnished him by the respondent for that purpose, acting under the respondent's orders, and in the prosecution of the respondent's business, for which he was employed, the distribution was caused by the respondent, within the meaning of the statute, and he is answerable therefor.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exceptions. Let execution be done.

HUNTLEY et al. v. HOUGHTON et al.

(Supreme Court of Vermont. Windham.
Oct. 18, 1911.)

1. DEEDS (§ 93*)—CONSTRUCTION—INTENT OF PARTIES.

In construing the descriptive part of a deed, the intention of the parties should control, when it can be ascertained therefrom.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

2. DEEDS (§ 111*)—CONSTRUCTION—DESCRIPTION.

When the particular and general descriptions of a deed conflict, effect should be given to the particular description in ascertaining the intention of the parties.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 111.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. DEEDS (§ 114*)—CONSTRUCTION.

In 1883 E. conveyed a farm in L. to defendant, containing about 95 acres, subject to an annual rent to a school corporation, and in 1890 another conveyed to defendant a $3\frac{1}{2}$ -acre tract adjoining the land conveyed by the E. deed, which was subject to an annual rent of 68 cents, and in 1896 defendant gave a bank a mortgage on all of the realty in L., describing it as the farm "owned and formerly occupied" by him, containing 100 acres more or less, and bounding it by the lands of the adjoining owners; the $3\frac{1}{2}$ -acre tract being a part of the farm mortgaged. The mortgage was foreclosed, and the bank thereafter conveyed the land to plaintiffs, describing it as the farm "formerly owned by" defendant, the description with reference to the adjoining lands correctly describing the whole farm, which the bank purchased under the mortgage foreclosure, including the $3\frac{1}{2}$ acres; but the deed further stated that the land was subject to an annual rent to the school corporation, and that the premises were the same as conveyed to it by the E. deed of 1883, and referred to that deed for a more particular description. In 1908 defendant paid to the school corporation the annual rental of 63 cents on the $3\frac{1}{2}$ -acre tract. *Held*, that the reference to the E. deed for a more particular description was in law a general description, so that the particular description would prevail, and the deed to plaintiffs be construed as including the $3\frac{1}{2}$ -acre tract.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 114.*]

4. DEEDS (§ 90*)—CONSTRUCTION.

As between two equally natural and reasonable constructions of a deed, that should be adopted which is most favorable to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 224-227; Dec. Dig. § 90.*]

5. TRIAL (§ 368*)—CONSTRUCTION.

A recital, in an agreed statement of facts in an action of trespass to the freehold, that eight years after defendant's interest in land was foreclosed he "entered upon" it without plaintiff's leave and cut hay therefrom, implied that defendant was out of possession at the time of such entry.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 368; Dec. Dig. § 368.*]

6. TRESPASS (§ 16*)—TITLE TO SUSTAIN ACTION.

One having title and the right of immediate possession of land may maintain an action of trespass to the freehold.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 16.*]

7. APPEAL AND ERROR (§ 1175*)—DISPOSITION—RENDERING JUDGMENT.

Where, in trespass to the freehold, the agreed statement of facts gives the value of hay cut by defendants, and refers to no other element of damage, the Supreme Court may, upon reversing a judgment for defendants, render judgment for plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Exceptions from Windham County Court: Alfred A. Hall, Judge.

Action by Martin C. Huntley and others against Stephen Houghton and others. Judgment for defendants, and plaintiffs except. Judgment reversed, and rendered for plaintiffs.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Cudworth & Pierce, for plaintiffs. F. C. Archibald, for defendants.

HASELTON, J. This was an action of trespass on the freehold. The case was submitted to the county court on an agreed statement of facts, and on such statement judgment was rendered pro forma for the defendant. The plaintiff excepted.

In 1883 Mary B. G. Eddy conveyed to Stephen Houghton a certain farm in Londonderry, containing, according to the description in the deed, about 95 acres, subject to an annual rent to the Londonderry Grammar School Corporation. In 1890 Frank P. Fuller conveyed to the same grantee a triangular piece of land of about $3\frac{1}{2}$ acres adjoining the land conveyed by the Eddy deed. This triangular piece of land was subject to an annual rent of 63 cents. In 1896 Houghton and his wife gave the Factory Point National Bank a mortgage of all their real estate in Londonderry, describing it as the farm "owned and formerly occupied" by them, containing 100 acres, more or less, and bounding it by the lands of adjoining owners. The $3\frac{1}{2}$ -acre piece was one corner of the farm so mortgaged. This mortgage was foreclosed by decree which became absolute December 11, 1900. The description in the decree followed the mortgage. July 26, 1901, the Factory Point National Bank gave the plaintiffs a deed, which the plaintiffs claim was a conveyance of the whole farm covered by the mortgage and decree, but which, according to the defendants' claim, did not convey the $3\frac{1}{2}$ -acre piece, which is the piece to which this litigation relates. The deed from the national bank to the plaintiffs designated the land conveyed as the farm "formerly owned by Stephen Houghton," and, as we have seen, the $3\frac{1}{2}$ -acre piece had constituted a part of that farm. The deed bounded the farm on the north, south, east, and west by lands of others, and this part of the description correctly describes the whole farm, which the bank got under the decree in its favor, and is not a correct description if the premises conveyed by the bank to the defendants do not include the $3\frac{1}{2}$ -acre piece. The deed then goes on to say that the premises are subject to an annual rental payable to the Londonderry Grammar School Corporation, and that they are the same premises conveyed to Stephen Houghton by the Eddy deed of 1883, and to that deed and the record thereof reference is made for more particular description.

[1, 2] It will be seen that the parts of the description are inconsistent, and the question is: What are the controlling elements? While the reference to a former deed is in terms for a more particular description, it

is what the law terms a general description. *Cummings v. Black*, 65 Vt. 76, 25 Atl. 906. In construing the descriptive part of the deed, the intention of the parties, when it can be gathered therefrom, is to govern, and the general rule is stated in the case just cited in the following language: "In ascertaining such intention, when the particular and the general description do not coincide, effect must be given to the particular description, such as is expressed by courses and distances, by permanent monuments, by lot and range, and by the adjoining surrounding lands. It is less probable that the parties would make an unnoticed mistake in the particular than in the general description."

[3] We find nothing in this case to indicate that the general rule should not apply; but, on the contrary, we find several things which indicate that it should. If this national bank had intended to reserve from its deed a part of the farm which it had acquired by foreclosure, it is difficult to understand how it should have described the farm by reference entirely to the lands of others. In describing the land as the farm formerly owned by Stephen Houghton, the grantor would naturally have had reference to the farm as it was at the times when it took its mortgage deed from Houghton and when it obtained its decree of foreclosure. It appears that down to 1908 Houghton paid to the agent for the Londonderry Grammar School Corporation the annual rental of 63 cents on the $3\frac{1}{4}$ -acre piece of land. But this fact does not aid the defendants; for beyond all question he had been foreclosed of his interest in the land, and there is nothing in the statement of facts to suggest that, at any time after conveying the Houghton farm to the plaintiffs, the bank in any way asserted, or suggested, or recognized that it had not conveyed the entire farm. The principles of construction herein applied are well settled in the state. *Spiller v. Scribner*, 36 Vt. 245; *Hibbard v. Hurlburt*, 10 Vt. 173; *Morrow v. Willard*, 30 Vt. 118; *Cummings v. Black*, 65 Vt. 76, 25 Atl. 906; *Bundy v. Morgan*, 45 Vt. 46; *Wilder v. Davenport*, 58 Vt. 642, 5 Atl. 753; *Chapman v. Longworth*, 71 Vt. 228, 44 Atl. 352.

[4] If, as we do not think, the intention of the parties to the deed is not resolved by the considerations already suggested, then resort should be had to the principle that, as between two constructions equally natural and reasonable, that should be adopted which is most favorable to the grantee. *Mills v. Catlin*, 22 Vt. 98.

[5, 6] The plaintiffs treat the question of the construction of the deed to them from the national bank as the only question in the case; but the defendants raise a question as to whether it appears that the defendant Houghton had ever been dispossessed of the land. We have seen that he was foreclosed

of all his interest in the land in 1900; and the agreed statement recites that during the summer of 1908—that is, nearly eight years later—the defendants, without leave of the plaintiffs, entered upon the land in question and cut and moved therefrom hay of the value of \$7. Whether or not this question of possession was spoken of below does not appear; but we think the statement that the defendants, in the summer of 1908, "entered upon" the land, imports that at the time of such entry they were without possession. So the plaintiffs, having title, and at least the right of immediate possession, were entitled to maintain this action of trespass. *Harris v. Haynes*, 34 Vt. 220; *Chesley v. Brockway*, 34 Vt. 550; *Robinson v. Douglass*, 2 Aikens, 364, 368; *Langdon v. Templeton*, 66 Vt. 173, 181, 28 Atl. 866.

[7] There must be a reversal of the pro forma judgment in favor of the defendants, and, since the agreed statement of facts gives the value of the hay cut, and refers to no other element of damage to the plaintiffs, we have an approximately accurate basis on which to render judgment for the plaintiffs.

Accordingly, the pro forma judgment is reversed, and judgment is rendered for the plaintiffs, to recover of the defendants the sum of \$7 and their costs.

BISHOP v. READSBORO CHAIR MFG. CO. (Supreme Court of Vermont. Bennington. Oct. 9, 1911.)

1. HUSBAND AND WIFE (§ 9*)—WIFE'S REALTY—OWNERSHIP.

Where at a wife's marriage she was seised of an estate of inheritance in certain described real estate, her husband by virtue of his marital right became seised of the freehold, and was entitled to the possession and to the rents and profits during their joint lives.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 30-37; Dec. Dig. § 9.*]

2. HUSBAND AND WIFE (§ 207*) — WIFE'S REALTY—INJURIES—ACTIONS.

In an action for damages to the real property of a wife during coverture, the husband may sue alone or the wife may be joined, but the action is improperly brought in the name of the wife alone.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 756-759; Dec. Dig. § 207.*]

3. PARTIES (§ 75*)—PROPER PARTIES—PLEA IN ABATEMENT.

The objection that an action for injuries to the real property of a married woman was improperly brought in her name alone, and not in the name of her husband or in their joint names, could only be pleaded in abatement, and was not available in bar or under the general issue.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 115, 116; Dec. Dig. § 75.*]

4. ADJOINING LANDOWNERS (§ 7*)—INJURY TO ADJOINING PROPERTY—EVIDENCE.

In an action for injuries to plaintiff's house by boards from piles on defendant's adjoining property being blown against the same, evidence held to warrant a finding of negligence in de-

defendant's failure to properly pile and secure the boards.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

5. ADJOINING LANDOWNERS (§ 7*)—INJURY TO ADJOINING PROPERTY—ACT OF GOD—HIGH WIND.

Where boards were blown from defendant's lumber piles on its adjoining property on to and against plaintiff's house, breaking the windows and otherwise injuring the same, and the wind, though high, was not unprecedented, defendant was not relieved from liability on the theory that the injury resulted from an act of God.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

6. ADJOINING LANDOWNERS (§ 7*)—CARE REQUIRED—PILING LUMBER.

Defendant while entitled to pile lumber on its own land was bound to so pile or secure the same as to guard against its being blown on to and against plaintiff's adjoining property.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

7. ADJOINING LANDOWNERS (§ 7*)—INJURY TO ADJOINING LAND—SNOWSLIDE.

Where snow was permitted to slide from defendant's roof on to plaintiff's adjoining premises and against her house, to her injury, and defendant, with notice, did nothing to prevent it, it was prima facie negligent, and liable for the injury sustained.

[Ed. Note.—For other cases, see Adjoining Landowners, Dec. Dig. § 7.*]

8. NUISANCE (§ 42*)—ACTION—NOTICE OF CONTINUANCE—GRANTEE.

The grantee of an estate is not liable for an injury resulting from the continuance of a nuisance erected thereon before he came into the estate until he had notice to remove it.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 101-103; Dec. Dig. § 42.*]

9. NUISANCE (§ 42*)—ACTION—NOTICE TO ABATE.

No particular form of notice or request for abatement of a nuisance is required to charge a grantee with liability for the continuance thereof; any notice informing the grantee of the existence of the nuisance and of the desire of the objector to have it removed being sufficient.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 101-103; Dec. Dig. § 42.*]

10. NUISANCE (§ 49*)—NOTICE—EVIDENCE—QUESTION FOR JURY.

In an action for injury to real property by the existence of a nuisance on defendant's premises, evidence *held* to warrant a finding of notice to defendant of the existence of the nuisance.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 49.*]

11. ADJOINING LANDOWNERS (§ 7*)—DAMAGES TO ADJOINING PROPERTY—REPAIR—INSTRUCTIONS.

Where plaintiff's property was injured by snow and lumber falling and being blown from defendant's adjoining property against plaintiff's house, and plaintiff's husband made repairs on her behalf and at her expense, necessitated by the injuries, an instruction that the jury should not include in any damages to which they might find plaintiff entitled any sum for labor performed by the husband was properly refused.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

12. ADJOINING LANDOWNERS (§ 7*)—INJURY TO ADJOINING PROPERTY—SNOW FROM ROOF.

Where snow was permitted to accumulate on defendant's roof and to fall on plaintiff's adjoining property, a request to charge that plaintiff could not recover for any damage by reason of the accumulation on the ground of snow which fell from defendant's roof was properly refused; plaintiff being entitled to recover nominal damages therefor, at least, as the practice, if long enough continued, would give a prescriptive right.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

13. EVIDENCE (§ 5*)—JUDICIAL NOTICE—MATTERS OF GENERAL KNOWLEDGE.

The court will take judicial notice as a matter of common knowledge that roof guards placed just above the eaves of a roof to prevent snow from sliding off are in effective use.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

14. ADJOINING LANDOWNERS (§ 7*)—INJURIES TO ADJOINING PROPERTY—INSTRUCTIONS.

Where, in an action for trespass, there was other evidence from which the law would imply malice on the part of defendant, their request to charge that, if defendant's officers did not come to look at plaintiff's property when requested to do so, such fact was not evidence of willfulness, wantonness, or malice, was properly refused.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 53-59; Dec. Dig. § 7.*]

15. EVIDENCE (§ 136*)—SIMILAR FACTS—MALICE.

Where plaintiff claimed malice in the maintenance of a nuisance by defendant in permitting snow to slide from its storehouses on to plaintiff's property, evidence that since the bringing of the suit snow had slid from the storehouse against plaintiff's house was admissible on the issue of willfulness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 404, 405; Dec. Dig. § 136.*]

16. CORPORATIONS (§ 493*)—MISCONDUCT OF OFFICERS—PUNITIVE DAMAGES.

Where defendant corporation maintained a storehouse adjoining plaintiff's property, and its president, treasurer, and manager, after notice, willfully permitted snow and ice to collect on the roof and slide therefrom on to and against plaintiff's house, the corporation was liable for punitive damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493.*]

17. EVIDENCE (§ 473*)—OPINION—AMOUNT OF DAMAGES.

Plaintiff's house was injured by boards from defendant's lumber piles being blown against it, smashing the windows and jamming and splitting the clapboards, and breaking a hole or holes in the roof of the porch from the side of the house. *Held*, that plaintiff's husband was properly permitted to give his opinion as to the amount of damages to the house under the rule that where a witness has means of personal observation and the facts which led his mind to a conclusion are incapable of being detailed and described, so as to enable anyone but himself to form an intelligent conclusion from them, the witness may add his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 473.*]

18. ADJOINING LANDOWNERS (§ 7*)—INJURY TO ADJOINING PROPERTY—EVIDENCE.

In an action for injuries to plaintiff's house by boards piled on defendant's property

being blown against it, plaintiff's husband was properly permitted to testify that after the first injury to the house he spoke to defendant's manager about it and asked him if he was going to continue piling boards, and not fasten them down, to which the manager replied that he had told the foreman either to weight or wire the boards to hold them.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Dec. Dig. § 7.*]

19. APPEAL AND ERROR (§ 204*)—ADMISSION OF EVIDENCE—NECESSITY OF OBJECTION.

Reception of evidence without objection is not reviewable on exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

Exceptions from Bennington County Court; Alfred A. Hall, Judge.

Action by Frances J. Bishop against the Readsboro Chair Manufacturing Company. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Chase & Daley, for plaintiff. Holden & Healy, for defendant.

WATSON, J. One ground assigned in the defendant's motion for a verdict, also in its motion to set aside the verdict, is that from the undisputed evidence the plaintiff at the time the grievances complained of were committed was and hitherto has been and now is a feme covert, living with her husband on the premises alleged to have been damaged by the negligence of the defendant, of which premises the husband was and is seized in the right of his wife, but has not been joined as a party plaintiff in this action.

[1] At the time of the plaintiff's marriage in 1903, she was seized of an estate of inheritance in the premises described in the declaration, and upon the marriage the husband by virtue of his marital rights became seized of the freehold; and the law is, as claimed by the defendant, that this entitled the husband to the possession of the land and to the rents and profits during their joint lives. *Laird v. Perry*, 74 Vt. 454, 52 Atl. 1040, 59 L. R. A. 340.

[2] Yet the conclusion drawn in defendant's brief that the action should have been brought in the husband's name alone does not follow. This suit is merely for damages to the real property of the wife during coverture, and for such purpose the husband may sue alone, or the wife may be joined. In *Armstrong and Wife v. Colby*, 47 Vt. 359, the action was trespass quare clausum fregit. On motion in arrest of judgment it was said that the gist of the cause of action set forth in each count of the declaration is the breaking and entering a close alleged to be the plaintiffs' close; that the plaintiffs, though husband and wife, might jointly have a close, and this allegation is in effect that the one

in question was theirs jointly; and that, if so, it was hers as much as it was his, and a cause of action for an injury to it would survive to her if she survived him, and they might sue jointly for such injury. In *Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604, the action was trespass quare clausum fregit brought by the husband alone for cutting trees on land of which the plaintiff and his wife were in possession in the right of the wife; his marital rights being his only interest in the realty. The case was heard on referee's report. One question presented was whether the action could be maintained in the name of the husband alone for cutting trees on the wife's land during coverture. Holding that the action was properly brought, the court said the law was well settled that an action of trespass for injuries to the wife's land during coverture will survive to the husband on the death of the wife, and if the wife survive any action for a tort committed to her real estate during coverture will survive to her; and that the principle deduced from the cases cited in the opinion was "that in all cases for injuries done to the wife's land during coverture, where the right of action will survive to the wife upon the death of the husband, and to the husband upon the death of the wife, the husband may sue alone or join with his wife at his election." The same general principle has been held applicable where the husband was seized of a house for life in the right of his wife, and leased it for years to a tenant who burned it (*Cro. Eliz.* 461); where the action was on the case for cutting down trees, the tops of which were reserved to the wife for her life (*Tregmiel v. Rieve*, *Cro. Car.* 437); where the action was on the case for stopping a way to the land of the wife, as the wrong was done to the wife, the husband having the close in her right (*Baker v. Brereman*, *Cro. Car.* 419); where the action was brought by the dipper at Tunbridge Wells against the defendant for exercising the business of a dipper, not being duly appointed, and approved according to a private statute (*Weller v. Baker*, 2 Wils. 414, 423). In this last case it was said that wherever the wife is the meritorious cause she may join in the action. To the same effect are, also, *Abbott v. Blofield*, *Cro. Jac.* 644; *Rose v. Bowker*, 1 H. Bl. 109. In the case before us the wife's interest in the real property injured does not give the right to sue in her own name alone. Yet, to be effective, advantage thereof should have been taken in the manner pointed out in the law of pleadings.

[3] The rule is in tort actions at least that where the feme was legally interested before or during coverture in the subject-matter of the action and might properly join in a suit with her husband, but sues alone, the coverture can only be pleaded in abatement. It cannot be pleaded in bar, or given in evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence under the general issue. 1 Chit. Pl. *449; 1 Saund. Pl. & Ev. 7; Bates v. Stevens, 4 Vt. 545; Snow v. Carpenter, 49 Vt. 426.

It is said that the declaration contains no allegations of the wife's interest in the property. However this may be, we pass it without further notice, since neither the declaration nor a copy thereof has been furnished us.

[4] The defendant moved for a verdict on the first count, for that there was no evidence tending to show the defendant guilty of any negligence which caused the injury alleged therein. Hereon it is argued that it nowhere appears in the testimony how high the pile was from which the boards were blown, nor whether the boards in question were blown from a pile near the line between the properties or from a pile erected in another part of the yard, or from one of the piles which were usually in the process of construction. This position is not well taken. The plaintiff's evidence tended to show that 17.6 feet north of the front of the upright part of the plaintiff's house and parallel with it is the south line of School street, and the porch on the front of the house is 6 by 4¼ feet; that the defendant's land, called here the "Mandeville property," adjoins the plaintiff's land on the west, the line between them running practically at right angles with the line of the street, extending southerly; that this division line is 5.10 feet from the northerly end, and 5.9 feet from the southerly end, of the upright part of the plaintiff's house, and the ell part of the house is nearer, it being at the north corner 3.3 feet and at the south corner 4 feet from the line; that on its side of the division line and near to it the defendant has a storehouse ——— feet wide, extending north and south between 86 and 87 feet, the north end of which is about 63 feet from the south line of the street; that the defendant went into possession of its said property as purchaser in July, 1907; that most of the time since thus taking possession the defendant has had pretty much all of its land from the storehouse north to the street next to the plaintiff's line covered with lumber piles, the piles being very near to the line, and occasionally a board would reach over; that soon after defendant began to pile lumber there, and before any damage was done, the plaintiff's husband, noticing the piles and being fearful that the wind might blow them over, spoke to the defendant's manager about it, asking him if it would not be best to wire or fasten the piles down to hold the top boards from blowing off against the plaintiff's buildings and the windows therein, and the manager said he would see about it, but nothing was done by way of fastening them down; that soon after this interview a heavy wind (in the language of the husband as a witness) "blew the boards here and there and drove some of them through the windows, some of them against the buildings, some of them un-

der the porch to the front door and over into the yard"; that windows were smashed, and the house otherwise damaged; that (again quoting from the testimony of the husband) "at the further side towards School street the pile that run the farthest, it looked as though it had fallen off the top of the pile, the board had, and had fallen over on the top of the porch and jammed the shingles and broke them, and jammed the porch away from the side of the building an inch and a half or a quarter." The plaintiff as a witness, being asked whether she could see the pile this board came from, said: "The pile was up like that, and the boards had not been fastened down, * * * and, as it slid off the pile, it came right down into the house." The evidence also showed that on two other occasions later boards were blown from these piles over into the plaintiff's yard and on her premises, hitting the side of her buildings and jamming the clapboards on one or both of the occasions.

[5] In this connection it is further argued that the proximate cause of such injury was not the defendant's negligence, but solely the heavy wind, an act of God for which the defendant is not liable. The only evidence before the court respecting the character of the wind on the occasion when the board or boards were blown through plaintiff's windows, and of the winds to which that place is subject, was introduced by the plaintiff, and was unconflicting. In substance it was that on the occasion referred to there was a heavy hard wind, accompanied by hail, sleet, and snow. On being cross-examined by defendant's counsel touching the wind on that occasion, the witness testified as follows: "Q. The wind must have been blowing hard that night. A. Yes, sir. Q. Whether that was usual? A. I have seen it blow at other times as hard." In answer to another question in cross-examination the witness said: "It is a hard place for winds. It is all open, and the wind blows harder than it used to on School street." Another witness who lived five years on this place before the plaintiff purchased it in 1894 was asked in cross-examination, "Q. You have some hard windstorms over there?" and answered, "Some hard winds." The plaintiff, being cross-examined regarding the board that came into her window, testified as follows: "Q. The first was the one that went through the pantry window? A. Yes. Q. How big was that board? A. My windows are 14 by 30, I should say a foot wide and 7 or 8 or 9 feet long, a heavy board. Q. That must have been quite a wind that day? A. It was, but we have quite winds." This evidence shows an ordinary hard wind, such as frequently occurs at that place at such season of the year. It does not show such an extraordinary or unprecedented wind as may properly be termed in law an act of God.

[6] In thus piling lumber at the place

shown by the testimony the defendant was engaged in a lawful business on its own land. Yet in so doing it was in duty bound to exercise due care against infringing the legal rights of the owner of the adjoining property. As ordinary hard winds of the character of that on the occasion in question are such as might have been reasonably expected to occur there, the defendant was bound to know that fact and in piling lumber to exercise the care and prudence of a prudent man in like circumstances to guard against the probable consequences of such winds. The evidence on the part of the plaintiff tending to show negligence by the defendant in this respect was such that a verdict for the plaintiff might reasonably and properly be based thereon, and there was no error in submitting it to the jury. *Vaughan v. Menlove*, 3 Bing. N. C. 468, 18 Eng. Rul. Cas. 715; *Mayor of New York v. Bailey*, 2 Denio (N. Y.) 433; *Dunsbach v. Hollister*, 49 Hun, 352, 2 N. Y. Supp. 94, affirmed in 132 N. Y. 602, 30 N. E. 1152; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 165.

The defendant moved for a verdict upon the second count, stating four different grounds therefor, but reliance is now placed only upon the first two; that there was no evidence showing the defendant guilty of any negligence which caused the injury in the count complained of; and that by the undisputed evidence the defendant did not erect the building from the roof of which the snow is alleged to have slid. The motion was properly overruled.

[7] As to the first ground, the evidence shows beyond question that snow was allowed to slide from defendant's roof onto the plaintiff's premises and against her house, to her injury as alleged, and that defendant did nothing to prevent it. The second ground requires a more extended consideration. The "Mandeville property" was purchased by the defendant on December 5, 1906, but possession thereof could not pass under the deed of conveyance until May 1, 1907, and did not in fact till July following. At the time the defendant purchased this property the storehouse was on it just as it is now. No change has since been made in the location of the building, nor in the building itself. It is contended that the damages sought to be recovered by reason of snow sliding from the roof of the building were suffered before any notice from the plaintiff to the defendant to abate the nuisance, and consequently no recovery can be had therefor.

[8] Treating this as within the motion (though it seems otherwise), the general rule of law that the grantee of an estate is not liable for an injury resulting from the continuance of any nuisance erected thereon before he came to the estate until he has notice to remove it is well established. *Petti-*

bone v. Burton, 20 Vt. 302; *Dodge v. Stacy*, 39 Vt. 558; *Howe Scale Co. v. Terry*, 47 Vt. 109. Whether liability attaches after notice of the existence of the nuisance without a request for its removal we need not consider, for, in the case before us, we think the plaintiff's evidence fairly amounted to both. The transcript of the evidence is made a part of the exceptions for the purpose, among other things, of testing the accuracy of the statements in the bill of exceptions as to the meaning and tendency of the testimony, and is made to control. The bill does not accurately state the tendency of the plaintiff's evidence in this respect. The plaintiff's husband testified as follows: "Q. Was there a time soon after the Readsboro Chair Company bought that property when you had a talk with one of the officers about that snow? A. Yes, sir. Q. And whom did you talk with? A. I talked with Mr. Clark, Mr. A. B. Clark. Q. What was your talk about this snow? A. I spoke to Mr. Clark I think two or three times in regard to that snow, and asked him to put some snow protectors on to hold the snow on his roof, and not let it come onto us. Q. What did Mr. Clark say about that? A. He said he guessed it could be fixed. Q. What did he say he would do? A. He said he would look it over. He did not tell me whether he would or would not do it in regard to the roof. Q. Did you speak to Mr. Clark about a protector, or did he speak about a protector? A. I spoke to him first. Q. Was anything done about it? A. Never; no, sir."

[9] No particular form of notice or request is required, and it may be either written or oral, or by acts done. If it informs the party to be affected by it of the existence of the nuisance, and of the desire of the party injured to have it removed, so that the person to whom it is addressed fully understands the ground of the complaint, and that the party giving it is unwilling to have it continue, it is sufficient. *Carleton v. Redington*, 21 N. H. 291; *Snow v. Cowles*, 26 N. H. 275; *Conhocton Stone Road v. Buffalo, etc., R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646. It is further argued that it does not appear that Clark was engaged in the business of the corporation at any of the times when Bishop spoke to him about the snow, that what Bishop said was intended for the corporation, or that Clark had any authority in respect thereof, so that notice to him would bind the corporation. These are questions not covered by the motion, and therefore not considered. It is said in defendant's brief that the statement in the bill of exceptions that the evidence of the plaintiff tended to show that her husband acted in all these matters as her agent is not warranted by the testimony.

[10] The plaintiff when on the stand as a witness was asked what she did, if anything, in regard to notifying the defendant or its officers, the president or manager, in regard

to this snow that come off their roof against her house, and answered, "Mr. Bishop went and spoke to"—She was then interrupted by the court, with the question whether she heard the talk, and answered in the negative. Her answer before such interruption, viewed in the light of the question asked, fairly means that she sent her husband. In cross-examination, having testified concerning the occasion of the boards first being blown against her house, she was asked whether she had spoken "about the boards to Mr. Newton or to Mr. Clark before that time." To which she answered, "I had sent word to Mr. Clark. I did the next morning after the storm, asking him to come up." Again: "Q. You never had any talk with him (Mr. Newton) before the suit was brought? A. No; I always sent word to Mr. Clark." In redirect examination she testified, also, to sending Mr. Clark word after the snow came into the house to come up and see that, she wanted him to see the broken glass, but that neither he nor any one else from the company came. There was evidence that the plaintiff on one occasion sent Mr. Clark a letter respecting the boards, but there was no evidence that she ever sent him word regarding the snow from defendant's roof, other than by her husband. The plaintiff further testified that, before her marriage to Mr. Bishop, she attended to her own business, and attended to and cared for her buildings and made repairs on them. She was then asked whether since her marriage to Mr. Bishop he had helped her somewhat. To which she answered: "On the outside, but he don't in the inside. I look after my own business inside just the same." This testimony of the plaintiff is for consideration in connection with the other testimony showing the relation of husband and wife, and with the testimony of the husband as to what he did soon after the defendant entered into possession of the Mandeville property by way of seeing the defendant's manager about fastening down the piles of boards to prevent the top boards from blowing against the plaintiff's buildings and the windows, and in notifying the defendant regarding the sliding of snow from the roof of the storehouse onto his wife's land, and requesting that it be remedied, and his acts thenceforth to the bringing of this suit. Thus considered we think the evidence fairly warrants the statement in the bill of exceptions, respecting the tendency of the plaintiff's evidence as to the agency of the husband for the wife.

It may be said, also, that the evidence was sufficient to go to the jury on the question of agency by ratification. Mr. Greenleaf says: "The acts and conduct of the principal, evincing an assent to the act of the agent, are interpreted liberally in favor of the latter, and slight circumstances

will sometimes suffice to raise the presumptions of a ratification, which becomes stronger in proportion as the conduct of the principal is inconsistent with any other supposition." 2 Greenl. Ev. § 66. Moreover, the bill of exceptions further states that the fact of such agency was not contradicted by the defendant. And, in addition thereto, the course of procedure during the trial, as shown by the transcript, was that the husband was acting for the wife. No objection was made by the defendant to the husband's testimony as to what he told Mr. Clark, treasurer, also manager, of defendant company, soon after the company took possession of the "Mandeville property," regarding the snow coming from the roof of the storehouse on to the wife's land, etc., except that it was immaterial, "on the ground that the defendant owes the plaintiff no duty in respect of this roof and the snow on it."

[11] Defendant excepted to the noncompliance with its seventh request to charge: That the jury should not include in any damages to which they might find the plaintiff entitled any sum for labor performed by the plaintiff's husband. The evidence tended to show that whatever the husband did in the way of making repairs on the plaintiff's house consequent on the injuries in question in this case he did for his wife and at her expense. As to such labor, it could not be ruled according to the request as a matter of law. The request being unsound in that respect, we need not consider how it was with reference to labor in removing the snow that slid from the defendant's roof. Its refusal was not error.

[12] Defendant also excepted to the failure of the court to charge in conformity to its tenth request, which was that the plaintiff could not recover for any damage by reason of the accumulation upon the ground of snow which fell from the defendant's roof. This request was properly disregarded. Such an invasion of the plaintiff's rights, if continued long enough, would give the defendant a prescriptive right; and hence the plaintiff is entitled to nominal damages at least. *Willey v. Hunter*, 57 Vt. 479.

In ignoring the ninth request, that, before the jury could award the plaintiff damages by reason of snow sliding from the defendant's roof, she must prove by a fair balance of the evidence that there existed and was known to the defendant some means by which such an occurrence could be prevented, the court acted well.

[13] It is a matter of common knowledge that roof guards placed just above the eaves of a roof to prevent snow from sliding off are in effective use. And of matters of general knowledge within its jurisdiction a court will take judicial notice, and no evidence thereof need be given by the party alleging

their existence. Stephen's Digest of Ev. (Chase's Ed.) 173; Hoyt v. Russell, 117 U. S. 401, 6 Sup. Ct. 881, 29 L. Ed. 914.

[14] The eleventh request, that the fact, if it be found, that defendant's officers did not come to look at the property when requested to do so by the plaintiff is not evidence of willfulness, wantonness, or malice on the part of the defendant, was properly refused. How it might be were the acts to which reference is there made the only matters of conduct by said officers upon which the plaintiff relies as affording a basis for exemplary damages we need not consider; for, taken with the other acts of the officers appearing from the evidence, the case shows such a wanton invasion of the plaintiff's rights as in law to imply malice.

[15] Subject to objection and exception the plaintiff was permitted to testify that since the bringing of this suit the snow had slid from defendant's storehouse against her house. This evidence was admitted solely as bearing upon the motive and intent of the defendant at the time of the happening of the injuries for which she seeks to recover. In view of the fact that the defendant gave no heed to the plaintiff's notice of the existence of the nuisance, and her request to abate it, we think the fact that after the suit was brought the defendant knowingly permitted such nuisance to continue to the further annoyance of the plaintiff was evidence tending to show malice at the time of the injuries complained of. It was in principle like a repetition of the slanderous words by the defendant subsequent to the bringing of the suit for damages resulting therefrom. Evidence of such repetition has been held to be admissible for the purpose of showing the animus of the defendant at the time in question. *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; *Knapp v. Fuller*, 55 Vt. 311, 45 Am. Rep. 618.

[16] The question of the responsibility of the defendant for such conduct on the part of its officers, if shown, is presented. The defendant asserts nonliability, and in support thereof invokes the rule laid down in *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72, and followed in *Wells v. Boston & Maine R. R.*, 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. The doctrine of these cases is that, where the offender is the agent or servant of a corporation, the principal can be made liable for this class of damages only when it has either directed, participated in, or subsequently approved the misconduct of the agent or servant. In the case at bar the defendant's officers, whose acts have been established by the verdict as wanton, willful, and malicious, are the president and the treasurer of the corporation; the latter being also the manager of the company. The question is whether the official relation of the offenders to the corporation distinguishes this case from the two cases named. In the *Willett* Case the action was to recover for damages sustained by the negligence of

the defendant, a municipal corporation, in the construction and maintenance of its sewer. The negligence was that of the municipal trustees in not properly connecting certain sewers, etc., by reason of which sewage accumulated in the brook near the dwelling occupied by the plaintiff, and the trustees, though notified thereof several times, did not remedy the defects, etc. Holding that exemplary damages could not be awarded against the municipality unless it in some legal way, either authorized or subsequently approved of the wrongful act or neglect, the court said the trustees of such a corporation can act only by a majority vote; that they are the business managers of the corporation, but, after once elected, the voters and taxpayers on whom such damages must fall if awarded cannot, during their term of office, discharge them, and usually cannot control their action within the scope of their office. The *Wells* Case was trespass for assault and battery by the conductor of the defendant railroad in forcibly ejecting a passenger from the train. In *Denver & Rio Grande R. Co. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1148, the action was to recover for injuries sustained by the plaintiff in his person by reason of an illegal and wrongful assault made by the railroad company's agents and employees acting under its vice president and assistant general manager. The court, speaking through Mr. Justice Harlan, said that from the evidence the defendant within the meaning of the rule holding corporations responsible for the misconduct of their servants in the course of its business and of their employment directed that to be done which was done; and it was held that the doctrine of punitive damages should apply upon the ground that the evidence clearly showed that the corporation by its governing officers participated in and directed the things planned and done. In *Lake Shore & Mich. S. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the doctrine of which was followed in *Willett v. St. Albans*, the court, speaking by Mr. Justice Gray, after noticing the *Denver & Rio Grande Railroad Company* Case, said: "The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his in doing wrongful acts in behalf of the corporation to the injury of others may be treated as the intent of the corporation itself. But the conductor of a train or other subordinate agent or servant of a railroad corporation occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce."

We think the distinction drawn by the federal Supreme Court in these two cases is logically sound in basis, just and reasonable. In principle the same distinction is often made in negligence cases between the acts of a servant and the acts of those representing the master as affecting liability. A corporate body in the management and prosecution of its business necessarily acts through its governing officers, and therein, as to third persons with whom they are brought in contact or collision, such officers stand to all intents and purposes as the corporation itself, and all acts done and performed by them in the course of its business and of their employment, whether in contractu or in delicto, are characterized accordingly. Within the meaning of the law the corporation participates therein, and it is responsible for the consequences the same as an individual is responsible in similar circumstances. *Philadelphia, W. & B. Railroad Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73. It follows that if such acts be of a character to give a right of action against the corporation in form appropriate for the allowance of punitive damages, and, as in the case before us, the evidence affords a proper basis therefor, they may be awarded.

[17] The plaintiff's husband was permitted to testify his opinion as to amount of damages to her house, resulting from the boards blown against it. The defendant objected thereto solely upon the ground that opinion evidence is not admissible for that purpose. The evidence shows the injuries to the house, so caused, to be in general the smashing of windows, the jamming and splitting of clapboards, in different places on the house, the breaking of a hole or holes in the roof of the porch, and the porch from the side of the house. The general rule in this state is against the admission of this class of evidence for such purpose. *Cavendish v. Troy*, 41 Vt. 99; *Bates v. Sharon*, 45 Vt. 475; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Bain v. Cushman*, 60 Vt. 343, 15 Atl. 171. Yet this rule has its exceptions, one of which is stated and was applied in the former case. Where the witness had the means of personal observation, and the facts and circumstances which lead his mind to a conclusion are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is often allowed to add his opinion, or conclusion. We think the present case in the respect named falls within this exception to the general rule rather than within the rule itself, and that therein the ruling of the trial court was without error.

[18] Subject to objection, the plaintiff's husband was permitted to testify that after the first injury to the house by the boards

when he spoke to the defendant's manager about it, asking him if he was going to continue piling boards and not fasten them down, the manager said he had told their foreman who had charge of the lumber in the yard to fix it either by weighting it or wiring the boards to hold them. The objection made was that the defendant was not obliged to weight the boards, and therefore the evidence is immaterial. The court rightly ruled that whether it was immaterial or not depended on what a careful and prudent man would do. The witness was further allowed to testify that quite a little while after that the boards were wired down. It is argued that this also was error.

[19] However, the evidence was received without objection, and the question is not before us.

This in effect disposes of all the points in defendant's brief.

Judgment affirmed.

STATE v. AVERILL.

(Supreme Court of Vermont. Franklin.
Oct. 9, 1911.)

1. HOMICIDE (§ 158*)—EVIDENCE—THREATS.

In a prosecution for homicide, previous threats by accused to kill deceased are admissible to show the state of accused's mind, his intent to kill, and his malice against deceased at the time of the homicide; the remoteness of the threats, in point of time, relating only to the weight of the evidence, and not to its admissibility.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 298-296; Dec. Dig. § 158.*]

2. HOMICIDE (§ 158*)—PREVIOUS THREATS—EVIDENCE.

In a prosecution for homicide, evidence of prior threats by accused to kill deceased was not objectionable as an attack on accused's character.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

3. CRIMINAL LAW (§ 376*)—EVIDENCE—CHARACTER OF ACCUSED.

The rule that prosecutor cannot impeach the character of accused until accused has adduced evidence to support it refers only to the general character restricted to the trait in issue, and does not apply to evidence otherwise having a legitimate bearing on the guilt of accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. § 376.*]

4. WITNESSES (§ 37*)—COMPETENCY—CONVERSATIONS.

That a witness did not hear all that accused said in a prior conversation with deceased did not render her incompetent to testify to the part of the conversation she did hear.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 85; Dec. Dig. § 37.*]

5. CRIMINAL LAW (§ 448*)—CONCLUSION OF WITNESS.

Where a witness had fully stated all that accused said and did at a particular time and place, a question whether accused made any

statement or did any act at that time that had the appearance of a desire on her part to hide a petticoat was properly excluded, as calling for a conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1048-1051; Dec. Dig. § 448.*]

6. CRIMINAL LAW (§ 695*)—TRIAL—RECEPTION OF EVIDENCE.

Where a question objected to contained several elements and one of them was improper, it was not error to exclude the entire question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1037; Dec. Dig. § 695.*]

7. WITNESSES (§ 277*)—CROSS-EXAMINATION.

Where, in a prosecution for homicide, accused had been permitted to testify concerning her relations with deceased, and that, when accused and deceased left C. together, accused supposed defendant was married to B., questions as to why B. did not come back and whether accused knew of deceased ever getting a divorce from her was proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

8. INDICTMENT AND INFORMATION (§ 189*)—INCLUDED OFFENSES—MURDER—INVOLUNTARY MANSLAUGHTER.

P. S. § 2337, provides that, under an indictment for murder, defendant may be convicted of murder in the first or second degree, or of manslaughter, according to the proofs, and section 5697 declares that, if the evidence in the jury's opinion is insufficient to convict of murder, a person arraigned and put on trial for that offense may be convicted of manslaughter if the evidence proves that offense. *Held*, that where accused is indicted for murder he may be convicted of involuntary manslaughter under such indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 593; Dec. Dig. § 189.*]

9. CRIMINAL LAW (§ 936*)—NEW TRIAL—SURPRISE.

Where accused was indicted for murder in the first degree, he was bound to know that it was the duty of the court to charge on every branch of the case included in the indictment and supported by the evidence, and hence the fact that the court charged on involuntary manslaughter was not surprise for which he could obtain a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 936.*]

Exceptions from Franklin County Court; Willard W. Miles, Judge.

Josephine Averill was convicted of manslaughter, and brings exceptions, and petitions for new trial. Affirmed, and petition for new trial dismissed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John G. Sargent, Atty. Gen., and George M. Hogan, State's Atty., for the State. M. H. Alexander and C. G. Austin & Sons, for respondent.

WATSON, J. The indictment on which respondent was tried contains two counts, each charging her with murder in the first degree, by shooting Frank C. Averill at St. Albans on the 20th day of October, 1910. Verdict, guilty of manslaughter, and judgment thereon.

It appeared that the deceased and the respondent were husband and wife. The state called as a witness one Mrs. Delvina Hastings, and offered to show by her that she and her husband lived on a farm at Sunapee, N. H., where the respondent and her husband lived for four or five years; that the witness and her husband were there as tenants from the fall of 1907 about a year; that while there she heard the respondent make threats against the life of her husband, hearing her say she would kill him if he did not do certain things. The court asked, "What things?" The state's attorney answered, "That had to do in part with the leasing of the farm and their own private affairs, not all of which she heard; that the respondent is a loud talking woman; that she frequently became angry with her husband, and I offer to show also that the witness has seen her seize hold of him by the coat collar and yank him around, put him in a chair and on the lounge, in connection with threats she heard her make; that these threats were in summer of 1908." Objection was made to this offer (1) because it is an attack upon the character of the respondent, which is not in issue; (2) because it does not tend to show her mental condition at the time of the alleged killing; (3) "because not the whole of the conversation can be stated, and, if the whole, might be perhaps a different color or interpretation would be given to what she said;" and (4) because it opens up a collateral issue, and makes it necessary to try each one of these alleged occasions to ascertain whether she had the intent at the times she made the threats or not. The state disclaimed any purpose of attacking her character, or of going into collateral matters.

Addressing the state's attorney, the court said: "You offer to show that while she was residing there at a certain time this witness heard her make a threat to kill her husband?" To which the state's attorney answered: "That is it. That is all we want to show." The court: "Then come right to that point." An exception was saved. Subject to the objection made and the exception taken, all inquiry respecting threats was received. The witness testified that in the summer time of the year of 1908, on the place where they all lived together, she heard the respondent make threats to her husband, Frank C. Averill. The witness was then asked: "What was the threat, and what did you hear her say?" The witness answered: "She said she would kill Frank if he didn't do so and so, when she was angry." The state objected to the answer, and moved to strike out "the part about being angry." The court ruled, granting the motion unless the respondent wished to have that part of the answer stand; and, no objection being made to striking it out, the motion was granted. The witness fur-

ther testified that she heard the respondent make threats twice. The question was asked: "Did you hear anything else she said at the time she made the threats?" Here the respondent's attorney objected, saying: "If they undertake to show the entire conversation, we do not object, but I take it they want to show a part of it and leave out a part, and we object to it." To which the court replied: "You may call out in cross-examination such of the conversation as took place." No objection was made nor exception taken to this course of procedure. The witness then testified that the threat she heard the respondent make on the second occasion was: "I will kill you, Frank, if you don't put them out of the house." Under the same offer, objection, ruling, and exception as were made respecting Mrs. Hastings' testimony, her son, also a witness for the state, was permitted to testify that he heard the respondent threaten to shoot her husband in June or July of 1908. But, before this evidence was offered and received, the respondent's counsel had called out from the state's witness evidence tending to show love and affection on the part of the respondent for her husband, "and that they had been loving and affectionate from their early acquaintance."

[1] It was urged in argument that the threats of the respondent thus shown were conditional, and that, in order to make them admissible in evidence, it was incumbent on the state to show that the conditions forming the basis had been complied with. Whether this is so or not we are not called upon to consider, for the objection to the evidence was not put upon this ground. In cases of homicide, previous threats by the accused to kill the deceased are always held admissible to show the state of the mind of the accused, his intent to kill, and his malice against the deceased at the time of the homicide. The remoteness of the threats in point of time does not affect their competency. It goes only to the weight of the evidence. *State v. Bradley*, 64 Vt. 466, 24 Atl. 1053; *Id.*, 67 Vt. 465, 32 Atl. 238; *Cribbo v. State*, 86 Ala. 613, 6 South. 109; *Redd v. State*, 68 Ala. 492; *State v. Hoyt*, 46 Conn. 330; *Commonwealth v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; *Commonwealth v. Goodwin*, 14 Gray (Mass.) 55; *Commonwealth v. Quinn*, 150 Mass. 401, 23 N. E. 54; *State v. Porter*, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589. And, since the matter of such threats had such a connection with the issue as allowed them to be given in evidence, no collateral issue was thereby raised. *Comstock's Adm'r v. Jacobs*, 84 Vt. 281, 78 Atl. 1017.

[2] Nor within the meaning of the law was the evidence in its declared purpose an attack upon the respondent's character.

[3] The rule that the prosecutor cannot impeach the character of the accused until the latter has adduced evidence to support

it has reference to the general character restricted to the trait which is in issue. It has no reference to evidence otherwise having a legitimate bearing on the guilt of the accused, and thus offered.

The third objection, "because not the whole of the conversation can be stated," had reference to the state's attorney's answer to the court's inquiry, "What things?" The answer so far as need be particularly noticed in this connection was "that had to do in part with the leasing of the farm and their own private affairs, not all of which she heard." It had no reference to the witness not stating in direct examination all she did hear of the conversation. That question was not raised until, as before seen, near the close of the direct examination of the witness, and then to the ruling (that the respondent's counsel might call out in cross-examination such of the conversation as took place) no exception was taken.

[4] The fact that the witness did not hear all the respondent said does not render her testimony incompetent. *Commonwealth v. Pitsinger*, 110 Mass. 101; *Commonwealth v. Taylor*, 129 Pa. 534, 18 Atl. 558.

[5] Mrs. Lucina Bird, a witness for the state, testified in direct examination, among other things, that, after the homicide, she was present with the respondent in an out-house, to which they had gone during the time that the prosecuting officers and the police officers were at the respondent's house to arrest her, the afternoon of October 22d; that while there she saw the respondent remove the petticoat she had worn the night of the shooting, and put it into a can, and cover it with papers, narrating what the respondent said at the time of doing so; and that the witness afterwards pointed out the petticoat to the police officer who produced it in court. In cross-examination the witness was asked: "Was there any statement or expression by her (respondent) or any conduct on her part in connection with that act—the removal of the petticoat and putting it into the can—that had the appearance of a desire to hide the petticoat?" The question was excluded on the ground that it called for a characterization of the act. So far as anything appears, the witness could and did sufficiently detail and describe all that the respondent said and did at the time and place named to enable the jury to form intelligent conclusions from them. The conclusions of the witness called for by the question were therefore properly excluded. *Clifford v. Richardson*, 18 Vt. 620; *Cavendish v. Troy*, 41 Vt. 99; *Bain v. Cushman*, 60 Vt. 343, 15 Atl. 171; *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. —, 81 Atl. 454. It is urged, however, that the question called for the appearance of the respondent at the time of her arrest, and hence it was proper, even though it called for the judgment or opinion of the witness. An analysis of the

question asked shows it really to contain three co-ordinate questions disjunctively connected, only the first of which need be stated. It amounted to this: Was there any statement by the respondent in connection with the removal of the petticoat, and putting it into the can, that had the appearance of a desire to hide the petticoat? The witness having narrated what the respondent said in that connection, it was the province of the jury to say what those sayings indicated.

[6] This element of the question being improper, it was not error to exclude the entire question. *Vaillancourt v. Grand Trunk Ry. Co.*, 82 Vt. 416, 74 Atl. 99.

[7] The respondent testified in her own behalf. In cross-examination, her attention being directed to a time previous to any about which she had given testimony in chief, and to an occasion when she left the place in Cambridge, Mass., where she had been working for the deceased and a woman named or called Blanche Averill, she testified that the deceased and Blanche lived as husband and wife, and she then supposed they were married to each other, though she afterwards knew they were not; that after the respondent had been there about six or eight weeks Blanche went away with the understanding that she probably would return before a great while, and the respondent testified that Blanche did not come back there. This was in answer to the question: "How long after that did she (Blanche) and he live together as husband and wife?" The respondent was then asked by the Attorney General: "Why didn't she come back there?" This question was objected to as not cross-examination. Thereupon the court said to respondent's attorney: "You have been showing their relations and have offered these letters to show their relations. In that view of the case, do you insist this is not cross-examination?" The attorney answered that he did. The question was allowed and exception noted. The respondent answered, "Because there was nobody there, we had gone away." In further cross-examination she was asked: "Then within two days after this time, after the woman you understood to be the man's wife left the house, everything was sold, and you and he had gone to the Boston boarding house to live?" and answered, "Yes." She also testified without objection on cross-examination that she and her husband occasionally talked about Blanche, but that she could not remember when this last occurred. Later, in cross-examination, she was asked whether she ever knew of his getting a divorce from Blanche. This was objected to as not cross-examination. The court ruled that she might answer "Yes or no," and an exception was saved. She answered, "No." No evidence was offered tending to show that Blanche and the deceased

were married, or that the respondent did not know at the time of the conversation about Blanche, that she was not his wife. It appears that the court permitted the questions as proper cross-examination. We take it to be true, as stated by the court when objection was made to the former question, that the respondent had been showing her relations with the deceased, and had offered letters bearing thereon. The fair construction of the bill of exceptions is that, when these questions were asked, the respondent had given testimony in cross-examination without objection tending to show that when she and the deceased left Cambridge together, and went to the Boston boarding house to live, she supposed that he and Blanche were husband and wife, though she afterwards knew they were not. The questions objected to were along the same line—to elicit further testimony bearing upon the respondent's relations with the deceased, and we cannot say from the bill of exceptions that it was not within legitimate cross-examination. Although for the purpose of showing the tendency of the evidence, and the charge of the court, and the exceptions thereto, a certified transcript of the entire case and the exhibits are referred to and made a part of the bill of exceptions, they are not made controlling, and the questions are to be determined upon the bill. *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148; *Comstock's Adm'r v. Jacobs*, cited above.

The exception to the Attorney General's argument in criticism of the argument of respondent's counsel in the treatment and characterization of the state's witnesses, and the testimony given by them, is without force. That part of the Attorney General's argument to which the exception points, considered in the light of his explanation when the exception was noted, if intemperate at all, was not so to an extent warranting a reversal. Besides, the arguments of respondent's attorneys, as well as that of the Attorney General, were addressed to the jury, and, if the argument of the latter was unwarranted as now urged, the jury knew it, and it could do the respondent no harm. *Marshal v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128.

[8] The respondent admitted killing the deceased by shooting, but denied that it was intentional, and claimed it was purely accidental. The court instructed the jury as to the law of involuntary manslaughter. Respondent's counsel excepted generally to the charge regarding that offense, stating their theory of the prosecution all through the trial had been that it was a case of a *mélée* in which the shooting was done in the heat of passion, and that at no time did they cross-examine witnesses or put in testimony on the theory of involuntary manslaughter, nor so argue to the jury. "A lawful act done in an unlawful or negligent manner is

in law an unlawful act" (*State v. Dorsey*, 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111); and we think the testimony given by the respondent tended to show that the shooting, though unintentionally done, was the result of negligence by her in handling the gun, indicating on her part a carelessness or recklessness incompatible with a proper regard for human life, which, if established, would in law render her guilty of involuntary manslaughter. It cannot be said that the charge respecting that subject was wholly unsound (see *State v. Center*, 35 Vt. 378), and defect in any particular part of it is not reached by such general exception. *Needham v. Boston & Maine Railroad*, 82 Vt. 518, 74 Atl. 226. This confines our consideration under that exception to the contention that thus to submit the case to the jury was error, because (respondent says) it did not conform to the indictment which did not furnish her with a description of the charge of involuntary manslaughter.

The question, then, is whether a person indicted for murder may be convicted of involuntary manslaughter where the facts justify it, a question, so far as we are aware, never before raised in this state. At common law felonious homicide by killing another man was divided into murder and manslaughter—murder, "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought either express or implied"; manslaughter, "the unlawful killing of another without malice either express or implied; which may be either voluntary, upon sudden heat; or involuntary, but in the commission of some unlawful act." 4 Black. Com. 190-191, 195. In *Salisbury's Case*, 1 Plow. 101, where John Vane Salisbury was indicted of murder upon malice prepense, the jury found that he killed the man, but not of malice prepense, and so acquitted him of the murder, and found him guilty of manslaughter. Whether he should be utterly acquitted by this verdict, or whether the court should give judgment upon him that he should be hanged for the manslaughter, or whether the verdict should serve only against him for an indictment of manslaughter, and be of no other effect, or what else should be done with him, was privately considered and debated by the bench among themselves. The opinion of the whole court was clearly that they might give judgment upon him to be hanged for the manslaughter; for they held that the jury might give a verdict at large, and find the whole matter, that, when he was arraigned for killing a man upon malice prepense, the substance of the matter was whether he killed him or not, and the malice prepense was but matter of form or the circumstance of killing. And although the malice prepense makes the fact more odious, and for this cause the offender shall

lose divers advantages which he should otherwise have, yet it is nothing more than the manner of the fact, and not the substance of the fact, for the substance of the fact is the killing, and when the substance of the fact, and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, judgment shall be given according to the substance.

In *MacKalley's Case*, 9 Co. 65, the indictment was for murder in killing a serjeant of London, and on trial the jury returned a special verdict, submitting to the justices of the court whether thereon the prisoners were guilty of murder or manslaughter. By the King's command all the judges of England were ordered to meet together to resolve what the law was upon the said record; and accordingly all the judges of England and Barons of the Exchequer, met together and heard counsel upon this special verdict as well of the prisoners as of the King. Lord Coke says the matter was very well argued by counsel learned on both sides at two several days, and that divers exceptions were taken to the indictment and to the verdict also. One exception to the verdict was for that the jurors had not found the special matter contained in the indictment, but other matter, and judgment could not be given against the prisoners upon that indictment. To this it was answered, and in the end resolved, that there was sufficient matter in the verdict pursuant to the matter contained in the indictment upon which the court ought to give judgment of death against the prisoners, notwithstanding the said variance, because the warrant which the serjeant had to arrest the defendant was but circumstance, which it was not necessary to be precisely pursued in evidence, to be found by the jury, that the variance urged was but circumstance, and a variance from the circumstance of the indictment is not material; and "so if one is indicted of the murder of another upon malice prepense, and he is found guilty of manslaughter, he shall have judgment upon his verdict, for the killing is the substance and the malice prepense the manner of it; and, when the matter is found, judgment shall be given thereupon, although the manner is not precisely pursued"—citing Plow. Com. 101. Thus it was established at common law that a person indicted for the murder of another upon malice prepense may be found guilty of manslaughter, because it does not differ in kind or nature of the offense, but only in the degree—not in substance of the fact from murder, but only in the ensuing circumstances, a variance as to which does not hurt the verdict. And to this effect is the law stated by Sir Mathew Hale, and by Serjeant Hawkins, in their respective Pleas of the Crown. 1 Hale's P. C. 449, 466; 2 Hawk. P. C. c. 47, § 4. See *State v. Scott*, 24 Vt. 127. It is said in *State v. McDonnell*, 32 Vt. 491,

that the law of manslaughter is very correctly defined by Chief Justice Shaw in the Webster Case, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, thus: "Manslaughter is the unlawful killing of another, without malice, and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the offense; or involuntary, when the death of another is caused by some unlawful act, not accompanied with any intention to take life." Speaking of the latter branch of manslaughter, Sir Mathew Hale says: "In these cases, to speak once for all, the indictment itself must find the special matter, or in case the indictment be of murder or manslaughter, and upon the trial it appears to the jury it was involuntary (as by misfortune, or in his own defense), the jury ought to find the special matter, and so conclude, et sic per infortunium, or se defendendo, and not generally, that it was per infortunium, or se defendendo, because the court must judge upon the special matter, whether it be murder, homicide, or per infortunium, or se defendendo, and the jury is only to find the fact, and leave the judgment thereupon to the court; and in such case the prisoner must not plead the special matter, and so justify, but must plead not guilty, and the special matter must be found by the jury, * * * for upon the special matter found the court may give judgment against the conclusion of the verdict, as that the fact is manslaughter, though the conclusion of the verdict be per infortunium or se defendendo." And by way of illustration his lordship refers to a case very much in point: "Sir John Chichester, and his man servant, whom he very well loved, were playing together. The man had a bedstaff in his hand, and Sir John has his rapier in the scabbard. Sir John, according to the usual sport between them, bids his man guard his thrust or pass, which he was making at him with his rapier, in the scabbard. The servant with the bedstaff breke the thrust, but withal struck off the chape of the scabbard, where by the end of the rapier came out of the scabbard, but the thrust was not so effectually broken, but the end of the rapier prickt the servant in the groin, whereof he died. Sir John Chichester was for this indicted of murder, and tried at the King's bench bar, where all this evidence was given; and it was ruled: (1) That it was not murder, though the act itself was not lawful, because there was no malice or ill will between them. (2) That it was not barely chance medley, or per infortunium, because altho the act, which occasioned the death, intended no harm, nor could it have done harm, if the chape had not been stricken off by the party

kild, and tho the parties were in sport, yet the act itself, the thrusting at his servant, was unlawful, and consequently the death that ensued thereupon was manslaughter, and was accordingly found and adjudged, which I heard." 1 Hale's P. C. 471-473. It is in point to note in passing that excusable homicide as distinguishable from justifiable homicide, whether per infortunium or se defendendo, was formerly considered as involving some degree of legal blame or punishment, and so in such cases the verdict, though it excused the death, it did not excuse the forfeiture of goods, nor was the prisoner to be absolutely discharged out of prison, but bailed till the next term or sessions to sue out a pardon and writ of restitution of his goods as a matter of course and right, only paying the expense thereof; that in later times to prevent this expense in such cases the judges usually directed a general verdict of acquittal; and still later, by Acts of Parliament, all practical distinction between excusable and justifiable homicide was wholly done away. 2 Hale's P. C. 477, 478; 4 Steph. Com. 57. Regarding the form of the verdict, Serjeant Hawkins (vol. 2, c. 47, s. 4) says: "That it hath been adjudged, that where the jury find a man not guilty of an indictment or appeal of murder, they are not bound to make any inquiry, whether he be guilty of manslaughter, &c.; but that if they will, they may, according to the nature of the evidence, find him guilty of manslaughter or homicide se defendendo or per infortunium; for the killing is the substance, and the malice but a circumstance, a variance as to which hurts not the verdict. Yet the books seem to make this difference, that where the jury find the defendant guilty of manslaughter on an indictment of murder, they may give their verdict generally, without setting out any of the circumstances of the fact; but that they shall not be received to find him guilty generally of homicide se defendendo, or per infortunium; but must set out the whole circumstances of the fact, and in the conclusion show of what crime they find the defendant guilty, wherein if they be mistaken, it is said, that the court may notwithstanding give such judgment as shall appear to be proper from the circumstances of the fact specially set forth." That both voluntary and involuntary manslaughter are included in the crime of murder, and a person indicted for murder may be convicted of murder or of either species of manslaughter, as the evidence may warrant, at common law, is held in the following cases in this country: Conner v. Commonwealth, 13 Bush (Ky.) 714; Buckner v. Commonwealth, 14 Bush (Ky.) 601; Bush v. Commonwealth, 78 Ky. 268; Powers v. State, 87 Ind. 144; Pigg v. State, 145 Ind. 560, 43 N. E. 309; Watson v. State, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1; Thomas v

State, 121 Ga. 331, 48 S. E. 273; *Gibson v. Somers*, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700.

In this state by statute (P. S. 5693) murder is defined and divided into first and second degrees. By section 2268: "In an indictment for murder or manslaughter the manner in which or the means by which the death of deceased was caused need not be set forth, but it shall be sufficient in an indictment for murder to charge that the respondent did feloniously, willfully, and of his malice aforethought kill and murder the deceased, and in an indictment for manslaughter to charge that the respondent did feloniously kill and slay the deceased." The first count of the indictment charges that the respondent "with force and arms, feloniously, willfully, deliberately, with premeditation, and of her own malice aforethought, did kill and murder" the deceased, setting forth neither the manner nor the means. This count is in the same form as the indictment challenged by demurrer in *State v. Noakes*, 70 Vt. 247, 40 Atl. 249. In that case it was urged that the above provisions of the statute prescribing the form of the indictment were in violation of the Declaration of Rights, which declares that in all prosecutions for criminal offenses a person has a right to demand the cause and nature of his accusation. It was held that a person charged with murder in the manner prescribed by this statute is fully informed of the cause and nature of the accusation against him; and that there is nothing in the Constitution which precludes the Legislature from dispensing with the necessity of stating the means, manner, and circumstances of the killing, in an indictment for homicide. If an indictment so drawn sufficiently informs the accused of the cause and nature of the accusation against him for murder, it must follow that it sufficiently informs him of the cause and nature of any offense included within that of murder, for the greater contains the less. Under an English statute (24 and 25 Vict. c. 100, s. 6), like section 2268 of the Public Statutes, quoted above, it has been held that in an indictment for manslaughter it is not necessary to go into detail as to the duty by neglect whereof the death was caused, yet, if it is set out, it must be so set out as to show a legal duty. *Queen v. Clerk of Assize of Oxford Circuit* (1897) 1 Q. B. 370; 8 Ency. Laws of Eng. 567. By P. S. 2337, "under an indictment for murder the respondent may be convicted of murder in the first degree, murder in the second degree, or of manslaughter, as the case may be upon the proofs." And in section 5697 the statute is specific that, if in the opinion of the jury the evidence is not sufficient to convict of murder a person arraign-

ed and put on trial for that offense, it may convict him of manslaughter, if in its opinion the evidence is sufficient to prove that offense. Manslaughter, like murder, is a felony in this state. It is not defined by statute nor are voluntary and involuntary manslaughter thus recognized as distinct crimes. The Legislature specifies manslaughter, but leaves the definition or description of that offense to the common law, by which, as before noticed, it may be either voluntary or involuntary, according to the circumstances under which the unlawful act causing death was done. We think it clear that the sections of the statute prescribing the form of the indictment for murder and manslaughter, and of the verdict which may be rendered where the accused has been arraigned and put on trial for murder, are not in restriction of the common law in this respect, and that the crime of manslaughter named in these sections includes, as at common law, both species, voluntary and involuntary. It follows that since the respondent's evidence tended to show that the death of the deceased was caused by the unlawful act of the respondent, not accompanied with any intention to take life, it was the duty of the court to give instructions to the jury to meet that view of the case, and a failure so to do would have been prejudicial error. This was expressly held in *Bush v. Commonwealth*, 78 Ky. 268, and in *Spriggs v. Commonwealth*, 113 Ky. 724, 68 S. W. 1087.

[9] The petition for a new trial is based upon the ground that the respondent was surprised by the court's giving any charge upon involuntary manslaughter, and she did not have an opportunity to meet that charge. But this petition is without merit. The respondent was bound to know that it was the duty of the court to charge upon every branch of the case within the indictment and supported by evidence. As held upon the exceptions, this included the involuntary branch of manslaughter. In these circumstances, the submission of the case to the jury in a manner to include that offense affords no ground for surprise, and, if she was surprised thereby, it was due to her own fault, and not to any act of the prosecution or of the court. Moreover, since this view of the case rested largely if not wholly upon testimony given by the respondent herself in direct examination, there does not seem to be much force in her position that she did not have an opportunity to meet it.

Judgment that there was no error in the proceedings of the county court, and that the respondent take nothing by her exceptions. Petition for a new trial dismissed, with costs.

In re TOMLINSON.

(Orphans' Court of Delaware. Kent. Sept. 19, 1911.)

1. DOWER (§ 83*)—ASSIGNING DOWER—DEBTS OF DECEASED HUSBAND.

A debt incurred by a man prior to his marriage and paid during his lifetime cannot be considered in assigning dower to his widow, and her rights cannot be diminished thereby.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 322-328; Dec. Dig. § 83.*]

2. DOWER (§ 27*)—ASSIGNING DOWER—DEBTS OF DECEASED HUSBAND.

A vendor of an undivided interest in land to his cotenant may not, as against the dower right of the widow of the cotenant, enforce a lien for the unpaid price.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 27.*]

3. DOWER (§ 83*)—ASSIGNING DOWER—DEBTS OF DECEASED HUSBAND.

A purchaser at an execution sale is a lienor of the debtor, within the rule that in assigning dower the widow is entitled to have considered the enhanced value of the land arising from the increased prosperity of the country and the improvements in the neighborhood; but the assignment must be made according to the condition of the land at the time of the sale, independent of the improvements erected thereon at the expense of the purchaser subsequent to his purchase.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 83.*]

Petition of Ellen B. Tomlinson for assignment of dower. Granted.

By her petition, Ellen B. Tomlinson, widow of Daniel R. Tomlinson, deceased, alleged that her husband, after marriage, became seised of a farm in Milford Hundred, containing about 166½ acres, and that on August 29, 1863, the farm was sold by the sheriff on a writ of venditioni exponas issued on a judgment in favor of James Cook, for the use of Joseph Hill, against her husband, Daniel R. Tomlinson. The judgment was for a debt of the husband, contracted after the marriage. On March 11, 1911, the husband of the petitioner died and the land having become the property of William B. Tomlinson, an assignment of dower by metes and bounds was asked for.

By the answer of William B. Tomlinson, the marriage of the petitioner to Daniel R. Tomlinson was denied, but at the hearing it was shown that they were married in 1855. It appeared further, that before the marriage Daniel R. Tomlinson gave to Stephen C. Boone a bond, dated May 1, 1853, for \$279.34, on which judgment was entered after the marriage at the October term, 1856. The next lien on the land was a judgment against Daniel R. Tomlinson for \$2,500, entered on January 27, 1859, on a bond given by Daniel R. Tomlinson to William B. Tomlinson, dated January 25, 1859. This latter bond was alleged to have been given to secure payment of the price of an undivided one-half interest in the farm, which undi-

vided interest by deed dated January 25, 1859, William B. Tomlinson conveyed to Daniel R. Tomlinson, they being then tenants in common thereof. It was claimed that when the property was sold by the sheriff in 1863 on a judgment of Cook, which was the third lien, the proceeds of sale were not sufficient to pay the judgment given for the purchase money by about \$400, and that this should be considered in assigning dower, William B. Tomlinson claiming a vendor's lien to that amount. By the answer it was further alleged that in 1863 the value of the farm did not exceed \$3,210, the price at which it was then sold; that since then the farm had been improved; and that certain new buildings had been erected thereon since, by the present owner, against whom the dower is sought.

The petition and answer were set down for hearing before Chancellor CURTIS and Judge BOYCE in the Orphans' Court on September 19, 1911, and the testimony of witnesses heard.

James M. Satterfield and Caleb S. Layton, for petitioner. James H. Hughes, for defendant.

CURTIS, Ch. (delivering the opinion of the court). After having heard the testimony of witnesses on the allegations of the petition and answer, the court find that the petitioner, Ellen B. Tomlinson and Daniel R. Tomlinson were married in 1855, and that Daniel R. Tomlinson died on March 11, 1911, 48 years after the sale of the farm by the sheriff. The questions raised were three: (1) Whether in assigning dower by metes and bounds the freeholders should consider the debt due from Daniel R. Tomlinson to Boone, represented by the bond for \$279.34, dated prior to the marriage. (2) Whether they should consider the claim of William B. Tomlinson to a vendor's lien for the unpaid part of the price of an undivided interest in the farm purchased by him from Daniel R. Tomlinson subsequent to the marriage. (3) What improvements had been added to the farm since the sheriff's sale and in the lifetime of Daniel R. Tomlinson.

[1] 1. Inasmuch as the bond of Boone was paid in the lifetime of Daniel R. Tomlinson, and therefore was not a debt due from him at the time of his death, it is not to be considered in assigning dower, and the widow's right of dower is not to be diminished thereby, or to the extent thereof. *Griffin v. Reece*, 1 Har. 508.

[2] 2. William B. Tomlinson is not entitled to enforce as against the widow's right of dower a claim for a vendor's lien to the extent of the unpaid portion of the undivided interest in the farm bought by him from Daniel R. Tomlinson. The right of a vendor to enforce a lien for the unpaid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

purchase money has not been established in Delaware, but whenever the question has arisen the tendency of the courts here have been against it. *Budd et al. v. Busti et al.*, 1 Har. 69; *Cannon v. Hudson*, 6 Houst. 21; *Godwin v. Collins*, 3 Del. Ch. 189; *Rice v. Rice* (C. C.) 36 Fed. 860.

[3] 3. In this state the respective rights of the widow of the alienee of the husband, respecting the improvements on the land by the former after alienation and during the life of the husband, are settled by decisions. The purchaser of land of the husband, sold during marriage by the sheriff on an execution against the husband, is regarded as an alienee of the husband. *Green v. Tennant*, 2 Har. 336, 339. In assigning and estimating dower, the widow is entitled to have considered the enhanced value of the land arising from the increased prosperity of the country and the improvements in the neighborhood. *Green v. Tennant*, supra. But the assignment should be made according to the condition of the land at the time of the sale, independent of the improvements erected or produced thereon at the cost and expense of the purchaser subsequent to the purchase. *Green v. Tennant* supra; *Rawlins v. Buttell*, 1 Houst. 224. By the proofs the character of the buildings and improvements so erected by the purchaser were shown, and the order for the assignment will contain a statement thereof, as well as instructions in accordance with the conclusion of the court.

The following order was made:

And now, to wit, this 19th day of September, A. D. 1911, the foregoing petition of Ellen B. Tomlinson, widow of Daniel R. Tomlinson, deceased, for assignment of dower in the lands and tenements whereof the said Daniel R. Tomlinson was seised in his lifetime, and the answer of William B. Tomlinson, the defendant and present owner of said lands and tenements, having come on to be heard by the judges of the said Orphans' Court, and the oral testimony of witnesses produced by the parties in said cause having been duly considered by the court;

And it appearing to the court that the petitioner, Ellen B. Tomlinson, and the said Daniel R. Tomlinson were duly married in the year 1855; that the said Daniel R. Tomlinson in his lifetime, during said marriage, was seised in his demesne as of fee of and in a tract of land in said petition mentioned, except the said tract of 7 acres and 90 perches situated on the north side of the public road in said answer mentioned; that since the alienation of said tract of land by the sale thereof by the sheriff on the 29th day of August, A. D. 1863, certain improvements have been erected thereon, namely, the dwelling house, barn and wagon shed, corn crib, chicken house and cow house:

It is, therefore, ordered, adjudged and decreed by the court that a commission shall issue directed to Robert H. Lewis, Gilder D. Jackson, John W. Caulk, William G. Postles and William Denney, five judicious and substantial freeholders of Kent county, directing them to assign dower to the said Ellen B. Tomlinson, widow of the said Daniel R. Tomlinson, out of the said premises in said petition mentioned, excepting as aforesaid, according to the condition thereof at the time of the sale thereof on the said 29th day of August, A. D. 1863, and according to the present value thereof, and that in determining the present value thereof the said freeholders shall not consider the said improvements erected on said lands and premises since the said sale, namely, the said dwelling house, barn and wagon shed, corn crib, chicken house and cow house;

And further, that they make return of their proceedings to this court at Dover, at the adjourned term thereof, to be held on the 7th day of October, A. D. 1911.

ODESSA LOAN ASS'N v. DYER.

(Superior Court of Delaware. New Castle.
Sept. 27, 1911.)

1. COURTS (§ 24*)—JURISDICTION OF SUBJECT-MATTER—ASSENT OF PARTIES.

Jurisdiction over the subject-matter cannot be conferred by assent of the parties, but must be given by law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

2. COURTS (§ 25*)—JURISDICTION—JURISDICTION OF PERSON.

The jurisdiction of a court over the person or property of a party is acquired by process served in the statutory manner, and the legality of the service is dependent on the statute, and not on any agreement by the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 79, 80; Dec. Dig. § 25.*]

3. APPEARANCE (§ 24*)—WAIVER OF OBJECTIONS—SERVICE.

The constitutional guaranty that no valid proceeding can be had against one until he has been notified thereof by proper service of process is for his protection, and a party may voluntarily waive it by voluntary appearance and submission to the court's jurisdiction; but where he appears, not voluntarily, but in response to service of process, the service must be legal to make the proceeding legal.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

4. PROCESS (§ 58*)—SERVICE—STATUTES.

The statute defining legal service of process, by prescribing with particularity the methods by which service may be made, does not authorize service on or acceptance of service by the attorney of a defendant, for such service is on an agent, and is good only when made so by statute.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 58.*]

Action by the Odessa Loan Association against William E. Dyer, administrator of Rebecca V. Dyer, deceased. On rule to show

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause why a judgment and the execution issued thereon should not be vacated. Rule made absolute.

Argued before CONRAD and WOOLLEY, JJ.

T. Bayard Heisel, for petitioner. George L. Townsend, Jr., for respondent.

WOOLLEY, J. (delivering the opinion of the court). It appears, from the petition filed in support of the rule, that the above-entitled cause was docketed in this court at its May term, 1907; that no service of process was made or attempted to be made upon the defendant, except in the manner shown by the return indorsed thereon, as follows: "Service accepted. [Signature of Attorney], Attorney for William E. Dyer, May 18, 1907;" that judgment was moved for and entered for want of an affidavit of defense and execution on the judgment thereafter issued.

[1-3] The jurisdiction of a court over the subject-matter of a suit is given it by law and is never conferred by the assent of parties. Likewise the jurisdiction of a court over the person or property of a party is acquired by process, served in a manner prescribed by the law and not in a manner agreed upon by the parties, however satisfactory that manner may be to one or to both of them. No valid proceeding can be had against a person until he shall have been notified of such proceeding by proper service of process. This is a right secured to all by the constitutions of the United States and of the state of Delaware. Being provisions for his protection, a party may voluntarily waive them, and by appearance, submit himself to the court's jurisdiction, but if he appear not voluntarily but in response to service of process, the service must be legal in order to make the proceeding legal.

[4] The statutes of this state have declared what is legal service, by prescribing with particularity, the methods by which service of process may be made upon defendants of different classes in different forms of action. As legal service of process is defined and determined by law, a defendant in an action may not determine for himself how he may be served nor may his attorney decide for him, for the legality of a service is dependent upon the authority of the law and not upon the authority of the parties.

Service upon or service accepted by the attorney of a defendant in an action, is service upon an agent and is good only when made so by statute. As there is no statute making legal the acceptance of service by an attorney for a defendant, such a service does not constitute legal service, notwithstanding its effect may be to bind the attorney, morally or professionally, to cure the defect by appearance. The court therefore

holds that there was no legal service in this case and that the judgment entered thereon and the execution issued thereunder should be vacated.

Rule absolute.

KNOWLES v. MASSEY.

(Superior Court of Delaware. Sussex.

April 14, 1908.)

1. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—ACCOUNT BOOKS.

Where account books are admitted in evidence, it is improper for the court to charge as to the weight to be given them; the jury being authorized to give them such weight, in considering them with all the other evidence, as they believe them entitled to.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439; Dec. Dig. § 194.*]

2. CONTRACTS (§ 28*)—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE.

In assumpsit, it is incumbent on plaintiff to show by a preponderance of the evidence that there was a contract, express or implied in law, between plaintiff and defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 133; Dec. Dig. § 28.*]

3. CONTRACTS (§ 187*)—SERVICES FOR THIRD PERSON.

Where plaintiff, a physician, rendered services in curing certain others under a verbal agreement with defendant to pay therefor and on defendant's credit, defendant was liable to pay for the services, notwithstanding a subsequent promise by any other person to pay therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

4. EVIDENCE (§ 588*)—CONFLICT—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, it is the jury's duty to reconcile it, if possible; otherwise, to determine which of the witnesses is entitled to the greater credit, and, having determined that, to reject the testimony of any witness believed to be untrue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

Action by Jacob C. Knowles against Edwin T. Massey for professional services and medicine administered to certain persons at defendant's special instance and request and on his promise to pay therefor. Verdict for plaintiff.

Argued before SPRUANCE and BOYCE, JJ.

James A. Marsh, for plaintiff. Woodburn Martin, for defendant.

BOYCE, J. (charging the jury). Gentlemen of the jury: This is an action of assumpsit, brought by Jacob C. Knowles, the plaintiff, against Edwin Massey, the defendant.

The plaintiff has declared on a special agreement alleged to have been made with the defendant.

The declaration contains a special count with the common counts added. The special

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ount charges in substance that the defendant was prior to the bringing of this action indebted to the plaintiff in a special sum of money for professional services before that time done and performed as a physician and apothecary for the defendant, at his special instance and request, in and about the healing and curing of William Massey, George Massey and Ola Massey of diseases and maladies under which they had before then labored and languished, and for medicines provided and administered to them, and that being so indebted the defendant promised the plaintiff to pay him the said sum of money. It is further averred that the defendant undertook and promised to pay the plaintiff so much money as he reasonably deserved to have of the defendant for said services.

To entitle the plaintiff to recover on said special count he must prove the defendant's promise as charged in said special count by a preponderance of the evidence.

The plaintiff has filed a bill of particulars and his claim is for 31 visits to George, Ola and William Massey while stricken with smallpox from November 16, 1903, to December 21, 1903, at \$10 a visit, and for medicine, aggregating the sum of \$312.

It is conceded that there has been paid on account of said bill the sum of \$51.50. The balance claimed to be due is, the sum of \$260.50, with interest from September 17, 1904, said to amount to \$53.27; the whole amount now claimed aggregating the sum of \$313.77.

We have a statute in this state which provides, among other things, that a book of original entries regularly and fairly kept, shall, together with the oath or affirmation of the plaintiff, be admitted to charge the defendant for sums therein contained.

[1] The plaintiff's book of original entries in this case has been admitted in evidence, and you will have it when you go to your room for deliberation upon this case. It is not competent for us to charge you upon the weight or the value which you should give to the book account, but you are to consider it in connection with all the other evidence in the case and give it such weight as you consider it entitled to.

The defendant denies that he made the agreement with the plaintiff as set forth in said special count, but admits that he did on behalf of his father, with the knowledge of the plaintiff that he was acting for his father, engage the plaintiff to attend his brother George who was at the time sick of smallpox, and he also admits that he did for himself agree with the plaintiff to pay him for two visits to his brother George at \$10 a visit and he insists that he did pay the plaintiff for said two visits the sum of \$20, which he claims he had obtained from his father for that purpose.

[2] In order to support this action of assumpsit, it is incumbent on the plaintiff to show from a preponderance of the evidence that there was a contract, express or implied in law between him and the defendant.

If you find that the plaintiff rendered professional services to George, Ola and William Massey, brothers and sister of the defendant, as claimed by the plaintiff, the law will not imply from that alone, a promise on the part of the defendant to pay for such services.

It is not denied that the plaintiff made the visits and furnished the medicines as shown by his bill of particulars.

The question of the defendant's liability turns upon the character of the agreement which he made with the plaintiff at the time the latter was engaged to visit the place where the said Massey children were located.

Did the defendant for himself promise to pay the plaintiff \$10 a visit as is claimed by the plaintiff? Or did the defendant engage the plaintiff on behalf of his father with the knowledge of the plaintiff that he was acting for his father, limiting his personal liability to the payment for two visits or the sum of \$20, as is claimed by the defendant?

[3] If you find from the evidence that the plaintiff rendered the alleged services under a verbal agreement with the defendant and on the credit of the defendant, as alleged by the plaintiff, the defendant would be liable to the plaintiff to pay for such services, and any subsequent promise of Sheppard Massey or any other person to pay the plaintiff for such services would not alone be sufficient to affect the right of the plaintiff to proceed against the defendant upon such special promise.

If the defendant did not enter into the special agreement with the plaintiff as alleged by the plaintiff, then the plaintiff would not be entitled to recover. To determine the liability of the defendant in this action, you must look to the evidence produced before you as to the nature, character and extent of the agreement made between the plaintiff and the defendant.

[4] This evidence is conflicting; you must reconcile it if you can; if you cannot, considering all the evidence produced before you, you are to determine which of the witnesses you think entitled to the greater credit, and having determined as to that, you may reject the testimony of any witness which you believe to be untrue, and accept that which you believe to be true, and upon that basis you are to determine as to the weight and preponderance of the evidence.

You are to decide for the plaintiff or the defendant in this case according as you find the weight or preponderance of the evidence for the one or the other.

Verdict for plaintiff for \$250.

STATE v. SEDGWICK.

(Court of General Sessions of Delaware. New Castle. Sept. 21, 1911.)

1. LOTTERIES (§ 3*)—ELEMENTS OF OFFENSE—STATUTES.

Rev. Code 1852, amended to 1893, p. 396 (12 Del. Laws, c. 33), provides that if any person shall sell or dispose of any lottery policy, certificate, or of anything by which such person or any number of persons promises or guarantees that any particular number, character, ticket, or certificate shall, in an event or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt, every person so offending shall on conviction be subject to a penalty. *Held*, that the fact that tickets representing membership in a baseball pool did not in themselves show a promise or guaranty that on the happening of an event, the holder should be entitled to money, did not save the scheme from being a violation of the statute, since the term "lottery," as used therein, includes any scheme for the distribution of money or prizes by chance, not limited to a sale of tickets nor to the terms or promises printed or written upon them.

[Ed. Note.—For other cases, see Lotteries, Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4245-4252; vol. 8, pp. 7710, 7711.]

2. LOTTERIES (§ 29*)—SCHEME—PROOF.

Where a lottery scheme involved more than appeared on tickets issued in the conduct thereof, its character and extent could be shown by any proper testimony.

[Ed. Note.—For other cases, see Lotteries, Dec. Dig. § 29.*]

3. LOTTERIES (§ 3*)—CONTINGENCY—CHANCE.

Where a baseball pool involved a double hazard of selection of a combination of numbers designated by a drawing to be representative of certain baseball clubs, the winnings on which were determined by the baseball score, the prize being given, not to him who might forecast the results of the games either in victories or runs, but to him who selected and paid for combinations of numbers, each representing a club, not selected by, but designated for, him, the total numbers of which approached nearest the highest total of runs made in a given time by a like number of clubs, the payment of the prizes depended on the happening of a contingency in the nature of a lottery, and was prohibited by Rev. Code 1852, amended to 1893, p. 396 (12 Del. Laws, c. 33).

[Ed. Note.—For other cases, see Lotteries, Dec. Dig. § 3.*]

Harry Sedgwick was indicted for lottery. Verdict of guilty.

The prisoner was indicted for a violation of the statute against lotteries and was charged with the particular offense of conducting a baseball pool, the plan of which was as follows:

On or before Saturday of one week, a person who desired to take a chance in the play of the next week paid the prisoner 30 cents, and in return received from him a ticket upon which were printed the names of the baseball clubs of the National and American Leagues and of the American Association. Before the name of each club there was a blank space in which a number

might thereafter be written. Upon the payment of the money and the delivery of the ticket on Saturday, the purchaser selected and gave to the prisoner six numbers, each denoting a club, then unknown alike to him and to the prisoner. On Monday, a number was given to each club, the numbers for all the clubs being determined by a drawing, the result of which was on that day announced to all purchasers of tickets who composed the membership of the pool. They then knew for the first time what six clubs they had selected when on the previous Saturday they bought their tickets and gave in their numbers.

The days of the week were shown by names upon the tickets and were arranged transversely to the names of the clubs so that the number of runs made by any club on any day might be entered in a blank opposite the name of the club and below the name of the day, and upon the margin of the tickets were blanks in which the total number of runs made by each club might be entered, and also a blank in which might be entered the grand total of runs made during the week by the six clubs selected in the manner stated. Upon the back of each ticket when purchased from the prisoner were stamped the winnings for the previous week and the amount of prizes to be paid at the conclusion of the ball games of the ensuing week, there being nothing further upon the tickets that indicated promises of payment of money or the manner of winning prizes. It appeared by the evidence that the first prize was paid to the holder of a ticket who had selected by numbers, at the time and in the manner stated, a combination of six clubs, that together made a number of runs the aggregate of which approached nearest the total number of runs of those six clubs, which at the end of the week were shown by the scores to have made the highest total of any six clubs named on the tickets. The other prizes were graduated in somewhat the same manner.

Argued before CONRAD and WOOLLEY, JJ.

Josiah O. Wolcott, Deputy Atty. Gen., for the State. James Saulsbury and Philip L. Garrett, for defendant.

WOOLLEY, J. (delivering the opinion of the court). We assume, for the present motion, that the law under which this indictment was found is that which appears on page 396 of the Revised Code, being chapter 33, volume 12, of the Laws of Delaware, and which in part reads as follows:

"If any person shall * * * sell or dispose of, * * * any lottery policy, certificate, or anything by which such person or any other person promises or guarantees that any particular number, character, ticket,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or certificate, shall in the event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt, * * * every person so offending shall, upon conviction," be subject to a certain penalty.

Counsel for the prisoner have moved the court that the jury be instructed to return a verdict of not guilty, upon two grounds, which, as we understand them, are as follows:

[1] First, that the tickets sold by the prisoner, do not in themselves show a promise or guarantee by him that upon the happening of an event the holder shall be entitled to money.

[2] Lottery is a scheme for the distribution of money or prizes by chance. That scheme is not limited to the sale of tickets nor to the terms or promises printed or written upon them. Being a scheme, involving more than appears upon the tickets, its character and extent may be shown by any proper testimony.

Entertaining that view, we have ruled in certain evidence, and for the same reason we decline to grant the motion upon the first ground.

[3] The second ground of the motion is that the "contingency" which determines the winning of a prize in this particular scheme is the aggregate number of runs made by a certain number of baseball clubs, which being the result of skill and not of chance, is not "a contingency in the nature of a lottery."

The "happening of a contingency in the nature of a lottery," as contemplated by the statute and applied to the particular facts of this case, is not the number of the runs made by different baseball clubs, which uncertainty may or may not be a matter of chance within the meaning of the law, but the contingency here, into which enters the element of chance and which partakes of the nature of a lottery, is the double hazard of the selection of a combination of numbers which are designated by a drawing to be representative of certain clubs, the winnings upon which are determined by baseball scores. The prize is given not to him who may forecast the results of the games, either in victories or in runs, but to him who selects and pays for a combination of numbers, each representing a club not selected by but designated for him, the total runs of which approach nearest the highest total of runs made in a given time by a like number of clubs.

There is but one highest total of runs made by six clubs regardless of the number of runs made and that highest number of runs is the factor that determines who wins on the combinations of numbers selected by the members of the pool. As a method of

determining the winner of all who participated in the game, it has no advantage over nor is it essentially different from the ordinary method of having a little girl or a man of position draw the decisive or determining number from a hat. We are of opinion that the scheme disclosed by the evidence constitutes a lottery within the meaning of the law and therefore decline to grant the motion that the jury be instructed to acquit the prisoner.

The defendant thereupon entered a plea of guilty and was paroled upon his own recognition.

In re SULLIVAN COUNTY R. R.
(Supreme Court of New Hampshire. Oct. 3, 1911.)

1. EMINENT DOMAIN (§ 167*) — STATUTORY PROVISIONS—EFFECT.

Laws 1911, c. 164, § 3, subds. "a" and "c" abolishing the Board of Railroad Commissioners, creating a public service commission, and providing that the act shall not affect pending actions, but all actions pending before the Supreme Court, etc., shall thereafter be acted upon by the Commission, affects pending actions to the extent that thereafter they are to be acted upon and determined by the Commission, depriving the Supreme Court of further original jurisdiction of a pending proceeding for leave to extend railroad tracks, and for that purpose to take lands of objecting owners.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 167.*]

2. WORDS AND PHRASES—"BUT."

The word "but" is commonly used in the sense of "except."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 926, 927.]

Petition by Sullivan County Railroad for leave to extend its tracks from Lebanon to Cornish, and for that purpose to take the lands of certain objecting owners. Motions for further proceedings denied.

Branch & Branch (Oliver E. Branch, orally), for petitioner. Herbert C. Lakin and Remick & Hollis (Mr. Remick, orally), for objecting landowners.

YOUNG, J. [1] The objectors contend that chapter 164, Laws 1911, deprives the court of all further original jurisdiction of this proceeding. That act creates a public service commission to perform the duties of the Board of Railroad Commissioners (section 3 [a]) and those which sections 18-20, c. 156, Public Statutes 1901, impose on the court (section 12). It also provides that its passage "shall not affect pending actions, * * * but all actions * * * pending before the Supreme Court * * * or before the Board of Railroad Commissioners * * * shall thereafter be acted upon and determined by the Public Service Commission" (section 3 [c]), abolishes the Board of Railroad Commissioners (section 3 [a]), and repeals sections 18-20, c. 156, Public Stat-

utes—the statutory provisions on which this proceeding rests (section 21).

[2] Whether this court has further jurisdiction depends on what is intended by section 3 (c). If chapter 164 in no way affects pending actions, this court has final jurisdiction of this cause; but, if that was not the Legislature's intention, it must be either transferred to the Public Service Commission, or dismissed. The only evidence relevant to the issue of intention is the language the Legislature used, and that provides in so many words that after the act becomes a law actions of this kind shall "be acted upon and determined" by the Commission. Therefore it could not have intended the act to have no effect whatever upon them. It is more probable that section 3 (c) was intended to limit the effect of the act on such actions. In other words, the Legislature used "but," in the second line of section 3 (c), in the sense of "except"; and that is one of its most common meanings. Webster, New Int. Dict., But, 1, 2. If it was used in that sense, the act so far affects pending actions that thereafter they are to "be acted upon" by the Commission. The fact that section 3 (c) is meaningless, if that was not the sense in which "but" was used, tends to the same conclusion; and, as there is nothing in the act to rebut this presumption, it must be held that it affects pending actions to this extent, and to this extent only, that thereafter they are to be acted upon and determined by the Commission.

Motions for further proceedings in this court denied. All concurred.

DAY v. WASHBURN et al.

(Supreme Court of New Hampshire. Grafton. Oct. 3, 1911.)

1. WILLS (§ 67*)—CONTRACT TO DEVISE—ENFORCEMENT.

An agreement by testator to leave all his estate to complainant, in consideration of board and care during the balance of his life, was a contract which testator had power to make, and which, in case of default, was enforceable against his administrator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 175-177; Dec. Dig. § 67.*]

2. SPECIFIC PERFORMANCE (§ 24*)—CONTRACT TO WILL—ENFORCEMENT—PARTIES.

Where decedent did not perform a contract to will all his property to complainant, her claim for the enforcement of such agreement should be prosecuted against decedent's administrators, and not against his heirs or legatees.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 54, 55; Dec. Dig. § 24.*]

3. WILLS (§ 68*) — CONTRACT TO WILL — BREACH—DAMAGES.

Where testator did not perform his contract to leave all his property to complainant by will, complainant's damage was the value of the property left by him, not willed to her,

which was not consumed in administration or payment of debts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 178-182; Dec. Dig. § 68.*]

4. SPECIFIC PERFORMANCE (§ 86*)—CONTRACT TO WILL—ADEQUATE REMEDY AT LAW.

Where a suit in equity was originally brought against decedent's administrator by claimants under his will, and complainant filed a claim for specific performance of decedent's contract to will her all his property, the proceeding could be treated as a bill of interpleader, brought by the administrator, so that complainant's claim was not objectionable, on the ground that she had an adequate remedy at law.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

5. SPECIFIC PERFORMANCE (§ 127*)—PROBATE — ANNULLMENT—CONTRACT.

Where, in a suit for specific performance of a contract to will claimant all decedent's property, a former will was offered merely as evidence of a contract alleged, the superior court in that proceeding had no jurisdiction, on finding in favor of the contract, to set up the former will, or to annul the probate of a later one, by which a part of testator's property was willed to others.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

6. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION.

In a suit to enforce performance of a contract to will complainant all testator's property, parol evidence to show the consideration of complainant's alleged contract with decedent was admissible, and not subject to objection that it tended to vary or contradict the written evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

Transferred from Superior Court, Grafton County; Chamberlin, Judge.

Suit by Hattie L. Day against Fred Washburn, administrator of Edgar A. Washburn, and another, praying that an instrument, proved and allowed as the last will of Orson Day, be declared null and void, and for the specific performance of a contract entered into by Orson Day and the plaintiff. Trial by the court. The bill was originally brought against Fred Washburn, administrator of the estate of Edgar A. Washburn, and William Kimball, claimants under the will of Orson Day. By agreement of the parties, Wilbur F. Smith was appointed administrator with the will annexed of the estate of Orson Day, and appeared as a party defendant. The defendants demurred and answered. The demurrer was overruled, subject to exception. Case discharged.

Upon a hearing, it was found that Orson agreed with the plaintiff that he would, by his last will, give and devise to her all his estate. In order that she might have sufficient income to meet her current expenses, Orson further agreed to pay her \$4 at the end of each week and a reasonable sum for necessary nursing during sickness; and in consideration of Orson's agreements, the

plaintiff promised to board and care for him during his life. September 22, 1906, Orson made a will, by which he gave all his estate to the plaintiff. On the same day and as a part of the same transaction, Orson and the plaintiff signed a contract, whereby she agreed to board him during his natural life for \$4 a week, and he promised to pay her that sum. The plaintiff performed the contract on her part. August 20, 1907, Orson made a will, which has been proved and allowed as his last will, by which he bequeathed to the defendant Kimball and Edgar A. Washburn personal property exceeding \$2,400 in value.

The plaintiff was offered as a witness, but her testimony was excluded and not considered as to matters occurring in the lifetime of Orson. The defendants excepted to evidence of the first will, on the ground that the court had no jurisdiction to pass on its validity, and to it and other evidence, as contradicting the written contract between the parties.

Smith & Smith, Albin & Sawyer, and Charles A. Dole, for plaintiff. Scott Sloane, for defendants.

PARSONS, O. J. [1-3] Upon competent evidence, the testimony of the plaintiff having been excluded and not considered, the court has found that the deceased, Orson Day, in consideration of services to be performed by the plaintiff, agreed, among other things, to leave her all his property, by his last will, at his decease. This was a contract which the deceased had the power to make, and which, in default of performance by him, could be enforced against his administrator. *Peterborough Savings Bank v. Hartshorn*, 67 N. H. 156, 33 Atl. 729; *Clements v. Marston*, 52 N. H. 31, 39; *Parsell v. Stryker*, 41 N. Y. 480, 487. The contract was performed by the plaintiff; but, by the instrument which has been proved as the last will of Day, although the plaintiff is made residuary legatee, certain items of personal property of considerable value were given to Kimball and Washburn, the original defendants. The estate of Day is represented by his administrator, and claims against it should be prosecuted against the administrator, and not against heirs or legatees. As Day did not fully perform his contract to give the plaintiff all his property by will, the plaintiff's damages by the breach are the value of all property left by him, not willed to the plaintiff, which is not consumed in administration; there being no debts.

[4] The defendants demur, upon the ground that the plaintiff has an adequate remedy at law. A decree for specific performance would have precisely the same effect as a judgment for damages in a suit at

law. Justice does not require a separate suit to accomplish the same result which may be reached in this without further hearing. The administrator of Day is a party by agreement, and is entitled to protection and advice as to the conflicting claims of the defendants, claiming the property by the terms of the will, and of the plaintiff, claiming under the contract. It is immaterial that the contending parties have brought him into court, rather than that he, as plaintiff, has compelled the parties to interplead. The parties have stated their claims in pleading and tried their case. The proceeding may be treated as a bill of interpleader, brought by the administrator, and a decree be entered, directing the administrator to pay over to the plaintiff all the estate of Day in his hands after payment of the expenses of his trust. *Peterborough Savings Bank v. Hartshorn*, 67 N. H. 156, 33 Atl. 729; *Cox v. Leviston*, 63 N. H. 283, 287.

[5, 6] The superior court, of course, had no jurisdiction in this proceeding to set up the first will, or to annul the probate had of the later. The decree has no such effect. The first will was offered merely as evidence of the contract alleged, and the decree does not affect the probate of the second. The parol evidence objected to was not introduced to vary or control the written evidence, but merely tended to show the consideration, and was competent. *Quimby v. Stebbins*, 55 N. H. 420. Whether the instrument executed by Day as his will, September 22, 1906, was a sufficient acknowledgment in writing to avoid the statute of frauds as to real estate is not involved, as the title to real estate is not in issue. *Clements v. Marston*, 52 N. H. 31, 39.

Case discharged. All concurred.

BERLIN NAT. BANK v. GUAY.

(Supreme Court of New Hampshire. Cocs. Oct. 3, 1911.)

1. PRINCIPAL AND SURETY (§ 115*)—DISCHARGE OF SURETY—ADDITIONAL SECURITY—PRINCIPAL'S REFUSAL TO ACCEPT.

That a creditor, by the exercise of diligence, might have secured additional security from the principal debtor did not release the surety, under the rule that a creditor is under no obligation to the surety to accept collateral security when offered by the principal debtor.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 244-268; Dec. Dig. § 115.*]

2. PRINCIPAL AND SURETY (§ 115*)—DISCHARGE OF SURETY—ACTS OF CREDITORS.

Defendant signed a note as surety for D., payable to plaintiff bank, for \$2,000, and, while this debt was owing the bank, discounted for D. a note for \$5,350, and received as collateral certain notes executed to D. by B. for \$9,600; these notes being taken by the bank to secure all of D.'s indebtedness, including that on which defendant was surety. Thereafter these notes were further secured by stock in a corporation

which B. organized, whereupon it was agreed in writing that, after payment to the bank of B.'s notes, held as collateral, and the discharge of D.'s liability as indorser or otherwise to the bank, the proceeds of B.'s notes should be applied to the payment of the debt for which defendant was an indorser. The property of B.'s corporation having been destroyed by fire, insurance policies were assigned to plaintiff's cashier as trustee, whereupon creditors of the corporation brought suits and summoned the insurance companies as trustees. Defendant was notified by the bank to assist in the defense of these suits, but refused to do so, whereupon they were compromised by the cashier, and the amount received, less certain fees and expenses, and an amount, paid on other indebtedness of D., was applied in reduction of the former indebtedness. *Held*, that the bank was not bound to notify defendant before making an adjustment of the litigation, and, having conducted the same in good faith, defendant was not discharged of liability because of the bank's failure to collect more.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 115.*]

Transferred from Superior Court, Coos County; Chamberlin, Judge.

Assumpsit by the Berlin National Bank against Joseph Guay, on a note for \$2,000, dated March 13, 1906, payable to plaintiff and signed by defendant as surety. Case transferred from Superior Court. Judgment for plaintiff.

The original consideration for the note was a loan by the plaintiff, July 14, 1906, of \$5,000 to one Decker, the principal upon the note in suit. This loan was made upon a promissory note of that amount and date, signed by Decker as principal, and by the defendant and one Brooks as sureties. March 14, 1907, Decker paid \$1,000, and a new note for \$4,000 was signed by the same parties in the same way. March 13, 1908, the \$4,000 note was replaced by two notes for \$2,000 each, both signed by Decker as principal; one—the note in suit—was signed by the defendant as surety, and the other by Brooks.

April 28, 1907, Decker sold the stock and business of the Cousens Hardware Company, of which he was owner, to one Burbank for \$9,600, taking the latter's notes in payment. May 31, 1907, Decker secured of the plaintiff a loan of \$5,350 on his note, with the Burbank notes as collateral. Burbank subsequently incorporated the business under the name of the Burbank Company, and deposited the stock certificates, amounting to \$12,000 (120 shares), with the plaintiff as additional security for the payment of the Burbank notes, which were all indorsed by one Woodward. The Burbank notes were taken by the plaintiff as collateral security for (1) the payment of Decker's note for \$5,350, (2) the payment of all liabilities of Decker to the plaintiff as indorser or otherwise, and (3) the payment of the two Decker notes for \$2,000 each; one signed by the defendant, and the other by Brooks, as

sureties. When the Burbank notes were taken by the plaintiff, an arrangement was made to have purchases of stock in trade insured; the policies to be payable to the plaintiff in case of loss, and the proceeds to be first applied in payment of the Burbank notes, and then in discharge of the liabilities to which the Burbank notes were collateral.

The defendant and Brooks became uneasy because of the existing situation; and, on September 4, 1907, Miles, the plaintiff's cashier, procured from Decker the following agreement, and delivered it to Brooks and Guay: "Whereas C. Brooks and Joseph Guay, of Berlin, N. H., have indorsed my note for the sum of four thousand dollars (\$4,000), dated July 13, 1907, payable to the order of the Berlin National Bank, of Berlin, N. H., and I have also given my note to said Berlin National Bank for the sum of fifty-three hundred and fifty (\$5,350) dollars, dated May 31, 1907, said last-mentioned note being secured by 128 notes for different sums, amounting to nine thousand six hundred (\$9,600) dollars, signed by E. A. Burbank and indorsed by Jason Woodward and by me indorsed to said Berlin National Bank, said Burbank notes being secured by 120 shares of the stock of the Burbank Company as collateral: Now, therefore, I agree that after the payment to said bank of said last mentioned note—that is, the note of E. A. Burbank—and the discharge of all my liability as indorser or otherwise to said Berlin National Bank, that the proceeds of said E. A. Burbank's note shall be applied as fast as they are paid to the payment of the note for four thousand (\$4,000) dollars indorsed by said C. Brooks and Joseph Guay."

February 4, 1908, all the property of the Burbank Company was destroyed by fire. There was no insurance, payable to the plaintiff, as arranged when the Burbank notes were taken as collateral; but immediately after the fire Miles, acting for the bank, and to protect the interests of all parties arising out of the transactions hereinbefore stated, took an assignment to himself, as trustee, of policies amounting to \$10,500. After the assignment of the policies, suits were brought by creditors of the Burbank Company, in which the insurance companies were summoned as trustees. These suits were duly entered in court, and Miles appeared as claimant of the funds trusted. During the September term, 1909, at Colebrook, the suits came on for trial.

While the cases were pending and about to be tried, the defendant and Brooks, upon request, attended with their counsel a meeting had at the plaintiff's banking rooms in Berlin. It was proposed by some of the directors of the bank that Brooks and Guay

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

join with the bank in the suits of the creditors of the Burbank Company, and that counsel engaged for the bank be authorized to act for all. The defendant and Brooks declined to enter into the agreement, and disclaimed any interest in the litigation, claiming they were not liable upon the notes. Brooks and the defendant were not represented by counsel or otherwise at the hearings subsequently had at Colebrook. One of the cases was heard at Colebrook, and resulted in a decree discharging the trustees. Upon the suggestion of the presiding justice, other suits were compromised. By agreement, decrees were entered, under which the proceeds of insurance policies, amounting to \$9,569.96, were paid over to Miles. From this fund Miles paid the creditors in the various suits \$2,706.66 (being a percentage of their claims), retained \$250 as his fees and expenses, and applied \$5,875.34 upon notes of Decker held by the plaintiff, and \$737.96 upon a note of Woodward. After the deposit of the Burbank notes as collateral, Decker increased his indebtedness to the bank to the amount of \$360, giving one note for \$300 and one for \$60. These two notes were included in making up the \$5,875.34 of Decker's indebtedness extinguished by the proceeds of the insurance.

By refusing to join in the litigation in the trustee suits, the defendant did not intend to waive any right to have the proceeds of the Burbank notes applied according to Decker's agreement of September 4, 1907; and it was ruled as matter of law that he was not estopped to now insist upon such application. The court ruled that the sum of \$737.96 applied on the Woodward note and the sum of \$2,706.66 paid creditors should have been applied on the Decker notes, for which Brooks and the defendant were sureties, and that the plaintiff could have judgment for the amount due on the note in suit, less \$1,722.31; that being one half of the sum paid on the Woodward note and to creditors. To this ruling and the ruling upon the question of estoppel, the plaintiff excepted.

The plaintiff requested a finding "that the compromise settlement made by Miles at Colebrook, as trustee, was a fair and reasonable settlement of a disputed claim." Upon this request, the court found "that, if Miles had a legal right to apply the money received by him as he did, the settlement was reasonable; but, if he was legally obligated to apply the money in his hands in accordance with the Decker agreement, the settlement was not reasonable, without disclosing the terms of that agreement and obtaining the consent of the defendant." Neither the justice presiding at the Colebrook term nor the plaintiff's counsel at that time were informed of Decker's agreement of September 4, 1907.

Herbert I. Goss and Drew, Shurtleff & Morris (Messrs. Goss and Morris, orally), for plaintiff. William H. Paine and Sullivan & Daley (Mr. Sullivan, orally), for defendant.

PARSONS, C. J. The most favorable view for the defendant is that he was surety upon the note in suit for Decker, the first signer. While this debt from Decker and the defendant was owing the bank, the bank discounted for Decker a note for \$5,350, and received as collateral security certain notes, payable to Decker, called the Burbank notes, amounting to \$9,600. These notes were taken by the plaintiff, not only as security for the \$5,350 note, but also as security for any other indebtedness of Decker's to the bank, including that upon which the defendant was liable as surety. The consideration of the Burbank notes was the sale to the signer (E. A. Burbank) by Decker of the stock and business of the Cousens Hardware Company. When the plaintiff took the Burbank notes, an arrangement was made to have the stock purchased by Burbank insured, payable to the plaintiff, in case of loss; the funds, if any, realized therefrom to be applied by the bank to the payment of the Burbank notes and the payment of the indebtedness for which those notes were held as collateral. The note of \$5,350 was dated May 31, 1907, and the agreement between the bank and Decker as to the disposition of the proceeds of the collateral appears not to have been reduced to writing. Subsequently the cashier of the bank procured from Decker a written agreement, which he delivered to the defendant, providing that after payment of the \$5,350 note and the discharge of all his liability to the bank as indorser, or otherwise, the proceeds of the Burbank notes should be applied to the payment of the debt for which the defendant was surety. This agreement accords with the terms under which the bank received the notes the May before, except that it contains no mention of insurance. Shortly after his purchase of the Cousens Hardware Company, Burbank organized the business into a corporation, known as the Burbank Company, and deposited the stock certificates with the plaintiff as additional security for the payment of his notes. The arrangement as to insurance was not effected. February 4, 1908, the property of the Burbank Company was destroyed by fire.

[1] The defendant claims that the failure of the bank, either to effect insurance itself, or to cause the owner of the property to effect insurance, payable to it, discharged him from liability upon Decker's debt. It will not be necessary to consider the questions whether the bank, as a general creditor of the Burbank Company (against which, so far as appears, it had no claim), or as pledgee of the stock of the Burbank Company, could have obtained insurance upon the property of

that corporation; or whether, in case the Burbank Company had insured its property, payable to the bank as its interest might appear, or had assigned its policies of insurance before loss to the bank, the legal title of the bank to the proceeds of the policies after the fire would have been so clear that none of the general creditors of the Burbank Company would have disputed it. The defendant's position is merely that the plaintiff by diligence might have secured additional security. Assuming that it could, the defendant is in no worse case than if the security were voluntarily offered and refused. Assume that Burbank or the Burbank Company before the fire offered the bank the insurance security which it is found was arranged for when the loan of \$5,350 was made, and the plaintiff refused to accept it, the refusal would not have discharged the surety, because a creditor is under no obligation to accept collateral security when offered by the principal debtor.

"The creditor may, without prejudice to his rights against the surety, decline to accept additional security offered by the principal. *Bank v. Young*, 43 N. H. 457, 461. He is under no obligation to pursue any of the remedies which the law gives him against the principal, though the surety requests him to do so. *Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539. He need not prove the debt against him in bankruptcy, exhibit the note to the deceased principal's executor, nor, if his estate is administered as insolvent, present it to the commissioner for allowance. *Sibley v. McAllaster*, 8 N. H. 389; *Stevens v. Hood*, 70 N. H. 177 [46 Atl. 29]. In short, he is not required to take any active measures to obtain payment, either directly from the principal, or out of property which he holds as security. *Bank v. Rogers*, 16 N. H. 9, 17, 18. As between creditor and surety, it is the surety's business to see that the principal pays. *Sibley v. McAllaster*, 8 N. H. 389, 390. * * * The surety's contract is that he will himself pay the note when it falls due, and not that he will pay it in case the payee or holder cannot, by due diligence, enforce payment by the principal." *Carpenter, J., in Morrison v. Bank*, 65 N. H. 253, 280, 20 Atl. 300, 303 (9 L. R. A. 282, 23 Am. St. Rep. 39).

[2] The remaining question is whether the action of the bank or its cashier, Miles, after the fire, has discharged the defendant. Immediately after the fire, Miles took from the Burbank Company to himself, as trustee, an assignment of insurance policies amounting to \$10,500. In doing this, he acted for the bank, and to protect the interests of all parties arising out of the transactions between the bank and Decker. The terms of the assignment are not disclosed; but, as the only claim the bank had to any payment from the Burbank Company was founded upon the notes and stock it held as collateral, it

is assumed that the proceeds of the policies were intended to be applied in the same way to the extinguishment of the liability of Decker to the bank, in the order agreed upon when the collateral was left with the bank. The defendant therefore was entitled to have the money realized upon the policies applied to the extinguishment of the debts upon which he was liable, after the satisfaction of the liabilities of Decker, upon which the proceeds of the notes were made first applicable. Whether Decker could incur further indebtedness after the collateral was left, which would take precedence of the debt upon which Brooks and Guay were liable, would depend upon the terms upon which the collateral was deposited. The court interpreted the agreement as permitting such increase of Decker's indebtedness, and approved the application of the proceeds of the policies to an indebtedness of \$360 subsequently incurred, making the total of the Decker indebtedness entitled to precedence in the application of the proceeds of the Burbank notes \$5,875.34. To this ruling the defendant took no exception, and no question is here raised thereby. Whatever the plaintiff realized out of the assignment of the policies in addition to this sum was applicable to the remaining indebtedness of Decker, which consisted of the \$2,000 note in suit and one of like amount, on which one Brooks was surety. There was therefore for application on the defendant's note one-half of the sum realized over and above \$5,875.34.

Immediately after the assignment to Miles, creditors of the Burbank Company brought suit against them, trusteeing the insurance companies. Miles appeared as claimant in these suits under the assignment to him. After the trial of one suit, a compromise was made, by which it was agreed that the trusteeing creditors should receive, either from the bank or out of the insurance fund, a certain percentage of their claims. Thereupon decrees were made, upon which insurance money amounting to \$9,569.96, which had been collected by a receiver, was paid over to Miles. Miles paid the creditors' percentage (\$2,706.66), retained \$250 as his charges and expenses, and paid over to the bank, or, as an officer of the bank, applied, \$5,875.34 to the indebtedness of Decker, which had prior claim to the collateral, and \$737.96 to a note of Jason Woodward, thus disposing of the entire amount. The ground of the application of \$737.96 upon the Jason Woodward note does not appear, and the plaintiff concedes that as the case stands this amount should be applied on the notes for which Brooks and the defendant were sureties, i. e., one-half that sum upon the note in suit. This would dispose of all that was realized upon the insurance policies; for it is clear that to free the funds from the claims of the attaching creditor the plaintiff paid, either directly or indirectly, \$2,706.66, so that the

sum actually realized for application upon the Burbank and Decker indebtedness was that sum, plus expenses (\$250), less than the total amount of the insurance fund.

The controversy relates solely to the compromise payment to the attaching creditors. The question is whether the plaintiff is to be charged with that sum as wrongfully paid out of the insurance fund, or refused credit for it as a reasonable expense of realizing upon the assignment of the policies. Counsel do not differ as to the law. It is conceded in argument that if, under all the circumstances, the compromise was reasonable the defendant cannot complain. The controversy relates to the interpretation of the finding upon this point. The court found "that, if Miles had a legal right to apply the money received by him as he did, the settlement was reasonable; but, if he was legally obligated to apply the money in his hands in accordance with the Decker agreement, the settlement was not reasonable, without disclosing the terms of that agreement and obtaining the consent of the defendant." This appears to mean that the settlement was reasonable in fact, unless, as matter of law, the plaintiff could not legally settle the controversy nor withdraw from the litigation with the trustee creditors without the consent of the defendant. The answer to his proposition is found in the quotation previously made from *Morrison v. Bank*, 65 N. H. 253, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39. The plaintiff was under no obligation to litigate its title to the collateral for the benefit of the defendant; nor, if it did so, was it obliged to do so at its own expense. Miles or the bank were obliged to apply the proceeds of the collateral secured by Miles' vigilance after the fire in accordance with the terms under which they held the Burbank notes and stock, of which the agreement signed by Decker and given Brooks and Guay was evidence; but they were not obliged to apply anything which they did not succeed in collecting. The assignment was collateral security. Anything paid to the bank under it they were legally bound to apply in accordance with Decker's directions, but they were not bound to bring suit on it. After the attachment of the funds, the assignment was worthless, unless the bank took active measures to enforce it, appeared as claimant, and gave bond for costs. Having entered upon the litigation, so long as they acted in good faith, they were at liberty to withdraw therefrom whenever they desired to do so; and the defendant could not complain, for it was the defendant's duty to pay the debt and conduct the litigation. He had full and reasonable information of the situation, but he refused to assume the debt for which the security was held, or even to join in the attempt to realize thereon.

The case of *Morrison v. Bank*, 65 N. H. 253, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39, before referred to, involved very similar questions, and was decided after great consideration. There the bank, having a note upon which the plaintiff Morrison was surety, sued the principal, and attached property more than sufficient to satisfy the notes in that suit, and also sued the surety. After judgment against both, the bank applied the attached property upon claims against the principal, in suits in which the attachment was made subject to the one in which the note upon which Morrison was liable was sued, and collected the judgment against Morrison, who, upon learning the facts as to the order of the attachments, brought a bill in equity to recover the money paid on the judgment against him. It was held that the creditor, being under no obligation to bring the suit against the principal, could stay the proceeding at his pleasure; and that the surety was not discharged by the neglect to levy upon the attached property, or by the application of it upon judgments in subsequent attachment suits. In that case the surety, Morrison, had only constructive knowledge of the security obtained by the creditor by attachment. Here the defendant surety was fully informed of the situation. He knew that to realize upon the security claimed to have been obtained involved litigation. He was invited to join therein, and refused. He could not expect to control or be consulted as to the conduct of litigation in which he refused to participate, and in which he claimed he had no interest.

As the plaintiff was not legally bound to notify the defendant before making an adjustment of the litigation, the finding of the court means that the settlement was reasonable. In other words, in the conduct of the litigation in good faith, the plaintiff recovered on the assigned insurance all that it reasonably could. This being so, the defendant cannot complain that more was not recovered. The plaintiff's exception to the ruling of the court, applying one-half the sum paid creditors upon the note sued, and to the amount of the judgment ordered, is sustained. The plaintiff is entitled to judgment for the amount due on the note, less one-half the amount applied on the Jason Woodward note.

Case discharged. All concurred.

FERGUSON et al. v. O'BRIEN.

(Supreme Court of New Hampshire. Hillsborough. Oct. 3, 1911.)

1. FIXTURES (§ 32*) — REMOVAL BY TENANT — TIME.

A tenant's right to remove fixtures placed on the premises by himself continues as long as he remains in possession of the premises by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

landlord's consent, even after the lease has expired.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 63; Dec. Dig. § 32.*]

2. FIXTURES (§ 17*)—LANDLORD AND TENANT—OWNERSHIP.

Whether the ownership of a stove installed by the tenant remained in her after she accepted a second lease depends upon the intention of the parties when the second lease was made.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. § 31; Dec. Dig. § 17.*]

3. APPEAL AND ERROR (§ 694*)—RECORD—EVIDENCE.

The Supreme Court cannot consider whether there was any evidence to sustain the court's finding, where the evidence was not transferred.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2910; Dec. Dig. § 694.*]

Exceptions from Superior Court, Hillsborough County; Mitchell, Judge.

Action by Eleanora Ferguson and others against Martin O'Brien. Verdict for defendant, and plaintiffs except. Exceptions overruled.

April 1, 1904, the plaintiffs leased a store for the term of two years to Elizabeth Hayes, who installed a steam heater in December of the same year. She intended to remove the heater before the lease expired, but prior to that time an agreement was made, by which she was to have the store for a second term of two years, with a right of renewal for a like term. The second lease was not written until after the first expired. Hayes subsequently assigned the second lease and sold the heater to one Gray, and he sold it to the defendant, who removed it while Gray was occupying under the lease.

Irving E. Forbes, for plaintiffs. Harry T. Lord, for defendant.

YOUNG, J. [1] 1. The authorities do not sustain the plaintiffs' contention that a tenant cannot remove fixtures after his lease expires. His right to remove them continues as long as he remains in possession of the

premises by consent of the lessors. *Penton v. Robart*, 2 East, 86.

[2] 2. Notwithstanding the weight of authority is in favor of the plaintiffs' contention that Hayes surrendered the heater to them when she accepted the second lease (19 Cyc. 1068; 13 Am. & Eng. Enc. Law, 651), the court is inclined to follow the minority view of the law, which makes the ownership of the heater depend on the intention of the parties at the time the second lease was made (*Radey v. McCurdy*, 209 Pa. 306, 58 Atl. 558, 67 L. R. A. 359, 103 Am. St. Rep. 1009; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Second Nat'l Bank v. Merrill*, 69 Wis. 501, 34 N. W. 514; *Daly v. Simonson*, 126 Iowa, 716, 102 N. W. 780; *Thomas v. Gayle*, 134 Ky. 330, 120 S. W. 290, 28 L. R. A. [N. S.] 767, 135 Am. St. Rep. 412; *Ogden v. Garrison*, 82 Neb. 302, 117 N. W. 714, 17 L. R. A. [N. S.] 1135; *Bergh v. Company*, 136 Fed. 368, 69 C. C. A. 212, 70 L. R. A. 756); for that is the view of the law this court is accustomed to apply to decide the question of ownership. *Dame v. Wood*, 75 N. H. 38, 70 Atl. 1081; *Langdon v. Buchanan*, 62 N. H. 657, 660; *Dana v. Burke*, 62 N. H. 627, 629; *Cavis v. Beckford*, 62 N. H. 229, 18 Am. St. Rep. 554; *Cochran v. Flint*, 57 N. H. 514, 543.

[3] The plaintiffs' right to maintain this action depends, therefore, on whether Hayes intended to give them the heater when she accepted the second lease, or did anything which estops the defendant to deny that that was her intention; for both parties derive their title to the heater from her. What she intended and whether he is estopped are both questions of fact. Consequently the only question of law raised by the plaintiffs' exception is whether there was any evidence to sustain the court's finding. That question is not open to the plaintiffs, for the evidence is not transferred.

Plaintiffs' exception overruled. All concurred.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

POTTLE et al. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Supreme Judicial Court of Maine. Nov. 13, 1911.)

1. INSURANCE (§ 553*)—FIRE POLICIES—FRAUD BY INSURED—VALUATION OF PROPERTY LOST AND SAVED.

Recovery on a fire policy is defeated by insured falsely and knowingly inserting in his proof of loss articles as burned which were not burned, or knowingly putting such false and excessive valuation on single articles, or on the whole property, as displays reckless disregard of truth, or by fraudulent undervaluation of goods saved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.*]

2. INSURANCE (§ 665*)—FIRE POLICIES—FRAUD BY INSURED—VALUATION OF PROPERTY—EVIDENCE—WEIGHT.

In an action on a fire policy, evidence held to show fraudulent overvaluation of property lost, and fraudulent undervaluation of that saved.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

On Motion from Supreme Judicial Court, Washington County.

Action by James W. Pottle and others against the Liverpool & London & Globe Insurance Company. Verdict for plaintiffs, and defendant moves for a new trial. Motion sustained.

Assumpsit on a fire insurance policy, Maine standard form, issued by the defendant. Plea, the general issue, with a brief statement alleging, among other things, as follows:

"That the alleged fire originated by the voluntary act, design, and procurement of the plaintiffs, or one of them, whereby they attempted to defraud defendant, and that the policy declared on was thereby rendered void.

"That plaintiffs attempted to defraud the defendant by knowingly and intentionally including in their proof of loss personal property that was not in their store when the fire occurred, and which was not injured, destroyed, or lost by reason of said fire, and by knowingly and intentionally including in said proof of loss personal property that they did not know was in said store at the time of the fire, and destroyed, injured, or lost, and which they had no reasonable ground for believing was therein, and so destroyed, injured, or lost, and that said policy was thereby rendered void.

"That plaintiffs attempted to defraud the defendant by knowingly, willfully, and intentionally placing in their proof of loss a false and excessive valuation upon the several articles alleged to have been injured, destroyed, or lost by reason of said fire, and by placing therein valuations on said articles that they did not know to be just and true, and had no reasonable grounds for believing to be just and true, and that said policy was thereby rendered void.

"That the insured property was exposed to loss or damage by fire to the knowledge of the plaintiffs, and they willfully, intentionally, and fraudulently neglected to make all reasonable exertions to save and protect the same, as required by the terms of said policy, thereby attempting to defraud the defendant, and rendering the policy void."

Verdict for plaintiffs for \$1,293.75. The defendant filed a general motion for a new trial.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Hanson & St. Clair and R. J. McGarrigle, for plaintiffs. C. B. & E. C. Donworth, for defendant.

CORNISH, J. It is a firmly established legal doctrine that if a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss any articles as burned which were not burned, or knowingly puts such a false and excessive valuation on single articles, or on the whole property, as displays a reckless disregard of truth, he cannot recover. His own fraudulent acts prohibit it. *Dolloff v. Insurance Co.*, 82 Me. 266, 19 Atl. 396; *Rovinsky v. Insurance Co.*, 100 Me. 112, 60 Atl. 1025.

A painstaking examination and consideration of the record in this case lead inevitably to the conclusion that, although these legal principles were clearly laid down in the charge of the presiding justice, they were ignored by the jury, and their verdict for the plaintiffs is manifestly wrong for that reason.

The plaintiffs were proprietors of a country store at North Perry, in the county of Washington, a rural community in which this was the only store, and in which a sawmill giving employment to about 35 men was the only industry. About 6 o'clock on the morning of October 18, 1909, smoke was discovered issuing from the roof of the building which the proprietors had left a few minutes before, and a few neighbors, with the entire force from the mill, rushed to the rescue, and while some were engaged in putting out the fire, which seemed to be in the partition near the chimney, the rest employed themselves in removing the goods and fixtures from the lower story of the building. After working for an hour or more, they thought the fire had been quenched and all the men left. But it broke out again shortly after, and before it could be arrested the building, with the remaining contents, burned. The total insurance on the goods was \$2,500, one-half of which was in the defendant company.

The plaintiffs claimed in their proof of loss that the total sound value of all the goods was \$3,496.87, and of the goods saved \$224.10, leaving a net loss of \$3,272.77. This claim they reiterate at the trial, leaving no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

opportunity for error or misjudgment, and the only plaintiff who testified further claimed that he had thought of other goods which were omitted from his schedule, amounting to \$800 or \$1,000 more, the largest part of which was downstairs and destroyed. This would make a total claim of nearly \$4,500, of which only \$224.10 was saved, or, as he put it in another form, only one thirty-second part was taken out, although he admits that the entire stock amounted in May, 1899, to only \$2,500, and the invoices of goods bought for six months prior to October, 1900, aggregated less than \$2,400.

It is conceded that the size of the store was 24 by 36 feet, with two stories, the lower, the store proper, having a height of about nine feet, and the upper, about seven. The lower story was fitted in the usual manner, with shelving on three sides, a counter on two sides, and drawers beneath the shelving and counters. This room was well stocked; one of the plaintiff's witnesses, an experienced traveling salesman who was familiar with the condition, estimating the value of the goods in this room as \$1,500. A flight of stairs, at the top of which was a trapdoor, connected the upper and lower stories, and this upper room the plaintiffs occupied as their sleeping apartment. During the previous summer they had also used it to some extent as a shop; a carpenter's bench having been installed.

[1] 1. In the first place, it is impossible to reach any other conclusion than that all the goods in the store proper were removed and saved. There was ample time in which to accomplish it, an ample force for the work, and no smoke to interfere. Even the fixtures, such as stove, desk, post office boxes, telephone, and safe were rescued, as well as the heavier goods, such as a barrel of oil and a hogshead of molasses. The testimony of the mill men who did the work, and did not depart until it was completed, leaves no room for doubt as to the thoroughness with which they acted.

If the value of these goods was, as claimed by the plaintiffs' witness, \$1,500, the value placed upon them by the plaintiffs as \$224.10 is so low as in itself to substantiate the claim of fraudulent undervaluation, which is as fatal in goods saved as fraudulent overvaluation is in goods lost.

[2] 2. In the second place, the quantity and value of the goods claimed by the plaintiffs to have been located on the second floor are so great as to render the claim inherently improbable. There would hardly seem to be a demand for such quantities of specific articles in that small community, as, for instance 2,750 yards of cloth, 24 cases of breakfast foods, 8 barrels of crackers and biscuit, 450 pounds of nuts, 35 cases of canned berries, 300 pairs of overalls, \$1,136 worth of boots, shoes, and rubbers, \$100 of children's

hosiery, 15 boxes, or 1,500 cakes, of soap, 50 pounds of nutmeg, which is usually sold by the ounce, 1,500 cans of Norwegian sardines, etc.

Moreover, all these, and much more, which it is needless to recapitulate, aggregating, as the plaintiffs say, between \$2,000 and \$3,000 in value, were stored in this upper room, which was also used as a chamber. Were the bulk measured, it would readily be seen that the space would be utterly inadequate for the purpose.

It is therefore

Held that the proof of loss is so clearly false and fraudulent that the plaintiffs' right of recovery was thereby forfeited.

Motion sustained.

Verdict set aside.

McCORMICK v. SAWYER.

(Supreme Judicial Court of Maine. Nov. 18, 1911.)

1. BILLS AND NOTES (§ 351*)—INDORSEMENT AFTER MATURITY—DEFENSES.

A note, purchased before, but indorsed after, maturity, is open to any legal defenses that might have been made against the original payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 878-885; Dec. Dig. § 351.*]

2. BILLS AND NOTES (§ 489*)—GENERAL ISSUE—ADMISSIBILITY OF EVIDENCE—PARTIAL FAILURE OF CONSIDERATION.

While total failure of consideration may be shown under the general issue, in a suit on a note given for the price of machinery, the maker cannot show breach of warranty under the general issue, without previous notice of such defense; it not being claimed that the machinery is of no value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1603-1610; Dec. Dig. § 489.*]

Exceptions from Superior Court, Kennebec County.

Action by J. E. McCormick against H. H. Sawyer. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Action of assumpsit, brought in the superior court, Kennebec county, on the defendant's promissory note, made payable to the International Harvester Company of America and indorsed by that company to the plaintiff after maturity. The plaintiff was the agent of the International Harvester Company, and as such agent sold to the defendant a certain manure spreader, for which the note in suit was given. Plea, the general issue. At the conclusion of the evidence the presiding justice ordered a verdict for the plaintiff, and the defendant excepted.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Williamson, Burleigh & McLean, for plaintiff. H. H. Sawyer, pro se.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

WHITEHOUSE, C. J. This is an action on the defendant's promissory note, made payable to the International Harvester Company of America, and indorsed by that company to the plaintiff after maturity. In defense, under the general issue pleaded, the defendant offered to prove a breach of warranty on the part of the company respecting the construction and operation of the agricultural implement for which the note was given, and claimed a recoupment of the damages thereby sustained.

[1] It was conceded by the plaintiff that, although the note in controversy was purchased by him before maturity, the fact that it was not indorsed until after maturity rendered it open to any legal defenses which the defendant might have had under proper pleadings, if the action had been brought by the original payee (*Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711); but it is contended that under our rule of practice such a defense cannot be allowed under the general issue, but must be set up either by a special plea or by a brief statement, and that in any event, before it can be shown under the general issue, the plaintiff is entitled to notice before the trial of the nature of the defense.

[2] At the trial the presiding judge ruled that the defense of breach of warranty could not be set up under the general issue, without previous notice that such a defense would be made, and, in the absence of any request on the part of the defendant for permission to amend his pleadings by filing a brief statement of such defense, the presiding judge ordered a verdict for the plaintiff, and the case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct.

It is undoubtedly true that a total failure of consideration may be shown under the general issue, for the reason that "as the action is founded on the contract, and the injury is the nonperformance of it, evidence which disaffirms the continuing obligation of the contract at the time when the action was commenced goes to the gist of the action. The plea of nonassumpsit was considered as not only putting in issue every allegation, as well the promise as the inducement, consideration, and all averments in fact, but also as enabling the defendant to give in evidence every description of defense which showed that the promise was void or voidable, or that it had been performed." *Chitty on Pl.* (16th Am. Ed.) 489-493; *Clark v. Holway*, 101 Me. 391, 64 Atl. 642.

But while an entire failure of consideration may be given in evidence under the general issue, without notice, "it is otherwise as to a partial failure of consideration, since it does not go to the foundation of the action and show that the plaintiff is not entitled to recover anything, but is merely in mitigation of damages. * * * As recoupment signifies nothing more than a reduction of dam-

ages, the right can in general only be exercised under a special notice, and not under a plea which purports to be a bar to the action. *Waterman on Set-Off and Recoupment*, §§ 669, 670; *People v. Niagara*, 12 Wend. (N. Y.) 246; *Mayor v. Trowbridge*, 5 Hill (N. Y.) 71. *Runyan v. Nichols*, 11 Johns. (N. Y.) 547, was an action by an attorney against his client to recover his fees, and the defendant had been permitted to set up, under the general issue, the plaintiff's negligence in conducting his business as his attorney. But judgment was reversed, on the ground that "the defendant neither pleaded nor gave notice of this defense, and it must have been a complete surprise upon the plaintiff." So in *Gleason v. Clark*, 9 Cow. (N. Y.) 57, it is said that, "under the plea of the general issue, the defendant may show that the plaintiff never had any cause of action. If this species of defense goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages, notice should be given." See, also, *Hills v. Bannister*, 8 Cow. (N. Y.) 31.

In *Eldridge v. Mather*, 2 N. Y. 157, the result of the New York decisions upon this question is thus stated in the opinion of the court: "We are of opinion that in this state the rule is fully settled, and should be adhered to, that where the defendant is sued upon a contract, and desires to set up in defense a partial want or failure of consideration in mitigation of damages, he must give notice thereof. This principle was expressly adopted as early as 1814 by the Supreme Court of this state, in the case of *Runyan v. Nichols*, 11 Johns. 547, *supra*. After so long an adherence to a rule which is just in itself, and so well calculated to effectuate the object of all pleadings, viz., to apprise the opposite party of the true ground in dispute, it is too late to inquire into the origin of the rule."

This just and convenient rule of practice, which has been observed in New York for more than a century, was adopted in Massachusetts as early as 1839 in the case of *Harrington v. Stratton*, 22 Pick. 510. In *Hodgkins v. Moulton*, 100 Mass. 309, it is said in the opinion: "Partial failure of consideration can be pleaded only when ascertained and liquidated, unless offered in evidence in reduction of damages, under rules which permit such a defense in certain cases, when it is properly pleaded, to avoid circuity of action. * * * But clearly such defense must be specially stated in the defendant's answer." See, also, *Jackman v. Doland*, 116 Mass. 550, and *Hunting v. Downer*, 151 Mass. 275, 23 N. E. 832.

In 9 Cyc. p. 738, it is said: "At common law partial failure of consideration would not be set up as a defense, unless the transaction was fraudulent in its inception. The defendant was obliged to resort to a cross-action to recover his damages, unless he could show an entire failure of consideration. But now, generally, either by statute or judicial

determination, the defense of partial want or failure of consideration may be interposed in an action on a contract, when the facts constituting the defense are specially pleaded or set out by way of recoupment, or as a bar to so much of the demand as may be thus answered."

In this state it is believed that the rule requiring notice of such a defense to be given to the plaintiff by brief statement or otherwise has been uniformly recognized and enforced, unless expressly or impliedly waived by the plaintiff. There is no legislation or judicial authority to the contrary. In the case of *Pratt v. Johnson*, 100 Me. 443, 62 Atl. 242, the defendant claimed at the trial that the warranty in question in that case was a part of the consideration of the notes in suit, the whole constituting one transaction, and that he should be allowed to set up the breach of the warranty in defense of the action. On the other hand, the plaintiffs contended that the alleged warranty was an independent agreement, the breach of which, if any, could not be set up in defense of that action. This was the only question considered in the opinion of the court. The plaintiffs did not object to the defense offered on the ground that it was not set up by brief statement, and no allusion was made to that question, either in the arguments of counsel or the opinion of the court. The decision of the questions presented in that case cannot be deemed a judicial determination which was designed to abrogate a time-honored and beneficent rule of practice.

In the case at bar it was not claimed or suggested that the agricultural implement for which the note in suit was given was of no value. It may have been of considerable value, notwithstanding the defects involved in the alleged breach of warranty. This defense of a partial failure of consideration should have been set up in a brief statement.

Exceptions overruled.

STATE v. PARSHLEY.

(Supreme Judicial Court of Maine. Nov. 14, 1911.)

1. CARRIERS (§ 114*)—EXPRESS COMPANIES—TERMINATION OF LIABILITY.

An express company's liability as a carrier continues until delivery of the shipment to the consignee, personally or at his residence or place of business.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

2. COMMERCE (§ 41*)—REGULATION—SEARCHES AND SEIZURES.

Respondent, having been advised by an express company that it held an interstate shipment of intoxicating liquors addressed to him, paid the express charges and signed a receipt therefor, but told the company to keep the package until he found out whether it was his.

Seven hours later the package was seized under search and seizure process while in the company's office. Held that, at the time of seizure, there had been no constructive delivery to respondent, and that the liquors were still in interstate commerce, and hence not subject to search and seizure on state process.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 31; Dec. Dig. § 41.*]

Report from Supreme Judicial Court, Sagadahoc County, at Law.

Search and seizure process by the State against Henry C. Parshley. On report. Nol. pros. ordered entered.

Search and seizure process, and reported to the law court.

The report is as follows:

"This was a process for the seizure of intoxicating liquors, alleged to be stored for the purpose of illegal sale in the office of the American Express Company in the city of Bath. It was issued by the Bath municipal court, and is dated August 5, 1910.

"The following facts appear in evidence:

"A barrel containing intoxicating liquors was shipped from Boston, Mass., to Bath, Me.; the barrel, according to the marks thereon being consigned to H. C. Parshley. The driver for the express company called at the respondent's shop about 10 o'clock a. m., notified him of the arrival of this barrel, and asked if it was for him and what he wanted done with it. Respondent said he did not know whether it was for him or not, but that he would pay the express charges, which he did, and signed the express receipt book, and told the driver to keep the liquors until he (Parshley) found out about it.

"The liquors remained in the storeroom of the express company until about 5 o'clock in the afternoon of the same day, when they were seized under this warrant. Between the time the notice was given by the driver and time of the seizure no notice had been received by the express company from Parshley, or any one representing him, as to the disposition of the liquors. But the driver testifies that, if any direction had been given by Parshley, he understood that it would have been his duty to carry and deliver the barrel to the respondent, as directed.

"Upon the foregoing statement of facts the case is, by agreement of parties, reported to the law court for its determination. Only a single question is reserved. All others necessary for the state to prove are admitted by the respondent. If the court is of opinion that the barrel of liquors seized had been sufficiently delivered by the express company to the respondent, so that it was no longer under the protection of the interstate commerce provision of the United States Constitution and of the federal statutes relating to the same, judgment is to be rendered for the state as follows: 'Judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of the Bath municipal court affirmed; ' otherwise, a nol. pro. is to be entered."

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Arthur H. Stetson, Co. Atty., for the State.
Frank L. Staples, for defendant.

BIRD, J. There being no claim of an actual delivery, the sole question for determination is whether the liquors were constructively delivered before seizure under process.

The act of Congress of August 8, 1890 (26 Stat. 313, c. 728 [U. S. Comp. St. 1901, p. 3177]), known as the "Wilson Act," provided that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The meaning of the word "arrival" as employed in this act was authoritatively settled in *Heymann v. Southern Railway Company*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178. The conclusions reached in that case have been summarized by this court as follows:

1. The elementary and long-settled doctrine is reiterated that, prior to the Wilson act, in case of interstate shipments, "delivery and sale in the original packages was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned."

2. That the Wilson act manifested no attempt on the part of Congress to delegate to the states the right to forbid the transportation of merchandise from one state to another, "since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

3. That the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state has power to prevent the sale of the liquors, even in the original package.

4. That the question whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, is immaterial. *State v. Intoxicating Liquors*, 102 Me. 385, 395, 67 Atl. 312, 120 Am. St. Rep. 504.

In the case under consideration, as al-

ready seen, there is no pretense of an actual delivery; but it is urged by the state that there was a constructive delivery, and that such is sufficient to meet the requirement of the Wilson act. In *Heymann v. Southern Railway Co.*, ubi supra, there were no facts justifying the passing upon the question of constructive delivery; but the court in its opinion says: "Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered." Id., 203 U. S. 276, 27 Sup. Ct. 107, 51 L. Ed. 178.

This language of the Supreme Court of the United States has already been considered by this court in *State v. Intoxicating Liquors*, 102 Me. 385, 396, 67 Atl. 312, 120 Am. St. Rep. 504, in which it is held that the point, if tenable, is unimportant from lack of facts to render it applicable to the cases under consideration, and in *State v. Intoxicating Liquors*, 104 Me. 463, 72 Atl. 331, 23 L. R. A. (N. S.) 1020, and again in *State v. Intoxicating Liquors*, 106 Me. 138, 76 Atl. 265, 29 L. R. A. (N. S.) 745.

In the case in 104 Me. 463, 72 Atl. 331, 23 L. R. A. (N. S.) 1020, it is said: "In this paragraph the court seems to have undertaken to state, but not to decide, the three essential elements of constructive delivery to be notice to the consignee of the arrival of the goods, a reasonable time on his part after notice to receive them, and a mutual design or arrangement with the carrier to hold them for the consignee." And, referring to the words "designedly left in the hands of the carrier for an unreasonable time," the court says: "This phrase was undoubtedly intended to allude to a passive or silent understanding between the shippers of liquors, the carriers, and consignees with reference to those transactions which operate to enable an evasion of the law and assist consignees in obtaining a safe delivery of their contraband goods. * * * The rule is well established that a constructive delivery can be effected only by an agreement between the carrier or middleman and the buyer or person claiming under him, whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer

make the carrier his agent for custody without the carrier's consent. * * * The relation of the carrier to the shipper, the consignee, and the goods is originally fixed by law, and by a contract between the parties, which is that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract, once existing, can be changed only by operation of law or by an agreement between the parties. When the goods arrive at their journey's end, it is the duty of the carrier to store them. This duty is imposed by law. When stored, they are still in the possession and custody of the carrier, and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery, or by a new contract with the consignee in place of the contract of carriage."

In 106 Me. 138, 72 Atl. 265, 29 L. R. A. (N. S.) 745, this court says: "In *Heymann v. Southern Railway Company*, 203 U. S. 270, 276 [27 Sup. Ct. 104, 51 L. Ed. 178], the court was careful to say that it did not decide that the federal protection would not be lost where the consignee, after notice, designedly left the liquors in the hands of the carrier for an unreasonable time. The locality of the liquors is not made the test. All that the federal courts seem to require is that the liquors shall once have been turned over to and accepted by the consignee. This may occur without any removal of the liquors themselves from the freight sheds of the carrier." This case and that in 104 Me. 463, 72 Atl. 331, 23 L. R. A. (N. S.) 1020, were contracts for the carriage of goods as freight, and not by express. In the latter case it was held there was no constructive delivery, and in the former that there was; but in that case not only had all the goods been receipted for, but part of them had been delivered from the freight shed of the carrier to the agent of the consignee.

[1, 2] Was there constructive delivery of the liquors in the case at bar? As has been noted, the contract between the shipper and carrier provided for carriage by express. Such contract includes the delivery of the goods to the consignee personally, or at his residence or place of business, and until such delivery the liability of the carrier continues. *State v. Intoxicating Liquors*, 101 Me. 430, 64 Atl. 812; *Id.*, 102 Me. 211, 66 Atl. 393, 11 L. R. A. (N. S.) 550; *A., T. & S. F. Ry. Co. v. I. C. Com. (Com. C.)* 188 Fed. 229, 237. The record in the case at bar does not show that the liquors were ever tendered to the plaintiff personally or at his place of business. Notice was given him at 10 o'clock of the forenoon of a certain day that the liquors had arrived, and inquiry made if they were for him, and

what he wanted done with them. He replied that he was uncertain if his or not, and said that he would pay the express charges, and directed the driver of the carrier to keep the liquors until he ascertained. He paid the charges and signed the express receipt book.

We do not think that the facts present a case within the exception from the rule as to delivery suggested in *Heymann v. Southern Railway Company*, *ubi supra*. There is no evidence that the liquors were designedly left in the hands of the carrier. At most, there is but a suspicion or surmise arising from the character of the goods; but there is no evidence contradicting the statement of plaintiff that he was not informed as to their ownership and that he asked opportunity to learn. Neither do we think they were held by the carrier an unreasonable length of time. If, instead of liquors, the goods had been any other commodity, would seven hours have been an unreasonable delay? And to hold that a delay reasonable as to other commodities is unreasonable with respect to intoxicating liquors would be to refuse to the latter before delivery the same protection which the commerce clause of the Constitution affords to other goods. See *Heymann v. Southern Railway Co.*, 203 U. S. 270, 276, 277, 27 Sup. Ct. 104, 51 L. Ed. 178; *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135, 136, 27 Sup. Ct. 606, 51 L. Ed. 987.

Until delivery, commerce in intoxicating liquors is left by the Wilson act as free and untrammelled, and subject to the same regulations, as other commodities; but to hold unreasonable delay in case of the former to be different from that of the latter would be discrimination, and would permit the police laws of the state to affect the regulation of commerce. *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 53 L. Ed. 972; *Ex parte Eaglesfield (D. C.)* 180 Fed. 558, 562. The regulation of commerce adopted by the Wilson act is one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. In *re Rahrer*, 140 U. S. 545, 559, 561, 11 Sup. Ct. 865, 35 L. Ed. 572; *Heymann v. Southern Railway Co.*, 203 U. S. 270, 274, 27 Sup. Ct. 104, 51 L. Ed. 178. Yet, if unreasonable delay is to be interpreted in view of the police laws of the states, no uniform rule is established, and delay reasonable in a license state will be unreasonable in a state where prohibition prevails. The receipt is not conclusive, but may be modified in its terms or wholly contradicted by evidence. Defendant, nevertheless, had a right under the contract of carriage to delivery either to him personally or where he should direct, and we find no evidence of waiver of this right. Indeed, it does not appear that the liquors bore any address, except the name of defendant and the words "Bath, Maine," and, until directed

where to make it, the express company could make no delivery. Finally, not only is a designed leaving in the hands of the carrier for unreasonable time not proven, but it is nowhere affirmatively alleged.

Applying the test of our own decisions, we do not find constructive delivery proven by the facts presented in the reported case. There is no satisfactory evidence of a change of the contract of carriage by agreement of the parties, nor was such a change affected by operation of law. *State v. Intoxicating Liquors*, 104 Me. 463, 468, 72 Atl. 331, 23 L. R. A. (N. S.) 1020. Nor is there evidence that, either contemporaneously with or subsequent to the giving of the receipt, there was delivery of a part of the goods, as in *State v. Intoxicating Liquors*, 106 Me. 138, 140, 76 Atl. 285, 29 L. R. A. (N. S.) 745.

A nol. pros. may be entered.

SPEAR and CORNISH, JJ., concurring in the result only.

DRESSER v. KRONBERG.

(Supreme Judicial Court of Maine. Nov. 20, 1911.)

1. EXECUTION (§ 286*)—SALE—BONA FIDE PURCHASERS.

A bona fide purchaser for value of chattels at a sheriff's sale can recover from the judgment creditor in an action for money had and received, when the chattels sold were at the time of sale the property not of the judgment debtor, but of a third party.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 523-528; Dec. Dig. § 286.*]

2. MONEY RECEIVED (§ 15*)—NATURE OF REMEDY—ASSUMPSIT.

Assumpsit for money had and received is comprehensive in its scope, and though the form of procedure is in law, it is equitable in spirit and favored by the courts.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 44-50; Dec. Dig. § 15.*]

Exceptions from Superior Court, Cumberland County.

Action by Clarence H. Dresser against Jacob Kronberg. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Wilford G. Chapman, for plaintiff. Gerry L. Brooks, for defendant.

CORNISH, J. The defendant, Kronberg, recovered judgment against one Waterhouse, took out execution, and caused two horses which had been previously attached on mesne process to be sold upon execution at sheriff's sale, as the property of Waterhouse, to the plaintiff for the sum of \$58, and the proceeds of the sale were paid by the officer to the defendant in this action as the judgment creditor in the execution.

Subsequently the horses were replevined by the Saco Grain & Milling Company as the true owner thereof, and judgment in the replevin suit was duly rendered in favor of said company. Thereupon the plaintiff, Dresser, brought this action of assumpsit for money had and received against the defendant, the judgment creditor in the original action. The presiding judge directed a verdict in favor of the plaintiff, and the case is before this court on defendant's exceptions to this ruling.

[1, 2] A single question of law is involved, namely, whether a bona fide purchaser for value of chattels at a sheriff's sale can recover from the judgment creditor in an action for money had and received, when the chattels sold were at the time of sale the property not of the judgment debtor but of a third party.

It should be observed at the outset that the action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of the procedure is in law, it is equitable in spirit and purpose, and the substantial justice which it promotes renders it favored of the courts. "It is a familiar principle," says the court in *Pease v. Bamford*, 96 Me. 23, 51 Atl. 234, "that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained." This is but the affirmation of the early statement of Lord Mansfield in *Moses v. McFerlan*, 2 Burr. 1012, that when, *ex æquo et bono*, the plaintiff is better entitled to the thing than the defendant is to withhold it from him, he may recover in this form of action.

The instances in which the courts have applied this doctrine are so numerous and varied as to render citation of authorities unnecessary. The question is: Should it be applied in the case at bar? It is conceded that the attempted sale of chattels not belonging to the judgment debtor was void and conveyed no title to the plaintiff, the would-be purchaser. *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Buffum v. Deane*, 8 Cush. (Mass.) 35; *Champney v. Smith*, 15 Gray (Mass.) 512; *Coombs v. Gorden*, 59 Me. 111. The execution was not in itself a nullity, but it gave no authority to proceed against the property which was sold. It authorized the sale of the property of the judgment debtor, but not of a stranger.

It is further conceded that the plaintiff purchased the property in good faith, assuming, as we think he had a right to assume, that it belonged to the judgment debtor, and that he was securing a good title

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

thereto. This proved to be a mistake in fact, for the title absolutely failed. No consideration whatever passed to the plaintiff for the money which he paid through the hands of the sheriff into the pocket of the defendant. The price paid does not belong to the defendant, because the property sold did not belong to the judgment debtor, and a creditor cannot satisfy his execution against A. by seizing the property of B. On the other hand, the money does belong to the plaintiff, who parted with it without consideration. Why should not the repayment by the party who is not entitled to it to the party to whom it belongs be compelled by means of this legal process designed to meet just such cases? No one loses thereby. The true owner has recovered his property, the judgment debtor cannot have his debt paid with the property of another, and the judgment creditor, the defendant in this suit, after repayment, can obtain a new execution upon the judgment for the full amount by a writ of *scire facias*. *Wilson v. Green*, 19 Pick. (Mass.) 433; *Pillsbury v. Smyth*, 25 Me. 427; *Rice v. Cook*, 75 Me. 45. A result which restores to each his own is equitable, and therefore desirable.

Suppose the judgment creditor bids in the property at the sale, and subsequently it is taken from him as the property of another. Clearly a new execution for the full amount would be granted. *Piscataquis County v. Kingsbury*, 73 Me. 326. The situation is no different if the purchase has been made by another and the creditor has repaid the purchase price, either voluntarily or involuntarily. The original purchase was under a mistake of fact, and the remedy here asked puts the parties in statu quo.

We are aware that the courts in some other jurisdictions, notably in Indiana and Illinois, have denied recovery from the judgment creditor; but we are unable to assent to the force of the reasoning by which that conclusion is reached. *Dunn v. Frazier*, 8 Blackf. (Ind.) 482; *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, and note to same in 3 L. R. A. 440; *England v. Clark*, 5 Ill. 487. The decisions in Indiana are placed upon the ground that the doctrine of caveat emptor applies with full force in all judicial sales, and that the purchaser buys at his peril. This statement, when rightly interpreted, is true; but it simply means that there is no guaranty or warranty of title because the purchaser takes, and can only take, whatever title the debtor has. Therefore, in the absence of fraud, the law will not ordinarily relieve a purchaser from a defective title and a partial failure of consideration, as, for instance, an outstanding incumbrance or a lien for taxes. *Ritter v. Henshaw*, 7 Iowa, 97; *Parker v. Rodman*, 84 Ind. 256. But the doctrine is not carried to the extent that in case of absolute failure of title the purchaser is

without remedy. Even the states which deny a right of action against the creditor grant it against the judgment debtor. *McGhee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124; *Price v. Boyd*, 1 Dana (Ky.) 434; *Geoghegan v. Ditto*, 59 Ky. 483, 74 Am. Dec. 413; *Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 480; *Westfield v. Williams*, 59 Ind. 221; *Coan v. Grimes*, 63 Ind. 21.

The principle of equitable recovery against one party is stated in *Julian v. Beal*, supra, as follows: "When the judgment defendant has no title whatever in the lands sold at sheriff's sale, there is no consideration for the promise of the purchaser to pay the purchase money, and when a bid is made under a mistake of fact in this respect, the bidder is not bound to complete his purchase; but if he should pay the purchase money, he may recover it back from the judgment defendant whose debt was thereby paid." We fail to see why the same payment under the same mistake of fact does not apply with equal force to the judgment creditor. The debtor has been entirely passive in the whole proceeding, while the creditor has set in motion the legal machinery whereby the sale of a stranger's property has been illegally made, and now seeks to inequitably retain the benefit therefrom. The fallacy of the doctrine lies, perhaps, in holding that the judgment against the debtor has been paid, and that therefore the purchaser has expended money for his benefit, while to compel the creditor to refund would deprive him both of the money and the judgment. It is true that nominal payment has been made, but not real payment. The judgment has not been satisfied, but may be revived, and an alias execution issued on *scire facias* for the full amount, when all the facts are disclosed.

The leading case in Illinois, *England v. Clark*, 5 Ill. 487, in denying the purchaser recovery against the judgment creditor, though practically conceding it might exist against the debtor, laid emphasis upon the want of privity of contract between the purchaser and the creditor and no implied contract on the part of the latter.

The answer to this proposition is that there need be no privity of contract between the parties, in order to support an action for money had and received, except that which results from one man's having another's money which he has not a right conscientiously to retain. The law then creates both the privity and the contract. *Hall v. Marston*, 17 Mass. 575; *Keene v. Sage*, 75 Me. 138.

While the precise question involved here has not before been squarely presented to the court in this state for determination, it has arisen incidentally on two occasions, and the language of the court in those cases is in harmony with the conclusion here reached.

Pillsbury v. Smyth, 25 Me. 427, revived a judgment and ordered the issuing of an alias execution, when in the sheriff's sale of real estate no title passed. In the course of the opinion the court say: "If a purchaser, not the debtor, but a stranger, of property sold in the ordinary mode upon execution, obtained nothing under the sale, for want of title in the debtor, payment in such case would, like other payments made in mistake, be without consideration, and could be recovered back; it would be gross injustice for a creditor and officer to expose for sale goods which they had obtained by a trespass, and after sale and receipt of the purchase money throw upon the purchaser the loss occasioned by recovery by the owner of his rights in taking the property or compelling the buyer to pay its value."

In *County of Piscataquis v. Kingsbury*, 73 Me. 326, an execution against the defendant town was returned by the officer as satisfied by the sale of real estate of nonresidents. This was declared void, and the county, having repaid the money to the purchaser, brought an action of debt against the town to get the judgment renewed. The action was sustained, and the court say:

"It is contended by the defendants that no action lies, that as to the purchaser the rule of caveat emptor applies, that the purchaser had no right of action against the creditor for the price paid, and that the creditor cannot revive a right of action by a voluntary repayment to the purchaser."

"We cannot concede this position to the defendants. We think it was a case of money paid by common mistake and without consideration, and recoverable back. It may be assumed, perhaps, that the parties did not know that the land sold did not belong to residents, inasmuch as the land was advertised for sale as belonging to owners unknown. * * * A mistake of title may be a mistake of fact." See, also, *Magwire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121; *Richardson v. McDougall*, 19 Wend. (N. Y.) 80; *Bartholemew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251.

It is therefore the opinion of the court that this action is maintainable under the facts of this case, and that the ruling of the presiding judge in directing a verdict for the plaintiff was without error.

Exceptions overruled.

LUDLAM v. DALLAS.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 144*)—OATHS OF OFFICERS—"OTHER MUNICIPALITIES."

The phrase "other municipalities" contained in the title and body of "An act relative to the official oaths of officers heretofore or that

may hereafter be elected or appointed to office in the towns, townships, boroughs and other municipalities of this state" (P. L. 1908, p. 13), is sufficiently descriptive of cities to include them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 144.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

Quo warranto, on the relation of Thomas E. Ludlam, against Joseph Dallas. Demurrer to replication overruled.

Argued June term, 1911, before GUM-MERE, C. J., and PARKER and VOORHEES, JJ.

Thompson & Smathers, for demurrant. Howard L. Miller, for relator.

VOORHEES, J. To an information in the nature of a quo warranto, setting out that the relator, Ludlam, was qualified for the office of councilman in Sea Isle City, incorporated under "an act relating to and providing for the government of cities of this state containing a population of less than twelve thousand inhabitants" (P. L. 1899, p. 96), and at the general election in November, 1908, was elected councilman; that at the organization of council on the 1st day of January, 1909, he took the oath of office, and entered upon the exercise of the duties thereof, and was entitled to the enjoyment of such office until January 1, 1912; that on the 14th of November, 1910, the common council without notice passed a resolution vacating the office and elected the respondent, Dallas, to fill the vacancy, and claiming that Dallas went into office without any legal election, thus usurping and intruding into it, the respondent, Dallas, replied that by the above act of incorporation, any person elected at an annual election failing to qualify within 20 days after such election, the office should become vacant, and that every person elected or appointed to an office should, before entering upon their duties, take and subscribe an oath, and that the relator never subscribed an oath before any officer; that the relator merely swore by the uplifted hand before the clerk, such act not being done until January 1, 1909, more than 20 days after his election, and consequently the office became vacant. For replication to this plea it is set out that before the commencement of the term of office the relator subscribed and filed with the city clerk an oath, a copy of which is therein set forth, dated the 1st day of January, 1909. To the replication a demurrer has been interposed.

It is admitted that, if the act of 1893 above cited is still in force, the demurrer is good. *Anderson v. Myers*, 77 N. J. Law, 186, 71 Atl. 139; *Douglass v. Freeholders*, 88 N. J. Law, 214. The relator relies upon an act entitled "An act relative to the official oaths

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index—

of officers heretofore or that may hereafter be elected or appointed to office in the towns, townships, boroughs and other municipalities of this state." P. L. 1906, p. 13. This provides that the person elected to any office in any town or other municipality of this state shall, before entering upon the execution of the duties of his office, take and subscribe an oath.

The question is whether the title of the act and the body of it are sufficient to cover the appointment or election to a city office; that is, whether the words "other municipalities of this state" cover the case. *Smith v. Petty*, 73 N. J. Law, 333, 63 Atl. 911, does not directly decide this point, but that a city is a municipality we think there can be no doubt. In *Wright v. Campbell*, 74 N. J. Law, 83, 64 Atl. 171, this court held that the words "other municipalities" contained in a similar title in Act 1905, p. 14, meant a like municipality to a town, township, etc., that is a municipality possessed of the same characteristics as towns, etc.; the leading one being the power to hold an election by the people for offices. This case was affirmed (74 N. J. Law, 609, 67 Atl. 186), and the reasoning there indirectly leads to the conclusion that the phrase "other municipalities" is sufficiently descriptive of cities to include them.

The Supplement of 1906, having changed the act under which Sea Isle City was chartered, by a repealer contained therein of all inconsistent legislation, by making it no longer essential to file the qualifying oath within 20 days, as formerly, but providing that it now may be done at any time before entering upon the duties of the office, the demurrer must be overruled, and the relator will have judgment.

CHAMPLIN et al. v. BARTHOLD.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1135*)—REVIEW—PERFORMANCE.

Where, upon appeal, a judgment of the district court cannot be reversed upon any ground specified, it will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.*]

Appeal from District Court of Third District, Bergen County.

Action by Frank A. Champlin and others against Ottomar Barthold. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

George P. Rust, for appellants. Weinberger & Vanecek, for appellee.

GARRISON, J. The appellant, as plaintiff in the district court, sought to recover against the appellee upon two items arising out of the appellee's refusal to accept a car load of oats, viz., \$30 for loss on the resale of the oats and \$20 demurrage charges on the detention of the car containing the oats.

Under the view of the testimony taken by the district court (sitting without a jury), judgment was given for the plaintiff for the item of \$30, but not for the \$20 item.

The plaintiff, as appellant, now seeks to reverse this judgment, and specifies as the sole ground that "the judgment of the court as rendered is against the weight of evidence; that said judgment should have been in favor of the plaintiff, not only for the damages he sustained on the resale of the oats, but the demurrage which he paid to the railroad company for the detention of the car."

These grounds go solely to the weight or effect to be given to testimony, and, in the absence of any motion, request, or ruling in the trial court, present no determination as to matter of law only that this court may review upon appeal.

Where a judgment cannot be reversed upon the grounds specified, it is affirmed.

The judgment of the district court of the Third judicial district of Bergen county is affirmed.

HARRISON v. UNION TRANSP. CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 81*)—SMALL CAUSE COURT—SERVICE OF SUMMONS.

A summons issued out of the small cause court can be legally served only in the manner directed by the act creating that court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 258-261; Dec. Dig. § 81.*]

2. JUSTICES OF THE PEACE (§ 81*)—SERVICE OF SUMMONS—CORPORATIONS.

With respect to the service of summons on a domestic corporation, section 17 of the small cause act (P. L. 1903, p. 255), as amended by the act of 1906 (P. L. p. 47), names a succession of officers in the order in which, if possible, they shall be served, to wit: First, on the president or head officer or agent in charge of its principal office in this state; and, secondly, in case the president or other head officer or agent cannot be found and has no usual place of abode in the county, then on the clerk or secretary, if any there be within the county; and, thirdly, if no clerk or secretary, then on one of its directors; and, fourthly, if no director, then upon the agent in charge of any office maintained in the county.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 1983-1990; Dec. Dig. § 81.*]

3. JUSTICES OF THE PEACE (§ 81*)—SERVICE OF SUMMONS—CORPORATIONS.

Where a domestic corporation has a director residing within the county upon whom service of a summons issued out of the small

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause court may be made, service upon an agent in charge of an office maintained in the county is not a legal service.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 1983-1990; Dec. Dig. § 81.*]

Action by Isaac E. Harrison against the Union Transportation Company. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

B. B. Hutchinson, for prosecutor. V. Claude Palmer, for defendant.

TRENCHARD, J. This certiorari brings up a judgment of the small cause court of Burlington county in favor of the plaintiff below. The defendant insists that the judgment must be set aside because the summons was not legally served.

[1] A summons issued out of the small cause court can be legally served only in the manner directed by the act creating that court. The defendant is a domestic corporation. Section 17 of the small cause act (P. L. 1903, p. 255), as amended by the act of 1906 (P. L. p. 47), provides that: "If the defendant is a domestic corporation, the summons may be served on the president or head officer or agent in charge of its principal office in this state, either personally or by leaving a copy at his usual place of abode, at least six days before its return; and in case the president or other head officer or agent cannot be found to be served with process, and has no usual place of abode in the county, the summons may be served on the clerk or secretary of the corporation, if any there be within the county, and if no clerk or secretary, then on one of its directors, and if no director, then upon the agent in charge of any office maintained in the county, either personally or by leaving a copy at his usual place of abode within the county, six days before its return." The summons in this case was served "by reading it to Joshua M. Lamb, agent of the defendant at Cookstown, and giving him a copy thereof." The proofs presented to the court below on the motion to set aside the summons disclosed the following matters of fact: That the person upon whom service was made is the station agent of the defendant in Cookstown in Burlington county, that three directors of the defendant corporation reside in Burlington county, and that the principal office of the defendant is in Ocean county.

[2] We are of the opinion that the summons was not legally served. The statute hereinabove recited names a succession of officers in the order in which, if possible, they shall be served, to wit: First, on the president or head officer or agent in charge of its principal office in this state; and,

secondly, in case the president or other head officer or agent cannot be found and has no usual place of abode in the county, then on the clerk or secretary, if any there be within the county; and, thirdly, if no clerk or secretary, then on one of its directors; and, fourthly, if no director, then upon the agent in charge of any office maintained in the county.

[3] Since there were three directors of the defendant corporation residing within the county, upon any one of whom service might have been made as required by section 17 of the act, the service upon an agent in charge of an office maintained in the county is not a legal service. That being so, it is unnecessary in this case to determine whether the person served in this case was an agent in charge of an office.

The judgment of the court below will be reversed.

MANNS v. A. E. SANFORD CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS (§ 87*)—POWER OF PERSONAL REPRESENTATIVE—COMPROMISE OF SUIT.

By the death act (1 Gen. St. p. 1188), the Legislature has constituted the personal representative magister liti, and as such he may in his judgment on good faith release or compromise the cause of action before suit brought, and, after it has been instituted, he will control the litigation and may, acting without fraud, settle and discontinue it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 87.*]

Action by Adam Manns, administrator of John Helber, deceased, against the A. E. Sanford Company. Demurrer to plea overruled, and judgment entered for defendant.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

William A. Lord, for demurrant. Linda-bury, Depue & Faulks, for defendant.

VOORHEES, J. The plaintiff, as administrator, sued for pecuniary damages for the death of his intestate under the statute.

The defendant, in addition to the plea of general issue, has pleaded in substance that on the 25th of July, 1910, at the special instance and request of the next of kin of the decedent, the plaintiff obtained letters of administration of the decedent's estate from the surrogate of Essex county, and that on the same day, by his written release duly sealed, the plaintiff individually and as administrator released the defendant from all causes of action which accrued against the defendant, the plaintiff individually and as administrator of the estate of the decedent ever had, etc., and particularly of and from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all claims for damage that might accrue to the plaintiff individually and as administrator, by reason of the death of the said decedent, as a result of an accident while employed by the defendant.

To this plea, the plaintiff has demurred, alleging, as grounds of demurrer: First, that the release in its form does not bar the bringing of the action, because the action is not brought by the plaintiff for himself individually, nor as the representative of the decedent's estate, but on behalf of the next of kin; secondly, that the next of kin did not join in the release; and, thirdly, generally that the matters in the plea are insufficient to bar the action.

The question of fraud is not raised by the pleadings, but the point is directly made that the release is ineffectual, unless the next of kin, entitled to the proceeds of the recovery, join in it.

The theory of the demurrant, and the argument which he advances, is that the action is purely statutory, and the administrator's right to sue rests entirely upon it. *Bretthauer v. Jacobson*, 79 N. J. Law, 223, 75 Atl. 560. It is solely for the benefit of the next of kin, and a right vested in them (*McKerring v. P. R. R.*, 65 N. J. Law, 57, 46 Atl. 715), and the recovery is wholly for their benefit and not divested by the death of the beneficiary (*Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633), and that the administrator receiving the proceeds of a suit becomes a mere trustee for its distribution to the next of kin, as pointed out by the statute (*Gottlieb v. North Jersey St. Railway*, 72 N. J. Law, 480, 63 Atl. 333).

That an executor or administrator ordinarily can release or compromise a cause of action accruing to his decedent, or to the estate after his principal's death, is settled (*Rogers v. Hand*, 39 N. J. Eq. 270; *Meeker v. Vanderveer*, 15 N. J. Law, 392), and an administrator suing in virtue of the death act has been recognized as an ordinary representative to the extent of not being liable for costs (*Kinney v. Central R. R.*, 34 N. J. Law, 273).

This action the statute declares shall be brought by and in the name of the personal representative. It is his action, and the fact that it is peculiar and created by statute with the attributes above enumerated does not differentiate it from the general rule and prevent the personal representative from bona fide settling or releasing the action.

The case of *Pisano v. Shanley Co.*, 66 N. J. Law, 1, 48 Atl. 618, strongly urged by the demurrant as quite in point, is not a direct authority, for there was involved the status of a grant of letters in a foreign state, obtained by false representations, and it was really a contest between a foreign and a domestic representative of the same decedent.

The Legislature has constituted the person-

al representative magister liti, and as such he may in his judgment in good faith release or compromise the cause of action before suit brought, and, after it has been instituted, he will control the litigation and may, acting without fraud, settle and discontinue it. It must be conceded that it is his duty to exercise his judgment as to the validity of the claim for damages and the advisability of suing upon it, and that he may accept the verdict of a jury or dispute it by proceedings in review.

These duties were cast upon him by his legislative appointment, and it would be incongruous to say that he can do all these things and yet deny him the right to settle with the wrongdoer, upon the receipt of full pecuniary compensation for the damages sustained by the class of persons for whose benefit the statute was passed.

The weight of authority in other states upon statutes substantially like ours is to this effect. *Parker v. Providence & S. Steamboat Co. R. I.*, 17 R. I. 376, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869, is an instructive case, and quite in point. *Henchey v. City of Chicago*, 41 Ill. 136; *Pittsburg, C., C. & St. L. Ry. Co. v. Gipe*, 160 Ind. 360, 65 N. E. 1034; *Washington v. Louisville & N. R. Co.*, 136 Ill. 49, 26 N. E. 653—may also be cited upon the subject.

The demurrer will be overruled, and judgment given for the defendant.

CONLAN et al. v. LEONARD et al. (Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 238*)—EVIDENCE—NONSUIT.

The evidence examined, and the refusal of the court to nonsuit or to direct a verdict for the defendants held proper.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 238.*]

2. MECHANICS' LIENS (§ 263*)—PARTIES—MORTGAGEE.

In a suit upon a mechanic's lien, a mortgagee, whose mortgage being in existence and of record before the contract sued upon was filed or suit commenced, could not have been cut off by the suit, cannot properly be made a party defendant.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 263.*]

3. MECHANICS' LIENS (§ 263*)—ENFORCEMENT—PARTIES—MORTGAGEE.

To entitle the holder of a mortgage upon premises covered by a mechanic's lien to be made a party to a suit to enforce such lien, it is not enough that the plaintiff have notice of the existence of such mortgage at the time of the commencement of such suit. The mortgage must then have been "of record."

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 263.*]

Error to Circuit Court, Essex County.

Action by Patrick H. Conlan and others against William N. Leonard and others, re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceivers of the Hudson County Water Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

McCarter & English, for plaintiffs in error. Pitney, Hardin & Skinner, for defendants in error.

VOORHEES, J. This is a suit on a mechanic's lien to recover against the receivers of the Hudson County Water Company, who upon their own motion were substituted as defendants. The litigation grows out of two contracts, the one is dated August 6, 1909, and the other September 28, 1909, which involve the connecting up of certain wells, laying pipe, connecting boilers and machinery at the pumping station of the water company at Belleville, Essex county, in which county the lien claim was filed. The payments under these contracts were provided to be made monthly, less 15 per cent. upon estimates to be made by the company's engineer, of the amount of work done and the value of the material delivered. Such estimates were offered amounting to \$21,117.10, less an allowance for materials to be taken away by the plaintiffs, amounting to \$4,016.12, leaving a balance of \$17,100.98, which was the amount for which judgment was rendered after adding interest, viz., \$18,186.18, and admitted to be the correct amount, if the plaintiffs were entitled to recover any amount. The suit was commenced on March 23, 1910. The declaration consisted merely of the common counts, to which the general issue and the statutory plea were filed. The contractors had on March 22, 1910, assumed to rescind both these contracts because of the continued failure to make the payments provided for in the contract at the time specified, including failure to make any of the payments coming due since November 1, 1909. Motions to nonsuit and to direct a verdict for the defendants were refused, and error has been assigned thereon.

The grounds upon which the motion to nonsuit was rested were thus stated: "That the plaintiffs have not brought themselves within the requirements of the lien law to entitle them to recover. The point in issue by the plea which is filed requires the plaintiffs to establish those facts which under the mechanic's lien law entitle them to recover. Therefore they have a heavier burden than the ordinary plaintiff has to carry. The question is whether they have successfully rescinded their contract." And the ground for a direction in the following language: "That there has been no case made out which would entitle the jury to conclude that the plaintiffs should have a verdict." The court directed a verdict for the plaintiffs, but error has not been assigned upon this action; hence the inquiry relates solely to the prop-

erty of refusing to nonsuit and to direct a verdict for the defendant.

Passing by the fact that the reasons above given for the motions do not seem to have acquainted the court with the precise point involved (*Wallace Muller & Co. v. Leber*, 65 N. J. Law, 198, 47 Atl. 430; *Jones v. Whittier*, 77 N. J. Law, 715, 73 Atl. 497), we may examine the arguments presented in the defendant's brief. The defendants assert that the plaintiffs by their suit seek to recover for materials furnished and work actually performed, that it is not a case where the entire contract price is due, nor is it a suit to recover one or more installments as such under the contract, because the plaintiffs had assumed to rescind, and in consequence had refused further to perform; that, the contracts concededly being yet unfulfilled, unless the rescission was justified, the plaintiffs, in order to recover, must prove an acceptance of the work performed, the question of substantial performance not being involved. *Bozarth v. Dudley*, 44 N. J. Law, 304, 43 Am. Rep. 378; *Feeney v. Bardsley*, 66 N. J. Law, 239, 49 Atl. 443; *Mackinson v. Conlon*, 55 N. J. Law, 564, 27 Atl. 980.

[1] In reply to this argument, we hold that the frame of the pleadings would permit a recovery of an installment due under the contract, or upon a quantum meruit, for the value of the work and materials as evidenced by the certificate of the defendants' engineer, which certificate by the specifications created a liability to pay 85 per cent. of the amount certified. Besides, there was also testimony from which a jury might say that the work done and the materials delivered had been accepted by the defendants. The certificates tended to prove this. They had been given from time to time, and some of the installments called for under them had been paid, and there was proof of an arrangement made by the defendants' engineer, with the plaintiffs, permitting some of the materials furnished and delivered to be taken back, and credit to be given to the defendants upon the estimates, at prices fixed by the engineer. With these facts present the court could not as matter of law conclude that there was no proof tending to show an acceptance. But the further argument is put forth that the plaintiffs failed to produce substantial proof of a rescission, urging that the rule pertinent to a contract of the sort here involved was set out in *Empire Manuf. Co. v. Morris*, 77 N. J. Law, 498, 72 Atl. 1009, and the cases there cited, and that this case had not been brought within that rule. There was, however, evidence of abandonment of the contract by the defendants, in addition to their default in making payments, exhibited by the agreement to allow the plaintiffs to remove materials above alluded to, and further from the fact of the insolvency of the company. But we deem it unnecessary to decide whether the principles laid down in the case last cited

must be applied to the contract under consideration or not.

Under all the evidence in the case, whether the contract had been abandoned by the defendants became a jury question. We therefore have this situation: If the recovery was for installments (*Jones v. Whittier*, supra; *Stone Post Co. v. Corcoran*, 77 Atl. 1031), upon the theory that no successful rescission had been made, then there was ample evidence that the amounts of those installments were due. The point was not made that more than 85 per cent. was covered by the certificates, if, indeed, that was the case. This would prevent a nonsuit or a direction for the defendant on the installment theory. If, on the other hand, the case was to be decided upon the theory that the contracts might be considered as rescinded under the facts adduced, as before stated, there was still presented a jury question, and the certificate of the engineer became proof of the amount reasonably due at the time of rescission. This also would prevent a nonsuit or direction. There was therefore no error in refusing to nonsuit or to direct a verdict for the defendants.

The remaining assignment of error relates to the overruling of two offers of evidence by the defendants. They offered to prove the existence of two mortgages upon the premises, the first held by one Kamlah, not a party to the suit, dated December 15, 1904, recorded March 1, 1905, in the register's office of Hudson county, referred to in the deed by which the defendant company acquired title to the premises, and also of a mortgage to the Mechanics' Trust Company to secure an issue of bonds, recorded on November 30, 1910, being the day before the trial commenced, and of course, after the commencement of the suit, but likewise referred to in said deed. Both these offers were overruled.

[2] The first mortgage could not have been cut off because it existed and had been recorded in Hudson county before the contracts were filed or suit commenced, and therefore the mortgagee could not properly have been made a party defendant. *Central Trust Co. v. Bartlett*, 57 N. J. Law, 203, 30 Atl. 583. It is not to be understood, however, that any intimation is intended that a mortgage which has been recorded in a county other than that in which the lien claim has been filed is a "mortgage of record" in the sense in which those words are used in the mechanic's lien act. As to the second mortgage, it is claimed that the contractors must be deemed to have had notice of it, as well as of the former mortgage, not only because the deed to the water company recites it, but also because referred to in the declaration, and therefore the mortgagee ought to have been made a party.

[3] Assuming this to be true, it is not

available, for the mortgage was not of record at the time of the commencement of the suit. The statute declares that "every person holding a mortgage of record which would be cut off, shall be made a party." This mortgage was not of record, and whatever might be said by the holder of the mortgage in protection of his equitable claim in that regard could not be urged by the owner, for the omission is not detrimental to him. There was no error in the rejection of these offers.

The judgment will be affirmed.

BARCOLINI v. ATLANTIC CITY & S. R. CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 359*)—INJURIES TO PERSON ON TRACK—RIGHT TO RECOVER.

Section 55 of the general railroad law (P. L. 1903, p. 673) in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 359.*]

Error to Circuit Court, Atlantic County.

Action by Frank Barcolini, by his next friend, against the Atlantic City & Shore Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

Thompson & Smathers, for plaintiff in error. Garrison & Voorhees and Wescott & Wescott, for defendant in error.

VOORHEES, J. The plaintiff, a child 21 months old, strayed upon the private right of way of the defendant company, incorporated under the general railroad act of 1903 (P. L. 1903, p. 645), at a place not a public crossing, and was struck by defendant's car, resulting in the loss of one of his legs. Judgment was recovered by the plaintiff for \$2,500 in the Atlantic circuit court, to review which this writ of error has been sued out. A motion to direct a verdict for the defendant was refused, and error has been assigned thereon.

Neither in the declaration was there a charge that the injury was willfully caused, nor was there evidence offered to that effect. Throughout the plaintiff argued that the defendant's servant in charge of the car failed to use due care after he had seen the child. The motorman's testimony was uncontradicted, and showed that as soon as the child came in sight he used every effort to stop the car, but without success.

The defense was rested upon section 55

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the general railroad law (P. L. 1903, p. 673, § 55), which reads as follows: "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad, except when the same shall be laid upon a public highway, if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad: Provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

This statute is a bar to recovery by any person who walks, stands, or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition.

The motion to direct a verdict for the defendant should have prevailed, and in consequence of this error, the judgment of the circuit court will be reversed, to the end that a venire de novo be awarded.

TARLUCKI v. WEST JERSEY & S. R. CO.
(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 344*)—INJURY TO PEDESTRIAN—UNGUARDED THIRD RAIL—"BYWAY"—"BYROAD."

On demurrer to a declaration alleging that an "ancient byway" where it crossed a railway operated by a third rail charged with an electric current was "unguarded and unprotected," in a suit against the railway by a pedestrian upon the ancient byway, for injuries received from coming in contact with the current, held, that "byway" must be taken to be the equivalent of "byroad."

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 344.*]

For other definitions, see Words and Phrases, vol. 1, p. 939.]

2. RAILROADS (§ 303*)—INJURY TO PEDESTRIAN—UNGUARDED THIRD RAIL—"BYWAY."

A byway thus defined, being a public way of which the public are entitled to make use as of right, a railroad company where its tracks cross it is under a duty not to subject the traveling public to latent dangers at such crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 303.*]

Action by Edmund Tarlucki against the West Jersey & Seashore Railroad Company. Demurrer to declaration overruled.

Argued June term, 1911, before GUMMERE, O. J., and PARKER and VOORHEES, JJ.

Bourgeois & Coulomb, for demurrant. Wescott & Wescott, for plaintiff.

VOORHEES, J. The declaration alleges that the defendant maintained its railroad operated by a third rail, charged with an electric current, and that an "ancient byway" crossed the right of way which was fenced, and the rail guarded, except at the "byway crossing." Here the fences were open, and the third rail was "unguarded and unprotected."

[1] There is an allegation that the plaintiff walked along the ancient byway upon and over said roadbed, and, coming in contact with this rail, he was injured by the current. A byroad is recognized by the road act. Section 113, 3 Gen. Stat. p. 2827, and also by section 154, 3 Gen. Stat. p. 2836. If obstructed, it may be opened by the freeholders, and its course and location altered and changed. It has no statutory origin. It is an obscure road, but is so far a public road that the public have of right free access to it at all times. *Wood v. Hurd*, 34 N. J. Law, 87. See, also, *Perrine v. Farr*, 22 N. J. Law, 356; *Stevens v. Allen*, 29 N. J. Law, 68; *Allen v. Stevens*, 29 N. J. Law, 509; *Yeomans v. Ridgewood*, 46 N. J. Law, 508.

The demurrer admits that the road was an "ancient byway." The term "byway" must be taken to be the equivalent of "byroad," which is a public way that the plaintiff had a right to use. This seems inferentially to have been the view of this court when the case was here on a former occasion. *Tarlucki v. West Jersey & S. R. R. Co.*, 78 Atl. 149, for the learned justice who wrote the opinion says: "If the accident happened while the plaintiff was in the act of crossing the tracks from one side of the transverse byroad or public way to the other, * * * an element of legal duty might thereby be presented." There is added force to be given to the expression by the qualifying adjective ancient, for from it, in connection with the admission arising from the demurrer, there is a presumption that the way originated in a dedication, and so has existed for more than 20 years, sufficient to establish the public right. *Wood v. Hurd*, supra.

[2] Being, therefore, a public way, no invitation by the railroad company to use it was necessary to be proved, for the public were entitled to make use of it as of right, and the railroad company was under a duty not to subject the traveling public so using the public way to latent dangers. *Van Winkle v. American Steamboat Co.*, 52 N. J. Law, 240, 19 Atl. 472; *Weller v. McCormick*, 52 N. J. Law, 470, 19 Atl. 1101, 8 L. R. A. 798; *Schutte v. United Electric Co.*, 68 N. J. Law, 438, 53 Atl. 204; *Guinn v. D. & A. Telephone*

Co., 72 N. J. Law, 277, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668; Meyer v. Benton, 74 N. J. Law, 533, 65 Atl. 1023.

The demurrer will be overruled.

NEW JERSEY SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS v. ROSEN.

(Supreme Court of New Jersey. Oct. 31, 1911.)

(Syllabus by the Court.)

ANIMALS (§ 42*) — CRUELTY TO ANIMALS — CRIMINAL PROSECUTION.

A conviction under section 11 of "An act for the prevention of cruelty to animals" approved March 11, 1880 (1 Gen. St. 1895, p. 35, § 27), can be had for general violations of said act only when such violations occur in the presence of the persons or officers named in the amendment to said act approved March 16, 1893 (P. L. 1893, p. 361; 1 Gen. St. 1895, p. 41, § 46), and the arrest shall have been made without warrant by one of such persons or officers.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 42.*]

Jacob Rosen was convicted before a justice on the prosecution of the New Jersey Society for the Prevention of Cruelty to Animals for cruelty to a horse, and brings certiorari. Reversed.

Argued June term, 1911, before VOORHEES, J., under the statute.

T. V. Arrowsmith, for prosecutor. Halsted H. Wainright, for defendant in certiorari.

VOORHEES, J. This certiorari has been brought on for hearing under the statute before a single justice.

It removes proceedings had before a justice of the peace to whom an agent for the Society for the Prevention of Cruelty to Animals made complaint upon oath that the defendant, Jacob Rosen, "did cruelly torture and torment a horse, and * * * did inflict unnecessary cruelty upon said horse by driving said horse hitched to a delivery wagon while said horse was suffering from a large gall sore upon the back, raw and bleeding, upon which the harness pressed, causing the horse pain and suffering," and "thereby did violate 'An act for the prevention of cruelty to animals' and the supplements and amendments thereto, approved March 11, 1880." The justice thereupon indorsed upon said complaint an order for a warrant, in the words set out in the fourteenth section of the above-mentioned act (P. L. 1880, p. 217; 1 Gen. St. p. 37) and a warrant was accordingly issued. The return to the writ of certiorari shows that the defendant was arrested, and, being in custody, his attorney demanded "a trial by jury and offered to pay the costs of the same, claiming that there had been no summary arrest." This motion was denied, and the justice proceeded to swear and hear

the witnesses. The defendant refused to take any part in the hearing, asserting that he had been denied the right of trial by jury. The justice thereupon found the defendant guilty, and adjudged that he pay a fine of \$15 and costs.

One of the reasons filed by the prosecutor for reversal is that the justice of the peace lost jurisdiction because he refused to allow the defendant a trial by jury. There can be no doubt that a proceeding under the thirteenth section of the act of 1880 (Gen. Stat. 36) is a prosecution to recover a penalty wherein the defendant is entitled to a jury trial. N. J. Society v. Wilbur, 76 N. J. Law, 266, 69 Atl. 1010; N. J. Society v. Atkinson, 78 N. J. Law, 286, 69 Atl. 978. The prosecutor, however, insists that the prosecution was really under the eleventh section of the act (1 Gen. St. p. 35) and therefore is a summary proceeding in which the defendant is not entitled to a jury. This section originally gave power to certain officers to enter any place or building where there is an exhibition of fighting or baiting of certain animals, or where preparations are being made for such exhibition, and without warrant to arrest all persons present, and take possession of all animals engaged in fighting or there found, and all implements and appliances, and thereupon take such persons before the nearest magistrate, who may adjudge the persons to forfeit and pay a sum not exceeding \$100. By amendment (P. L. 1893, p. 361; 1 Gen. St. p. 41) any member, officer, or agent of the New Jersey Society for the Prevention of Cruelty to Animals and certain other officers are given power to arrest, without warrant, any person found violating that act in the presence of such officer, and take him before the nearest magistrate, to be proceeded against as provided for in section 11 of the act.

Without deciding whether there is a distinction to be made between section 13, which contemplates an action for a penalty to be recovered in an action of debt, in the name of the society, and section 11, which provides that when the amount has been adjudged as a forfeiture, the person or persons arrested shall be imprisoned and kept in custody until the amount and costs are paid, whereby proceedings under the latter might be deemed to be summary (Marter v. Repp, 77 Atl. 1030), it is manifest that in this case the member of the society who made the complaint did not arrest without warrant; that the arrest was in fact by a constable by virtue of a warrant issued after complaint had been made; and that such violation did not occur in the presence of the officer. A conviction under section 11 can be had for general violations of said act only when such violations occur in the presence of the persons or officers named in the amendment of 1893 above referred to, and the arrest shall have been made without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

warrant by one of such persons or officers. The supplement approved March 31, 1902 (P. L. 1902, p. 224), does not conflict with this view. It empowers certain persons to arrest "offenders found violating" the act, and, although this may mean that such violations must occur in the presence of the persons thus authorized to make arrests, yet it does not limit by its terms the proceedings to the eleventh section of the act. The inference from the proviso in the supplement on the contrary is that the prosecution shall be by the society in localities where the state society or a district society exists, and hence that a suit to recover a penalty is meant. It is clear that the proceedings in this case were intended to be prosecuted, and were in fact taken, under section 13 of the act, and therefore that the denial of a jury trial by the magistrate terminated his jurisdiction over the subject-matter.

The conviction must therefore be set aside, with costs.

BACKES v. MOVSOVICH.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 987*)—REVIEW—QUESTIONS OF FACT.

The Supreme Court will not review a decision of the district court upon questions of fact. It can only look to see if there was any legal evidence upon which judgment might be based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3393-3396; Dec. Dig. § 987.*]

2. EVIDENCE (§ 318*)—HEARSAY.

In a suit to recover for services rendered, a letter written by plaintiff's witness and offered in evidence by the defendant, not for the purpose of impeaching the credit of the witness, but for the avowed purpose only of showing the opinion of the writer thereof that the plaintiff was not entitled to recover, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

3. WITNESSES (§ 236*)—EXAMINATION—QUESTIONS—OBJECTIONS.

Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is rightfully excluded as a whole.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 236.*]

Appeal from District Court of Trenton.

Action by William J. Backes against Hyman Movsoovich. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

William M. Jamieson, for appellant. John H. Backes, for appellee.

TRENCHARD, J. This is the defendant's appeal from a judgment rendered by the

judge of the district court of the city of Trenton, sitting without a jury, in favor of the plaintiff in an action for services rendered.

[1] First. It is said that the plaintiff "failed to establish his case by a preponderance of the evidence," and it is contended that this requires a reversal of the judgment. Not so. This court will not review a decision of the district court upon questions of fact. It can look to see if there was any legal evidence upon which the judgment might be based. *Aschenberg v. Mundy*, 76 N. J. Law, 352, 69 Atl. 954. There was such evidence.

[2] Secondly. It is contended that the trial judge erroneously excluded a letter written by the plaintiff's witness Warady, and offered by the defendant. We are of the opinion that it was properly excluded. It was offered, not for the purpose of impeaching the credit of the witness, but for the avowed purpose only of showing the opinion of the writer thereof that the plaintiff was not entitled to recover for the services rendered.

[3] Thirdly. It is contended that the trial judge erred in sustaining an objection to the following question propounded by the defendant's counsel on cross-examination of the plaintiff's witness Warady: "Did you not tell me that any work done was done for you, and that you paid him well—that whatever he did, he did for you and that he was well paid by you for these services? What did you tell me?" The avowed purpose of the question was to lay a foundation for impeaching the credit of the witness. Now, it will be observed that the question is a compound one. Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is rightfully excluded as a whole. *Thompson on Trials*, p. 349. The latter part of the question was clearly objectionable for the purpose of laying a foundation for impeaching the credit of the witness. The question having been properly excluded for the reason stated, it is unnecessary to consider other objections urged against it.

The judgment of the court below will be affirmed.

SHAW v. THIELBAHR.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 706*)—COLLISION—INJURIES TO AUTOMOBILE—EVIDENCE.

In an action for damages, the failure of the plaintiff, whose automobile was struck by the defendant's wagon, to prove the possession of a license at the time of the collision, is not a ground for a nonsuit.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court of Bergen.

Action by Edward E. Shaw against Henry Thielbahr. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

R. M. Hart, for appellant. Mable & Malmend, for appellee.

GARRISON, J. The appellee recovered a judgment in the district court for damages resulting from his automobile being struck by the defendant's delivery wagon. The case was tried before the court, who, as shown by the judgment rendered, found that the driver of the defendant's wagon was guilty of negligence that caused the accident, and that the plaintiff was free from contributory negligence. The state of the case shows that there was testimony that supports each of these findings, and beyond this we do not look upon an appeal based upon matter of law only. The point is made by the appellant that the plaintiff produced a state license for 1911, whereas the accident happened in 1910. The uncontradicted proof, however, was that plaintiff had a license for 1910, which he had turned into the department at the time of trial. Moreover, the fact that the plaintiff was licensed at the time of the accident was not an essential part of his case, or even relevant to the issue as framed, since the possession of such a license has no tendency to avert collisions as do brakes, signal trumpets, and lighted lamps at night. The duty created by the police regulation to have a license and to display its number was not owing to the defendant or created for his benefit, at least as far as the avoidance of accidents is concerned. Hence the effect of the nonobservance of such duty comes within the reasoning of the well-considered case of *Fielders v. North Jersey Street Railway Co.*, 68 N. J. Law, 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552. What is gained by the display of a license number is, not the avoidance of collisions, but the more ready identification of the machine, and its responsible owner. To the argument that the absence of this means of identification had a tendency to make the plaintiff less careful, the answer is that such a consideration is too remote to be relevant in the legal meaning of that term, which is derived, not by the strict processes of logic, but from the exigencies of trial by jury. Such argument, therefore, comes within the reasoning of the case of *Sutten v. Bell*, 79 N. J. Law, 507, 77 Atl. 42, where upon like ground it was held that the plaintiff's insurance against loss was irrelevant upon the question of his negligence.

In the present case the point that plaintiff had not proved that he was licensed was raised only as a ground of nonsuit. It was

clearly not error to refuse such motion upon this ground, since, in as far as the matter not proved bore upon the plaintiff's negligence, he was under no obligation to meet it by his own proofs, and in as far as it rested upon a right to run down with impunity an unlicensed autoist, it was without foundation in law.

The judgment of the district court of the Third judicial district of Bergen county is affirmed.

MAYOR AND BOARD OF ALDERMEN OF TOWN OF MORRISTOWN et al. v. MURPHY et al.

(Supreme Court of New Jersey. Nov. 13, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 641*)—VIOLATION OF ORDINANCE—CONVICTION—RECORD.

The record of conviction in a proceeding before a police justice in the town of Morristown for the violation of an ordinance must set out sufficient evidence to show that the offense charged in the complaint was committed, in order to constitute a legal conviction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 641.*]

2. MUNICIPAL CORPORATIONS (§ 640*)—VIOLATION OF ORDINANCE—EVIDENCE.

Testimony that "defendants were in their hacks at places not designated as public hack stands" does not justify a conviction of the defendants of the offense of "standing with their hacks at a place which had not been designated as a public stand for hacks."

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 640.*]

Certiorari by Joseph Murphy and George Dolan to review a conviction for violation of an ordinance of the town of Morristown. Judgment of the mayor and board of aldermen reversed, and conviction set aside.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

Willard W. Cutler, for prosecutors. C. A. Reed, for defendants.

TRENCHARD, J. The prosecutors of this writ were arrested upon a warrant issued by a police justice upon a complaint that they "did stand with their hacks at the railroad station on Morris street, in Morristown, N. J., at a place which had not been designated as a public stand for hacks," etc., contrary to the provisions of "An ordinance concerning licenses to hackmen and others," etc. The record of conviction states that upon the hearing the police justice "adjudged them guilty of the violation of section 14 of 'An ordinance concerning licenses to hackmen and others,' and sentenced each of them to pay a fine of five dollars, with costs of one dollar and seventy-five cents each." Upon appeal such conviction was affirmed by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the mayor and board of aldermen of the town of Morristown.

[1] By this writ the prosecutors challenge the validity of such conviction and of such affirmance thereof. We have not found it necessary to consider many of the questions argued, because we are of the opinion that such conviction must be set aside, for the reason that the record of the conviction does not set out any evidence to show that the offense charged in the complaint was committed. *Salter v. Bayonne*, 59 N. J. Law, 128, 36 Atl. 607; *Massinger v. Millville*, 63 N. J. Law, 123, 43 Atl. 443; *Elizabeth v. Central R. R. Co.*, 66 N. J. Law, 568, 49 Atl. 682.

[2] The only evidence set out is that of a witness who testified "that defendants were in their hacks at places not designated as public hack stands." That does not tend to show that they were standing with their hacks at a place which had not been designated as a public stand for hacks. If to be "in their hacks at places not designated as public hack stands" justified their conviction, they could never lawfully move from such designated stands.

The judgment of the mayor and board of aldermen, affirming such conviction, will be reversed, and the conviction set aside, with costs.

SHINE et al. v. DISTRICT COURT OF CITY OF ORANGE et al.

(Supreme Court of New Jersey. Nov. 15, 1911.)

(Syllabus by the Court.)

COSTS (§ 175*)—FEES FOR VENIRE—STATUTORY PROVISIONS.

The increase in fees, by virtue of section 215 of the act of 1910, p. 247, to be paid to jurors summoned to serve in a district court, does not thereby authorize the clerk to demand more than \$5.75 for a venire for a jury of 12 men.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 175.*]

Application by Margaret Shine and another for rule to show cause why a writ of mandamus should not issue to the District Court of the City of Orange and another. Writ granted.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

William A. Lord, for relators. Smith & Dugan, for defendants.

KALISCH, J. This is a rule to show cause why a peremptory or alternative mandamus should not issue commanding and enjoining the district court of the city of Orange and the judge and clerk thereof to issue a venire to try the issue in an action brought by the relators against the Public Service Railway Company, upon the said relators tendering

and paying to the clerk of said court the sum of \$5.75. Testimony was taken under the rule, and it raises the single inquiry whether the relators are entitled under the act of 1910, to the issuance of a venire, upon the tender and payment of \$5.75.

By section 214 of the District Court Act (P. L. 1906, p. 550), it is expressly provided: "In all actions which may be brought by virtue of this act the following and no other fees shall be paid to the clerks of said court." Then follows a schedule of fees, among which is: "Venire facias, jury of twelve men, \$5.75." This section 214 of the act of 1906 is amendatory of section 214, of an act entitled "An act to amend an act entitled, an act concerning district courts (revision of 1898)."

Section 215 of the act of 1898 reads: "From the foregoing (referring to the schedule of fees) shall be paid by the clerk to the following persons." P. L. 1898, p. 634. Then follows a detailed statement how and in what proportion the fees should be distributed and among whom. Section 215 was amended by the act of 1910 (P. L. 1910, p. 247), entitled "An act to amend an act entitled 'An act concerning district courts (Revision 1898).'" This amended section, like the original one of the act of 1898, reads: "From the foregoing (referring to the schedule fees, among which is 'Venire facias, jury of twelve men, \$5.75'), shall be paid by the clerk to the following persons." This is followed by a schedule of fees to be paid to various individuals, and therein is contained the item: "Jurors—For all cases tried (per man) .75."

Since, by virtue of the amendment of the schedule of fees to be paid to jurors, each juror is to receive 50 cents more than under the old schedule of 25 cents, it follows, as a matter of course, that a panel of 12 jurors will cost \$6 more than formerly, and, because of this, it is insisted by the counsel for the defendants that, although section 214 expressly provides that \$5.75 shall be the fee paid to the clerk for a venire for a jury of 12 men, yet, nevertheless, the amendment by fair implication raised the venire fee from \$5.75 to \$11.75.

The answer to this contention of counsel for defendants is that the Legislature has expressly declared, by section 214, that \$5.75 and no more shall be paid to the clerk for a "venire facias, jury of twelve men."

It would require a most violent wrenching of legal principles applicable to statutory interpretation to hold that because the Legislature provided that the clerk shall pay to each juror 75 cents, instead of 25 cents, that therefore, by necessary implication, the venire fee for a jury of 12 men has been raised from \$5.75 to \$11.75, despite the explicit command in section 214 of the act that the clerk shall receive no more than \$5.75 for a "venire facias, jury of twelve men."

In this connection, it should be pointed out

that section 214 is wholly concerned with what fees the clerk shall receive from the litigants for the various matters mentioned therein; while section 215 relates wholly and exclusively to what fees the clerk shall pay to various individuals. The purposes of the two sections are manifestly distinct and separate. It would therefore follow that a change in the fees to be paid out by the clerk by a legislative enactment cannot, in any way, affect the fees which the clerk is entitled to receive under section 214 of the act. This leads to the conclusion that the amendment of section 215 of the act of 1910, which raises the fees to be paid to jurors, does not authorize the clerk to demand more than \$5.75 for a venire for a jury of 12 men.

The facts being undisputed, and the law being with the applicants, a peremptory writ of mandamus should issue, with costs. *American La France Engine Co. v. Seymour*, 79 N. J. Law, 92, 74 Atl. 439.

AMERICAN MALLEABLES CO. v. TOWN OF BLOOMFIELD.

(Supreme Court of New Jersey. Nov. 10, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 873*)—CONTRACTS—PLEDGE OF PUBLIC FUNDS—VALIDITY.

A municipality entered into a contract with a railroad company providing for the elevation of its railroad tracks in order to abolish grade crossings. To accomplish this, it was necessary either to eliminate an industrial siding, which crossed a street and connected prosecutor's factories with the railroad, or elevate it. The contract required the town to vacate the street, and the railroad company to elevate its tracks, and preserve the industrial siding at the same elevation. The prosecutor, with this understanding, permitted the railroad company to build its depot on its land in furtherance of the contract, made no objection to the vacation of the street along its land, and permitted the removal of the existing siding. The town then adopted a resolution to modify the original contract by eliminating the siding, and agreed to pay all damages the prosecutor might suffer from the discontinuance by the railroad company of the siding. *Held*, that the town had no authority to pledge public funds in exoneration of the liability of the railroad company to the prosecutor because of its nonobservance of a right which the prosecutor claimed to be due to it from the company.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 873.*]

Certiorari by the American Malleables Company against the Town of Bloomfield to review resolution of such town. Resolution set aside.

Argued June term, 1911, before SWAYZE and BERGEN, JJ.

Pitney, Hardin & Skinner, for prosecutor. Charles F. Kocher, for defendant.

BERGEN, J. Prior to its elevation, as herein described, the main line of the Delaware, Lackawanna & Western Railroad Company, through the town of Bloomfield, crossed its streets at grade. Between Washington street and Glenwood avenue the company's right of way ran parallel with, and adjoined on the east Mechanic street, across which, and connected with the main line, ran an industrial siding which was continued over the property of the prosecutor, lying west of the railroad and Mechanic street to its factories, and was used by the railroad company to deliver and carry away freight by car loads. The town, desiring to abolish certain grade crossings under the provisions of P. L. 1901, 116, and P. L. 1903, 661, authorized, by ordinance, the making of a contract with the railroad company, which was duly executed, the terms of which provided that the company should elevate its tracks to accomplish the desired improvement in the manner therein set forth and according to certain maps and plans filed with the town and adopted as a part of the contract. The contract, among other things, provided that the industrial siding should be maintained, as shown on the maps and plans, to leave the main line north of Washington street at the elevated grade, crossing Mechanic street in a diagonal course and from thence extending to the works of the prosecutor. It also required the town to vacate Mechanic street between Washington street and Glenwood avenue, which was done, and the railroad company erected abutments at Washington street to provide for the siding at the elevation shown on the maps. The contract also provided that the railroad company should construct a depot between Washington street and Glenwood avenue at the location fixed on the plans adopted, the construction of which was commenced, and its foundation occupies nearly the entire width of what was Mechanic street at that point, one-half of which reverted to prosecutor when the street was vacated, and it is stipulated "that for the purposes of such work by said railroad companies in accordance with the contract between said town of Bloomfield and the said railroad companies possession of the portion of the land within the lines of said (old) Mechanic street belonging to said prosecutor and reverting to it by the vacation has been permitted to said railroad companies, and the industrial sidings formerly connecting the property of the prosecutor with the railroad have been removed."

With matters in this posture, the prosecutor, relying upon the provision made for it in the contract, and having interposed no objections to the vacation of the street, and the erection of the depot on its land, the town, by resolution, authorized a supplement-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tary agreement "so as to omit the construction of the said industrial sidings and switches on the property of the American Malleables Company or the Hedden Iron Construction Company between Glenwood avenue and Washington street in said town of Bloomfield," upon condition that the railroad company acquire by condemnation or agreement the land in Mechanic street which would revert to the prosecutor because of the vacation of Mechanic street, but it does not appear that this condition was ever performed. The proposed amended agreement also bound the town to pay all damages arising from the elimination of the siding. The present writ brings up the resolution authorizing this modification of the contract. When the resolution was adopted, Mechanic street was not a public highway. It belonged to the adjacent landowners, one of whom was the prosecutor, and the town no longer had any police control over it as a highway, and neither the main line nor siding crossed any street at grade that had been eliminated as provided for in the original contract, and the resolution could only operate upon the relations existing between the railroad company and the prosecutor regarding siding facilities to be furnished by the company, to which the town was not a party, and the damages, if any, resulting from the withdrawal of any such existing facilities would not be a charge upon the public funds, unless it was necessary in order to abolish a grade crossing, which in this case had been provided for and accomplished before the resolution was adopted. The town had no power to pledge public funds in exoneration of the liability of the railroad company to the prosecutor because of its nonobservance of a right to which the prosecutor might be entitled, and which the company was apparently unwilling to violate without indemnity, and therefore the resolution is void. This makes it unnecessary to consider the other questions raised; but it is doubtful whether, when this contract was made for the benefit of the prosecutor, although it was not a party, but acting on the benefits it conferred on it, it allowed the railroad company to erect a building on its property and permitted the existing siding to be removed as required by the contract, and acquiesced in all that was required of it to carry out the contract, and after all that it might have protested against had been accomplished, to the knowledge of the railroad company and the town, they can, without notice to it and without restoring the status quo, deprive it of a contract, to the consideration of which it has contributed by allowing its land to be used in execution of the contract, relying upon the benefits it reserved to it.

For the reason first given, the resolution under review will be set aside.

IN RE WARRINGTON'S WILL.

(Superior Court of Delaware. Kent. July 6, 1911.)

WILLS (§ 415*) — CONTEST — COUNSEL FEES — DISBURSEMENTS.

Fees of petitioner's counsel in a will contest are neither of right nor of course taxable as a part of the costs to be paid out of the estate, although an allowance out of the estate to counsel for petitioners to recompense them for disbursements may be made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 894; Dec. Dig. § 415.*]

Appeal from the register of wills on a review of a paper writing purporting to be the last will of Alfred C. Warrington, Sr., deceased. Decree admitting the will and codicils to probate affirmed, and application for allowance to counsel for petitioner denied, except for disbursements.

Argued before CONRAD, WOOLLEY, and RICE, JJ.

Henry Ridgely and John B. Hutton, for petitioners for review. Thomas C. Frame, Jr., for propounders of will.

WOOLLEY, J. (delivering the opinion of the court). At the adjourned April term of the Superior Court for this county, argument was heard upon the appeal from the decree of the register of wills in the matter of the review of the probate of the papers writing purporting to be the will and codicils of Alfred C. Warrington, Sr.

The court finds, and therefore decides, that under the facts and the law of this case, the rulings and decree of the register of wills, as shown by the exceptions filed, are without error; that the papers writing purporting respectively to be the last will and testament of Alfred C. Warrington, Sr., and his codicils thereto, are together the last will and testament of Alfred C. Warrington, Sr.; and that the exceptions filed by the appellants to the rulings and finding of the register of wills should *not* be sustained.

Commenting only upon that exception which relates to the disallowance by the register of counsel fees for this petitioner's counsel, the court has to say that it knows no rule whereby counsel fees for petitioner's counsel in contested will cases are of right or of course taxable as a part of the costs to be paid by the estate. Indeed, the inclination of the court is to the contrary, as it feels that the allowance of counsel fees as costs constitutes an exception rather than a rule. Obviously in certain cases counsel fees for both parties should be charged against and paid by the estate, but we do not think this case comes within this exceptional class. It is apparent to the court, however, that in the preparation and presentation of this case, counsel for the petitioners have been subjected to expenses, which although certain, are difficult to designate and enumer-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ate. To meet and defray their expenses, the court in the taxation of the costs, will allow counsel for the petitioners the sum of \$250, which, like the rest of the costs, is to be paid by the estate.

FLINT WAGON WORKS v. MALONEY, Sheriff.

(Superior Court of Delaware. Kent. Oct. 24, 1911.)

1. SALES (§ 459*)—CONDITIONAL SALE—WHAT CONSTITUTES.

Where the terms of a contract for the sale of goods provide that the title is to remain in the vendor until payment is made, and that the goods shall be immediately returned to the vendor or placed at its disposal on the financial embarrassment of the vendee, it is a conditional sale as between the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1337-1347; Dec. Dig. § 459.*]

2. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION OF PARTIES.

It is the duty of courts to construe contracts to carry out the intention of the parties, and such intention must govern, when ascertainable from the agreement, unless in contravention of an established principle of law or against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

3. SALES (§ 474*)—CONDITIONAL SALE—CREDITORS OF BUYER.

While a provision of a contract for the sale of goods, which are to be resold at retail, that title shall remain in the vendor until payment is made, cannot be enforced by the original vendor against a purchaser in the ordinary course of trade, because of its inconsistency with the express purpose for which the goods were sold, the vendor is estopped from asserting his title only to that extent; and where the contract of sale, which was entered into in good faith, shows that it is the intention of the parties that title be retained in the seller until the buyer sold the property in the regular course of his business, and until that unsold was paid for, it cannot be construed to allow a creditor of the vendee to levy on the property and sell it for the payment of his debts, and the vendor may assert his title against such creditor, who has previously obtained the goods under execution.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

Replevin by the Flint Wagon Works against William E. Maloney, Sheriff of Kent County. Judgment for plaintiff.

Argued before PENNEWILL, C. J., and RICE, J.

Richard R. Kenney and William Penn Shockley, for plaintiff. James H. Hughes, for defendant.

PENNEWILL, C. J. (delivering the opinion of the court). This case is before the court upon the following agreed statement of facts:

"That on April 26, 1909, the Flint Wagon Works sued out a writ of replevin in this court against William E. Maloney, at that

time sheriff of Kent county. That said writ was executed by William A. Willis, at that time coroner of said county. That under said writ the goods and chattels named in the list hereto attached and marked 'Exhibit A' were taken from the defendant. That the value of said chattels was then and there \$793. That the said chattels so replevied were at that time in the hands of the defendant at Smyrna, Del., having been previously levied on by him at Smyrna aforesaid by virtue of a writ of execution in his hands at the suit of Adam F. Huey and Garrett Foxwell against Thomas H. Wilson. That the said goods and chattels had been ordered by the said Thomas H. Wilson from the said the Flint Wagon Works on October 28, 1908. A copy of the said order, together with the conditions of such sale, is hereto attached and marked 'Exhibit B.' That the said goods and chattels were duly received by the said Thomas H. Wilson, who was a retail merchant or dealer in such goods in the town of Smyrna aforesaid. That before the issuing of the said execution a part of the goods had been sold by the said Thomas H. Wilson. That the judgment on which said execution was issued was for a debt existing previous to the delivery of said goods to said Wilson. That said goods had not, at the time of the suing out of the writ of replevin in this case, nor have they since, been paid for to the plaintiff by the said Thomas H. Wilson or any person for him. That if the court should be of the opinion that the Flint Wagon Works was, at the time of the suing out of the aforesaid writ of replevin, entitled to the possession of the goods and chattels replevied, then judgment to be entered in favor of the plaintiff for costs, but if not, then judgment to be entered for the defendant for \$793, with interest thereon from April 28, 1909, and costs—each party reserving the right to sue out a writ of error therein."

The question to be determined by the court is whether at the time the goods and chattels were replevied the right of possession was in the plaintiff or the defendant.

The terms and conditions of sale, according to Exhibit B, which is embraced in the case stated, were in part as follows:

"The title to the goods on this order, or any subsequent orders, is to remain in your (the vendor's) name until paid for in cash, and should we through any cause suspend doing business, or become or apparently become, embarrassed financially, any account or note you have against us shall become immediately due and payable, and we will deliver to whom you may direct, or place on cars if you so direct, any or all of your

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

goods remaining on hand, free of charge of any kind."

[1] There is no doubt that the language of the agreement respecting the property in question is such as would constitute a conditional sale under the well settled law of this and many other states.

But it is insisted that the admitted facts in this case bring it within an exception well recognized in the law governing conditional sales. The facts relied upon to support such contention are: That the goods and chattels in controversy were sold by the plaintiff to Thomas H. Wilson with the knowledge that the vendee was a retail merchant or dealer, and that the property would be sold by him in the usual course of trade; that the plaintiff having such knowledge impliedly agreed that the goods and chattels might be sold by the vendee at any time as his own. Such being the case it is contended that inasmuch as the plaintiff could not maintain an action to recover the property from one who purchased it from the vendee in the usual course of trade, without knowledge of the conditional sale, he cannot maintain such an action against a creditor of the vendee who had seized the property for a bona fide debt.

It has been decided in this state that if a person makes a conditional sale of goods to another for the purpose of being resold by him as a retail dealer in such goods the original vendor cannot maintain title thereto against a bona fide and innocent purchaser from the original vendee. And this has been declared to be the law in almost every state where the question has arisen, but in most jurisdictions there are now statutes governing the subject.

In some of the cases the courts have based their decisions upon the principle of estoppel, and in others upon the principle that a reservation of title in the vendor is so inconsistent with a sale of goods to a retail dealer for the purpose of being resold by him at any time, as to make void the condition. But, we do not understand that such sales have been declared invalid, as between the original parties, in any state where such contracts are so fully recognized as in this state.

Nowhere do we find this subject more clearly treated, and the authorities more satisfactorily reviewed, than in the case of *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217.

Loomis, J., in delivering the opinion of the court in that case said:

"There is much contrariety of reasoning and decision relative to the validity of what are called conditional sales in different states, and often to some extent in the same state.

"The courts of Pennsylvania have most firmly established the rule that a sale and

delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase money is paid, is fraudulent and void as to creditors of the vendee and innocent purchasers; but they are obliged to except cases of bailment where no present contract of sale is regarded as made, and they have often found difficulty in distinguishing between cases that lie near the border line separating sales from bailments, where there is a condition upon which the bailee may become the owner. * * *

"The courts of New York seem to concur with those of Pennsylvania in holding conditional sales void as to purchasers, * * * but differ in giving effect to them against levies made by creditors and assignments in trust, or as security for the payment of antecedent debts. But when the agreement confers on the conditional vendee the right to sell, or a right inconsistent with continued ownership of the original vendor, the courts of the latter state pronounce the transaction fraudulent as against both creditors and purchasers. * * *

"In Maine, Vermont and Massachusetts the condition that the right of property shall remain in the vendor until payment is held good, not only as between the original parties, but also against purchasers from the vendee and creditors of the latter, even when possession goes with the sale, and there is nothing to indicate that it is not absolute. In all the cases of this class that have hitherto been considered by the court, the court has uniformly and consistently applied the principle embodied in the ancient maxim 'that when a man hath a thing he may condition with it as he will.' "

In reply to the claim that the Massachusetts cases were peculiar to that state, the court in the case of *Forbes v. Marsh*, 15 Conn. 384, said:

"They are based upon the principle of the common law, which construes contracts according to the intention of the parties, and allows men to contract according to their own pleasure, unless contrary to the policy of the law or certain technical rules. The owner may dispose of his property to whomsoever he pleases, at any time and in any manner. When he relies upon his remedy it is but just that he should be left to it according to his agreement, but on the contrary there is no reason why a man should be forced to trust where he never meant it. For the agreement of the minds of the parties is the only thing the law respects in contracts. The rule of law making the property of one man liable for the debts of others in whose hands it is found, is applicable particularly to that property which was once owned by the possessor, and is by him sold to another, and then suffered to remain in his possession. In such cases possession is evidence of fraud, because there is not given to the world the usual evidence of a change

of title. The vendor is therefore presumed to remain owner of the property as before. It is otherwise in cases like that before us. The vendee comes into possession of property which was known to belong to another man. Whether therefore the vendee had borrowed it, or hired it, or purchased it, becomes a matter of inquiry, and ought to be ascertained by him who proposes to trust his property upon the faith of this appearance; for the law offers its protecting shield to those who attempt to protect themselves. Accordingly we find that all these cases of conditional sales made bona fide have been held good as against attaching creditors as well as against the parties."

In the Connecticut case there was an express condition that the title to the merchandise should not vest in the vendee until it was fully paid for, and until such payment was made the title was to remain in the vendor. The vendee was a retailer of liquors, and it was supposed by the parties that the merchandise would be used in his business, and in case any of it should have been sold and consumed before the conditions of sale were complied with, the vendor could only enforce his condition against such portion as might remain unsold.

"Under such an agreement," said the court, "after the property has been attached by creditors, will the law consider it as belonging to the plaintiffs or to their conditional vendee? If we invoke the aid of the courts of other states to give an answer to this question, we find decisions of the highest courts of Maine, Vermont and Massachusetts, protecting the title of the original vendor under agreements substantially the same as the one we are considering."

In the case of *Rogers v. Whitehouse*, 71 Me. 222, the court said: "We see no legal objection to a wholesale dealer making a conditional sale to a retailer with the understanding that he may dispose of the goods as they may be called for at retail, but that as between themselves the property shall not pass until the goods are paid for, and in such case, while the purchaser at retail would get a title which the original vendor could not impeach because of his agreement with the retailer, it would be the title of the original vendor, and not that of the retailer, who has none and can convey none except in the manner which his arrangement with the vendor permits." It was held in that case that the goods did not pass to the assignee in insolvency of the purchaser for the benefit of his creditors, although the original vendor would have been estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of business.

In *Armington v. Houston*, 88 Vt. 448, 91 Am. Dec. 386, the defendant, a constable, attached the goods in behalf of a creditor of the vendee. The court said: "It was the un-

questionable right of the plaintiff to sell his property to Thompson upon the condition that, until payment of the price, the property should remain in the plaintiff. The retention of the title to the property is not a fraud upon any person, and such a contract is one which every person has a right to make. In a conditional sale the possession of the property is ordinarily transferred to the vendee, and very frequently with expectation of both of the parties to the sale that the property will be used by the vendee; but, in such cases the vendee is, until the performance of the condition, only a bailee of the property for a specific purpose, and he acquires no property in the goods from the possession merely. His right rests upon the agreement of the parties, and their intention in making the contract of sale is to be carried into effect if the transaction was entered into in good faith, unless the contract is one which contravenes some established rule of law."

In *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470, there was a sale and delivery of a stock of goods to a shopkeeper to be put into his shop for sale, but upon condition that the title should not vest in him until payment of the price, and it was held that the title did not pass, and that the condition was operative as against even a purchaser from him of the whole stock of goods; although it was also held that, had a sale been made of individual articles in the ordinary course of business in a country store, the plaintiff might have been estopped to assert any right adverse to such purchaser, having placed them in the hands of such dealer with the understanding that they were to be thus used. But why multiply authorities? The opinions to which we have referred state with all possible clearness and force the grounds and argument in support of the validity of such conditional sales as the one now before us.

It cannot be denied that there is some conflict in the decisions upon this vexed question, but we think such conflict has arisen mainly because of the different attitude which courts in different states have taken respecting conditional sales generally. While such sales have been perhaps nowhere especially favored, and certainly not in this state, still they have been looked upon with more disfavor in some jurisdictions than in others, and particularly so in Pennsylvania.

The leading authority in support of the doctrine that the reservation of title to merchandise by a seller until payment is made is void as against creditors of the purchaser, where the latter is, by the contract, given the right to sell the merchandise in the ordinary course of business, is in *re Howland* (D. C.) 109 Fed. 869. The court held in that case that such right was inconsistent with the ownership of the seller, and one which

would necessarily destroy his right of property.

It will be noted from a careful examination of that case, which was decided in the District Court of the Northern District of New York, in 1901: (1) That the cases of that state upon which this decision was based, involved an element of fraud in the alleged conditional sale; (2) that the court held the title to be absolute in the vendee, and that the condition was inoperative and void against all parties. The court cited in particular the case of *Ludden v. Hazen*, 31 Barb. (N. Y.) 650, where it was said: "The principles of conditional sales, aside from fraud, which is very apparent, will not uphold such sale when the property is to be delivered to the buyer for consumption or for sale, or to be dealt with in any way inconsistent with the ownership of the seller, or in a manner that would destroy his lien or right of property." In *Frank v. Batten*, 49 Hun, 91, 1 N. Y. Supp. 705, which was also cited, and in which the facts were similar, a like decision was given. Respecting these two cases the court, in *Re Howland*, said: "These were both cases where the merchandise were sold on conditional contracts, to be retailed by the vendee, the title to remain in the vendor until paid for. Such sales are held to be inconsistent with the continued ownership of the vendor, as well as to be such as would destroy the vendor's right of property; and, as such, the title, so far as creditors of, and purchasers from, the vendee are concerned, is deemed absolute in the vendee." This case is, as we have said, the leading case against the validity of conditional sales as to creditors of the vendee when the property is sold to be retailed by the purchaser. No other case upon that side of the question is stronger or clearer, and we deem it unnecessary, therefore, to comment upon others in the same line. In the very full and exhaustive brief furnished by counsel for the defendant will be found a classification and analysis of the cases bearing upon the subject, as well as a classification of the same showing the attitude of the different states with respect to conditional sales. It may be conceded that some other states have taken the same position as that maintained in the *Howland Case*.

There being such a conflict in the authorities upon the subject, what position shall this court take with respect to this question which has now arisen for the first time in this state, and which has troubled the courts of other states so much in the past?

We have the reasoning of courts upon both sides of the question. Which seems to be the most sound and logical, and most consistent with the well-settled principles of law, and particularly the principles governing the construction of contracts?

[2] It is the duty of courts to construe con-

tracts so as to carry out the intention of the parties; and such intention must govern when it can be ascertained from the agreement, unless it is in contravention of some established principle of law, or against public policy.

The validity of conditional sales is as fully recognized in this state perhaps as in any other, and if made in good faith they are as binding on the innocent purchaser from the vendee, as upon the vendee himself, unless they fall within the exception recognized in the case of *South Bend Iron Works v. Reedy*, 5 Pennewill, 361, 60 Atl. 698, which is hereafter referred to. There is nothing to show, and indeed it is not contended, that the contract before the court was not made in good faith, and there is no suggestion of fraud or collusion therein. Neither can it be said that the agreement is in contravention of any settled principle of law, or of public policy. While the courts of this state have not favored conditional sales, and have frankly said so, they have been compelled at the same time to say they are valid here, and must be so regarded by courts and juries too.

[3] Undoubtedly it was the intention of the parties to this contract that the vendee should sell the carriages in the regular course of his business, because the agreement provided that any or all of the goods *remaining on hand*, should in a certain event, be redelivered to the plaintiff. But it was also the clear intention of the parties that the title to the unsold carriages should remain in the plaintiff until paid for.

And it is equally clear that while the vendee was permitted to sell the carriages in due course of business, and deliver the same to the purchasers free and discharged from the condition, the parties did not intend that a creditor of the vendee should levy upon the property and sell it for his debts. The agreement expressly provided that if the vendee should suspend doing business or become financially embarrassed, his debt to the plaintiff should become immediately due, and any or all the goods remaining on hand be redelivered to the vendor.

Can it be said that such a contract was not valid and binding on the vendee and his creditors too? The effort and intention of the parties was not to deprive creditors of the right to seize the *property of the vendee* for the payment of his debts, but to save the *property of the vendor* from such seizure.

It is not difficult to understand the reason for such an agreement. In most cases of a like character the vendee would not be able to pay for the goods until he had sold them, and the understanding would therefore be that he might sell the property in due course of business and make payments therefor as he made the sales. That would be a matter of confidence reposed by the vendor in the

vendee, and in that way only, in very many cases, could the vendee obtain possession of the property. But there is no reason to suppose that the parties to such a contract ever contemplated that the title to the property should be in the vendee so that his creditors might seize the same for the payment of his debts.

The Connecticut case to which we have already referred at some length, and which seems to us to be the clearest and most satisfactory exposition of the law upon the subject that we have found, is very similar in its facts to the one before us. Judge Loomis in that case presents the arguments on both sides of the question very fairly and strongly, and the conclusion reached by him commends itself to our minds as sound in principle, and entirely consistent with the well settled law governing the construction of contracts. In speaking of the reasons urged against the validity of the condition as against creditors of the vendee, the court said:

"But, conceding that the parties actually contemplated that there might be some sales made before actual payment of the price, yet the terms of the agreement, coupled with the conduct of the conditional vendee in pursuance of it, evince the perfect good faith and bona fide character of the transaction, so that it cannot be pronounced void on account of any wrong intent of the parties. If, therefore, the condition is to be held inoperative at all, the law must so declare it upon grounds of public policy, because it was calculated to give the one clothed with the possession a false credit, or else upon the ground that the plaintiffs through their contract are to be regarded as holding the possessor, or conditional vendee, out to the world as absolute owner.

"The objection as to giving false credit has undoubtedly much force, so that in many states the courts consider it as sufficient, but it applies with more or less strength, according to the circumstances, to all cases of conditional sales where the vendee is clothed with full possession and apparent ownership; but, as the court says in *Forbes v. Marsh*, supra, in this state all these cases of conditional sales made bona fide have been held good against attaching creditors, and in reply to the objection we are considering it warns persons against putting faith in appearances except where the case comes within the rule of the vendor's retaining possession after the sale, and persons about to give faith on such appearances must make inquiry; and in this respect the language of our courts is similar to that of *Campbell, J.*, in giving the opinion in *Ketchum v. Brennan*, 35 Miss. 596: 'A buyer must beware of purchasing from one who has not title; possession is not title.'

"The other objection, as to holding out the possessor to the world as absolute owner, is involved partly in the one just considered, except so far as the contract in question

must be construed as contemplating or authorizing a sale by the possessor.

"Possession, with the *jus disponendi* added, has been regarded by many courts as a sufficient reason for declaring a contract colorable and fraudulent without regard to the real intent of the parties.

"We concede that there is much force in the reasoning supporting such a rule, but at the same time we must bear in mind the spirit and drift of our own decisions as they may have induced the making of such contracts. While it is true, as already stated, that no case identical with the present in the particular feature we are now considering has hitherto been before this court, yet the cases referred to clearly show that the controlling consideration has been the bona fide character of the transaction and the honest meaning and intent of the parties, without applying any technical rule of public policy, as in the cases of a retention of possession by the vendor after a sale.

"The courts of Massachusetts and Connecticut have always been in harmony on this vexed subject, and the principles hitherto adopted by us, if they do not logically compel, yet very naturally lead to the same result as already reached in that state, where the title of the original vendor has been protected notwithstanding the objection we are considering."

The case of *South Bend Iron Works v. Reedy*, decided in this court, has been cited as an authority in support of the principle contended for by the defendant. In that case the plaintiff had sold to one H. D. Ruos, who was a retail dealer, a large quantity of agricultural implements to be by him sold within a certain territory, but the title to the goods to remain in plaintiff until paid for. The goods were shipped and delivered to the said Ruos, who sold to his brother Joseph A. Ruos a large portion of the goods so shipped without removing them from the car in which they had been consigned to him. It was held that the case was "within the exception well recognized in cases of conditional sales"; but the court went no further than to hold "that Joseph A. Ruos took title to the goods as an innocent holder for value without notice, and in the usual course of trade."

The right of an execution creditor to levy upon the goods as the property of the original vendee was not involved in that case, in fact or in principle, and the question is still an open one in this state.

It is not disputed that the contract involved in the present case constituted a valid and binding conditional sale between the vendor and vendee, and that as between them the title to the property remained in the vendor. But it is insisted that inasmuch as the sale was made to a retail dealer, the vendor could not avail himself of the condition, and maintain title to the property as against either an innocent purchaser for

value, or an execution creditor of the vendee.

There can be no doubt about the intention of the parties to the contract in the present case. Unquestionably they intended that, as between themselves, the title to the property should remain in the seller until paid for. It may be very fairly presumed that the seller intended that the buyer should sell the property in the regular course of his business, and thereby become able to pay for the same. It may be just as fairly presumed that the seller intended that any one who purchased the property from the vendee in the regular course of his business, would have a good title thereto. This is all meant, or implied, in every conditional sale of goods to a retail dealer. But, can the contract, by any fair and reasonable construction be held to mean that the creditors of the vendee could seize the property for the payment of his debts? We think not. There is, as we have said, a provision in the contract that clearly negatives such a meaning. But, independent of that, we are of the opinion that such a construction would be unwarranted. In order that the property might be liable for the debts of the vendee the title must have been in the vendee, which certainly could not be under the law as we understand it. But it is not necessary for the protection of an innocent purchaser that title shall be in the vendee, because when a vendor makes a conditional sale to a retail dealer he agrees, not that the title to the property shall vest in the vendee, but that he will not assert his title against an innocent purchaser from such vendee, when he knew, and had impliedly agreed, that the property might be sold by the vendee in the regular course of his business.

That, we think, is what the contract before us means, and to that extent only is the vendor estopped from asserting title in himself, because to such extent only is the agreement inconsistent with his continued ownership.

Adopting the clear and concise language employed by Judge Loomis in *Lewis v. McCabe*, we say:

"In this case the condition that no title was to pass until payment is so clear, express and positive in its terms that we are inclined to give it full effect, and to construe what is afterwards said of the understanding of the parties relative to a sale as the court in *Rogers v. Whitehouse* did, that is, not as authority to sell as his own (having nothing himself), but as authority simply to transfer the title of the plaintiff in the manner authorized."

The court are of the opinion that the *Flint Wagon Works* was, at the time the writ of replevin was issued, entitled to the possession of the goods and chattels replevied, and accordingly order and direct that judgment be entered in favor of the plaintiff for costs.

WILLS et al. v. WRIGHT.

(Superior Court of Delaware. Kent. July 6, 1911.)

1. JUSTICES OF THE PEACE (§ 58*)—JURISDICTION.

The jurisdiction of a justice's court must affirmatively appear in the record.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 207-215; Dec. Dig. § 58.*]

2. SALES (§ 246*)—"WARRANTY."

A "warranty" in a contract of sale is an undertaking collateral to the object of the sale.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 706, 711; Dec. Dig. § 246.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7396-7405, 7833.]

3. JUSTICES OF THE PEACE (§ 37*)—JURISDICTION—ACTION ON WARRANTY.

Under Rev. Code 1852, as amended to 1893, p. 740, c. 99, § 1, which provides that justices of the peace shall have jurisdiction of all causes of action arising from obligation, promise, or contract for the payment of money or delivery of goods, a justice of the peace has no jurisdiction of an action for breach of warranty arising out of a contract for the sale of a horse.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 98-115; Dec. Dig. § 37.*]

Action by James D. Wright against Henry Wills and another. Judgment for plaintiff, and defendants bring certiorari. Reversed.

Argued before PENNEWILL, C. J., and RICE, J.

John B. Hutton, for plaintiffs in error.
Franklin Brockson, for defendant in error.

RICE, J. (delivering the opinion of the court). This was an argument on a certiorari taken to the justice's record. The record of the justice of the peace, as filed in this court, sets forth the cause of action as follows: Action for breach of warranty arising out of a contract on the sale of a horse. Sum demanded, \$40.

The exceptions filed by the plaintiffs in error are as follows: First. "It does not appear by the record that the justice of the peace had jurisdiction of the cause of action." Second. "It appears by the record that the cause of action is for breach of warranty arising out of a contract on a sale of a horse, which is not a cause of action within the jurisdiction of a justice of the peace."

[1] The question raised in the first exception has been decided in principle in this state in the case of *Lewis v. White Bros.*, 4 Pennewill, 288, 55 Atl. 830. In that case Chief Justice Lore in delivering the opinion of the court said: "The jurisdiction of the court must affirmatively appear."

As to the second exception filed the counsel for the plaintiffs in error claims that the cause of action, as stated in the record filed, does not fall within the section of the stat-

ute giving jurisdiction to the justices of the peace; the section referred to being in part as follows: The justices of the peace shall severally have jurisdiction, within their respective counties, of all causes of action arising from obligation, or express or implied promise, or contract, for the payment of money, render of rent, or delivery of produce, chattels, goods, wares or merchandise, etc.

Counsel for the defendant in error contends that the warranty is part of the contract of sale for the delivery of the horse, and necessarily comes within that part of the section having reference to contracts for the delivery of chattels.

[2] The court have been unable to find a reported case in this state in which a warranty is defined, but the text-book writers and the decisions of other states uniformly define a warranty to be a collateral undertaking to the object of the sale.

[3] Therefore as a warranty is a collateral undertaking, and as the collateral undertaking in this case, for the breach of which the action was brought before the justice of the peace, does not affirmatively appear, from the record filed, to come within the provisions of the statute giving jurisdiction to the justices, we are of the opinion that the judgment below should be reversed, and the court order that it be and is reversed and that the plaintiffs in error have execution for their costs.

EMMONS v. CURLETT et al.

(Supreme Court of Delaware. June 21, 1911.)

1. TRUSTS (§ 145*)—DEED—CONSTRUCTION.

A deed by D., J., and another conveyed land in trust to sell and from the proceeds to pay all liens of record, and divide the remainder among the grantors; the share of any one of them against whom there might be liens of "record" being chargeable with the amount necessary to discharge the same. *Held*, that D. waived any right to have J.'s share applied to an equitable claim based on his discharge, before execution of the deed, of record liens under judgments against J.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 145.*]

2. PARTIES (§ 97*)—DEFECT OF—OBJECTIONS.

On bill to compel the trustee to account to J.'s estate for J.'s share free from D.'s claim, the trustee cannot assert want of jurisdiction to adjudicate such claim because D. is not a party; he having in effect made him a party by seeking to take credit for such claim, at D.'s instance.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 97.*]

3. COSTS (§ 32*)—RIGHT TO.

Costs were improperly awarded against a trustee on bill for an accounting, where he prevailed in the main and was probably justified in making the defense upon which he failed.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 32.*]

Appeal from Chancery Court.

Bill by Thomas R. Curlett and another against Harry Emmons, trustee. From the decree, defendant appeals. Modified and affirmed.

Argued before PENNEWILL, C. J., and BOYCE and CONRAD, JJ.

Anthony Higgins, for appellant. Thomas F. Bayard, for appellees.

PENNEWILL, C. J. (delivering the opinion of the court). [1] A bill in the nature of a bill for an account was filed in this case by the appellees, who were grantors and beneficiaries under a certain deed of trust, against the appellant, the trustee named in said deed.

By said deed, bearing date September 26, 1895, Thomas R. Curlett, David B. Curlett, James Curlett, and others, conveyed a tract of land situated in the city of Wilmington, to Harry Emmons, the appellant, in trust, to sell the land as soon as he conveniently could do so, convey the same to the purchaser or purchasers, and apply the proceeds of sale as follows:

"To the payment and discharge of all liens of record which may be entered against the said above described premises, also to the payment of the balance of twenty-five hundred and twenty-five dollars due on three certain mortgages, * * * and to apportion and divide any balance of said purchase money thereafter remaining to and among the parties, according to their several rights and interests in the above described real estate at the time of the execution of this indenture, the share of any of said parties against whom there may be liens of record covering their interest in said real estate being chargeable with the amount needed to satisfy and discharge said liens."

The case was heard below on bill and answer.

The land described in the trust deed was not sold by the trustee until 1905 because it was deemed by the parties in interest unadvisable to offer it for sale earlier, and the creditors had agreed with the trustee to forbear the collection of their claims until the sale should be made.

After the sale the trustee refused to settle with Thomas R. Curlett, one of the grantors for his share in the proceeds of sale, until the trustee had been allowed for the amount paid by him on account of a judgment against the said Thomas R. Curlett; and he likewise refused to settle with Cora Agnes Curlett, administratrix of James Curlett, until allowance had been made for the amount paid by the trustee on account of a judgment against James Curlett.

The chancellor decreed that the trustee be allowed the credits claimed by him on account of said two judgments, and this appeal does not embrace that portion of the decree.

It is alleged in paragraph 4 of the bill of

complaint, and not denied by the answer, that the trustee demanded that the complainant Cora Agnes Curlett, administratrix of James Curlett, settle with him as attorney for David B. Curlett, who claimed that there was money owing to him from the estate of James Curlett, but that said administratrix refused to make any settlement with him as trustee unless he paid to her the full share due to her as administratrix of James Curlett, without making any deduction for the claim of the said David B. Curlett.

It is alleged in paragraph 8 of the answer that before the execution of the deed of trust, the defendant below, at the special instance and request of James Curlett, and with money furnished to him by David B. Curlett, succeeded in getting all the judgments against James Curlett settled and discharged except one; that the sum of money furnished by David B. Curlett for this purpose amounted to \$376.12, and the same was paid by him under an express but verbal agreement on the part of the said James Curlett that the said sum of money should be repaid to the said David B. Curlett out of the interest of the said James Curlett in the proceeds of the sale of the aforesaid lands and premises when the same should be subsequently sold; that all the judgments so paid were satisfied of record at the request of James Curlett in order to save him from any embarrassment by reason of their lien against other real estate held by him; that no part of said sum has ever been repaid to David B. Curlett, who claims that he is entitled to the same, with interest.

By paragraph 15 of his answer the trustee claims as a credit against the distributive share of the administratrix of James Curlett in the proceeds of sale, the sum of \$761.47, being the said sum of \$376.12 advanced and paid out by David B. Curlett as stated in paragraph 8 of the answer, with interest thereon from January 1, 1889, which David B. Curlett demanded from the trustee as an equitable lien upon said distributive share, and which amount the said distributive share is insufficient to pay. Wherefore the appellant, the trustee, avers that there is nothing in his hands belonging to the estate of James Curlett for which his administratrix has any equitable claim.

The chancellor refused to allow the claim of David B. Curlett as a credit to the trustee, and it is from that part of the decree which disallowed the claim and imposed one-fourth of the costs of the cause on the appellant that this appeal was taken.

The five assignments of error filed by the appellant raise practically the same question, viz., whether the court below erred in decreeing that the claim of David B. Curlett against the share or interest of James Curlett, deceased, in the said trust estate, should be disallowed.

The chancellor in his opinion said: "It may be that David B. Curlett prior to the making of the deed of trust in 1905 had an

equitable lien against the share of James Curlett by reason of the payment by him of the seven judgments against James Curlett, or might have claimed to be in equity the assignee thereof to the extent of the amount so paid, and the authorities cited by the defendant seem to establish the principle. * * * But, by the execution of the deed of trust David B. Curlett waived and relinquished such rights; for by that deed, to which both he and James Curlett were parties, an entirely different arrangement was made, binding on both, and this deed provided that the share of James Curlett of the proceeds of sale of the property was applicable to the payment of such debts or claims only as were liens of record at the time the deed was made, and that this excluded all other claims against it, including that of David B. Curlett."

The important question to be determined by this court is whether David B. Curlett, by the deed of trust to which he was a party, waived and relinquished the right which he might otherwise have had to require the application to his claim against the estate of James Curlett of the latter's share of the proceeds of sale. Or whether the said David B. Curlett was estopped by said deed from claiming such right.

The deed provided that the balance of the purchase money remaining after the payment of all liens of record against the premises, and certain mortgages, should be apportioned and divided among the parties according to their several rights and interest in the said real estate at the time of the execution of the deed, the share of any of said parties against whom there may be liens of record covering their interest in said real estate being chargeable with the amount needed to satisfy and discharge said liens.

It is admitted that David B. Curlett's claim against the share of James Curlett was not at the time of the execution of the deed of trust a record lien. In fact he claims to be entitled to such share only upon the ground that his claim constitutes an equitable lien upon, or an assignment of, the share. The judgments against James Curlett that David B. Curlett paid off and discharged before the execution of the trust deed were record liens; but when they were paid by David they were satisfied of record. The appellant, however, as trustee for all the grantors or beneficiaries in the deed of trust, and as attorney for David B. Curlett in the collection of his claim, insists that even though the judgments so discharged are no longer record liens, nevertheless, under the express verbal agreement made by James Curlett at the time the judgments were paid, the claim of David B. Curlett is still a valid equitable claim against the share of James Curlett, or his administratrix, in the proceeds of sale.

In support of such contention the appellant argues that there is nothing in the trust

deed that is inconsistent with the existence of such equitable lien. He insists that by no language contained in said deed has David B. Curlett waived or relinquished his equitable lien against the share of James Curlett, nor is he thereby estopped from claiming the payment of the same out of the proceeds of sale.

The material and pertinent words in the deed to be considered in this connection have been already quoted, but we will quote them again here:

"And to apportion and divide any balance of said purchase money thereafter remaining to and among the parties according to their several rights and interest in the above described real estate at the time of the execution of this indenture, *the share of any of said parties against whom there may be liens of record covering their interest in said real estate being chargeable with the amount needed to satisfy and discharge said liens.*"

Such was the language used by David B. Curlett, as well as the other grantors, in said trust deed, and judged by such language what must we say was his intention and purpose at the time respecting the application or payment of each share of the balance of the proceeds of sale?

It will be observed that the first part of the provision last quoted directs that the balance of the purchase money is to be apportioned and divided among the parties according to their several rights and interest in the real estate sold. If those words constituted all of the direction respecting the application of the balance of the purchase money, it might be very strongly argued, and perhaps conceded, that they contained nothing inconsistent with the payment of an equitable lien which existed prior to the execution of the deed. It would not be unreasonable to hold in an equity proceeding that a division "according to the several rights and interest" of the parties would not preclude the payment of an equitable lien against one of them.

But these general words are qualified or explained by the clause that immediately follows them, viz., "the share of any of said parties against whom there may be liens of record covering their interest in said real estate being chargeable with the amount needed to satisfy and discharge said liens."

Manifestly this language means that a share could be charged only to pay or satisfy a record lien. David B. Curlett and the other grantors undertook to prescribe and direct just how the balance of the purchase money should be applied by their trustee, and such direction was, in effect, that each of the parties should be paid his proportional part unless there were liens of record against him, and in such case his share should be charged with such liens. Such, we think, is clearly the meaning of the language employed, and we are satisfied that at the time of the execution of the trust

deed neither David nor James Curlett had in mind, contemplated or intended that any liens other than record liens should be paid out of any share. David B. Curlett therefore in and by said deed declared and directed that the trustee should pay to James Curlett his share of the balance of the purchase money after deducting any record liens there might be against him; and the trustee could not, therefore, withhold from James's administratrix said share because of a claim against him held by David which was not a record lien.

If David, prior to the execution of the trust deed, held an equitable lien against the share or interest of James in the lands embraced therein, he released or discharged, by said deed, the lands and the proceeds that might be derived from a sale thereof, from such lien, and cannot in this proceeding be permitted to charge James's share of the proceeds with the payment of said lien.

We are of the opinion, therefore, that the chancellor rightly held that the trustee could not make such charge or be allowed as a credit thereof.

[2] As to the contention of the appellant, that the rights of David B. Curlett could not be adjudicated in a proceeding to which he is not a party, it is sufficient to say, that whether formally a party or not, the appellant has made him a party in effect by seeking to collect his claim out of James's share of the proceeds of sale. David demanded from the trustee the payment of his claim out of James's share, and the trustee, with David's consent, sought to charge James's share with the payment thereof. The question, therefore, as to David's right to collect his claim out of said share has been distinctly raised in this case, and was necessarily before the chancellor for adjudication in the hearing below.

[3] While we approve the decision of the chancellor respecting David B. Curlett's claim against James Curlett's distributive share, we do not think that any part of the costs in the cause should have been imposed upon the defendant below—the appellant here. The appellant made three contentions or defenses in the cause below, viz., that he be allowed as credits (1) the amount paid by him to settle a judgment against Thomas R. Curlett; (2) the amount paid by him to settle a judgment against James Curlett; (3) the amount paid by him to settle the alleged equitable lien of David B. Curlett against James Curlett. The first and second amounts so paid were allowed by the chancellor and the third disallowed. Inasmuch, therefore, as the appellant prevailed, or was successful, in the cause in the main; and inasmuch also as the appellant had some reason to believe that James Curlett's share might be charged with the payment of the claim of David B. Curlett, and was justified perhaps, as trustee under the deed in making such contention and defense, we think no part

of the costs should have been imposed upon the defendant below.

Under all the facts and circumstances of the case it would not, in our opinion, be inequitable to require the administratrix of James Curlett, complainant below, to pay the costs imposed upon the defendant below, and we think this should be done.

We find no error in that part of the chancellor's decree which directed that the defendant below should settle with the administratrix of James Curlett for the balance of the share of James Curlett, without any deduction on account of the amount claimed by David B. Curlett, and the decree of the chancellor is in that respect therefore affirmed. But we think that part of the decree which directed that the remaining one-half of the costs of the cause should be divided between the administratrix of James Curlett and the defendant should be modified so that the said one-half of the costs shall be imposed entirely upon the administratrix of James Curlett, deceased.

D. E. FOOTE & CO. et al. v. CLAGETT,
Comptroller, et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. COMMERCE (§ 10*)—INTERSTATE COMMERCE—POWER TO REGULATE—POWER OF CONGRESS.

Under Const. U. S. art. 1, § 8, declaring that Congress shall have power to regulate commerce with foreign nations and among the several states, the power of Congress to regulate interstate commerce is exclusive, and its failure to make express regulations indicates that the subject must be left free from any restrictions or impositions, and states can affect such commerce only by virtue of their police power and jurisdiction over persons and property within their limits.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. COMMERCE (§ 33*)—INTERSTATE COMMERCE—SUBJECTS OF REGULATION—TRANSPORTATION OF GOODS.

The transportation of oysters out of one state into another is "commerce" within the meaning of Const. U. S. art. 1, § 8, granting to Congress the right to regulate commerce with foreign nations and among the several states.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1287-1298; vol. 8, pp. 7606, 7607.]

3. COMMERCE (§ 72*)—SUBJECTS OF REGULATION—INTERSTATE COMMERCE—TRANSPORTATION OF GOODS.

Laws 1910, c. 735, providing for the inspection of oysters and levying a tax thereon, declares that a charge of two cents per bushel should be levied, one half to be paid by the buyer and the other half by the seller, which tax should be made a charge on oysters sold by commission merchants and others selling less than a cargo, and that all transportation companies carrying oysters consigned to Baltimore should furnish to the oyster inspector a copy of the manifest showing the number of

bushels on board and to whom consigned. The act also forbade packers to buy oysters in transit except in the presence of an inspector who must certify to the amount of the tax. *Held*, that as this act provided for the imposition of a tax upon oysters shipped either to or in from a foreign state, and made the payment of the tax a prerequisite to sale, it was unconstitutional, being an interference with interstate commerce contrary to Const. U. S. art. 1, § 8, giving Congress exclusive control of such commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 124-136; Dec. Dig. § 72.*]

4. COMMERCE (§ 77*)—INTERSTATE COMMERCE—SUBJECTS OF REGULATION—INSPECTION.

Laws 1910, c. 735, entitled "An act to increase the productivity of the natural oyster beds," and providing for the inspection of oysters and imposing a charge of two cents per bushel thereof, one-half of which is to defray the cost of inspection and the other to be used to reshell natural oyster beds, shows on its face that it is a revenue measure, and, being an interference with interstate commerce, cannot be sustained under Const. U. S. art. 1, § 10, prohibiting any state from laying any duties upon imports or exports except such as are absolutely necessary for executing its inspection laws.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61-70; Dec. Dig. § 77.*]

5. COMMERCE (§ 33*)—INTERSTATE SUBJECTS OF REGULATION—TRANSPORTATION OF GOODS.

An article brought from another state is an article of interstate commerce until sold, and hence Laws 1910, c. 735, which imposes a tax upon oysters shipped in from foreign states before they can be sold, interferes with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.*]

6. STATUTES (§ 64*)—CONSTRUCTION—INVALIDITY OF PART OF STATUTE.

Laws 1910, c. 735, providing for the inspecting and taxing of all oysters, being unconstitutional as to those oysters which are subjects of interstate commerce, is void in toto, as it cannot be presumed that the Legislature would have passed the act with the knowledge that it would be effectual only as to oysters transported within the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heusler, Judge.

Suit by D. E. Foote & Company and others against William B. Clagett, Comptroller of the State of Maryland, and Thomas M. Jarmart, Constable. From a decree for defendants, complainants appeal. Reversed and remanded, with directions.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

W. Thomas Kemp, for appellants. Frederick Dallam, for appellees.

PEARCE, J. This case originated in a bill of complaint filed by D. E. Foote & Co., a corporation under the laws of Delaware, and William H. McGee, trading as William H. McGee & Co., in the circuit court of Baltimore City against William B. Clagett, Comptroller of the State of Maryland, and Thomas M.

Jamart, a constable of the city of Baltimore, to restrain the collection by them of a tax or charge of two cents per bushel upon certain quantities of oysters in the shell, bought by said plaintiffs at their respective factories for the packing of oysters in Baltimore City, during the oyster season of 1910 and 1911, and prior to December 10, 1910, which tax or charge was imposed by chapter 735 of the Acts of 1910. Subsequently, J. Langrall & Co., a corporation, the C. L. Applegrath Company, a corporation, and William H. Killian, trading as W. H. Killian & Co., were upon their respective petitions, made parties plaintiffs, and prayed for similar injunctions upon like grounds, they being oyster packers in like condition as the original plaintiffs, and preliminary injunctions were accordingly granted to the original plaintiffs.

The bill alleged that the plaintiffs were each oyster packers in Baltimore City, and large buyers of oysters in the shell taken from oyster beds located within the states of Maryland, Virginia, and New Jersey, and brought therefrom in vessels and cars to said factories. The bill then set out the material provisions of chapter 735 of 1910 as follows: Chapter 735 of the Acts of the General Assembly of Maryland, passed at the session of 1910, entitled "An act to increase the productivity of the natural oyster beds or bars of the state and for that purpose to repeal section 69 of article 72 of the Code of Public General Laws and to re-enact said section with amendments and to add to said article a new section, to come in after section 69, and to be known as section 69A. And to add five other new sections to said article to come in after section 119, and to be known as sections 120, 121, 122, 123 and 124 respectively," provide in part as follows:

"Sec. 69. It shall be the duty of the commander of the state fishery force, at the commencement of or during the oyster season in each year, to appoint from the counties producing oysters for packing purposes in the state, not exceeding twenty special inspectors to be appointed as follows: Two each from Anne Arundel, St. Mary's, Talbot and Wicomico counties; three each from Dorchester, Somerset and Queen Anne's counties, and one each from Kent, Calvert and Charles counties, at a salary of forty-five dollars per month, during the oyster season, and they shall be stationed at such places as in the judgment of the commander of the state fishery force their services may be needed. Before assuming the duties of their offices the said special inspectors shall take an oath, to be administered by said commander, to diligently and faithfully discharge the duties of their said offices. The said special inspectors shall inspect all oysters in the district to which he is assigned; upon the inspection of any such oysters each special inspector shall make a certificate of the number of bushels in triplicate, one of which shall be given to

the purchaser; one to the seller and the other daily to the general measurer and inspector of the district where such inspection occurred. A charge of *two cents* per bushel is hereby levied, one-half of which is to help defray the expense of such inspection (of oysters), and the other expenses of the state fishery force, and the other half of which is to be expended in *reshelling* and otherwise cultivating and improving the natural oyster beds and bars in the waters of the state, to be charged equally to the buyer and seller, but to be paid weekly to the Comptroller of the State Treasury, or his agent, by the buyers; the certificate given the general measurer and inspector shall be by him mailed weekly to the Comptroller, or his agent, and in case the amounts of money shown to be due, not paid in one week thereafter to the Comptroller, or his agent, which is hereby required to be done, the properties of the parties so indebted may be levied on and sold by the said Comptroller, or his agent, as in cases of taxes in default, without other process of law. The tax of two cents per bushel hereby levied is also made a charge on oysters sold by commission merchants and others selling by less than the cargo, and also a tax of six cents per barrel containing not more than three bushels, on oysters in bag, a tax of four cents per bag, containing not more than two bushels, and all transportation companies carrying oysters in the shell consigned to Baltimore shall furnish to the oyster inspector or collector of oyster tax a copy of his manifest, showing the number of bushels on board on arrival of steamer and to whom consigned, and the special inspectors are charged with the duty of seeing that proper returns are made for the purpose of this act, by such commission merchants or retailers, and in the performance of the duty the said special inspectors are authorized and directed to visit the places where oysters less than cargoes are sold and get from such sellers a statement, under oath, as to the number of bushels sold from time to time, and to return to the general measurers and inspectors a certificate thereof to be forwarded to the Comptroller, as is required in the case of the certificates for cargoes. And the payments of the amounts so found to be due shall be similarly enforced. All such special inspectors may be removed at any time by the commander for neglect or malfeasance in office, and said commander shall report to the Governor any neglect of a general measurer or inspector. The commander of the state of fishery force shall furnish to each of said special inspectors certificates in book form supplied with carbon paper, so that each of said triplicate certificates shall be exactly the same. The form of the certificate shall be as follows: 19—. I hereby certify that I have this day inspected for Captain Schooner a cargo of oysters, sold to ——— and found the same to contain ——— bushels of merchantable oysters. Signed ———,

"Sec. 69A. The Comptroller of the State Treasury shall pass one-half of the amounts paid in by the buyers, as provided in section 69, to the credit of a fund to be known as a 'Natural Oyster Bed Reshelling Fund.'"

The bill then avers that said act is unconstitutional and void:

(a) Because it is in violation of article 1, § 8, of the Constitution of the United States, which vests in Congress exclusive power to regulate commerce between the states.

(b) Because it violates article 1, § 10, of the Constitution of the United States, which prohibits any state, without the consent of Congress, from laying any duties upon imports or exports, except such as are absolutely necessary for executing its inspection laws.

(c) Because the title of the act is insufficient under article 3, § 29, of the Constitution of the State of Maryland.

(d) Because it violates article 15 of the Bill of Rights of Maryland in imposing a direct tax upon property, and not upon the owner thereof, the same not being laid with a political view for the good government and benefit of the community.

(e) Because it is in other respects repugnant to the Constitution of the United States and to the Constitution of the State of Maryland respectively.

(1) Because said act has been repealed by chapter 413 of the Acts of 1910 approved by the Governor on the same day (April 13, 1910) as chapter 735.

The bill further avers that the Comptroller of the state, acting through said constable, and in pursuance of said chapter 735, has levied upon certain valuable property of the plaintiffs to enforce the collection of said tax or charge, and is about to remove and sell said property for the payment of said tax or charge; and that part of the oysters so purchased by said plaintiffs respectively were taken and brought in vessels and cars from the waters of Virginia and New Jersey, and the remainder from the waters of Maryland.

The defendants both answered, admitting all the allegations of fact contained in the bill, but alleging that the validity, operation, and effect of the Acts of 1910, chapters 735 and 413, are matters of law to be determined by the court, and insisting upon all matters of defense to the bill which might have been availed of by demurrer, and praying the court to retain jurisdiction, and ascertain the amount which the answer alleges to be due from the plaintiffs respectively under said chapter 735, and to enter a decree therefor against the said respective plaintiffs.

An agreement of counsel was also filed submitting the case for decree upon the bill, answer, and the facts contained in said agreement. This agreement details the history of the enactment of chapters 735 and 413 as bearing upon the averment of the bill that the former was repealed by the latter. It shows

that each of the plaintiffs had paid the special license tax of \$25 prescribed in section 77 of article 72 of the Code of Public General Laws of Maryland, up to and including the season of 1910 and 1911, and that each plaintiff was regularly assessed for miscellaneous stock at the factory, and had each paid state and city taxes annually on such assessments. It also states the number of bushels of oysters in the shell purchased by each plaintiff from the waters of Maryland, Virginia, and New Jersey, respectively, during the season of 1910 and 1911, and delivered at their respective factories in vessel loads, or in barrels and bags, and statements were attached to said agreement of facts, showing the amounts claimed by the defendants, and admitted by the plaintiffs to be due from each of them on account of said tax or charge, if the same should be determined by the court to be enforceable under the provisions of chapter 735 of 1910.

The circuit court sustained said act as constitutional and valid, and dissolved the injunctions and dismissed the bill, and this appeal is from that decree.

The first and most serious objection urged to the validity of this act is that it violates that provision of the Constitution of the United States which declares that "Congress shall have power to regulate commerce with foreign nations and among the several states." In approaching the consideration of this question it may be well to recall the language of Judge Alvey in *State v. C. & P. R. R. Co.*, 40 Md. 44, where the taxing power of the state was challenged upon the ground mentioned above. The court said: "It is proper to say that the taxing power of the state is of vital importance to it; indeed, so essential is the power that the very existence of the state depends upon the right to exercise it. All persons and property, therefore, within the jurisdiction of the state, are liable to it; and the power is conferred upon the state for the benefit of the entire body politic. The power resides in the state as an attribute of its sovereignty, and the right of the Legislature, as the representatives of the people, to exercise it, should never be questioned, except in plain cases, where the power is relinquished for valid consideration, or where to prevent its abuse it has been placed under restriction, either as to the subjects liable to it, or the mode and manner of its exercise.

That the state's power of taxation has been restrained and made subject to limitation by the federal Constitution as to certain subjects is clear, and it is equally clear that, with respect to the mode and manner of exercising the power by the Legislature, it has been restrained by the Constitution of the state. The ultimate questions for our determination, therefore, are: (1) Whether the transportation of oysters out of this state into another state or their transportation from

another state into this state constitutes commerce within the meaning of the Constitution of the United States; and (2) if it does, then whether chapter 735 is an invasion of the right of Congress to regulate such commerce.

[1] But preliminary to these is the question of whether the power to regulate commerce is exclusively vested in Congress, or whether it can be exercised by the state when Congress has not exerted its power. In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, it was declared that this power "comprehends every species of commercial intercourse between the United States and foreign nations, * * * and among the several states; * * * that it does not stop at the external boundary line of each state; * * * and that the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."

In *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, it was said: "That this power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. * * * That, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and that any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. * * * And that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the state, *mingled with and forming part of the great mass of property therein*. But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary pur-

pose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state, from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations adversely to the persons or property of other states, and no regulations can be made directly affecting interstate commerce. * * * In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are, and must be, subject to one system of regulations, and not to a multitude of systems." We have reproduced this passage here, because, while it emphasizes the exclusive power of Congress to regulate commerce in its national character and scope, it also enumerates concisely, but fully, and with unusual precision, the exceptions which are established by numerous decisions of the Supreme Court of the United States.

[2, 3] In *Brown v. State of Maryland*, 12 Wheat. 419, 6 L. Ed. 678, *Gibbons v. Ogden* was approved; the court saying in that case that "the power was declared" to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. We deem it unnecessary now to reason in support of these propositions. "Commerce * * * is intercourse; one of its most ordinary ingredients is traffic. * * * To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? *Sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part.* * * * Congress has a right not only to authorize importation but to authorize the importer to sell."

In the *Passenger Cases*, 7 How. 416, 12 L. Ed. 702, in the opinion of Mr. Justice Wayne, it is said: "Commerce consists in selling the superfluity; in purchasing articles of necessity, as well productions, as manufactures; in buying from one nation, and selling to another; or in transporting the merchandise from the seller to the buyer, to gain the freight." In *Phil. & Reading R. R. Co. v. Pa.*, 15 Wall. 232, 21 L. Ed. 146, it was said: "It makes no difference whether this interchange of commodity is by land or by water. In either case, *the bringing of the goods from the seller to the buyer is commerce.* * * * Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself."

In that case an act of the state of Pennsylvania required every transportation company doing business in the state to pay to the State Treasurer, for the use of the state, two cents per ton on each ton of coal carried by said companies, and the Supreme Court in its opinion asks: "Why, then, is not a tax upon freight transported from state to state a regulation of interstate transportation, and

therefore a regulation of commerce among the states?" And it then proceeds to say that the act in question, "so far as it applies to articles carried through the state, or articles taken up in the state, and carried out of it, or articles taken up without the state, and brought into it, is unconstitutional and void."

The case last cited was considered by the Court of Appeals of Maryland in *State v. C. & P. R. R. Co.*, 40 Md. 22, and it was there adopted as the basis of the opinion delivered by the court. The only question presented in that case was whether the Act of 1872, chapter 274, was constitutional or not. That act provided "that it shall not be lawful for any coal mining company or association in this state to transport any coal mined in this state, on any rail road, canal, or by any boat or vessel, from any mine in this state, to any place in this state or elsewhere, for sale, until a state tax of two cents per ton of 2,240 pounds on said coal, be first paid to the company undertaking to transport the same immediately from the mine, or payment of the same be provided for to the satisfaction of the said company undertaking to transport the same as aforesaid." Subsequent sections of said act made it unlawful for any transportation company doing business in the state to receive any such coal until the tax was paid to the company, which was declared liable to the state therefor. In the course of the opinion in that case, Judge Alvey said: "The tax now under consideration is imposed directly upon the coal transported, and only on that transported for sale; and as to all such portion of the coal as may be transported directly from the mines to places or markets beyond the limits of the state for sale, the tax would plainly appear to be an interference with and a restriction on interstate commerce, and hence in contravention of that provision of the federal Constitution which gives to Congress the power to regulate commerce among the several states. Indeed, we are not left to construction or speculation as to this question. It has been recently before the Supreme Court of the United States, and has there been decided in a case so entirely analogous to the present that we are relieved from doing more than to state the nature and ruling of that case." He then states the ruling of the Supreme Court, and the reasoning upon which it is based, which it is unnecessary to repeat here, and concludes as follows: "It is quite clear that the act contemplates the transportation of coal as freight beyond the state for sale; and thus the payment of the tax becomes a condition precedent, and consequently an impediment to the prosecution of this branch of commerce. And though the tax be levied upon all coal transported, as well that transported to places within the state as that transported beyond its limits, still that can make no difference in the effect of the law. The state is at liberty to tax her internal commerce; but, if an act to tax interstate

commerce be unconstitutional, it is not cured by including in its provisions subjects within the taxing power of the state. This is explicitly decided by *R. R. Co. v. Pa.*, 15 Wall. 276, 277 [21 L. Ed. 146]. Without saying more in regard to this question, we are of opinion, upon the authority cited, that the Act of 1872, c. 274, so far as it affects to impose the tax upon coal transported from the mines in this state to places beyond the state for sale, is unconstitutional and void."

We have not been able to discriminate that case from the one before us. To us it seems to be conclusive. Paraphrasing the language of that case, it is quite clear that the Act of 1910, c. 735, contemplates the transportation of oysters as freight, whether it be from this state to another state, or from another state into this state, for sale, and either transaction constitutes interstate commerce. The packer is forbidden to buy oysters in course of transportation, except in the presence of the inspector who must certify the amount of the tax, and thus the payment of the tax becomes a condition precedent to the sale, and consequently an impediment to the prosecution of that branch of commerce. That provision of the act, which requires all transportation companies carrying oysters in the shell to furnish to the inspector a copy of his manifest showing the number of bushels on board and to whom consigned, is conclusive that the tax is on oysters, *transported as freight*. It is freight which is transported, and there can be no difference in principle, in this respect, between oysters and coal. The only distinction between the two cases is that in one the tax is determined at the commencement of the transportation, and in the other at its termination.

The learned judge of the circuit court, doubtless in recognition of the duty to sustain the law of the state if possible to do so, sought to discriminate the two cases upon two grounds: (1) That 90 per cent. of the coal in that case was designed for shipment out of the state, whereas in the present case only about one-third of the oysters were shipped from other states; but it is a sufficient answer to this contention that right and wrong cannot thus be apportioned. (2) That there is an inherent difference in respect of the ownership of coal and oysters, the former being the absolute property of the private owner of the soil which it underlies, and the latter being the property of the state which owns the soil covered by its navigable waters. But this distinction can have no application to oysters taken in the waters of other states and brought into this state for sale, whether as the property of that other state, or of individuals who have acquired ownership under the laws of that state. The learned judge of the circuit court, in stating his conclusion that the constitutional objection we are considering does not affect this case, frankly said: "This particular conclusion is reached by me after a care-

ful and repeated reading of the dissenting opinion of Judge Stewart in 40 Md." However vigorous and persuasive may be that opinion, it did not prevail as the opinion of the court, nor has it sufficed during the 37 years which have elapsed since its rendition to shake the authority of the opinion of the majority, which has been cited with approval so late as *State v. Applegarth*, 81 Md. 302, 31 Atl. 961, 28 L. R. A. 812.

The cases which uphold inspection laws of the states cannot rescue this case from the controlling effect of the decision in 40 Md. 22.

[4] No tax can be laid by a state under article 1, § 10, of the Constitution of the United States, "except such as may be absolutely necessary for executing its inspection laws," and the courts are to judge of the reasonableness of the tax for that purpose. This act, upon its face, discloses the fact that the charge of two cents per bushel is not necessary for the execution of the law, since it segregates one-half the charge, and applies it to reselling the oyster bottoms of the state, thus enriching the resources of the state by a tax upon interstate commerce. The title of this act, "To increase the productivity of the natural oyster bars or beds of this state," read in connection with the application of one-half the tax just mentioned, demonstrates that it is in fact a revenue measure under the guise of an inspection law.

[5] The appellees contend that "there is no element of shipment from other states into this state as an article of interstate commerce; the oysters from Virginia and New Jersey being brought in and mingled with the other property in the state of Maryland, sold here after hawking around from one canning house to another." But it has been expressly decided that "*only by sale* does the article brought from another state become mingled in the common mass of property within the state, *up to which time the state has no power to interfere by any action.*" *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

[6] We regret that we are forced to hold that this law is void for the reason stated, but we cannot escape that conclusion. As was said in *State v. C. & P. R. R.*, supra: "If would not be fair to indulge a presumption that the Legislature would have passed the act in question with a knowledge that it could only be effectual as to the coal (oysters) transported within the state, and thus intentionally have discriminated against the citizens of the state and in favor of those beyond its limits."

In view of the conclusive effect of the one objection to the validity of this law which we have considered, we will not prolong this opinion by considering any of the other objections urged.

The decree of the circuit court will be

reversed, and the cause be remanded, that a decree may be passed making perpetual the injunctions heretofore granted, and granting injunctions in like manner to each of the intervening petitioners seeking that relief.

Decree reversed, and cause remanded for further proceedings in conformity with this opinion.

JOSEPH B. DUNN & SONS v. BRAGER.
(Court of Appeals of Maryland. June 23, 1911.)

1. STATUTES (§ 37*)—VALIDITY—APPROVAL BY EXECUTIVE—ERROR IN ENROLLMENT.

Laws 1910, c. 52, § 1, was enacted by the Legislature to read: "Every building erected and every building repaired rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the Counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same and in the Counties Every such building shall also be subject to a lien for the payment of all debts Contracted for Materials furnished for or about the same,"—and through error or inadvertence in enrolling a period was inserted after the word "Counties" and before the word "Every," and the word "Every" was capitalized as the first word of a new sentence. Const. art. 3, § 30, requires that every bill enacted shall be presented to the Governor, who, if he approves it, shall sign it. *Held*, that the act as signed and as printed in the statute book was the same act passed by the Legislature, and not another or different act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 37.*]

2. STATUTES (§ 200*)—CONSTRUCTION—MEANING OF LANGUAGE—PUNCTUATION.

Code Pub. Gen. Laws 1904, art. 63, § 1, title "Mechanics' Liens," provided that in Baltimore city there should be no mechanic's lien, except for work done, and that in Baltimore county there should be a lien for work done, but none for material furnished, except when the contract therefor was directly with the owner of the building or his agent. Laws 1908, c. 495, § 281, repealed and re-enacted article 63, and gave the same rights to liens in Baltimore county and city. Laws 1910, c. 52, § 1, which repealed Laws 1908, c. 495, § 281, repealed and re-enacted with amendments Code Pub. Gen. Laws 1904, art. 63, § 1, so as to read: "Every building erected and every building repaired rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the Counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same and in the Counties Every such building shall also be subject to a lien for the payment of all debts Contracted for Materials furnished for or about the same"—but it was through error or inadvertence in its enrollment that a period was inserted after the word "Counties" and before the word "Every," and that the word "Every" was capitalized as the first word of the following sentence, and so reading the enactment was signed by the Governor. *Held*, in view of Code Pub. Gen. Laws 1904, art. 63, § 1, and Laws 1908, c. 495, § 281, that the sole purpose of the Legislature was to put Baltimore county upon the same basis as the other counties, without changing the law relating to Baltimore city, and that it would be changed to make the purpose of the Legislature clear, by striking out the period after the word "Counties" and changing the

capital "E" in the word "Every" to a small "e," since the punctuation was no part of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. § 200.*]

3. MECHANICS' LIENS (§ 35*)—RIGHT TO LIEN—STATUTORY PROVISIONS.

Under Laws 1910, c. 52, § 1, which, as to Baltimore city, gives a lien only for work done, a subcontractor, whose contract is on its face an indivisible contract for labor and materials, is entitled to no lien whatever.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 40; Dec. Dig. § 35.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Heusler, Judge.

Action to enforce a mechanic's lien by Joseph B. Dunn & Sons, subcontractors, against Albert A. Brager, in which Charles Lee Merrikin, trustee in bankruptcy of the Engineering & Contracting Company, contractor, intervened as a party defendant. Judgment for defendants on sustaining demurrers to the bill, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Randolph Barton, Jr., for appellants. Louis N. Frank and Carville D. Benson, for appellees.

PEARCE, J. The bill of complaint in this case was filed by the appellants, for the enforcement of a mechanic's lien claim for work done and materials furnished and used in the construction of a building belonging to Albert A. Brager, originally the sole defendant, and situated in the city of Baltimore. This work was done and materials furnished under a contract between the appellants and the Engineering & Contracting Company, a body corporate, engaged in the erection of said building for the said Brager under their contract with him, and all the formal requirements of law preliminary to the enforcement of a valid claim were complied with. The said Brager, however, demurred to the whole bill, assigning three grounds of demurrer: (1) Because the plaintiffs have not stated in their bill such a case as entitles them to any relief in equity against him. (2) Because the court is without jurisdiction to grant the relief prayed. (3) Because there is no valid law of the state of Maryland which entitles the plaintiffs to the right to a mechanic's lien, as stated in their bill. Thereafter, the Engineering & Contracting Company having been adjudicated a bankrupt, Charles Lee Merrikin, its trustee in bankruptcy, was on his petition made a party defendant, and he filed the following demurrer and answer:

"Answering said bill of complaint, this respondent says:

"(1) That this respondent admits the allegations contained in paragraphs 1, 2, 3, 4, and 5 of said bill, but denies that the act of Assembly of the state of Maryland of the

year 1910, chapter 52, is a valid and legal statute of the state of Maryland, giving a mechanic's lien for materials, in the city of Baltimore: Because section 30 of the Constitution of the state of Maryland provides as follows: 'Every bill, when passed by the General Assembly and sealed with the great seal, shall be presented to the Governor, who, if he approves it, shall sign the same in the presence of the presiding officers and chief clerks of the Senate and House of Delegates.' And because said alleged act of Assembly, known as chapter 52 of the Acts of 1910, when passed by the General Assembly and sealed with the great seal, read, in part, as follows: 'Every building erected and every building repaired rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the Counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same and in the Counties Every such building shall also be subject to a lien for the payment of all debts Contracted for Materials furnished for or about the same'—as will more fully appear by the original act, as passed by the ye and nay vote of the Senate and House of Delegates of the state of Maryland, which is herewith filed, marked 'Respondent C. L. M. Exhibit A,' and which it is prayed may be taken as part hereof, and as will more fully appear by said original bill, as engrossed and referred to the Attorney General, and by the advice of said Attorney General, and at the request of the General Assembly of Maryland, returned to said General Assembly for amendments, and, as amended passed by said General Assembly by the ye and nay vote of each house thereof, and sealed with the great seal of the state of Maryland, as will more fully appear by said last-mentioned bill, which is herewith filed, marked 'Respondent C. L. M. Exhibit B,' and which is prayed may be taken as part hereof.

"And said alleged act of Assembly, when passed and sealed as aforesaid, was enrolled, and during said enrollment, through error or inadvertence, was made to read, by the improper, inadvertent, and unauthorized insertion of a period, contrary to the acts and intent of the General Assembly of Maryland, as follows: 'Every building erected and every building repaired rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the Counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same and in the Counties. Every such building shall also be subject to a lien for the payment of all debts Contracted for Materials furnished for or about the same.' And as enrolled as last above set forth was signed by the Governor of the state of Maryland, and by reason thereof said act of Assembly, signed as aforesaid, is not a valid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

law of the state of Maryland. And because said alleged act, as signed by the Governor of the state of Maryland, 'was not passed in each house by a majority of the whole number of members elected,' in accordance with the requirements of section 28 of the Constitution of the state of Maryland. Wherefore, having as fully answered said bill as this respondent is advised is necessary and proper, this respondent prays to be hence dismissed with costs. And as in duty bound, etc. Carville D. Benson, Sol. for Respondent. Chas. Lee Merriken, Respondent. [Affidavit attached.]"

An agreed statement of facts was filed, admitting that "C. L. M. Exhibit A," referred to in the answer, is the original bill mentioned therein as passed by the General Assembly of Maryland, and that "C. L. M. Exhibit B," referred to in the answer, is the enrolled copy of said bill so passed, and presented to the Governor of the state for his signature, and that these exhibits should be used in the circuit court and in this court, for the purpose of viewing the writing and punctuation, and for any purpose for which they would be admissible, if regularly offered and proved; but the plaintiffs reserved the right to object to their admissibility as evidence for any purpose. The testimony of Carville D. Benson, a member of the House of Delegates of Maryland at the January Session of 1910, when the bill referred to was passed, and who was thoroughly familiar with the method and routine of enacting laws, and with the history of the passage of that particular bill, was also taken, and he explained at length every step in its passage, in support of the averments of the answer relating thereto. The plaintiffs objected to the introduction of Exhibits "C. L. M. A" and "C. L. M. B," and to all the evidence of Carville D. Benson, and, these objections being overruled, they excepted to these rulings, and the court sustained the demurrers and dismissed the bill, and this appeal is from that decree. The record thus raises the question, both of the validity and interpretation of chapter 52 of the Acts of 1910, relating to mechanics' liens.

The appellants contend that the act is valid, and that by its provisions a lien is given in Baltimore city, as well as in the counties of the state, for the payment of debts, both for labor and material. The appellee contends that under the true interpretation of the act the lien for material debts is confined to the counties, and does not exist in Baltimore city, and also suggests, rather than contends, that the act, as signed and printed in the published volume of Laws of 1910, differs from the act as it actually passed the General Assembly, and is therefore not a valid act at all. The circuit court held the act to be valid, and sustained the interpretation placed upon it by the appellee.

The most satisfactory way to determine

what was the situation after the passage of chapter 52 of 1910 is to ascertain what was the situation immediately preceding its passage. At that time section 1 of article 63, Public General Laws, title "Mechanic's Lien," was as follows:

"Every building erected and every building repaired, rebuilt or improved to the extent of one fourth its value in Baltimore city and in any of the counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same; and in the counties, except Baltimore county, every such building shall also be subject to a lien for the payment of all debts contracted for materials furnished for or about the same. In Baltimore county nothing in this article except as provided in section 20, shall entitle any person, firm or corporation to the benefit of such lien upon any such building for materials furnished for or about the same, unless the contract for furnishing such material shall have been made directly with the owner of such building or his agent. This section shall not affect or impair liens existing in Baltimore county on April 11th, 1902, under pre-existing law." It is clear, beyond question, that under that section, the existing situation up to that point of time was that in Baltimore city there was no lien, *except for work done*; that in Baltimore county there was a lien for work done, but none for materials furnished, *except when the contract therefor was directly with the owner of the building or his agent*; and that in all the other counties of the state there was a lien, *both for work done and materials furnished* in all cases.

Section 281 of chapter 495 of 1908 repealed and re-enacted the whole Code of Public Local Laws, title "Baltimore County"; and section 281 of that article, which was the only one relating to mechanics' liens, was as follows: "Every building erected, and every building repaired, rebuilt or improved in Baltimore county to the extent of one-fourth its value, shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the same; provided that nothing in article 63 of the Public General Laws, title 'Mechanics' Liens,' except as provided in section 20 thereof, shall entitle any person, firm or corporation, to the benefit of such lien upon any such building in Baltimore county for materials furnished for or about the same, unless the contract for furnishing such material shall have been made directly with the owner of such building or his agent." The situation of Baltimore county was therefore the same, whether regard be had to the public general or to the public local law. In the meantime, there was no change in the legislation upon that subject, relating to Baltimore city; the lien being consistently confined *there* to debts for work done.

Then followed chapter 52 of 1910, the act

now in question, the title and text of which is as follows:

"An Act to repeal sec. 281 of Art. 3 of the Code of Public Local Laws of Maryland, title 'Baltimore County,' as said section was enacted by Chapter 495 of the Acts of 1908 of the General Assembly of Maryland, and also to repeal and re-enact with amendments section 1 of Article 63 of the Code of Public General Laws, title 'Mechanic's Lien,' as amended by the Acts of 1902, chapter 432."

"Section 1. Be it enacted by the General Assembly of Maryland that section 281 of Article 3 of the Public Local Laws of Maryland, title 'Baltimore County,' as said section was enacted by Chapter 495 of the Acts of 1908 of the General Assembly of Maryland, be and the same is hereby repealed, and that section 1 of Article 63 of the Code of Public General Laws of Maryland, title 'Mechanic's Lien,' as amended by the Acts of 1902, Chapter 432, be and the same is hereby repealed and reenacted with amendments so as to read as follows:

"1. Every building erected and every building repaired, rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the counties shall be subject to a lien for the payment of all debts contracted for, work done for, or about the same and in the counties. Every such building shall also be subject to a lien for the payment of all debts contracted for, materials furnished for or about the same.

"Sec. 2. And be it further enacted, that this Act shall take effect from the date of its passage."

The punctuation and capital letters in the above transcript are precisely as they appear in the printed volume. In C. L. M. Exhibit A, there is not a single punctuation mark of any description, except the period at the end of the section, and the great seal was never impressed thereon; nor was it signed by the Governor and the presiding officers of the Senate and House of Delegates. C. L. M. Exhibit B is the enrolled copy of this bill, upon which the great seal was impressed, and which was presented to the Governor for his signature. Before it was signed, however, it was returned to the Senate, in response to a message from that body, and, after making certain amendments to the title and body of the act, which in no way affect the question in this case, it was passed by both houses as amended. There is not a single punctuation mark in this exhibit, of any description, except the period at the end of section 1, but capital letters are used in several places, as in the word "Counties" whenever it occurs; in the word "Every," between the words "Counties" and "such"; in the word "Contracted" as last used in that section, and in the word "Materials" as last used therein, thus indicating a total absence of discrimination and significance in the use of capital letters.

[1] We have examined and compared the printed act with the original second enrolled copy, signed by the Governor, and on file in the office of the clerk of this court, and it agrees in every respect with the printed act, except that there is no comma after the word "repaired" in the first line. In all other respects there is the same faulty and unmeaning punctuation. The only difference between the two exhibits—the enrolled and signed act on file in the clerk's office of this court, and the printed act—is in the punctuation. Unless, therefore, punctuation is held to be an essential part of an act as passed by the Legislature, this act, as signed by the Governor, and as printed in the statute book, is the same act passed by the Legislature, and not another or different act, and is not invalid because of merely inaccurate punctuation, or the absence of punctuation.

[2] If the punctuation can be supplied, or altered, so as to render the language of the act intelligible, and to bring it into accord with the obvious purpose of the Legislature, it is the plain duty of the court to supply the defect, or make the change; and, as that result can be accomplished in this case by a slight change, and in accordance with decisions of our own and other courts, we cannot hold this act to be invalid. In *Weatherly v. Mister*, 39 Md. 629, the court said: "Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists, except what the punctuation itself creates. In such cases, it will not be allowed to confuse a construction otherwise clear." If the punctuation be disregarded, it will be impossible to read the text of this act without instantly and unhesitatingly determining that the sole purpose of the Legislature was to put Baltimore county upon the same footing as all the other counties of the state, without altering the law relating to Baltimore city. This purpose will be made clear by striking out the period after the word "counties," changing the capital "E" in the word "every" to a small "e," and inserting a comma after the word "same." The period and the capital "E" following break into two sentences what was evidently designed to be one sentence, and destroy what would otherwise be the clear meaning of the language used. Almost the identical change now proposed was made in *Manger v. Board of Examiners*, 90 Md. 659, 45 Atl. 891; Judge McSherry saying: "Neither bad grammar nor inaccurate punctuation can alter the obvious sense of a legislative enactment. This is necessarily so. The statutes in England are not punctuated in the original rolls; but more or less marks of punctuation appear in them as printed, by authority. With us, the punctuation is the work of the draftsman, the engrossers, or the printers. In the legislative body, the bills are read, so that the ear, not the eye, takes cognizance of it. Therefore the punc-

tuation is not, in either country, of controlling effect in the interpretation." The same view is held by other courts of high standing. In *Martin v. Gleason*, 139 Mass. 183, 29 N. E. 664, the court said, "Punctuation may sometimes be properly disregarded." In *Gyger's Estate*, 65 Pa. 311, Judge Sharswood said, "No punctuation ought to control a statute;" and in *Randolph v. Bayne*, 44 Cal. 366, the court said, "Punctuation cannot be permitted an effect which would lead to absurdity." The repetition in the statute before us of the words "and in the counties" is meaningless as the punctuation stands, because the counties are provided for by the earlier use of the same words; but, when the punctuation is changed as indicated, the meaning of the latter words becomes apparent, and legal effect is given to their use. We therefore fully concur in the interpretation of this act by the learned judge of the circuit court.

[3] The appellants suggested that in any event they were entitled to a lien for the work done, and that the bill should have been retained for that purpose. But the contract in this case was an indivisible contract upon its face for labor and materials, and in *Evans Marble Company v. International Trust Company*, 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568, it was held under such a contract there was no enforceable lien whatever. The bill was therefore properly dismissed.

Decree affirmed, with costs to the appellers above and below.

CHESAPEAKE & POTOMAC TELEPHONE CO. OF BALTIMORE v. BOARD OF COUNTY COM'RS.

(Court of Appeals of Maryland. June 23, 1911.)

1. APPEAL AND ERROR (§ 78*)—ORDERS APPEALABLE—FINAL ORDER.

Where, though a demurrer to the petition was sustained in a proceeding to review the refusal of the county commissioners, acting as a board of control and review, to abate an assessment, the petition was not dismissed, and no final disposition made of the case, the order sustaining the demurrer was not final so as to be appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 78.*]

2. TAXATION (§ 493*)—ASSESSMENT—REVIEW BY CIRCUIT COURT—GROUNDS OF APPEAL—EXCESSIVE VALUATION.

Laws 1910, c. 300, providing for a general valuation and reassessment of property for taxation, provides for the return of the assessments authorized by the act to the county commissioners, sitting as boards of control and review. Section 7 requires such boards to be sworn before entering upon their duties. Section 20 gives such boards the power to correct any assessments returned to them, and to increase any valuation returned. Section 21 permits one claiming not to own property assessed to him, or that is exempt, to file a petition

in the circuit court, stating the ground upon which the exemption is claimed, or denying ownership, and provides for a determination whether the property is subject to assessment, or should be valued to the alleged owner. Chapter 430, approved four days after chapter 300, adds section 17a to Code Pub. Gen. Laws 1904, art. 81, which section provides that any person, claiming to be aggrieved "because of an assessment made by the county commissioners * * * or because of the failure to reduce or abate an existing assessment," may appeal to the circuit court, and that the directions of article 81, § 17, as to appeals to the Baltimore city court, shall apply to proceedings in the circuit courts, provided that the section shall not apply to assessments under Acts 1896, c. 120. Section 17 provides for an appeal to the Baltimore city court by one aggrieved by an assessment of the appeal tax court of Baltimore, or for failure to abate or reduce an existing assessment. *Held*, that chapter 300, § 21, did not authorize an appeal to the circuit court from an assessment by the county commissioners, acting as a board of control and review, on the ground that the valuation and assessment was excessive.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 493.*]

3. TAXATION (§ 493*)—ASSESSMENT—APPEAL TO CIRCUIT COURT—EXCESSIVE VALUATION.

Laws 1910, c. 430, § 17a, does not authorize an appeal to the circuit court on the ground of an excessive valuation and assessment by the county commissioners, acting as a board of control and review; that section only applying to "existing" assessments, and not to those in course of being made.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 493.*]

4. TAXATION (§ 493*)—ASSESSMENT—APPEAL TO CIRCUIT COURT—EXCESSIVE VALUATION.

Laws 1910, c. 430, § 17a, would not authorize an appeal to the circuit court from an assessment by the county commissioners, acting as a board of control and review; the assessment being a new general assessment, made under chapter 300, and the section only applying to assessments made from time to time by the county commissioners as such.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 493.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Proceedings by the Chesapeake & Potomac Telephone Company of Baltimore City against the Board of County Commissioners, sitting as a Board of Control and Review. From an order sustaining a demurrer to the petition, petitioner appeals. Appeal dismissed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Shirley Carter, for appellant. Harry R. Donnelly, for appellee.

BOYD, C. J. The appellant filed an appeal in the circuit court for Allegany county from what it alleged to be an exorbitant valuation and unlawful assessment of its wires and cables in Allegany county, and prayed that the increase in the valuation of the same, as made by the county commissioners of that county, sitting as a board of control and review, be reviewed by that court and abated or reduced. The petition alleges that the ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pellant returned all of its assessable property in the respective election districts and assessment districts of the county, and that the valuation set upon the wires and cables by it in its return was the full value of the same; that, on January 6, 1911, the appellees notified the appellant that they had increased the valuation as returned by it, by doubling that so set upon its iron and copper wire and aerial and underground cables; that it, on the 9th day of January, filed its appeal with the county commissioners, sitting as a board of control and review, setting forth that the increase in valuation of its wires, etc., was not warranted by law, and prayed the board of county commissioners to abate the increase; that after a hearing they, sitting as a board of control and review, notified petitioner that they had decided to leave the valuation as made by them.

The circuit court passed an order, setting said petition and appeal down for hearing, and directing a subpoena duces tecum to be issued to the county commissioners, sitting as a board of control and review, requiring them to produce the record of proceedings, and all papers and documents in reference to the valuations and assessments appealed from.

The defendants demurred to the petition, for the reasons: (1) That it did not allege that the property mentioned was exempt from assessment, valuation, and taxation. (2) That it did not allege that it was not the property of the petitioner, and should not be assessed as such. (3) And for other reasons to be made known at the hearing. The demurrer was sustained by a short entry to that effect on the docket, and the appeal was taken four days thereafter.

[1] The petition was not dismissed, and no final disposition of the case was made, by entry of judgment for costs or otherwise. It was not a proceeding in equity; and hence it was not such a case as *McNiece v. Ellason*, 78 Md. 168, 27 Atl. 940, referred to by the appellant, but, as there was no motion to dismiss the appeal, and the questions involved were fully argued, we will state our views on them, as we understand from the appellant's brief the ruling on the demurrer concludes the case.

[2] We have no doubt that the lower court was right in holding that there was no appeal to that court on the grounds alleged in the petition. Chapter 300 of the Acts of 1910 is "An act to provide for the general revaluation and reassessment of property for purposes of taxation in all the counties of this state except Somerset and Worcester counties." Due provision is made by that act for assessments by the assessors authorized to be appointed, and upon the completion of their work for the return of the assessments, schedules, and returns filed with them, as well as all books, documents, etc., to the county commissioners of the respective counties, sitting as boards of control and review.

The members of the respective boards of control and review are required to take the oath set out in section 7 before entering upon their duties, which of itself indicates that they were not acting in the discharge of their ordinary duties as county commissioners.

By section 20, the boards of county commissioners, acting as boards of control and review, are required to give notice of their meetings, and to proceed to consider the returns made by the assessors, and to hear and determine the appeals authorized by section 16 (which are not applicable to this case). That section (20) specifies a number of duties and powers of the boards of county commissioners, acting as boards of control and review; amongst others, that they "shall have power to correct any valuation or assessment returned to them, respectively, whether any complaint or appeal has been made in relation thereto or not," and "shall have the power to increase any valuation so returned to them, respectively, in every case in which they shall deem it proper to make due increase," provided notice of such increase is given, etc.

Section 21 provides that each board of control and review shall, with the aid of their clerks, enter and record in books to be printed for the purpose accurate and fair accounts of all the properties within their respective counties, which have been valued as provided. The said records shall show the name of each owner in each election district, the property valued to him, description of the properties, etc. Indexes are required to be made, and the boards of control and review were required to return the books and indexes so prepared to the county commissioners "not later than sixty days after they shall have respectively as boards of control and review begun their work of reviewing the returns of said assessors in the said counties," unless the Governor extended the time.

It then provides that: "The owner of property or owner to whom property has been valued and who shall claim that the property so to him, her or it valued is not owned by him, her or it, or is exempt from valuation or assessment * * * may file a petition in the circuit court for that county in which the said property has been so valued, setting forth the facts of the said case and the ground upon which said exemption is claimed or denying all said ownership." It then provides for a hearing by the court, and for the court determining "whether the said property, so valued to the said owner, is or is not subject to such valuation and assessment, or ought not to be valued to said alleged owner," etc. Section 22 provides for cases where property, not exempted, has not been valued; and section 23 provides for appeals to this court by parties to the proceedings mentioned in sections 21 and 22, and that on such appeals the original papers be transmitted.

It is therefore perfectly clear that the only appeals to the circuit courts under section 21, which alone provides for appeals by the owners of property to the court, are on the grounds, either that the party to whom it is assessed is *not the owner*, or that the property is *exempt*. That act does not in any way suggest the right of any one to appeal to the court on the ground that the valuation is too high; but, on the contrary, it does just what prior general assessment laws have done—leaves the valuation of the property to the assessors, subject to the review of the board of control and review. It would undoubtedly greatly and unnecessarily add to the labors of the courts if they had the power and were required to review valuations when general assessments were made; but, so far as we are aware, that has never been attempted by the Legislature of this state. In most cases, it could perhaps be more satisfactorily done by business men than by judges.

[3, 4] But it is contended that chapter 430 of the acts of 1910 gives such right of appeal. We cannot, however, agree with that contention. It is true that that act was approved by the Governor four days after chapter 300, but it is perfectly manifest that it was not intended to make the circuit courts boards of control and review, and this court the final board, to determine valuations of properties, made under the general assessment contemplated by chapter 300, or any other general assessment law. It would be impracticable, if not impossible, for the courts to so act and attend to their regular duties, and the various provisions of chapter 300 negative such an idea. In the first place, we have seen what are the grounds upon which an interested party can go into court, and there is no suggestion of the right of appeal on account of the valuation, but it is excluded as effectually as if it had in terms been denied. The circuit courts could have no possible right to review and change such valuation, unless the statute in express terms or by necessary implication conferred such right, and that has not been done. In thus speaking of it, we are leaving out of consideration the question whether the Legislature could require the judges of those courts to perform such services.

The assessments made under chapter 300 (and those involved in this case were) are first made by the assessors, and then are subject to review by the board of control and review. When the latter complete their work—in other words, when all the property in the county has been assessed, or is supposed to be—they turn the books, etc., showing the amount of the assessment on each property, with the names of the respective owners, etc., over to the county commissioners, and, although the same individuals compose the two boards, their duties are as separate and distinct in the respective capacities in which

they act, as if they were different individuals. The county commissioners, *as such*, take no part in fixing the valuations on the properties in the county, and it is only after the assessment is completed and the books are turned over to them that they have anything to do with the assessment, beyond the appointment of assessors, etc.

The petition in this case shows that the increase in the valuation was made by the county commissioners, sitting as a board of control and review, and the appeal taken by the appellant was to the board acting in the same capacity.

Chapter 430 of the Acts of 1910 added section 17a to article 81 of the Code. It provides that: "Any person or persons, or corporation, claiming to be aggrieved because of an assessment made by county commissioners of any one of the counties of this state, or because of the failure to reduce or abate an existing assessment, may, by petition, appeal to the circuit court of the county in which said property is situated." It then goes on to provide that all of the directions set forth in section 17 of that article, relating to the taking, prosecution, and determination of the appeals thereby authorized to the Baltimore city court, shall be applicable to the proceedings in the circuit courts for the counties. Section 17 of article 81 provided for an appeal to the Baltimore city court by any one aggrieved by an assessment of the appeal tax court of Baltimore city, or because of the failure to reduce or abate an existing assessment, and the intention of the Legislature evidently was to extend the same provisions to the counties, which theretofore had been confined to Baltimore city. But the very language of the statute shows that the failure to reduce or abate, at which a party might feel aggrieved, was "the failure to reduce or abate an *existing* assessment," not some assessment which was in process of being made, as this was until completed by the board of control and review. The other ground for appeal to the court was "because of an assessment, made by county commissioners of any of the counties of this state," and what we have already said is sufficient to indicate that in our judgment this valuation was not made by the county commissioners, as such, but by the board of control and review; and hence it cannot properly be said that this proceeding can be entertained under chapter 430 of the Acts of 1910.

Section 17a concludes by saying, "none of the provisions of this section shall apply to assessments made under the act of 1896, chapter 120." We do not regard that of any particular significance. It certainly was never intended to mean that section 17a was not to be subject to the act of 1896, c. 120, but was to be subject to chapter 300 of the Acts of 1910, which was intended as a substitute for the act of 1896, in so far as the general assessments were concerned. Section 1 of

chapter 300 of Acts of 1910 provides that there shall be an entire revaluation and reassessment, for the purposes of taxation, of all the property, real, personal, and mixed, subject to taxation under existing laws, in all the counties of the state, except Somerset and Worcester, "and such an entire revaluation and reassessment are hereby ordered and required to be made." As when chapter 430 was introduced the act of 1896 was the last general assessment law, it was doubtless supposed to be wisest to expressly except it, but, even if the county commissioners had assessed this property in 1910, or at any time before the new general assessment was completed, by the very terms of the act, it would have been required to be revalued and reassessed according to chapter 300.

Much more might be said, but it seems to be perfectly clear that chapter 300 was providing for the general assessment of all property in the counties of the state, excepting the two named, and that any assessment made under it was governed by its provisions, and that the assessment, reduction, and abatement spoken of in chapter 430 referred to such only as can properly be made by the county commissioners, from time to time, and not such as assessors and boards of control and review make, when there is a new general assessment.

As we do not regard the ruling on the demurrer in such a case as this a final order from which an appeal can be taken, we will dismiss the appeal.

Appeal dismissed; the appellant to pay the costs.

PRESTON v. SAFE DEPOSIT & TRUST CO. et al.

(Court of Appeals of Maryland. June 24, 1911.)

1. TRUSTS (§ 193½*)—TESTAMENTARY TRUSTS—POWER TO ORDER SALE.

A decree for the sale of property, devised in trust, upon future applications, when it should appear that such sales would be advantageous, was not authorized under the Act of 1868, c. 273, it being essential under that statute that the advantage appear to exist at the date of the decree; and it might be legitimately inferred that a sale was not beneficial when the decree was made, as required by the statute, where the trustee did not make a sale until 15 years thereafter.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 193½.*]

2. TRUSTS (§ 177*)—EQUITABLE JURISDICTION.

The supervision of the administration of trusts is a well-recognized ground of equity jurisdiction.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 177.*]

3. APPEAL AND ERROR (§ 837*)—FINDINGS—CONCLUSIVENESS IN EQUITY.

The Court of Appeals is not bound by the allegations of a bill, whether they be of fact or conclusions of law, but may inquire into all

questions of law or fact presented by the pleadings or evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

4. TRUSTS (§ 191*)—POWER OF SALE—TESTAMENTARY TRUSTS—IMPLIED POWER.

The existence of expressed powers of sale in a testamentary trust would not necessarily negative an implied power of sale of other property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 82-98; Dec. Dig. § 191.*]

5. TRUSTS (§ 191*)—TESTAMENTARY TRUSTS—IMPLIED POWER OF SALE.

An implied power of sale in a testamentary trust must be derived from the language of the will, which necessarily implies its exercise, or where it is essential for carrying out testator's purposes or he intended that such power exist.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 82-98; Dec. Dig. § 191.*]

6. TRUSTS (§ 191*)—TESTAMENTARY TRUSTS—IMPLIED POWER OF SALE.

A will, after devising property in trust to pay the income to testator's widow, provided that the property should be held in trust; in the second place, to invest the net surplus in good securities, to be held in trust for the same purposes mentioned, and "in like manner to invest the proceeds of the sale of any real estate or leasehold or personal property that may be sold by them." The will also expressly authorized the sale of certain property by the trustees. *Held*, that the will impliedly authorized the sale by the trustees of property other than that expressly authorized.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 82-98; Dec. Dig. § 191.*]

7. TRUSTS (§ 197*)—POWER OF SALE—EXERCISE—VALIDITY.

Where one having various capacities executes a delegated authority in one of them, the law will attribute the act to the proper authority, though he does not profess to exercise that authority in doing the particular act, so that the fact that the testamentary trustee sold the trust property under a decree of court based upon statutory authority, which was erroneous because the statute did not authorize sales made in the future as it appeared advantageous, did not prevent the trustee from making good title, where he in fact had an implied power of sale under the will, but did not purport to act thereunder.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 252-257; Dec. Dig. § 197.*]

Appeal from Circuit Court No. 2 of Baltimore City; H. Arthur Stump, Judge.

Suit by the Safe Deposit & Trust Company, trustee, and another, for the sale of property under a testamentary trust. From an order overruling exceptions to a sale made to Herbert R. Preston, he appeals. Order affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Herbert R. Preston, pro se. D. K. Este Fisher, for appellees.

STOCKBRIDGE, J. The case comes before the court upon an appeal from an order of the circuit court No. 2 of Baltimore City overruling the exceptions of the appellant, filed to a sale reported as made to him, of

certain property known as "Belle Grove," in Baltimore county.

The exceptions, four in number, all turn upon two questions: the power of the circuit court No. 2 to decree the sale of the property under which decree the sale of "Belle Grove" purports to have been made; and whether or not there was an implied power of sale contained in the will of the late Darius C. Howell.

A concise statement of certain facts will aid in reaching a correct conclusion. Darius C. Howell died in the year 1887, leaving a last will and two codicils, executed in conformity with the statute, for the passing of both real and personal property. The will is quite long, but the essential features of it may be briefly summarized. The first clause bequeaths certain personal chattels and furniture to his wife, Katherine E. Howell. The second clause gives to her during her widowhood his residence in Baltimore City, and his country residence, "Belle Grove," and further provides that upon her second marriage or death the same should constitute a part of the residuum of his estate. By the third clause he gave a half interest in certain property in Baltimore City to a granddaughter, Edith Howell, for life, with remainder to her children and descendants, her surviving, with cross-remainders among them, and, in default of such descendants or their death within a named period, then to another granddaughter, Florence, for life, with remainder in like manner to her children and descendants, and in default thereof the same to constitute a part of the residuum of his estate. The fourth clause of the will contained similar provisions with regard to the granddaughter Florence. The fifth or residuary clause of the will devised and bequeathed the balance of his estate to certain named trustees, for whom the present appellee was substituted as trustee by the first codicil to the will. The trusts created by this clause were to provide an income for his wife, Katherine E. Howell, of \$15,000 per annum, during her widowhood and for the support and education of his child or children, with a further provision that if his widow should remarry her income should be reduced to the sum of \$6,000. The will further provided for the payments over to the testator's children upon their attaining a certain age, and that in case all of the testator's children should die under the age of 20 years, without leaving issue living at the time of his or her death, then the residue should be divided between the two granddaughters already named and the testator's brothers and sisters, and their heirs, executors, and administrators in such shares as his widow, Katherine E. Howell, should appoint by her will, and, in the event of the failure of his widow to exercise such testamentary power of appointment, then for division, one half to the two granddaughters, and the other half to his broth-

ers and sisters in equal shares, and to their heirs, executors, and administrators.

In 1895 the Safe Deposit & Trust Company, the trustee under the will, and Katherine E. Howell, the widow, filed the bill of complaint in this case, in which there were made as parties defendants all persons then in esse who had, or who might have or be entitled to, an interest under the terms of Mr. Howell's will, and who then numbered approximately 100 persons, many of them nonresidents. The bill was manifestly intended to be filed under the act of 1868, for it alleges that the relief sought will be to the interest, benefit, and advantage of all persons concerned, and further alleges "that there is no power vested in said trustee to dispose of any of said property other than the property on Charles Street avenue and only that property in the manner and on the terms mentioned in his will." The relief prayed in the bill was that the court should assume general jurisdiction over the administration of the trusts created by said will, and of all the estate of the testator, and that a decree might be passed for the sale or lease of the property or such parts thereof as the court may decree to be sold and at such times and upon such terms as the court might from time to time direct; that a certain exchange with Blanchard Randall for the straightening of lines be ratified, and for general relief. The case proceeded to decree, which was passed on the 24th of February, 1896, and by which, in consonance with the relief prayed in the bill, the circuit court No. 2 of Baltimore City assumed "general jurisdiction over the administration of the trusts under the last will and testament of Darius C. Howell, late of Baltimore county, deceased, and the codicils thereto, and of all the property and estate of said testator," and decreed that the trustee should thereafter administer the trusts created by said will under the direction of the court. It also contained the following clause: "And it is further adjudged, ordered, and decreed that all the property and estate of said testator be sold or leased in such parts and in such manner and at such times as the Safe Deposit & Trust Company of Baltimore, which is hereby appointed trustee to make said sales or leases, may deem most advantageous to the persons beneficially entitled, but subject to the ratification and approval of this court."

About fifteen years elapsed from the passage of this decree until the report of the sale which gives rise to this appeal, and it is now contended by the appellant that the circuit court was without power to pass such a decree as it did, and reliance is placed upon the decision of this court in the case of *Ball v. Safe Deposit & Trust Co.*, 92 Md. 503, 48 Atl. 155, 52 L. R. A. 403. In that case a decree was held to be objectionable which authorized sales to be made from time to time, upon applications to be thereafter made

to the court as occasions might arise, and whenever it should appear to the court that such sales would be advantageous, for the reason that to conform with the statute the advantage must appear to exist at the date of the decree.

[1] That in this case it was not so beneficial at the time when the decree was passed is a legitimate inference from the fact that the trustee allowed 15 years to pass after the date of the decree, before the sale now in question was reported, and so far as that decree was predicated upon the Act of 1868, c. 273, it was open to the identical objection with the decree in the Ball Case, *supra*.

[2] The supervision of the administration of trusts is a well-recognized ground of equity jurisdiction, and so much of the decree as assumed jurisdiction over the administration of the trust estates created by the will is not open to any legitimate criticism.

The bill had alleged the nonexistence of any power of sale in the will except for a designated piece of property on Charles Street avenue, which was not this lot, or for certain specified purposes, and the present is undoubtedly not one of such purposes.

[3] But this court is not and cannot be bound by the allegations of a bill, whether they be of fact or conclusions of law. It can properly inquire into all questions of fact or law properly presented by the pleadings or evidence. It is therefore in the present case fully within the province of this court to examine and determine whether the will of Darius C. Howell contained any power of sale other than those expressly declared and already alluded to.

[4] It was suggested, rather than urged, in the brief of the appellant, that the existence of express powers would operate to negative any implied power of sale. This is not the law. In the case of *Hamilton v. Buckmaster*, L. R. 3 Ch. 323, where a testator by the terms of his will directed the sale of all his personal estate, the power of sale was held to extend to a freehold estate owned by him at the time of his death, where the exercise of such power was necessary for the purpose of carrying out the trust created by the will, and in *Corse v. Chapman*, 153 N. Y. 473, 47 N. E. 812, a testator had given an express power of sale of his unimproved and unproductive real estate; but that fact was held not to destroy an implied power of sale of his productive real estate.

[5, 6] The next question to consider is whether there was or was not any implied power of sale in the will of Darius C. Howell. That no particular form of words is required to constitute an implied power of sale has been too often held to call for the citation of any authorities. Such a power, if it exists, must be derived either from language in the will, which necessarily implies its exercise, or where the use of such a power is essential

to the carrying out of the objects and purposes of the testator, as in the case of *Harrison v. Denny*, Trustee, 113 Md. 520, 77 Atl. 837; or where it is manifest from an examination of the entire will that it was the intent of the testator that such a power should be vested in and exercised by his executor or trustee. The doctrine of implied powers of sale has been carefully considered by this court in the recent case of *Schloendorn et al., Trustees, v. Schmidt*, 80 Atl. 309, decided at the January term, 1911; and all that is requisite in the present case is to consider the doctrine as there laid down as applicable to the facts presented by the record in this case.

In the residuary clause of the will of Mr. Howell, after making the provision for the income of his widow, occurs the following clause: "And in trust, in the second place, after making the payments hereinbefore in this item of my will directed to be made, to invest the net surplus of the income of the property mentioned in this fifth item, or residuary clause, in good, safe securities, always giving the preference to ground rents paying six per centum per annum on the amount of the purchase money therefor, or real estate paying a like per centum, clear of taxes and expenses, to be held in trust for the same uses and purposes mentioned in this item, and in like manner to invest the proceeds of the sale of any real estate or leasehold or personal property that may be sold by them." It is to be observed that the term "in like manner to invest the proceeds of the sale of *any* real estate of leasehold" property is not limited either to the Charles Street avenue property, or to any balance which may be left, or arise from the sale of property sold for the purpose of paying a deficiency in the income of his widow. It is therefore broader in scope and effect than either of the cases in which express authority is given for the making of sales. The many and varied character of the trusts in the will are such that it cannot be seriously said that there are no active duties for the trustee to perform, and the very terms of the will necessarily provide a point where the duties of the trustee will involve a division of the estate, to accomplish which a sale of much, if not all, of his property will be inevitable. The present case therefore comes distinctly within the line of adjudications which sustain the existence of the implied power of sale in a trustee. *Schloendorn v. Schmidt*, *supra*; *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158; *Varick v. Smith*, 69 N. J. Eq. 505, 61 Atl. 151; *Wood v. Lembcke*, 72 N. J. Eq. 651, 66 Atl. 903; *Casselman v. McCooley*, 73 N. J. Eq. 253, 67 Atl. 436; *Salisbury v. Slade*, 160 N. Y. 289, 54 N. E. 741; *In re Curtis*, 26 R. I. 580, 60 Atl. 240; *Boston Safe Dep. & Tr. Co. v. Mixer*, 146 Mass. 103, 15 N. E. 141.

The authority given "to invest the proceeds of sale of *any* real estate" at once differentiates the present from the cases of Ball

v. Safe Dep. Co., 92 Md. 503, 48 Atl. 155, 52 L. R. A. 403, and *Murphy v. Coale*, 107 Md. 198, 68 Atl. 615, in each of which the will under consideration contained express language inhibiting the sale of certain property which had been attempted to be sold.

The conclusion is irresistible that under the will of Darius C. Howell there was an implied power of sale which could be properly exercised by the appellee, as trustee appointed by the codicil to his will. The decree of the circuit court No. 2 which appointed the Safe Deposit & Trust Company trustee in this suit was merely confirmatory of the appointment made by the will and codicil.

[7] There could be no additional powers vested in it beyond those conferred by the will, even though the power of sale was in terms conferred, and sales were authorized to be made from time to time and at such times as the trustee might see fit, subject to the approval and ratification of the court. The fact that the decree appears to have been founded upon the act of 1868, instead of upon the implied power contained in the will, is immaterial, since the trustee did in fact possess the power.

From the date of the decree the trust company proceeded in the administration of the trusts upon the assumption that, since the court had taken general jurisdiction of the trust estates, it was acting in its capacity of trustee, by virtue of the decree, not by virtue of any power granted to it by the will. It accordingly made and reported in all about 10 sales of various portions of the estate before the sale now in question, and no objection was raised in any of them to the sufficiency of the decree. In the meantime this court had decided the case of *Ball v. Safe Deposit & Trust Co.*, supra; but, notwithstanding that fact, the appellee continued from time to time to make sales as under the authority of the decree, and did not claim to derive any power of sale from Mr. Howell's will, and never did set up any such claim until its authority was questioned in the present case. It had not even asked the court, under the jurisdiction of which it was acting, to construe the will and declare the existence of the implied power of sale.

In this case, however, we are not concerned with the course of the trustee. The only question is: Can that trustee now make a good title to the purchaser of "Belle Grove"? The trustee was validly appointed by the testator, and that appointment was further sanctioned by a decree of a court of competent jurisdiction, all parties in interest who were in esse at the time when the proceeding was begun were parties to the cause, the property of the trust estate was within the jurisdiction of the court, the will which created the trusts then being administered by the trustee under the supervision of the court contained an implied power of sale, and the sole ques-

tion remaining is: Did the erroneous assumption of the trustee that it was acting under the decree of the court which had assumed jurisdiction of the administration of the trusts, when in fact its power came from the will, invalidate the sale to the appellant? That question is settled so far as Maryland is concerned by the case of *Philbin v. Thurn*, 103 Md. on page 349, 63 Atl. on page 574, and the cases there cited. Briefly stated, the principle is that, "where one having various capacities executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not profess to exercise it in virtue of that particular power."

The order appealed from will be affirmed.

Order affirmed; costs to be paid by the trustee out of the estate in its hands.

TOWN OF WINCHESTER v. STOCKWELL (two cases).

(Supreme Court of New Hampshire. Cheshire.
Oct. 3, 1911.)

1. TAXATION (§ 679*)—SUIT ON JUDGMENT—RIGHT TO MAINTAIN.

Neither a town nor a collector of taxes can sue on a judgment for taxes, after a tax deed to the town, since the town stands in relation to the purchase the same as an individual would, and the taxpayer's obligation for the taxes was extinguished by the sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361-1362; Dec. Dig. § 679.*]

2. TAXATION (§ 809*)—SUIT ON JUDGMENT—AMENDMENT.

A town, having improperly sued on a judgment for taxes after a tax deed to the town, may be permitted by way of amendment to file a writ of entry for the lands in which the validity of the tax title may be litigated.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 809.*]

3. TAXATION (§ 679*)—TAX SALES—PURCHASE BY TOWN—PREREQUISITES.

Under Laws 1895, c. 64, § 2, and Pub. St. 1901, c. 61, § 6, permitting a town or city to purchase at any sale of lands for taxes, the fact that when a town became a purchaser the sales had not been adjourned from day to day not exceeding three days, without a person having appeared on or before the last adjourned day who offered to pay the taxes and incidental charges for a part or the whole estate, as provided by Pub. St. 1901, c. 61, §§ 5, 6, did not affect the validity of the sales.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 679.*]

4. TAXATION (§ 800*)—INVALID TAX TITLE—REIMBURSEMENT OF PURCHASER.

Before a taxpayer is entitled to judgment setting aside tax titles for irregularities in the assessments, he must reimburse the purchaser for taxes paid by him, unless justice otherwise requires.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1586; Dec. Dig. § 800.*]

Transferred from Superior Court, Cheshire County; Mitchell, Judge.

Actions by the Town of Winchester against Rosa B. Stockwell and against Thomas E.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Stockwell. Transferred from the superior court. Cases discharged.

Assumpsit. The first action was brought upon a personal judgment against Rosa B. Stockwell, a resident of Winchester, for taxes assessed against her in that town for the years 1903 and 1904. The second action was for the recovery of nonresident taxes assessed for the years 1900, 1901, and 1902, against certain lands in Winchester standing in the name of Thomas E. Stockwell, a nonresident, as owner. In the first action the defendant filed certain pleas. The plaintiff demurred to the pleas, and filed an answer, alleging certain facts, which the defendant admitted to be true in part; and upon the admitted facts, and other facts found, a verdict was ordered for the plaintiff, subject to the defendant's exception. In the second action Rosa was permitted to appear in defense of the suit, to file the same pleas, and to have the facts admitted and found in the first action considered so far as they are applicable. Judgments in rem were ordered against each tract of land for the amount of the taxes thereon in the several years, subject to the defendant's exception. The defendants claim that the actions cannot be maintained, as the taxes sought to be recovered have been paid by the town to the collector of taxes; that, being in default in the payment of their taxes, the collector advertised and sold their lands to satisfy them; and the town, being the only party who would take the lands and pay the taxes, became the purchaser, and later received conveyances of the property.

John E. Allen, for plaintiff. Joseph Maden, for defendants.

BINGHAM, J. [1] On the facts here presented these actions cannot be maintained, either in the name of the town or the collector of taxes. Actions under section 17, c. 60, of the Public Statutes, should be brought by the collector acting in his public capacity and as the representative of the state. The taxes collectible under the statute are in no sense debts owed to the town as a corporation, but to the public. The controversy there contemplated is one between the state and the taxpayer for the enforcement of a public right. *Canaan v. District*, 74 N. H. 517, 536, 70 Atl. 250. The town, in becoming the purchaser of the property at the tax sales, acted in its corporate capacity, and stands with relation to the pur-

chase the same as an individual would. *Coolley, Tax*. (1st Ed.) 353. It paid the taxes "solely as a consideration for a supposed title, taking the risk of its failure." *Perham v. Fibre Co.*, 64 N. H. 485, 486, 14 Atl. 462, 463. And by paying them it extinguished the tax obligations of the defendants to the public in the town of Winchester for the years in question.

[2] But, notwithstanding these actions cannot be maintained, the town as owner of the tax titles may be permitted by way of amendment to consolidate the suits and file a writ of entry for the lands, in which the validity of the tax titles may be litigated.

[3] The fact that when the town became a purchaser the sales had not been adjourned from day to day not exceeding three days, without a person having appeared on or before the last adjourned day who offered to pay the taxes and incidental charges for a part or the whole of the estate (P. S. c. 61, §§ 5, 6), would not seem to affect their validity. Since 1895 a town or city may become "a purchaser at any sale of lands for the payment of taxes." *Laws 1895, c. 64, § 2; P. S. c. 61, § 6.*

[4] The defendants, however, claim that the plaintiff's tax titles are invalid, because of irregularities in the assessments. The facts in support of this claim are not found; but, if found, and they would invalidate the titles, the defendants would not be permitted to have judgment rendered in their favor in the amended suit, without reimbursing the town for the taxes which they have paid, unless justice required a different course. *Laws 1895, c. 64, § 1; Greeley v. Beckman*, 75 N. H. 413, 415, 75 Atl. 528; *Glynn v. Maxfield*, 75 N. H. 482, 485, 76 Atl. 196. And if the town is willing, as it apparently is, to release its claim to the lands upon being reimbursed for the taxes, without putting the defendants to the expense of contesting the title, it would seem that there would be no evidence from which it could be found to be unjust to require the defendants to do so, and that, the amendment being allowed, judgment should be entered in the superior court for the defendants, upon their paying the town the taxes and charges for which the lands were sold. The costs in the present proceeding should follow the usual course.

The defendants' exceptions are sustained, the verdict in the first action is set aside, and the judgments in the second are vacated.

Cases discharged. All concurred.

McBRIDE v. HUCKINS et al.
(Supreme Court of New Hampshire. Grafton.
Oct. 3, 1911.)

1. PHYSICIANS AND SURGEONS (§ 14*)—DEGREE OF SKILL AND CARE REQUIRED.

A physician impliedly agrees that his skill and experience is at least equal to that of the average physician practicing in the same or similar localities, but he does not agree that he possesses the skill of the average of physicians practicing in other unlike localities; and the degree of skill which a country physician assumes to possess must be measured by a consideration of the limited opportunities afforded in the same or similar communities, and not by the greater and different opportunities existing in larger and different communities.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—INSTRUCTIONS.

An instruction, in an action for malpractice, that defendant is bound to possess the reasonable degree of skill which is ordinarily possessed by physicians engaged in the practice is objectionable, because failing to restrict the jury to any locality, in the attempt to find the average skill of the profession.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 18.*]

3. EVIDENCE (§ 19*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The court cannot judicially know whether the average skill of the medical profession as a body is higher or lower than that of physicians practicing in particular localities; and hence cannot say that a charge that the degree of skill required of a country physician is such as is ordinarily possessed by the profession was not erroneous, as imposing too high a standard of medical skill, as applied to such physician.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 19.*]

4. APPEAL AND ERROR (§ 1062*)—ERRONEOUS INSTRUCTIONS—PRESUMPTIONS.

The refusal to give a correct instruction authorizes the presumption that the error was not harmless, unless the case shows that the party complaining was not prejudiced thereby; but the adverse party must show, as a matter of fact, that the error was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

5. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—INSTRUCTIONS—"PHYSICIANS PRACTICING."

The phrase "physicians practicing," in a requested instruction in a malpractice case that, if defendants possessed such skill as is ordinarily possessed by "physicians practicing" in the same line in similar localities, and that in treating plaintiff's case they used ordinary care in exercising such skill, the verdict must be for them, means only such physicians as are ordinarily recognized as reputable physicians, and the refusal to give it cannot be justified on the ground that the phrase is too indefinite, and may include quacks.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 18.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5374-5376; vol. 8, p. 7754.]

6. TRIAL (§ 251*)—THEORY OF CASE—PLEADINGS—INSTRUCTIONS.

Where a malpractice case was tried on the theory that defendants were only bound to pos-

sess the degree of skill required by law, the refusal to give a requested charge that, if defendants possessed such skill as is ordinarily possessed by physicians practicing in similar localities, the verdict must be for them was available error, though one of the issues raised by their plea was whether they possessed the ordinary skill of persons in the medical profession, as the practical interpretation placed on the pleadings by the parties cannot be disregarded.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

On Rehearing.

7. APPEAL AND ERROR (§ 1064*)—PREJUDICIAL ERROR—ERRONEOUS INSTRUCTIONS.

Where an erroneous theory of liability, adopted at the trial of a physician charged with malpractice and with assault and battery, might have been considered by the jury on either ground of action as having a tendency to enhance the damages, the award of damages must be set aside, as well as the verdict against the physician on the issue of liability.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

8. APPEAL AND ERROR (§ 1064*)—PREJUDICIAL ERROR—ERRONEOUS INSTRUCTIONS—EFFECT.

Where the declaration, in an action against a physician, alleged in one count a cause of action for malpractice and in another for assault and battery, and the evidence showed that plaintiff, who had sustained an injury to his arm, requested the physician to examine it and do what was necessary to save it, but not to amputate it, and that plaintiff was placed under the influence of an anæsthetic, and that the physician then amputated the arm, and there was a general verdict for plaintiff, the error in an instruction imposing on the physician a too high standard of skill necessitated the reversal of the award of damages, as well as the verdict against the physician, since the erroneous instruction might have effected the amount awarded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.*]

Young, J., dissenting.

Transferred from Superior Court, Grafton County; Chamberlin, Judge.

Case by James McBride against John C. Huckins and others, surgeons, for malpractice and for assault and battery. There was a verdict for plaintiff, and the case was transferred on exceptions to the refusal to give an instruction. Sustained.

The court refused to give the following instruction requested by defendants: "If you find that the defendants possessed such skill and learning as is ordinarily possessed by physicians practicing in the same line in similar localities, and that in treating and diagnosing the plaintiff's case they used ordinary care in exercising such learning and skill, notwithstanding you find that the arm might have been saved, your verdict should be for the defendants." The court instructed the jury that the degree of skill required of the defendants is such as is ordinarily possessed by the profession.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Alvin F. Wentworth and Martin & Howe, for plaintiff. Sullivan & Daley and Burritt H. Hinman, for defendants.

WALKER, J. The jury were instructed, in substance, that the defendants were bound, under their contract of employment, to possess that degree of skill in surgery in the treatment of the plaintiff's injured arm which is ordinarily possessed by those engaged in the same profession. The skill of the average physician and surgeon was made the standard or test by which the jury were to determine the material question whether the defendants had the knowledge, experience, and skill which the law requires a person to have, who represents himself to be qualified surgeon, and assumes upon request to render surgical assistance in a particular case.

The requested instruction, which was denied, subject to the defendants' exception, made the necessary degree of skill of the defendants to depend upon the average or ordinary skill of physicians practicing in localities similar to Plymouth or Ashland, where the defendants lived and practiced their profession. Under the charge as given, the rule which the jury were required to apply was that the defendants must have the average skill of the profession generally, without limitations as to locality; while the rule contained in the request was that the defendants' competency as surgeons is to be determined by the average skill of practicing physicians or surgeons in similar localities. Although the word "physicians" is alone used in the request, it is evident that it was intended to include those members of the profession who practice surgery in connection with the general treatment of diseases; and the request limits the inquiry to surgeons or physicians whose practice includes cases requiring surgical attention, like the plaintiff's. "Practicing in the same line in similar localities" means, as applied to this case, the practice of surgery in country towns whose general characteristics, as to location, size, industries, and population, are substantially similar to those where the defendants assume to practice. The phraseology of the request, though open to some verbal criticism, is not so obscure or ambiguous as to mislead the jury, when considered in connection with the evidence and the circumstances disclosed by the case.

[1] The question raised by the exception is not a merely fanciful or academic one. Expert proficiency in performing difficult surgical operations is not ordinarily possessed by the country doctor, for the reason that such cases do not often occur in his practice. His opportunities for experience and observation are much more limited than those of physicians and surgeons practicing in large cities, where surgical operations are of frequent occurrence. While his profes-

sional education and knowledge of the books may be extensive, he is necessarily defective in that expert skill which is only produced by practical experience. Devoting himself to the ordinary practice of a rural community, he is necessarily deprived of that acquired skill which he would have attained, if he had practiced his profession in a large and densely populated community. The degree of skill, therefore, which he can reasonably be assumed to possess, as a general rule, must be measured and determined by a due consideration of the limited opportunities afforded in the same or similar communities, and not by the greater and dissimilar opportunities existing in larger and different communities. It would be unjust to hold him to that degree of professional ability which his environment prevents him from possessing. On the other hand, it would be equally unjust to the plaintiff in a malpractice case to permit the jury to measure the defendants' skill by the average of professional ability found to exist in other communities affording less opportunity for practice in a given medical line than the defendants' locality affords. As in the former case the standard is too high, in the latter it would be too low. In neither case would it work out substantial justice.

[2] It may be claimed that all inequality is avoided by adopting the rule announced by the court in the charge: That the defendants are bound to possess "that reasonable degree of learning, skill, and experience which is ordinarily possessed by those engaged in the same business or profession;" or that "the duty which the law imposed upon them was that they did possess the learning, skill, and experience of the average physician and surgeon engaged in the profession of medicine." But it is apparent that upon principle this is an unsatisfactory and impracticable test. It restricts the jury to no locality in the attempt to find the average skill of the profession in surgery. It is impracticable because of the difficulty, not to say impossibility, of determining the average skill of the medical profession as a body in the treatment of a given case. In view of the facts that different schools of medicine often employ radically different methods of treating the same disease, that the practice followed in one school would often be strong evidence of negligence, if resorted to by a member of another school (*Spעד v. Tomlinson*, 73 N. H. 46, 51, 59 Atl. 376, 68 L. R. A. 432), and that practitioners in one locality have opportunities for experience in treating certain diseases and bodily injuries which are almost entirely wanting in other localities, the extreme difficulty of ascertaining the average skill possessed by all physicians is apparent. Such a rule is unlimited, and, because it is unlimited, it is too indiscriminate to be of any real service to the jury in ascertaining whether a defend-

ant possesses the average skill required. The field of inquiry must be restricted. Some reasonable territorial limit must be recognized, if the law is to furnish a rule that is just to the parties and useful to the triers of the fact. As no limit was prescribed, the instruction given by the court was of little assistance to the jury, and was as liable to result in their finding a standard that is clearly too high, as in one that is too low. The logical result is perhaps the same as it would be if no instruction upon the point were given.

But, if they are instructed that the average skill and ability of surgeons in active practice in communities affording opportunities for professional observation and experience of a character similar to those afforded by the town or district where the defendant practices his profession is the standard, it is apparent that justice to both parties under their contract will be secured. The implied agreement of the surgeon is that his surgical knowledge and experience is at least equal to that of the average surgeon practicing in the same or similar localities, not to that of the average of surgeons practicing in dissimilar localities. It must be assumed that the parties had this distinction in mind; and it must also be assumed, in any reasonable construction of their contract, that they did not have in mind a general average of professional ability, in regard to which neither could have had any definite information. They did not make a contract, a material part of which neither contemplated nor understood, and which it would be impractical for a jury to apply. "Such a finding would be contrary to what the evidence shows the parties understood, or could understand, at the time of entering into the contract; and the law will not imply an undertaking which a jury could not reasonably find from the evidence." *Spead v. Tomlinson*, 73 N. H. 46, 52, 59 Atl. 376, 378 (68 L. R. A. 432).

In *Leighton v. Sargent*, 27 N. H. 460, 469 (59 Am. Dec. 388), the question of the legal qualifications of a surgeon, in a suit against him for malpractice, was carefully considered, and it was decided that he agrees "that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business." Upon the subsequent transfer of the case after a second trial, the court say (31 N. H. 119, 132 [64 Am. Dec. 323]): "One important question involved in the trial related to the degree of skill possessed by the defendant as a surgeon. The fact essential to be proved was that he was as skillful as surgeons generally in the section of the country in which he practiced; or, in other language, that his skill was equal to the ordi-

nary skill of the members of the profession in practice." The locality doctrine was here expressly recognized and enforced. There is no intimation that the average skill of the entire profession of the state or country was regarded as the test. The professional ability referred to was the ability ordinarily found to exist among physicians and surgeons "in the section of the country in which" the defendant practiced.

It is probably true that in some cases this rule, literally applied, might restrict the inquiry to a too narrow territory. The defendant's actual practice might be confined to a single town where no other physician practiced, and in such a case necessarily no comparison could be made. He alone would furnish the test of his own skill—an evident absurdity. "It seems to us that physicians or surgeons practicing in small towns, or rural or sparsely populated districts, are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will not do, as we think, to say that, if a surgeon or physician has exercised such a degree of skill as is exercised in the particular locality in which he practices, it will be sufficient." *Gramm v. Boener*, 56 Ind. 497, 501. For similar reasons, a similar rule is followed in numerous cases. *Tremblay v. Kimball*, 107 Me. 53, 77 Atl. 405, 29 L. R. A. (N. S.) 900; *Hathorn v. Richmond*, 48 Vt. 557; *Willard v. Norcross*, 81 Vt. 293, 69 Atl. 942; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Bigney v. Fisher*, 26 R. I. 402, 59 Atl. 72; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17; *Thomas v. Dabblement*, 31 Ind. App. 146, 67 N. E. 463; *Hitchcock v. Burgett*, 38 Mich. 501, 512; *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830; *Dunbault v. Thompson*, 109 Iowa, 199, 203, 80 N. W. 324; *Burk v. Foster*, 114 Ky. 20, 69 S. W. 1096, 59 L. R. A. 277; *Dorris v. Warford*, 124 Ky. 768, 100 S. W. 312, 9 L. R. A. (N. S.) 1090; *Stew. Leg. Med.* § 87; 1 *Wit. & Beck, Med. Jur.* 79. There are other cases that seem to confine the rule as to comparative skill to the vicinity in which the defendant practiced (*Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674), but it is probable that the distinction above discussed was not pressed by counsel, and may not have been considered. In fact, in some cases the distinction might be of little or no use, as where the defendant resides in a city where presumably there are many other practicing physicians (*Pelky v. Palmer*, *supra*), but its general validity and usefulness is apparent, both upon principle and authority.

The foregoing authorities, of course, fortify and establish the principle that a country physician is not bound, as a matter of law, to possess the professional qualifications

found by taking the general average skill of the entire profession. In *McCandless v. McWha*, 22 Pa. 261, 268, which is often referred to in the books, the question under the charge was in effect whether a physician warrants a cure; and it was held that he is only bound to use "reasonable skill and diligence, * * * such as thoroughly educated surgeons ordinarily employ." While the language of the opinion might involve a comparison of the skill of the entire profession, that point was not discussed, and the case cannot be regarded as a clear decision upon it.

[3, 4] It is argued in behalf of the plaintiff that it does not appear whether the average skill of the profession as a body is higher than that of physicians practicing in localities similar to Plymouth and Ashland, and that, in the absence of such a finding, it cannot be said that the defendants were harmed by the exclusion of the requested instruction. On the other hand, there is nothing in the case to indicate that it is lower. The court cannot take judicial notice of the fact, and declare it to be one way or the other. If the requested instruction ought to have been given as a proposition of law, the fact that it was not given authorizes the presumption that the error was not merely harmless, unless the case discloses some fact clearly indicating that the defendants were not prejudiced by it. Having succeeded in showing that error was committed by the ruling of the court, which, upon one view of the case, may have misled the jury, the defendants were not obliged to go further and show, as a matter of fact, that it did them substantial harm. Under our system of jurisprudence, the presumption is that it did have that effect. Moreover, the plaintiff's position upon this point is inconsistent with his theory that, upon the evidence in the case, the jury could properly find that the average of surgical ability in the profession as a body was higher than that possessed by the defendants. The verdict was based upon this proposition. But, if the jury were authorized to find that fact, either from evidence given upon the stand or from their general knowledge or understanding of the profession as a whole, it necessarily follows that the same information would enable them to determine whether physicians in communities like Plymouth and Ashland had a greater degree of skill than physicians generally, or a less degree. The fact is that such a finding depends largely upon the judgment of the jury, based upon their general knowledge of matters of general notoriety and repute in the vicinage from which they came. It is not true, even in theory, that a jurymen's mind is an absolute blank with reference to all material matters that arise in the course of a trial. 4 Wig. Ev. § 2570; Thayer, Prelim. Ev. 296-298.

[5] The argument that the word "physicians," as used in the request, is too indef-

inite, and might include quacks, empirics, and impostors, whose evident incompetence would lower the standard sought, might have some legitimate bearing, if it were found that the jury would probably give that word such an unreasonable meaning. But the phrase "physicians practicing" in a community evidently means, in this connection, physicians whose learning, experience, and practice in that community entitle them to public confidence. It does not mean all persons who assume to treat diseases or personal injuries, but only such as are ordinarily recognized as reputable physicians. *Lawson v. Conaway*, 37 W. Va. 159, 163, 18 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17.

[6] It is further insisted that, if the request stated the correct rule, the defendants are precluded from taking advantage of the erroneous ruling, because one of the issues raised by the plea was whether the defendants possessed "the ordinary skill of persons of said profession." The language quoted is from the declaration, and the plea is the general issue. But it is apparent that the trial was conducted throughout upon the ground that the defendants were only bound to possess the degree of skill required by law. And the practical interpretation put upon the declaration in this respect by the court and the parties cannot be disregarded, and the professional qualifications of the defendants be determined by a technicality which substitutes error for law, because possibly the declaration, to which the defendants did not demur, stated the liability too broadly. The declaration was a general statement of facts from which it was claimed the defendants' liability legally resulted. It was not intended to contain exact statements of legal principles. The verdict must be set aside.

Exception sustained. All concurred.

Upon the filing of the foregoing opinion, on January 3, 1911, the plaintiff moved for a rehearing, which was denied, upon the question of liability; but upon the question whether there should be a new trial as to damages further argument was invited. After such argument, the following opinion was rendered:

[7] It is impossible to determine on which count of the declaration the damages were assessed, or whether both causes of action were considered by the jury in deciding upon the amount of their verdict. *Peabody v. Kinsley*, 40 N. H. 416. If the erroneous theory of liability adopted at the trial may have been considered by the jury on either count, as having some tendency to enhance the damages, their finding in that respect must be set aside, as well as their finding on the issue of liability. While it is true that when the error found to exist in a trial does not apply to or affect all the issues covered by the verdict a new trial of the entire case is not ordinarily ordered, but only so much of it is set aside as the error

related to (*Lisbon v. Lyman*, 49 N. H. 553; *Genest v. Company*, 75 N. H. 365, 74 Atl. 593; *Piper v. Railroad*, 75 N. H. 435, 75 Atl. 1041), it must clearly appear that the effect of the error did not extend to all the issues tried. If the error ostensibly relates to the question of liability, it may still be of such a character as to have had a prejudicial effect on the jury's assessment of damages. If, for instance, it should be erroneously ruled in an action for negligence, that the defendant's previous conviction for theft might be considered on the question of liability, it would require little argument to show that it probably had a very prejudicial effect upon the jury's assessment of damages. While not technically relevant to any question in the case, it could not be said, in the absence of specific instructions not to consider it, that the jury did not make it a substantial element of the damages awarded. It would therefore vitiate the entire verdict.

[8] There were two counts in the declaration—one for negligence or malpractice, and one for an assault. The evidence tended to show that the plaintiff received a severe injury to his arm, requested the defendants to examine it and do what was necessary to save the arm, but not to amputate it. He was put under the influence of an anæsthetic, and the defendants, upon examining the wound, in disregard of the plaintiff's instruction, amputated the arm. There was a general verdict for the plaintiff, and upon the defendants' exception to the charge of the court to the jury the exception was sustained. It was held in the former opinion that the court erred in instructing the jury that the law imposed upon the defendants the degree of skill possessed by physicians and surgeons generally, instead of that possessed by physicians and surgeons whose practice is confined to localities in which the defendants practiced. They were charged with a higher degree of skill than the law requires, and because of that fact the jury may have found they were liable under the first count for malpractice. The question now presented is whether the jury might not also have considered that fact in deciding upon the amount of the damages.

Under the count for malpractice, the jury may have found that, although the defendants had no authority from the plaintiff to amputate his arm, they were negligent in doing what they assumed to do. They assumed to act as surgeons having full authority, and consequently to exercise the professional skill which the law imposes upon surgeons under such circumstances. They were chargeable with the performance of a surgeon's duty when they undertook a surgeon's task. *Pittsfield, etc., Co. v. Shoe Co.*, 71 N. H. 522, 533, 53 Atl. 807, 60 L. R. A. 116. If they did not have the requisite skill for the performance of that duty, as the jury may have found, and injury resulted to the plaintiff, the question of their liability would be determined against them; but the

question of damages would remain. If it is true that in an action for negligence it is immaterial on the question of liability whether the defendant acted willfully in doing the act complained of, the circumstances attending the act, including the motives of the defendant, may often be considered in assessing the damages. "In civil trespasses, the law considers the damage actually inflicted upon the party wronged, rather than the intent or malice of him who is the wrongdoer, though the *quo animo* is sometimes shown, as material in aggravation of damages." *Cate v. Cate*, 44 N. H. 211, 214; *Holyoke v. Railway*, 48 N. H. 541, 545; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372.

In *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475, it was held that ordinarily, in actions for torts, the rule of damages is compensation in money for the money value of such damage as would naturally and reasonably be expected to happen to the plaintiff by reason of the wrongful act; but that when the element of malice enters into the wrong a more liberal rule of damages prevails, and the jury, taking into consideration all the circumstances of the wrong, ought to give as compensation what, in their judgment, it is reasonable that the plaintiff should receive and the defendant pay. This was merely an application of the doctrine announced, after much investigation, in *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, which has since been followed in this jurisdiction. *Barnes v. Campbell*, 60 N. H. 27; *Kimball v. Holmes*, 60 N. H. 163; *Felch v. Railroad*, 66 N. H. 318, 320, 29 Atl. 557; *Friel v. Plumer*, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190; *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100; *Cohn v. Saidel*, 71 N. H. 558, 566, 572, 53 Atl. 800; *Prescott v. Robinson*, 74 N. H. 460, 465, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987.

Whether the use of the word "malice" in this connection is not unfortunate, and whether generically it is not too narrow to express the meaning intended, it is unnecessary to inquire, since it undoubtedly includes a willful invasion of the admitted rights of others with reference to person or property. If the jury found, as they might have done in this case, that the defendants deliberately and intentionally disregarded the unequivocal instruction of the plaintiff not to amputate his arm, but merely to make an examination of it and dress the wound, while he was unconscious, it could not be doubted that they acted maliciously. Amputating the arm under such circumstances might show a wanton and contemptuous disregard and abuse of the professional confidence which the plaintiff reposed in the defendants. It would be a material circumstance characterizing their act; and upon the authorities cited and upon principle it might have an important bearing upon the amount of damages the plaintiff ought to receive and the defendants ought to pay.

If, in connection with, or in addition to,

this element of damage, the jury believed that the defendants did not have the skill imposed upon them by the law, and that they knew they were incompetent to do what they wrongfully assumed to do—that is, to decide whether amputation was necessary, and whether they should perform the operation—it cannot be doubted that the amount of the verdict would be materially increased thereby. It is also evident that the degree of skill thus considered by the jury in determining the competency of the defendants would be important. If the law required them to have and exercise the skill of the best surgeons, and they had only the skill of country physicians, the jury might be convinced that they acted maliciously or wantonly in assuming to undertake to diagnose the case with reference to the necessity for amputation. It would be a willful breach of their duty to the plaintiff, which would authorize the jury to apply what is called a liberal rule of damages. Even if they were guilty of no excess of authority, their attempt to do what they knew they were not qualified to do would furnish ground for the application of that rule of damages, especially if, as was evidently found by the jury, the plaintiff's arm might have been saved by the required degree of skill. The erroneous standard of skill by which the jury were guided may have had in their minds a material bearing upon the question of damages; and, as it was higher than the law requires, its obvious tendency was to increase the amount of the verdict. If the defendants, falsely representing themselves to the plaintiff to be competent surgeons, unnecessarily cut off his arm, the fact of their incompetency, which the plaintiff sought to guard against, might cause very deep regret in his mind, for which he ought to receive compensation, and for which the defendants ought to make amends. The charge of the court in regard to damages was very brief, and did not exclude from the consideration of the jury this element of compensation, so that the presumption is at least that the jury considered all the legal elements of damage that might have been specifically submitted to them under the theory of liability adopted at the trial; and one of those elements was the defendants' want of skill.

Motion for rehearing denied.

YOUNG, J., dissented; the others concurred.

DINSMORE v. MAYOR AND ALDERMEN OF CITY OF MANCHESTER.

(Supreme Court of New Hampshire. Hillsborough. Oct. 8, 1911.)

1. STIPULATIONS (§ 18*)—ELECTION CONTEST—CONCLUSIVENESS.

A party to an election contest, having agreed that certain ballots in dispute were legally voted for his opponent, is estopped to

claim such votes, in the absence of fraud or imposition.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

2. ELECTIONS (§ 180*)—BALLOTS—INDICATION OF CHOICE BY VOTER.

Ballots marked by a cross in the circle above the Democratic column and a cross in the Republican column opposite a particular candidate's name, the name of the Democratic opponent not being erased, cannot be counted for either candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 155; Dec. Dig. § 180.*]

3. ELECTIONS (§ 305*)—CONTEST—REVIEW—SCOPE.

On certiorari to review decision of a municipal board in an election contest, the court is not limited in its investigation to the records of the board, and can consider extrinsic evidence to show that the law was disregarded by the board, in that ballots not described by the records were improperly counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 325; Dec. Dig. § 305.*]

4. APPEAL AND ERROR (§ 3*)—REVIEW—FORM OF PROCEEDING.

Under Pub. St. 1901, c. 204, § 2, giving the Supreme Court general superintendence of inferior courts to correct errors and power to issue writs of error, certiorari, prohibition, etc., right to review does not depend upon technical accuracy in designating the form of proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 3.*]

5. ELECTIONS (§ 305*)—CONTESTS—REVIEW—FORM OF PROCEEDING.

Error committed by a municipal board in an election contest affecting the merits, and resulting in manifest injustice, is correctible by certiorari in the exercise of the Supreme Court's superintending power over inferior courts granted by Pub. St. 1901, c. 204, § 2.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 318; Dec. Dig. § 305.*]

6. ELECTIONS (§ 305*)—CONTEST—RIGHT TO RELIEF.

In certiorari to correct errors committed by a municipal board in an election contest, relief is granted, not as a matter of right, but as a matter of discretion based on the justice of the case; the burden being upon petitioner to show not merely that error has been committed, but that injustice has been done thereby.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

7. ELECTIONS (§ 305*)—CONTEST—RELIEF ON REVIEW—SCOPE.

In granting relief on certiorari, the Supreme Court will not quash all the proceedings or make an order broader than is necessary to correct the effect of the error; and hence, on deciding that a municipal board improperly counted ballots in an election contest, the record will be amended merely to show the number of votes received by the respective parties.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

Transferred from Superior Court, Hillsborough County; Wallace, Judge.

Certiorari by Arthur W. Dinsmore against the Mayor and Aldermen of City of Manchester. Transferred on defendant's exceptions. Exceptions overruled.

At the election in November, 1910, the moderator of ward 8, Manchester, declared

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one Wenzel elected to the office of alderman. Thereupon the plaintiff petitioned the board of mayor and aldermen, alleging that he received more votes for alderman than Wenzel, and that he should be given the office. Several hearings were had upon this petition; and, as it appeared that the result depended on an examination of the ballots cast, a recount was had at the office of the Secretary of State, which showed that Wenzel had 645 votes and the plaintiff 643, exclusive of 5 disputed ballots. At a subsequent meeting of the board it was conceded that three of the disputed ballots should be counted for the plaintiff. The other two ballots were substantially alike. In each there was a cross in the circle above the Democratic column, in which the plaintiff's name was printed as a candidate for alderman, and a cross opposite Wenzel's name, which was printed in the Republican column as a candidate for the same office, but the plaintiff's name was not erased. The board adopted a resolution finding that three of the five disputed ballots should be counted for the plaintiff and the other two for Wenzel, by which recount Wenzel would have one more vote than the plaintiff. The plaintiff was given leave to withdraw, and then filed this petition in the superior court. The defendants and Wenzel excepted to the reception of any parol evidence descriptive of the disputed ballots, and to evidence of the agreement that three of the ballots should be counted for the plaintiff.

Branch & Branch, for plaintiff. John T. Nixon and George A. Wagner, for defendant.

WALKER, J. [1] At a hearing before the board of mayor and aldermen, where this election contest was being considered, it was conceded by all parties concerned, who were present and represented by counsel, that three of the five ballots in dispute were legal ballots for Dinsmore, and that the contest, in fact, related to the effect to be given the other two. Having agreed that three of the disputed ballots should be counted for Dinsmore, and having rested his claim to an election upon the interpretation to be given to the other two, Wenzel cannot now insist that he was not bound by that agreement. He waived his right to claim that the three ballots counted for Dinsmore should be counted for him, in the absence of any evidence of fraud or imposition; and an inspection of the ballots does not indicate that such counting was erroneous.

[2] The question, therefore, relates to the effect to be given to the two ballots in dispute. If they are not counted for either of the contestants and the other three are given to Dinsmore, as upon the facts of the case they must be, Dinsmore received one more vote than Wenzel. The two ballots are substantially alike so far as this contest is concerned. Each has a cross in the circle

above the Democratic column and a cross in the Republican column opposite the name of Wenzel, but in neither case is Dinsmore's name erased in the Democratic column. The question of interpretation thus presented is the same that was decided in *Murchie v. Clifford*, 76 N. H. 99, 103, 79 Atl. 901, where it was held that the ballot could not be counted for either party, since it was impossible under the statute to say for whom the voter intended to vote. The evidence of intention furnished by the ballot was equally consistent with an intention to vote for either candidate; hence the impossibility, as a matter of law, of ascertaining for which one he desired to vote. Upon the authority of that case, it is clear that it was error of law to count the two ballots in dispute for either of the candidates. It was legally impossible to do so.

[3] But the principal contention on the part of the defendant relates to the form of the proceeding the plaintiff chose to bring for the correction of the error in the proceedings of the board. It is insisted that upon a petition for certiorari in a case like this the court is limited in its investigation to the record of the clerk of the board; that it cannot consider extrinsic evidence to show that the law has been disregarded or violated by the inferior court whose proceedings are alleged to be erroneous; and that, as the record kept by the clerk of the board contains no description of the two ballots above considered, the court is without power to ascertain the facts or to require a full and complete record of the doings of the board. This argument is largely based upon a narrow conception of the office of the writ of certiorari in accordance with which it has sometimes been said that its office is to bring up the record, so that the court may see if the inferior tribunal had jurisdiction (*State v. Thompson*, 2 N. H. 236), and that, if that fact appeared affirmatively, further investigation of the proceedings was unnecessary and useless. Upon such a view of the law, parol or other evidence that the tribunal, having jurisdiction to determine the matter before it, committed grave errors of law in respect to the rights of the parties, would be immaterial. It would be in effect a holding that the inferior court had jurisdiction to disregard plain provisions of the law, provided it had the requisite power to hear the parties and determine the controversy. If the court above could not correct the errors which might be proved, it would be absurd to attempt to prove them. But that view of the law has not been adopted in this state. In *re Petition of Landaff*, 34 N. H. 163, 173-175, it was expressly repudiated. If errors of law are correctible upon certiorari when committed by a subordinate court having jurisdiction of the parties and the subject-matter, it would be a strange refinement of reasoning to hold that

it could only do so when the errors were shown by an inspection of the record alone, or that, if the record were silent upon that subject, the fact could not be shown in any other way. In the early case of *Huse v. Grimes*, 2 N. H. 208, 210, the court remark that certiorari lies "to reverse the doings of inferior jurisdictions, whose powers are given them by statute, whose mode of proceeding is unknown to the common law, and who render their doings effectual, not by a judgment, technically called, but by orders to be executed in a summary way, such as orders for the laying out of highways and for the removal of paupers." It is not confined to jurisdictional matters, but extends to the correction of all errors of law affecting the substantial justice of the case, whether disclosed by the record or proved aliunde. This view of the office of the writ is recognized in *Pittsfield v. Exeter*, 69 N. H. 836, 338, 41 Atl. 82, 83, where the question was which of the two towns was entitled to certain railroad taxes. The action was assumpsit, which it was held would not lie, as it involved a collateral attack on the ruling of the state treasurer. But in reaching that conclusion the court say "Although the law does not give a party aggrieved by a decision of the state treasurer a right of appeal, as it does to one aggrieved by a decision of selectmen (P. S., 1901, c. 59, § 11), it affords an ample remedy in the writ of certiorari." *Cate v. Martin*, 69 N. H. 610, 613, 45 Atl. 644.

[4] But in this state it is unimportant whether the process be called certiorari, or be given some other Latin or English name. If it is an appropriate and convenient mode of vindicating legal right, it is perhaps not essential that it should have a technical name. The superintending power of the court over inferior tribunals does not depend upon, and is not limited by, technical accuracy of designation in legal forms of action. The parties' rights in this action do not depend upon our definition of certiorari. They are entitled under the established practice in this state to the most convenient procedure for the settlement of their controversy. *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794.

"The court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses, and shall have exclusive authority to issue writs of error, certiorari, and prohibition, and may issue writs of habeas corpus and all other writs and processes to other courts, to corporations, and to individuals." P. S. 1901, c. 204, § 2. "One object [of this statute] to be accomplished is the execution of the laws when they have not provided specific modes of preventing and correcting the errors and abuses of courts of inferior jurisdiction." *Boody v. Watson*, 64 N. H. 171, 9 Atl. 803. "Cumbersome machinery for bringing up the

record of the lower court is unnecessary. *Ableman v. Booth*, 21 How. 506, 511, 512, 514, 522, 526 [16 L. Ed. 169]. The record can be proved and found with the other facts of the case at the trial term on a petition, as well as in an action of debt, or a writ of entry. * * * On a sufficient petition the question is whether there is an error correctible by the superintending power, and not whether it was committed by a court of record, or whether it is correctible on a writ of error, writ of false judgment, certiorari, mandamus, audita querela, or prohibition." *Boody v. Watson*, 64 N. H. 173, 9 Atl. 803. Since the decision in that case the doctrine that the extraordinary correctional power of the court for the promotion of justice and the due administration of the law is not hampered or defeated by abstruse technicalities of remedy, but that it is exercised upon simple, ample, convenient, and reasonably expeditious methods of procedure, has not been doubted. *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829; *Attorney General v. Taggart*, 66 N. H. 362, 369, 29 Atl. 1027, 25 L. R. A. 613; *Concord, etc., R. R. v. Railroad*, 67 N. H. 464, 41 Atl. 263; *Manchester v. Fernald*, 71 N. H. 156, 51 Atl. 657; *Sheehan v. Mayor and Aldermen*, 74 N. H. 445, 68 Atl. 872; *Attorney General v. Bartlett*, 75 N. H. 388, 74 Atl. 877; *Attorney General v. Duncan*, 76 N. H. 11, 78 Atl. 925.

[5] As the municipal board in deciding this election controversy exercised judicial powers, and as it committed an error of law affecting the merits of the case and resulting in manifest injustice, its action in that respect is correctible by the exercise of the superintending power of this court over inferior courts (*Sheehan v. Mayor and Aldermen*, supra), in the absence of any other specified form of remedy. No reason is perceived why the form of petition adopted by the plaintiff is not adequate.

[6] In proceedings of this character relief is granted, not as a matter of right, but as a matter of discretion, which is governed by the justice of the case. *Petition of Landaff*, 34 N. H. 163, 176; *Boston & Maine R. R. v. Folsom*, 46 N. H. 64. If the error of law found to exist does not appear to have affected the result of the proceedings in the lower tribunal, justice would not require its correction by a decree quashing the judgment or order rendered. It is for the petitioner to show not merely that error of law has been committed, but that injustice has been done thereby.

[7] Nor will the court quash all the proceedings or make an order broader than is necessary to correct the effect of the error. *Hayward v. Bath*, 35 N. H. 514.

In this case, therefore, so much of the record as declares that Wenzel received 647 votes and Dinsmore 646 is quashed, and the record is amended to show that Wenzel re-

ceived 645 votes and Dinsmore 646. At the present time no other specific order is necessary, since it is presumed the board will take such further action in the matter as is necessary to finally determine the controversy.

Exceptions overruled. All concurred.

CLARK v. WILD et al.

(Supreme Court of Vermont. Orleans. Oct. 18, 1911.)

1. CORPORATIONS (§ 195*)—MEETINGS—QUORUM—STATUTE AND BY-LAWS.

P. S. 4301, applicable to corporations formed by voluntary association, providing that a majority of the stock represented at a meeting of the stockholders shall be a quorum, is not intended to apply merely where there is no by-law providing what shall constitute a quorum; so that a by-law requiring for a quorum a majority of all the shares issued is invalid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 195.*]

2. CORPORATIONS (§ 195*)—MEETINGS—QUORUM—COURSE OF CORPORATE ACTION.

It being provided by statute what shall constitute a quorum for a meeting of stockholders of a corporation, adjourning meetings in recognition of a by-law requiring a greater number of shares for a quorum does not affect the question of what is necessary for a quorum at a subsequent meeting.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 195.*]

3. CORPORATIONS (§ 198*)—MEETINGS—QUORUM—ILLEGAL PROXIES.

All the shares voted at a meeting of stockholders being voted the same way, it is immaterial that some of the shares were voted under proxies not duly executed; a majority of the stock properly represented being a quorum.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 198.*]

4. EVIDENCE (§ 591*)—SECONDARY EVIDENCE—CONCLUSIVENESS ON PARTY INTRODUCING.

One who has introduced oral testimony of matter not objected to, as it might have been, as not being the best evidence, cannot be heard to say that it should not be given such consideration as its natural probative value entitles it to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440-2443; Dec. Dig. § 591.*]

5. CORPORATIONS (§ 194*)—MEETINGS—NOTICES.

The by-laws of a corporation requiring merely that notices of a meeting of stockholders shall be "mailed" a certain time before the meeting, it is immaterial that the notices are not dated.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 194.*]

6. QUO WARRANTO (§ 55*)—COMPLAINT—PRE-SUMPTIONS.

The complaint for quo warranto being required, by P. S. 1972, to set forth the facts warranting the issuance of the writ, it is to be presumed that there was seasonable notice of the meeting, at which there was a purported election of defendants as directors of corporation; the complaint not alleging the contrary.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 55.*]

7. QUO WARRANTO (§ 55*)—BURDEN OF PROOF.

Complainant seeking quo warranto on the ground that defendants illegally hold the office of directors of a corporation must make out a case, and has the burden of showing, if relying on such fact, that there were not proper notices of the meeting at which there was a purported election of defendants.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. § 55.*]

8. CORPORATIONS (§ 194*)—ADJOURNED MEETINGS—NOTICE.

Notices of an adjourned meeting of stockholders of a corporation, not being required by the by-laws or by any statute, are unnecessary.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 194.*]

9. CORPORATIONS (§ 283*)—DIRECTORS—ELECTION—RESOLUTION OF ILLEGALITY.

An election of directors of a corporation being legal, adoption at a subsequent meeting of resolutions, not constituting a reconsideration of the vote of election, but undertaking to create vacancies by resolving that the previous election was illegal, is ineffectual.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 283.*]

10. QUO WARRANTO (§ 6*)—ISSUANCE OF WRIT—DISCRETION.

While within the limit of judicial discretion quo warranto may be refused, though defendant's title to office be shown defective, there is no discretion to issue the writ unless defendant's title be shown defective, though in their office of director of a corporation they have disregarded its interest.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 7; Dec. Dig. § 6.*]

Petition by Simpson Clark for quo warranto against E. B. Wild and others, heard on testimony taken and filed. Complaint dismissed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Young & Young, for petitioner. J. W. Redmond and W. W. Reiriden, for defendants.

HASELTON, J. This is a complaint alleging that each of the defendants illegally holds the office of director of the Percival Furniture Company, a corporation, and that the complainant and six other persons, whose names are set out, are the legal directors of the corporation. The complaint prays judgment in accordance with these allegations, and prays for the issuance of the writ of quo warranto. Conformably to law, the complaint sets forth the facts which it is claimed warrant the issue of the writ. P. S. 1972. The complaint being preferred and prosecuted by a private person, it is, as the law requires, verified by oath. P. S. 1973.

Among the things set forth in the complaint, and admitted by the answer, are the following: The corporation in question was organized under the laws of the state providing for the "formation of corporations by voluntary association." P. S. c. 187. It adopted certain by-laws. These provide that

the annual meeting of stockholders shall be in January of each year, and that the clerk shall give notice of time and place "either personally or by mailing a written notice to each stockholder at his last known place of residence at least ten days before said meeting." The by-laws also provide that directors, seven in number, shall be chosen at each annual stockholders' meeting, and that, if at any such meeting there is no quorum, the directors already in office shall hold over until their successors are chosen. The by-laws further provide that at any legally convened stockholders' meeting representation of one-half of the issued stock shall constitute a quorum for the transaction of business, but that a less representation may adjourn the meeting from time to time until there is a quorum.

At the annual meeting in January, 1910, C. F. Percival, M. A. Owen, E. F. Moody, E. L. C. Percival, E. W. Barron, Bernard M. Small, and Simpson Clark, the complainant, were elected directors of the corporation, and E. F. Moody was elected its clerk. In January, 1911, Moody, the clerk of the corporation, in pursuance of the by-laws, issued and mailed to every stockholder a written notice that the annual meeting for the election of directors would be held at the clerk's office in South Royalton January 31st. At the time and place so appointed less than one-half of the capital stock was represented in person or by proxy. Thereupon the meeting was adjourned to March 21, 1911, at the same place and hour of the day. At the adjourned meeting 68 shares, and no more, were represented. There were issued and outstanding 285 shares of the capital stock. Only two stockholders, E. F. Moody and C. C. Baldwin, were present in person. C. C. Baldwin owned $3\frac{1}{2}$ shares of stock, and held proxies for $61\frac{1}{2}$ shares, and cast his 65 votes for the defendants and one G. C. Baldwin as directors. No other votes were cast.

The validity of this election is the chief question to be determined; and it will first be considered upon the assumption that the allegations and admissions with reference to it, as above recited, are true, and without reference to the evidence, which it is claimed has a modifying effect.

[1] If the by-law declaring what shall constitute a quorum for the transaction of business is valid, then the defendants were never legally chosen as directors, for they were chosen, if at all, at a meeting at which a majority of the capital stock was not represented. But the by-law is not valid, for it is in conflict with the statute applicable to corporations formed by voluntary association which provides that a majority of the stock represented at a meeting of the stockholders shall be a quorum. P. S. 4301. It is argued that the statutory provision just referred to is intended to govern only when there is no by-law that provides what shall constitute a quorum. But to apply such a

principle of construction to the statutory provisions providing for the formation of corporations by voluntary association would, to the extent of its application, defeat the wise and manifest purpose of the statute. The provisions of the general law with regard to corporations organized by virtue thereof are as binding upon it as they would be if written into a special charter; and all by-laws which are inconsistent with the charter of a corporation or with the governing law are void. The principle is fundamental, but a few cases are cited below which illustrate the strictness with which it is applied. *Rex v. Bumstead*, 2 B. & Ad. 699; *Rex v. Tappendan*, 3 East, 187; *Brewster v. Hartley*, 37 Cal. 13, 99 Am. Dec. 237, 240; *Presbyterian Assurance Fund v. Allen*, 106 Ind. 593, 7 N. E. 317; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580, 5 N. E. 634; *Bergman v. St. Paul, etc., Ass'n*, 109 Minn. 275, 13 N. W. 120; *Katz v. M. F. G. Co.*, 183 N. Y. 578, 76 N. E. 1098, affirming same case in 109 App. Div. 49, 95 N. Y. Supp. 633; *Matter of Rapid Transit Ferry Co.*, 15 App. Div. 530, 44 N. Y. Supp. 539; *State v. Bank*, 51 La. Ann. 428, 25 South. 818; *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577, 584; *People v. Tibbets*, 4 Cow. (N. Y.) 358; *People v. Kip*, 4 Cow. (N. Y.) 382, note; *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *State v. Jeassup, etc.*, (Del.) 77 Atl. 16, 30 L. R. A. (N. S.) 290; *Rex v. Darlington School Governors*, 6 Q. B. 682.

The very question here under discussion was decided in *Matter of Rapid Transit Ferry Co.*, 15 App. Div. 530, 44 N. Y. Supp. 539, and note; *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196. The case which the complainant cites in support of his contention that the by-law here in question is valid is *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 10 Atl. 250. In that case a by-law providing that no business should be transacted at a stockholders' meeting without the representation of a majority of the stock was held legal, because, under the statute of Maine, the matter of a quorum was left for the stockholders to determine. The real contention in that case was not over the validity of the by-law, but over the question of the number of shares that should be counted in determining how many were necessary to a majority.

[2] It appeared from the evidence that C. C. Baldwin, who, either for himself or for those whose proxies he held, cast the votes at the election of directors March 21, 1911, then knew of the by-law in question, that the by-laws including this one had been drawn up by W. F. Baldwin, an attorney, and reported for adoption by a committee of which C. C. Baldwin was a member, that some meetings since 1900 had been adjourned for lack of a quorum to transact business. But this and like evidence was immaterial. A course of corporate action may, within the limits of corporate power, modify a by-

law. *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285. But corporative action cannot affect matters which are determined by the general law or by charter. Such matters are beyond the control of the corporation. See *Henry v. Jackson*, 37 Vt. 431. If it appeared that any of the stockholders failed of representation when the defendants were elected directors in consequence of any conduct which amounted to fraud or deception, we should carefully consider the effect of such conduct. But nothing in the nature of fraud appears.

[3] It is claimed by the complainant in that part of his brief given to a statement of facts that certain of the proxies by virtue of which votes were cast at the meeting of March 21, 1911, were not duly executed, and that so no legal votes could be cast by virtue of them. In one case this is clearly the situation, and in some other cases it may be; but the more proxies are treated as insufficient, the less is the number of votes necessary to a majority, and, if all proxies are rejected about which any claim of illegality is raised, the result stands unaffected. The complainant in that part of his brief devoted to the argument of the case bases no claim upon the statement with regard to the insufficiency of some of the proxies. Some parts of the record book of the corporation were introduced in evidence by the complainant. Among other things so introduced was the following: "Record of minutes of a Stockholders' meeting of the Percival Furniture Co. of the — held by order of So. Royalton at Jan. 31, 1811. Agreeable to by law No. 1 stockholders of the Percival Furniture Co are requested to meet at the Clerk's office in So. Royalton, Tues. Jan. 28, 1910, at 8 P. M. E. F. Moody, Clerk. So. Royalton, Vt. Jan. 31, 1910. Agreeable to above call meeting was called to order by E. F. Moody Clerk, as there was not stock enough represented to transact business it was moved by C. C. Baldwin that we adjourn until Mar. 21, at 8 P. M. vote was taken by ballot and was carried 70½ for 2 no. E. F. Moody, Clerk." The foregoing was offered by the complainant as the record of the meeting of January 31, 1911. Assuming that it was so intended, we note some remarkable things about it. It purports to be a "record of minutes" rather than a record of proceedings. It purports to be held "by order of So. Royalton." "At January 31, 1811." It is suggested that "1911" was intended. What purports to be a copy of the notice requests the stockholders to meet on Tuesday, January 28, 1910, at 8 p. m. Now, January 28th did not fall on Tuesday in 1910, nor in 1911. It last fell on Tuesday in 1908. In 1911 the last Tuesday in January fell on the 31st of the month. The record of proceedings at the meeting is dated January 31, 1910. In introducing it counsel for complainant suggested that "1910" should read "1911." It recites that the meeting

was held "agreeable to above call." But, of course, no date could be agreeable to that set out in what purports to be the "call." Assuming that this record was intended to relate to the annual meeting in January, 1911, as quite likely was the case, we are furnished with no record relating to the annual meeting in 1910, nor any record of the annual meeting in 1908, the last year in which the 28th of January fell on Tuesday. The records which are furnished us are of meetings in 1902, 1907, 1909, and 1911. How such a record came to be made up it is impossible to conjecture. How we should construe it if construction of it became necessary we do not undertake to say.

[4] The complainant in his brief claims that no legal meeting was held January 31, 1911, and cites *Stevens v. Eden Meeting House*, 12 Vt. 688, where oral evidence of the posting of warnings and of corporate proceedings was objected to and excluded, and its exclusion was held proper. But, regarding the meeting under consideration here, the complainant has produced oral evidence, and he cannot be heard to say, and does not say, that it should not be given such consideration as its natural probative value entitles it to.

The complainant called as one of his witnesses E. F. Moody, clerk of the corporation at the time of the sending out of notices, and in direct examination took his testimony that he and C. F. Percival together sent out the notices for the annual meeting in January, 1911, and that that meeting was called for January 31, 1911. The complainant called C. F. Percival, above mentioned, and took his testimony about the sending out of the notices for the annual meeting. He testified that he had to do with it, that he knew when the meeting was called for, and it was called for January 31, 1911.

[5] It is immaterial whether the notices were dated or not. The "record" to which reference has been made shows no date to what is there recorded as a notice. What the by-law requires is that the notices shall be "mailed" a certain length of time before a meeting.

[6, 7] It does not expressly appear by the evidence when the notices for the annual meeting on January 31, 1911, were mailed to the stockholders. But the complaint sets out that they were issued and mailed to each and every stockholder in accordance with the by-laws. The complaint is sworn to by the complainant, who makes oath that he has read the same and knows the contents thereof, and that it is true of his own knowledge. It is obvious that he could have had no personal knowledge of many of the things stated in the petition, and this is conceded by his counsel, who attributed the situation to their inadvertence. The defendants insist that because of the erroneous oath the complaint should be dismissed. But as the mat-

ter is presented we decline to act upon that motion. The fact remains, however, that the petitioner may be presumed to know of his own knowledge whether he received a notice of the meeting of January 31st, and, if he received one, when he received it, and whether or not the notice, if received, was correct in every respect. This being so, he has failed to give testimony in this case. In these circumstances it must be taken that the notices were seasonably sent out, for, as has been seen, the statute requires the complaint to set out the facts relied on. Further, the burden was upon the complainant to go forward in the proofs, and to make out a case against the defendants. *State ex rel. Danforth v. Hunton*, 28 Vt. 594. The case cited above was one in which the defendants were charged with having usurped the office of directors in a private corporation. The court there said: "The form of the issue requiring the defendants to show cause would seem to indicate, in form, that the defendants would be required to go forward in the case. But it seems to us that the form of the issue in the case does not correctly define the true position of the parties in regard to the presumption of right. The defendants are in possession of the office in question, and should be presumed regularly elected and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." The result is that all the issues respecting the annual meeting January 31, 1911, whether made by the pleadings or by the evidence, are found in favor of the defendants, and it is established that a meeting was regularly called for that day, was legally held, and was legally adjourned to March 21, 1911. The evidence as to the adjournment, aside from the record, has not been particularly referred to, but both sides introduced evidence on that point without objection, and all the evidence was to the effect above stated.

[8] The petitioner suggests that the stockholders, except C. F. Percival, were not notified of the adjourned meeting. This appears from the testimony of Clerk Moody, who testifies that after the adjournment of the meeting of January 31, 1911, he sent a copy of the proceedings to C. F. Percival, but did not send notices to the stockholders, since he did not find that notices of adjournments had been sent out in previous years. But notices of the adjourned meeting were not necessary, since they were not required by the by-laws nor by any general law.

[9] The meeting of March 21st was adjourned, after the election of directors and a clerk, to March 29, 1911, at the office of W. W. Reirden, in Barton. It is claimed by the complainant that at that meeting resolutions

declaring the election of the directors chosen March 21st to be illegal because not in accordance with the by-laws were read and adopted, and that thereupon a board of directors consisting of the complainant and six others being the same directors who were elected at the annual meeting in January, 1910, were chosen as directors. The doings at this meeting are matter of very conflicting testimony. Three witnesses testify that the resolutions were read and adopted, and five that they were neither read nor adopted. But it is unnecessary to settle the dispute over the doings at this meeting. These resolutions, if adopted, were not a reconsideration of the vote electing directors at South Royaltown on the 21st of March. They undertook to create vacancies by resolving that a previous election was illegal, when, in fact, it was strictly legal. The resolutions, if adopted, were of no sort of effect, and the choice of men to fill vacancies which did not exist was an idle form.

[10] Some testimony was introduced by the complainant to the effect that the defendants had voted salaries to the amount of \$2,500, including \$100 to each director, that the directors had theretofore been paid nothing, and that the aggregate of salaries had theretofore been much less than \$2,500; and it is claimed that by so voting salaries the defendants disregarded the interests of the company, and that their conduct in this regard should be considered on the ground that the issuance of a writ of quo warranto is discretionary with the court. It is true that in a quo warranto proceeding to try the title to an office the writ does not necessarily issue because the defendant's title is shown to be defective. Within the limits of a fairly well-defined judicial discretion, the court may still refuse to grant the writ. But the court has no discretion to issue the writ, unless the defendant's title is shown to be defective.

Complaint dismissed, with costs.

FETTEROLF et ux. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. RAILROADS (§ 348*)—ACCIDENTS AT CROSSING—NEGLIGENCE.

In an action for injuries received at a railroad crossing by being struck by an engine running 50 miles an hour, without signals of any kind, evidence held to sustain judgment for plaintiffs.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138–1150; Dec. Dig. § 348.*]

2. RAILROADS (§ 350*)—ACCIDENTS AT CROSSING—QUESTION FOR JURY.

In an action for injuries at a crossing, the question of defendant's negligence was for the jury, where testimony as to the failure to give signals on the approach of the train, while contradicted by a number of defendant's witnesses,

is of a positive character, by witnesses who were listening.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Columbia County.

Action by Daniel B. Fetterolf and Esther B. Fetterolf, his wife, against the Pennsylvania Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHIS-KER, JJ.

H. M. Hinckley and L. E. Waller, for appellant. Clinton Herring, Fred Ikeler, and Grant Herring, for appellees.

PER CURIAM. The assignments of error all relate to the refusal of the court to direct a verdict for the defendant or to enter judgment for it non obstante veredicto. The facts developed by the plaintiffs' testimony, as far as they are essential in considering the questions raised, are as follows: The plaintiffs were riding in a huckster wagon drawn by two horses, and approached from the north a grade crossing where there were two tracks. The track nearer them was a long siding, on which were two trains awaiting the passing of a special passenger train that was coming from the east. One of the standing trains was a long freight train, composed of high box and coke cars. The other was a passenger train, the last car of which was 40 feet east of the crossing. These cars shut off, from a person north of the crossing and within 400 feet of it, any view of a west-bound train on the main track, except a few inches of the top of the smokestack of the engine, from a point 40 feet east of the crossing to a point 1,900 feet east. When the plaintiffs were about 400 feet from the crossing they looked and listened for a train, and they continued to look and listen as they advanced. They stopped their team at the edge of the siding, with their horses' heads over the first rail, from which point they could see 270 feet east, and leaned forward over the dashboard of their wagon, and looked and listened for a train. As they drove on, their wagon was struck about the middle by an engine running 50 miles an hour, of the approach of which no signal of any kind was given. From the space between the siding and the main track, about 7 feet in width, there was an unobstructed view east for 1,900 feet.

[1, 2] The testimony in relation to the failure to give any signal of the approach of the train, while flatly contradicted by a number of the defendant's witnesses, was not negative merely, by persons who had no occasion to observe, but of a positive character, by witnesses who were listening, and clearly required the submission of the ques-

tion of the defendant's negligence to the jury. Whether there was a failure of duty by the driver was also for the jury. He did not act heedlessly, but with care, in approaching the crossing and he stopped as close to the track as was possible without placing himself in danger. While his view of the main track was limited, there was nothing to interfere with his hearing an approaching train. Whether, under the circumstances, he should have done more, was not a question for the court. *Barthelmas v. Railroad Co.*, 225 Pa. 597, 74 Atl. 556.

The judgment is affirmed.

FIRST NAT. BANK OF BLOOMSBURG v. GERLI.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. BANKS AND BANKING (§ 183*)—DISCOUNT—PRESUMPTION.

A bank has the right to assume that an ordinary person, presenting for discount, before maturity, a note made by himself and indorsed by the payee, is the owner, and that the payee is an accommodation indorser, and may pay the money to the person in possession, or credit it to his account; but, where the cashier of the bank presents such paper, and the payee indorser is a depositor who has been in the habit of doing business with the bank, the possession of the note by the cashier raises no presumption that he is the owner; the presumption being rather that it has been handed to him by the depositor for discount for his own credit.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 183.*]

2. BANKS AND BANKING (§ 183*)—DISCOUNTS—INDORSEMENT—LIABILITY OF INDORSEER.

Where the cashier of a bank presented to the bank, for discount, a note made by himself and indorsed by the payee, who was a depositor of the bank, and had been in the habit of doing business with it, and the bank knowingly credited the entire proceeds of the paper to the personal account of the cashier, and the payee never received any value therefor, judgment is properly entered for the payee, in an action by the bank against him on the note.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 183.*]

Appeal from Court of Common Pleas, Columbia County.

Action by the First National Bank of Bloomsburg against Emanuel Gerli, administrator cum testamento annexo of the estate of Joseph Ratti. From a judgment non obstante veredicto for defendant, plaintiff appeals. Affirmed.

Assumpsit to recover on a promissory note.

The plaintiff averred in its statement of claim "that E. F. Carpenter, on August 7, 1906, * * * made and delivered to Joseph Ratti, now deceased, * * * his promissory note, whereof the following is a copy: 'No. 7531. Bloomsburg, Pa., Aug. 7, 1906. Four months after date I promise to pay to the order of Joseph Ratti, \$5,000, five thou-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sand dollars, at the First National Bank of Bloomsburg, Pa. Due December 7, 1906. Without defalcation for value received. [Signed] E. F. Carpenter; that said Joseph Ratti, on August 8, 1906, * * * indorsed and delivered said note to the plaintiff, * * * and that the said bank thereupon took and now holds the said note in due course, for value received; that when said note became due * * * said note was duly presented for payment, * * * but that neither said E. F. Carpenter, nor any person or persons on his behalf, did or would * * * pay the said sum of money; * * * that said Joseph Ratti * * * had waived notice; * * * by means whereof the said Joseph Ratti then and there became liable. * * *

The testimony produced by the plaintiff, as to the circumstances surrounding the discount of the note, showed that the name indorsed on the back of the paper was the signature of Joseph Ratti. The teller of the plaintiff bank testified: "Q. By whom and when was this note presented to the First National Bank for discount? A. By Mr. Carpenter. Q. Can you tell me the date when it was brought into the bank by Mr. Carpenter for discount? A. On August 7, 1906. Q. Who discounted the paper? A. I discounted the paper. Q. That is part of your duties? A. Yes, sir. Q. In what capacity did Mr. Carpenter bring this note in for discount? I mean whether as an individual or as an officer of the bank? A. It was handed to me by Mr. Carpenter, individual, to place in my drawer for the purpose of discounting. Q. The E. F. Carpenter, who was cashier of the bank, is the same party whose signature appears attached to the note? A. Yes, sir. Q. As cashier of the bank, Carpenter was your superior officer? A. He was. Q. In connection with that part of the work that you did, as I believe you stated, discount clerk, you were also subject to the order and direction of Mr. Carpenter, the cashier? A. I was. Q. You have testified that on the August 7, 1906, Mr. Carpenter presented to you this note for discount, and that he presented it to you in his individual capacity. How do you know that? A. That would be hard to separate the two; whether he so specified at that time, I have no recollection. He handed it to me for his individual credit. Q. It was credited to his individual credit by his direction? A. Yes, sir. Q. In other words, you acted pursuant to his instructions in discounting this note? A. Yes, sir. Q. As a matter of fact, * * * Carpenter, the cashier of the bank at that time, had charge of this transaction, and directed what should be done about it? A. As cashier of the bank." Testimony given by Mr. Carpenter, the maker of the note, at a prior trial, was introduced by the defendant, and showed: "Q. Who did discount this paper for the First National Bank? Who had charge of that transaction? A. I did. Q. In your official capacity as cashier of that bank?

A. Yes, sir." The following admission appears upon the record: "It is admitted by all parties that the proceeds of the note in suit * * * were, on the date of its discount, placed to the credit of E. F. Carpenter in the First National Bank, * * * and that no part of it was credited to Joseph Ratti. It is also agreed that such entry of credit was made in the usual form and in the regular course of the business of the bank. * * * This agreement, however, not in any way to prejudice or deprive the defendant of the right of denying or questioning the right or authority or propriety of the bank to make such application of the proceeds."

The defendant presented the following points: "(1) It appearing from the testimony in this case that the note sued on was the promise of E. F. Carpenter to pay to Joseph Ratti, or order, the sum of \$5,000, for value received, that the said note was indorsed by Ratti and discounted by the authority and under the direction of E. F. Carpenter, the then cashier of the plaintiff bank, the presumption would be that when the note was discounted it was for the benefit of Ratti, and that the proceeds ought to have gone to his credit. (2) It appearing from the testimony in this case that Carpenter, the maker of the note in question, as cashier of the plaintiff bank, had charge of the discount of said note, and directed that the proceeds thereof be placed to his individual credit, which proceeds on the face of the note he ought not to have received, there can be no recovery by the plaintiff in this case. (3) The note in question, being on its face an absolute promise by Carpenter to pay Ratti or order \$5,000 for value received, and plaintiff admitting that the proceeds of the note were not paid to or credited to Ratti, but that the proceeds were credited by the plaintiff bank to Carpenter, the maker thereof, and there being no testimony on the part of the plaintiff to show that Ratti's indorsement of said note was for Carpenter's accommodation, there can be no recovery by plaintiff in this case, and the verdict must be for the defendant. (4) Under all the evidence in this case, the verdict of the jury must be for the defendant."

The trial judge directed a verdict for the plaintiff, saying: "We think we will take the verdict and reserve a point whether or not the plaintiff is entitled to recover. We will refuse the first three points of the defendant and reserve the last." Subsequently the court below filed an opinion in which it decided, "The defendant's points should have been affirmed and a verdict directed for the defendant." Judgment non obstante verdicto was entered accordingly. Plaintiff has appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHISZKER, JJ.

Fred Ikeler and Clinton Herring, for appellant. John G. Harman and Richard E. Dwight, for appellee.

MOSCHZISKER, J. When this case was here before (225 Pa. 256, 74 Atl. 52), we said: "From the note itself, it is clear that Ratti's indorsement was not for the accommodation of Carpenter. * * * The instrument, without parol testimony to vary it, is an absolute promise of Carpenter to pay Ratti \$5,000 for value received. At the time * * * Ratti delivered the note to him, Carpenter was the cashier of the bank, and the presumption would be that when the note was discounted it was for the benefit of Ratti, and that the proceeds ought to have gone to his credit." It is now urged upon us that this conclusion of law should be reversed, for the reason that the proper legal presumption would be that Carpenter was the owner of the note, and that Ratti was an accommodation indorser; and the appellant further contends that, if this view is not taken, then, in the absence of evidence to show that the bank had actual notice of the fact that Carpenter was the owner of the note, it should not be held liable for his wrongful diversion of the proceeds.

After a consideration of all the authorities called to our attention, the negotiable instrument act of May 16, 1901 (P. L. 194), and the rules of the law merchant, we discover nothing that requires a reversal of the view taken by this court upon the former appeal; in fact, we find no written authority bearing directly upon the state of facts before us, either upholding or denying the rule of presumption then announced.

It is for the courts not only to administer the written law, but to ascertain and apply the underlying principles of right and justice to conditions not expressly provided for when they appear. None of the cases cited by the appellant in support of the rule that, when a maker presents an indorsed note for discount, it is to be presumed that the payee is an accommodation indorser, and that the maker has possession of the note with power to receive the proceeds (*Parke v. Smith*, 4 Watts & S. 287; *Eckert v. Cameron*, 43 Pa. 120; *Mullison's Estate*, 68 Pa. 212; *Mishler v. Reed*, 76 Pa. 76; *Connelly v. McKean*, 64 Pa. 113; *Helzer v. Helzer*, 193 Pa. 217, 44 Atl. 281; *Mass. Nat. Bank v. Snow*, 187 Mass. 159, 72 N. E. 959), is an instance where the maker was the cashier and superior discount officer of the discounting bank, and where the payee and indorser was a depositor of the institution, who would naturally present paper to such cashier in his official capacity, for the purpose of discount; for that reason, the general rule announced in these cases has no application to the facts at bar.

[1] If the mere possession of commercial paper by one who is cashier of a discounting bank would justify the application of the rule

that, "where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed," so that paper thus found would be presumed to belong to such a holder in his individual capacity, every man dealing with a banking institution would be obliged actually to take the currency from the bank, instead of having it credited on his account, for fear the cashier would make away with the proceeds of paper handed to him for discount. A rule of law which would admit of the possibility of such a situation would be impracticable, intolerable, and contrary to the dictates of right and justice; further, it would afford no adequate protection to the mercantile world, and such security is the guiding thought back of all the principles governing the rules applicable to commercial paper. The provisions of the negotiable instrument act were never intended to be so applied.

When an ordinary person presents for discount, before maturity, a note made by himself and indorsed by the payee, the bank has the right to rely upon the presumption that he is the owner of the paper, and that the payee is an accommodation indorser, and it may pay the money to the party in possession of the note, or credit it to his account with safety. But, where a cashier of a bank presents such paper to his own institution for discount, and the payee and indorser is a depositor of the bank, who has been in the habit of doing business with it, the possession of the note by the cashier raises no presumption that he is the owner of the paper; on the contrary, the presumption is that it has been handed to him for the purpose of discount for the depositor's credit. Such was the rule laid down on the previous appeal in this case, and there was no competent evidence produced at the trial under review sufficient to overcome this presumption.

[2] It was admitted that Ratti never received any value for the note from the plaintiff bank, and that the bank knowingly credited the entire proceeds of the paper to the personal account of its cashier. Under the circumstances disclosed by the record, neither *Chestnut St. Trust & Sav. Fund Co. v. Record Publishing Co.*, 227 Pa. 235, 75 Atl. 1067, 136 Am. St. Rep. 874, nor *Gunster v. Heat & Power Co.*, 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650, governs the facts at bar. In these cases there was nothing on the face of the transaction to suggest scrutiny, and, if an investigation had been made, ample apparent power to issue the paper and to receive or control the proceeds would have been found vested in the party who perpetrated the fraud; while here, under the law as we have ruled it, the note bore evidence that it belonged to the payee and indorser, and, had the bank inquired, it might have discovered that its cashier had no power to direct a diversion of the proceeds to his own

credit. No more does *United Security Life Ins. & Trust Co. v. Bank*, 185 Pa. 586, 40 Atl. 97, control the present case; there we expressly said: "Of course, it is to be noted that this is not the case of an act done by an agent authorized, or apparently held out to the world as authorized, to do it, such as the illustration in the argument of the appellee of the receipt of a depositor's money by the receiving teller of a bank. There the act, being within his authority, is the act of the bank, which would therefore be responsible, though the teller subsequently embezzled the money." None of the cases cited by the appellant rules the present one; on the facts in this case, the loss, if any, must fall upon the plaintiff bank, and not upon the defendant's estate.

Since the court below entered judgment in favor of the defendant, the question of the competency of Carpenter, as a witness, to show that Ratti had waived notice of non-payment is not properly before us, and will not be passed upon.

The assignment of error is overruled, and the judgment is affirmed.

LEITZELL v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. DAMAGES (§ 182*)—EVIDENCE—PERSONAL INJURIES.

In an action to recover for personal injuries, evidence as to the probability of a cure of an otherwise permanent injury by a simple surgical operation is not to be received in mitigation of damages, but to show the actual damage sustained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 500; Dec. Dig. § 182.*]

2. DAMAGES (§ 214*)—PERSONAL INJURIES—INSTRUCTIONS.

Where, in an action for personal injuries, the evidence tended to show that the permanent injury alleged could be cured by a surgical operation, which a reasonably prudent man should submit to, an instruction that, if plaintiff's condition can be relieved by such operation, that fact must be considered as an element which would reduce the damages to which plaintiff would otherwise be entitled should have been given.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 542; Dec. Dig. § 214.*]

Appeal from Court of Common Pleas, Columbia County.

Action by Melvin A. Leitzell against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

J. H. Oliver, H. M. Hinckley, A. C. Jackson, and D. R. Reese, for appellant. Fred Ikeler and Clinton Herring, for appellee.

POTTER, J. [1, 2] The only question raised by this appeal is as to the basis upon which the damages for the injury sustained by the plaintiff should be computed. Evidence upon the part of the plaintiff was offered, tending to show that the injury to his knee is permanent, and that it will be so, unless a surgical operation be performed, was practically conceded. Upon the part of the defendant, there was evidence tending to show that the injury could be cured by a surgical operation, to which a reasonably prudent man ought to submit; and it was contended that by reason of that fact, in estimating the amount of the damages, the injury should not be regarded as necessarily permanent. The theory of the defendant in this respect was formulated in the third point for charge presented by counsel, as follows: "If the jury believe that the condition of the plaintiff can be relieved by a simple surgical operation, which an ordinarily prudent man would undergo, such facts must be taken into consideration as an element which would reduce the amount of damages to which the plaintiff would otherwise be entitled." The trial judge answered this point by saying: "The point is affirmed, providing the jury find that the proposed surgical operation is not a serious or dangerous one, and one that can be performed without any risk of failure or danger to the plaintiff. Otherwise it is refused." We think the point should have been affirmed without qualification. It referred to "a simple surgical operation, which an ordinarily prudent man should undergo." The answer ignored the feature as to what an ordinarily prudent man would do, and instructed the jury not to consider the matter, unless they found that the proposed operation was not serious or dangerous, and could be performed without any risk of failure or danger to the plaintiff. This we think was going too far. The plaintiff of course was entirely at liberty to refuse to submit to an operation; but, if the effect of his refusal would be to retain permanently a condition which might be removed by a simple operation, which an ordinarily prudent man would, under the circumstances, undergo, that matter should certainly be taken into consideration by the jury in estimating the damages. No compensation should be allowed for damages that might reasonably be averted. In *Watson on Damages for Personal Injuries* (1904) § 184, the rule is stated as follows: "It is the duty of an individual, injured by the wrongful act of another, to exercise reasonable judgment and prudence in securing medical or surgical aid, if the injuries are of a nature to render such treatment necessary or expedient. And there can be no recovery of any damages resulting from a failure to comply with this rule." Evidence as to the probability of a cure by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

means of a simple operation is not to be received in mitigation of damages, but as a proper method of showing the actual damages sustained. If the plaintiff could be cured by an operation reasonably safe, and one which would commend itself to the judgment of a prudent man, the injury would certainly be less serious than one for which no hope of cure existed.

The trial judge relied upon the decision in *Kehoe v. Traction Co.*, 187 Pa. 474, 41 Atl. 310, to sustain his ruling. But the points affirmed in that case related only to serious and critical operations, attended by risk of failure. They did not contemplate simple operations, which an ordinarily prudent man would undergo. That point does not seem to have been squarely raised or decided in the case last mentioned. The real point made was whether the charge was inadequate and misleading upon the questions involved in the third and fourth specifications of error, and it was decided that the charge was neither inadequate nor misleading.

In the present case, we think the defendant's third point presented a proper view of the law, and that it should have been affirmed without qualification.

The judgment is therefore reversed, with a *venire facias de novo*.

ISETT v. MEEHAN et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. STATES (§ 191*)—CONFLICTING JURISDICTION—SUIT AGAINST STATE.

A suit to restrain the commissioner of fisheries from diverting the waters of a creek for the purposes of a hatchery plant, in violation of a reservation in a deed from plaintiff to the commonwealth, is not a suit against the state, though the commissioner was sued in his official capacity, but was to prevent him from violating a covenant in the performance of merely ministerial duty.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

2. WATERS AND WATER COURSES (§ 179*)—FLOWAGE—INJUNCTIVE RELIEF.

Where a conveyance by plaintiff to the commonwealth, for use of the department of fisheries, reserved the right to the uninterrupted flow of water from a creek into a race to supply power for plaintiff's gristmill, and on a bill, alleging that the commissioner of fisheries intended to divert the waters of a creek for the purposes of a hatchery plant, in violation of the reservation, and to the irreparable injury of plaintiff, the uncontradicted testimony showed that his purpose was to take water from the stream only when it was running over the top of the dam, when water sufficient to run the mill would pass down the race, defendant should be enjoined from diverting water from the creek only when the waters were not running over the top of the dam.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 256-264; Dec. Dig. § 179.*]

Appeal from Court of Common Pleas, Huntingdon County.

Bill in equity by Sidney T. Isett for an injunction against William E. Meehan, Commissioner of Fisheries, and others. From a decree granting the injunction, defendants appeal. Modified.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John D. Dorris and William M. Hargest, Asst. Deputy Atty. Gen., J. E. B. Cunningham, Deputy Atty. Gen., and John C. Bell, Atty. Gen., for appellants. Howard L. Henderson and H. H. Waite, for appellee.

BROWN, J. By deed, dated January 29, 1906, Sidney T. Isett, the appellee, conveyed to the commonwealth, for the use of the department of fisheries, 27 acres and 20 perches of land near the village of Spruce Creek, in Huntingdon county; the land conveyed including the stream of Spruce creek. On this land the state has erected a fish hatchery plant. A gristmill and dam of the appellee are located further down Spruce creek, at a point about 200 feet from the southern line of the commonwealth's property. The race for this mill leaves Spruce creek at the breast of the appellee's dam, and is included within the boundaries of the hatchery property for nearly its entire length. In the conveyance from the appellee to the commonwealth, there is the following reservation: "And reserving further from this conveyance the right to the uninterrupted and perpetual flow of the water of Spruce creek into and through the said headrace from the western course of Spruce creek to the Isett gristmill at Spruce Creek of the same height, width, depth and capacity as now constructed, used and maintained, to furnish water and power to said gristmill." The appellee filed his bill in the court below, averring that the commissioner of fisheries had directed the digging of trenches or ditches to connect the milldam of the appellee and Spruce creek with a proposed feedmill on the hatchery plant, for the purpose of operating that mill by water power, and that by so doing the said commissioner was violating the reservation in the deed and working irreparable injury to the appellee. The workmen under the commissioner were made defendants with him. The court below, having found that what he proposed to do would, if carried out, divert a large quantity of water from the millrace which conveys the water to the complainant's mill, and thereby seriously impair and work irreparable injury to the water power at the mill, awarded the injunction appealed from, which restrains and enjoins the appellants "from diverting any water from the stream of Spruce creek, by pipes, trenches, drains, or otherwise, so that the same

cannot pass into and through the race leading to the gristmill of the complainant, or from doing any other act or acts whatsoever that would carry from said stream of Spruce creek any water that would otherwise pass down the stream to and through the mill-race connected with the gristmill, or interfere in any way with the water power belonging to the complainant, or doing any other act or acts whatsoever that would in any way injure or interfere with the water of the said stream of Spruce creek belonging to the complainant, and which is appurtenant to his said gristmill."

[1] This proceeding is not against the commonwealth, and Williamsport & Elmira Railroad Co. et al. v. Commonwealth et al., 33 Pa. 288, is not authority for the contention of the appellant, that the bill ought to have been dismissed for want of jurisdiction in the court to entertain it. While it is against Meehan in his official capacity as fish commissioner, it is not to enjoin him from discharging any official duty imposed upon him by statute, but is to prevent his performing what is to be regarded as a mere ministerial duty, under the general powers and discretion conferred upon him, and if in doing so he defies a covenant between the state and the appellee he cannot shield himself under the plea that the state is being sued.

[2] The manifest and sole purpose of the reservation was to preserve undiminished to the appellee the water power at his mill. The land which he conveyed to the commonwealth included so much of Spruce creek as runs through it, and on the banks of that stream, within the boundaries of the commonwealth's land, the fish commissioner would divert the waters of the stream, for the purpose of supplying a need of one of the state's fish hatcheries. In doing so, he did not propose to divert the water permanently from the creek, but, according to his testimony, intended to return it to the stream above the breast of the dam. The return of the water, however, to the creek, whether above or below the dam, is not material in passing upon the right of the appellee to the sweeping injunction decreed by the court below.

The purpose of the reservation in the deed, as already stated, was the preservation of the mill's water power as it existed at the time the conveyance was made. The water was to continue to flow uninterruptedly and perpetually through the race as it was then constructed, "in height, width, depth and capacity," "to furnish water and power" to the mill. Equity will not permit the purpose of the reservation to be defeat-

ed, and if, as a matter of fact, irreparable injury would result to the appellee, as he avers in his bill, by permitting the fish commissioner to do what he proposes to do, a chancellor will protect him in his rights. On the other hand, if what the commissioner proposes to do, or what he ought to be permitted to do, will not in any degree interfere with or impair the water power conveyed to the mill through the race, the appellee will sustain no injury, and the patent purpose of the reservation will not be interfered with. So long as the water flows over the dam, the power to run the mill passes down the race, and the purpose of the fish commissioner was to take water from the stream only when it was running over the top of the dam. This the court below ought to have found as a fact from Meehan's uncontradicted testimony, and the further finding ought to have been that he did not intend to draw water from the stream when it was below a mark that he had ordered his superintendent to place at the head of the race. If the water is taken from the stream only when these conditions exist, how can it be said that the appellee will suffer any injury? Though the unimpaired water power passing down the race will continue to drive the wheels of his mill, he asks that the appellants be enjoined from doing that which can do no harm to him, and will do good to the state, and he asks this because, he insists, it is so nominated in the bond. Even the cold eye of the law cannot so read it, and equity surely will not so construe it. The court below properly found, upon the request of the appellants, that "the commonwealth has the right to the ordinary use of the water of Spruce creek for the purpose of supplying the natural wants of her Spruce Creek hatchery, located on the lands purchased from the plaintiff, provided she does not violate the covenant in said deed with reference to the flow of water in the raceway;" but an inconsistent decree followed this finding, sustaining the contention of the appellee that the reservation prevents the use by the state of the waters of the stream above the breast of the dam under any conditions. That decree must be modified, and we do now modify it by ordering, adjudging, and decreeing that the appellants are enjoined from diverting any water from the stream of Spruce creek, by pipes, trenches, drains, or otherwise, only when the waters of the said creek are not running over the top of the dam; one half of the costs below and on this appeal to be paid by the appellants, and the remaining half by the appellee.

YODER v. COLE.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. APPEAL AND ERROR (§ 194*)—NECESSITY OF OBJECTIONS.

A judgment for defendant on his plea in bar, which was treated by the court as a demurrer to plaintiff's statement, will not be disturbed on appeal, because the plea was not disposed of according to the usual rules, where the plaintiff made no objection to the procedure.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 194.*]

2. TORTS (§ 13*)—RIGHT OF ACTION FOR FALSE OATH.

An action cannot be maintained for giving false answers under oath to interrogatories addressed to defendant as garnishee, and later giving testimony as to the same matter, with intent to injure plaintiff.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 14-17; Dec. Dig. § 13.*]

Appeal from Court of Common Pleas, Clearfield County.

Action by W. H. Yoder against A. L. Cole. From a judgment for defendant on plea in bar, plaintiff appeals. Affirmed.

The cause of action averred by the plaintiff was that the defendant, with intent to injure the plaintiff, made false answers under oath to interrogatories addressed to himself as garnishee, and later gave false testimony as to the same matters on the witness stand in an action by the plaintiff against a third party. The defendant filed a plea in bar, denying the allegation in plaintiff's statement, and also denying that the legal effect of said allegations was to give the plaintiff a right of action.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. C. Pentz and W. L. Calkins, for appellant. Smith V. Wilson, for appellee.

PER CURIAM. [1] The judgment for the defendant was on his plea in bar of the action. No question was raised to the form of the plea, and it was treated by the court below as a demurrer to the plaintiff's statement. This, so far as we can gather from the record, was done without objection from the plaintiff, and the judgment will therefore not be disturbed because the plea was not disposed of according to the usual rules of pleading.

[2] No precedent can be found for the action brought by the appellant, and the authorities are uniform in holding that it cannot be maintained, many of which are to be found in the opinion of the Supreme Court of North Carolina in *Godette v. Gaskill*, 151 N. C. 52, 65 S. E. 612, 134 Am. St. Rep. 964, and the notes to said case in 24 L. R. A. (N. S.) 265. "It would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness therein; and, more than that,

witnesses would be intimidated, if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses." *Clark, C. J., in Godette v. Gaskill, supra.* "Public policy and the safe administration of justice require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, excepting that imposed by the penalty for perjury." *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231.

Judgment affirmed.

HOCH v. BUTLER TP.

(Supreme Court of Pennsylvania. July 6, 1911.)

HIGHWAYS (§ 218*)—DEFECTS—QUESTION FOR JURY.

In an action against a township for injuries to plaintiff by falling from a heavily loaded wagon on which he was riding down a steep grade, because of the defective condition of the highway, the question of the township's negligence held for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 218.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by Nelson Hoch against Butler Township. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

F. W. Wheaton, Roger Dever, P. F. O'Neill, and Philip L. Drum, for appellant. John McGahren and John M. Carr, for appellee.

PER CURIAM. The plaintiff was injured by falling from a heavily loaded wagon on which he was riding down a steep grade on a rough mountain road. The road had been in very bad condition for months, and the township supervisors had both constructive and actual notice of its defects. The gutters at the sides had become filled with earth, and the surface water from rains had been diverted to the middle of the road, where it had made small gullies and washed the earth from the stones in the roadbed. A front wheel of the plaintiff's wagon struck the thin edge of a wedge-shaped stone, a foot in length and 7 inches in width at its thicker end, and pushed it on the top of other large stones, raising the wheel 18 or 20 inches. It was shown that stones of like size were in the roadbed in the immediate vicinity. There was, however, no proof of the length of time the particular stones which caused the accident had been in the road. Nor was such proof necessary to make out a *prima facie* case. If these stones had been on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an otherwise even surface, there might have been a presumption that they had been placed there by a teamster to block his wagon while resting his horses, or had slid down from the steep banks. But their presence in the road was not a specific defect, presumably of recent origin. They were a part of a defective condition common to the road generally.

The case was submitted to the jury with great care, and we find no error in the record.

The judgment is affirmed.

OWENS v. AMERICAN NATURAL GAS CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MINES AND MINERALS (§ 73*)—OIL LEASE—CONSTRUCTION.

Under an oil lease describing land as bounded by certain other lands, "being all of said farm with the exception of 50 acres, being the northwestern portion thereof, containing 153 acres, more or less," the northwestern 50 acres were excepted; the phrase "being in the northwestern portion thereof," referring to its immediate antecedent, the excepted 50 acres, and not to the tract conveyed.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.*]

2. MINES AND MINERALS (§ 78*)—OIL LEASE—CONSTRUCTION.

Where an oil lease provides that all wells must be located at a point satisfactory to both parties, but the only violation of the lease, or dissatisfaction averred in a bill to restrain the drilling of a well, referred to the wrongful drilling of the well on a portion of the tract reserved to the grantor, an indefinite, unexplained, and arbitrary dissatisfaction, not specifically averred in the bill, cannot be relied on to show error in refusing the injunction.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 78.*]

Appeal from Court of Common Pleas, Armstrong County.

Bill in equity by Hugh G. Owens against the American Natural Gas Company. From a decree sustaining a demurrer, the plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

Harvey A. Miller and Edwin L. Dively, for appellant. Walter Lyon and Helner & Golden, for appellee.

MOSCHZISKER, J. The decision of the matter before us requires the interpretation of a written instrument. The plaintiff owned certain land, which he let for oil development. The lease described the property as follows: "All that tract of land situate in the township of Kiskiminetas, county of Armstrong, Pennsylvania, bounded north by lands of Apollo borough and public road; east by lands of William McKinstry et al.; south by lands of William McKinstry

et al.; west by lands of Apollo borough et al.—being all of said farm with the exception of 50 acres, being the northwestern portion thereof, containing 153 acres, more or less." The defendant built a rig and was proceeding to drill a gas well on the southwestern corner of the tract, when the plaintiff obtained a preliminary injunction, alleging that the well was within the 50 acres excepted from the demised land. The injunction was dissolved, and the defendant demurred to the bill, upon the ground that "the lease * * * shows upon its face that the portion of this land upon which the defendant entered for the purpose of drilling the well * * * is included in the land upon which the defendant has the leasehold." The court below sustained the demurrer and dismissed the bill.

[1] The question is as to the location of the 50 acres excepted from the lease. The plaintiff contends that it is in the southwestern part of the tract where the gas well is drilled, while the defendant contends that the lease clearly located the 50 acres in the "northwestern portion thereof." The written instrument plainly excepts the northwestern 50 acres. The whole tract had an area of 203 acres, and after the 50 acres were taken out it then contained the 153 acres intended to be let; the excepted part being the 50 acres in the northwestern portion of the tract. This construction refers the phrase "being in the northwestern portion thereof" to its immediate antecedent, the excepted "50 acres." The phrase cannot be referred to the 153 acres on any reasonable construction, for that would place three-fourths of the land in the northwestern portion of the whole tract, which would be an impossible situation. The ordinary rules of interpretation require the construction which we place upon the description contained in the lease, and there is nothing in the evidence called to our attention which would demand any other.

[2] The lease contains a covenant that "said lessee shall also pay an acreage rental for said land of \$1 per acre, viz., \$153 per annum, * * * provided that each producing well drilled on said land shall suspend the acreage rental on 51 acres of said farm, so long as the well rental or royalty above provided for is paid. All wells to be located at points satisfactory to both parties. * * *" The court below decided that this provision as to the location of the wells "was never intended to apply to such a controversy as has now arisen. It applies to the rent or royalty, and was put in to protect both parties as to the acreage royalty or well royalty, as the case might be, after one or more test wells were put down." It is not necessary to decide whether or not this is the proper construction, for the only violation of the lease, or dissatisfaction,

averred in the bill, manifestly refers to the alleged wrongful drilling of a well "upon the tract of 50 acres reserved and excepted to your orator under the lease," and not to the location of a well on the land demised at a point which was unsatisfactory to the plaintiff for some other reason, or for general reasons. An indefinite, unexplained, and perhaps arbitrary dissatisfaction, not specifically averred in the bill, cannot be relied upon to convict a chancellor of error in refusing an injunction.

The assignments of error are all overruled, and the decree of the court is affirmed, at the cost of the appellant.

RUSSELL & CO. v. BOODY.

(Supreme Court of Pennsylvania. July 6, 1911.)

SALES (§ 363*)—DELIVERY OF PROPERTY—SUFFICIENCY.

Where an engine owned by plaintiff was in the possession of a lessee with power to purchase, and the lessee became financially involved and was in default in the payment of rent, and made an arrangement with plaintiff to transfer the engine subject to plaintiff's rights, and defendant signed an agreement with plaintiff, providing, after a recital of the lease, the lessee's inability to pay, and that an arrangement had been made with defendant to transfer the engine to him, that the defendant should take possession of and purchase the engine with attachments, taking it where it was and as it was, and defendant gave plaintiff his notes in payment, though there was no formal approval of the agreement by the plaintiff, a judgment was properly directed for him on the notes as against the defense of failure of delivery; no actual delivery of the engine being necessary under the written agreement.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 363.*]

Appeal from Court of Common Pleas, Columbia County.

Action by Russell & Co. against L. H. Boody. From a judgment on the verdict for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Frad Ikeler, for appellant. Grant Herring and Clinton Herring, for appellee.

PER OURIAM. This action was on two notes given by the defendant, L. H. Boody, to the plaintiff, in payment for a traction engine. The defense was a failure of delivery. The engine belonged to the plaintiff, and was in the possession of W. H. Stetler, the lessee, with the right to purchase. Stetler became financially involved, and was in default in the payment of rent to the plaintiff. He sold to the defendant all of his personal property, and arranged with him for the transfer of the engine, subject to the plaintiff's right thereto. The overwhelming weight of the testimony was that the

defendant received possession of the engine, placed his engineer in charge of it, used it in his business, and exercised all the acts of complete ownership in relation to it. This branch of the case and the rulings of the trial judge in relation to questions arising out of it need not be considered, as we are of opinion that under the written agreement of sale actual delivery was not essential.

This agreement was signed by the defendant and Stetler, and sent to the plaintiff for its acceptance. It provided, after a recital of the lease to Stetler, his inability to pay, and that an arrangement had been made with the defendant to transfer the engine to him, that the defendant should "take possession of and purchase the said engine, with attachments and fixtures as above described, taking the same where it is and as it is," and give the plaintiff his notes in payment. There was no formal approval of this agreement by the plaintiff, but by its acceptance of the defendant's notes it consented to the arrangement he had made with Stetler, and gave up to him all its right and title to the engine. There was nothing more for the plaintiff to do. It had parted with its title on the faith of the arrangement the defendant had declared that he had made with Stetler. It follows that it was not error to direct a verdict for the plaintiff.

The judgment is affirmed.

NEW CUMBERLAND BOROUGH v. RIVERTON CONSOL. WATER CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL WATER SUPPLY—ACQUISITION OF WORKS—CONSTRUCTION OF ORDINANCE.

Where a borough ordinance, giving a franchise to enter on the streets to supply water to the borough and its inhabitants, provides that the borough shall have the option, before all other persons or corporations, to purchase the plant of the grantee of the franchise at the end of 10 years, as provided by the existing laws of the state, and, if no purchase is made at the end of 10 years, the ordinance shall remain in full force until the waterworks are purchased by the borough, the borough has the right to acquire the water plant on the terms provided in Act April 29, 1874 (P. L. 73), at any time after 10 years, instead of at any time after 20 years as fixed in the statutes.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183.*]

2. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL WATER SUPPLY—ACQUISITION OF WORKS—ACCEPTANCE OF ORDINANCE.

Where water companies, incorporated after the passage of an ordinance granting a franchise to enter on the streets to supply water to the borough and its inhabitants, as assignees of the franchise, have accepted and assumed the benefits and obligations of the ordinance and installed a plant thereunder, they are presumably subject to its provisions and bound thereby, even though they had a charter right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under Act April 29, 1874 (P. L. 73) to enter the borough and install their plant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 183.*]

3. EQUITY (§ 48*)—JURISDICTION—ADEQUATE REMEDY AT LAW—MANDAMUS.

Equity has no jurisdiction to compel a water supply company to sell its plant under a special contract and to render a statement of the cost of erecting and maintaining its works; the appropriate remedy being at common law by mandamus.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 48.*]

4. APPEAL AND ERROR (§ 1106*)—DISPOSITION OF CAUSE—MANDATE TO TRIAL COURT.

Where an appeal from a decree in equity is by the plaintiff, and the contention that suit should have been brought at law is not raised, and the question presented to the Supreme Court is not whether the decree shall be reversed or set aside, but simply whether the appeal shall be dismissed, the case is not within Act June 7, 1907 (P. L. 441) § 3, providing that if, on an appeal, after a decision on the merits, the question whether the suit should have been brought at law is not specifically raised by the defendant's assignments of error, it shall be deemed to have been waived, and the decree shall not be reversed or set aside because suit should have been brought at law, and hence the decree of dismissal in the present case will not be disturbed; the proper remedy being at law.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1106.*]

Appeal from Court of Common Pleas, Cumberland County.

Bill in equity by the Borough of New Cumberland against the Riverton Consolidated Water Company and another. From a decree sustaining a demurrer, the plaintiff appeals. Affirmed.

Bill in equity to compel the defendant company to sell its plant to the plaintiff borough and to render to it an itemized statement of the net cost of erecting and maintaining its works, together with a detailed statement of dividends declared, and to exhibit such books, accounts, etc., as might be necessary to verify the statement so made.

The material facts are stated in the following excerpt from the opinion of the court below:

"On January 20, 1896, an ordinance was passed by the borough of New Cumberland, the plaintiff in this case, giving a franchise to H. M. Horner, or his heirs and assigns, to enter upon the streets and highways of that municipality for the purpose of supplying water to the same and its inhabitants. This ordinance contained a number of provisions; the one pertinent to the present contention, and upon which the bill in this case is based, being the eleventh section, and is as follows: 'That the said borough of New Cumberland shall have the option before all other persons or corporations to purchase the complete and entire plant of the said H. M. Horner at the end of ten (10) years, as provided for by the existing laws of Pennsylvania, and

if no purchase is made at the end of ten years, then this ordinance is to remain in full force until waterworks are purchased by the said borough.'

"The Mountain Water Company was incorporated February 20, 1896, under the general act of April 29, 1874 (P. L. 73), providing 'for the incorporation and regulation of certain corporations.' This corporation was on February 17, 1904, merged with other water companies into a corporation designated the Riverton Consolidated Water Company.

"On August 18, 1909, the town council of the said borough passed a resolution declaring that 'it intended and proposed to become the owner of the works and property of the said Mountain Water Company, under the terms of the franchise granted the said Mountain Water Company on January 20, 1896, and accepted by it on the twenty-second day of the same month, and the acts of assembly relating to this subject, made and provided, and agreeing and undertaking thereby to pay therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends heretofore declared.' The resolution also contained the request that the Riverton Consolidated Water Company should 'exhibit to a committee of the town council, their attorney or expert accountant, a detailed or itemized statement showing the net cost of erecting and maintaining the works and property of the Mountain Water Company, as well as the amounts and dates of the payment of all dividends, if any, declared, together with such information as will enable said committee, its agents and experts, to verify said statements, and that if said request is not complied with, and if the same is not done, to take such legal steps as may be necessary to compel the giving of the information desired.' A copy of the resolution was served upon the secretary of said Riverton Consolidated Water Company, on August 18, 1909, and reply made on September 17, that 'we have no desire at present to part with our plant,' and the information desired was thus refused.

"The bill prays * * * for a decree that 'the plaintiff is entitled to purchase the plant of the Mountain Water Company by virtue of the ordinance of January 20, 1896, under the laws of the state, and also that a detailed and itemized statement of the net cost of erecting and maintaining the works and property of the said Mountain Water Company, as well as of all dividends declared by the same, be furnished, and that an order be made upon it to produce all its books, accounts, etc., to the water committee, attorney, or expert accountant, if such statement is regarded insufficient, so that the same may be compared and properly made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

up, according to the act of assembly in such case made and provided.' * * *

The plaintiff's claim of right was averred in the bill as based on the section of the ordinance above quoted and clause 7 of section 34 of the act of April 29, 1874 (P. L. 95), which provides that: "It shall be lawful at any time after twenty years from the introduction of water * * * into any place * * * for the * * * borough * * * into which said company shall be located, to become the owners of said works, and the property of said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared."

The defendants demurred, and the court below dismissed the bill.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

J. W. Wetzel and Conrad Hambleton, for appellant. S. B. Sadler, for appellees.

MOSCHZISKER, J. [1] The court below dismissed the bill upon the ground that the provision of the ordinance of councils, "that the said borough of New Cumberland shall have the option before all other persons or corporations to purchase the complete and entire plant of the said H. M. Horner at the end of ten (10) years as provided for by the existing laws of the state of Pennsylvania, and if no purchase is made by the borough at the end of ten years, then this ordinance is to remain in full force until waterworks are purchased by said borough," did not serve to reduce the time fixed in clause 7 of section 34 of the act of April 29, 1874 (P. L. 95), to 10 years, but merely gave the borough a contingent right to purchase the water company's plant before all others at the end of the 10 years named in the ordinance, provided the water company was then willing to sell, or, in the words of the court below, it simply meant that "at the end of 10 years there can be no sale by the company of its property and rights to 'other persons or corporations' without first offering it to the borough." We cannot agree with this construction. We interpret the words used to mean that the borough shall have the right to acquire the water plant upon the terms provided in the act of 1874, supra, at any time after 10 years, instead of "at any time after twenty years," as fixed in the statute.

[2] The defendants contend, however, that they had a charter right under the act of 1874 to enter the borough and install their plant, and therefore the ordinance was not binding upon them. It is to be noted that these companies were not incorporated until after the date of the grant to Horner, and, as we understand the case from the averments of the bill demurred to, they are the

assignees of the Horner privileges which were passed for the benefit of the Mountain Water Company in anticipation of its incorporation. If the defendant companies for reasons of their own accepted and assumed the benefits and obligations of this ordinance and installed the plant thereunder, or if they took over a plant so installed, presumably they are subject to and bound by the section of the ordinance particularly depended upon by the plaintiff.

[3] But, since we have not the benefit of any findings and do not know exactly what the real facts are, we shall not attempt to determine the actual effect of the ordinance upon the liability of the defendant company under the act of assembly, for, whatever its effect may be, the court below was without jurisdiction in equity to afford the desired relief. We have fully treated of the subject of the proper proceedings to be pursued in actions of this character in an opinion this day filed in the case of City of Williamsport v. Citizens' Water & Gas Co., 81 Atl. 316, and we there held that the remedy was at common law by mandamus.

[4] In the case just cited we remitted the record to the court below with directions to transfer the cause to the law side of the court. This was done in acquiescence with section 3 of the act of June 7, 1907 (P. L. 441), which provides: "If upon an appeal, after a decision upon the merits, the question whether the suit should have been brought at law is not specifically raised by the defendant's assignments of error, the question shall be deemed to have been waived, and the decree below shall not be reversed or set aside because the suit should have been brought at law. If it is so raised, and the decision of the appellate court is that the suit should have been brought at law, it shall remit the cause to the court below, with directions to transfer it to the law side of the court. * * * The plaintiff shall not be permitted to raise the question upon his appeal after a decision upon the merits, nor shall the decree below be reversed or set aside upon his appeal, because the suit should have been brought at law." In the Williamsport Case the appeal was by the defendant, and the assignments of error specifically raised the contention that "the suit should have been brought at law." Here the appeal is by the plaintiff, and that point is not so raised. Furthermore, the question is not whether we shall "reverse or set aside" the decree, but simply whether we shall dismiss the appeal. Hence the present case is not within the principle of our decision in the Williamsport Case, or within the purview of the act of 1907.

Since the suit was instituted in equity and tried without jurisdiction, a judgment in favor of the plaintiff could not have been sustained had it been entered. *Lewisburg Bridge Co. v. County of Union et al.*, 81 Atl. 324, decided at this term and not yet

officially reported, and cases there cited. Under these circumstances we shall not disturb the dismissal of the bill; although, as before indicated, if the error assigned as to the construction placed upon the ordinance were the only matter before the court for decision, we should sustain the specifications and reverse the decree with a procedendo.

The appeal is dismissed, without prejudice; the costs to be divided between the parties.

MOUDY v. BELL et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. EXECUTION (§ 268*)—SALE—RIGHTS OF PURCHASER—PRIORITIES OF LIEN.

A purchaser of realty at sheriff's sale, who obtains possession, is not liable in trespass to a lessee, where the lease was subject to the mortgage under which the property was sold.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762-767; Dec. Dig. § 268.*]

2. TROVER AND CONVERSION (§ 9*)—EVIDENCE—DEMAND.

Where purchaser of real estate at sheriff's sale peaceably obtains possession, there is no conversion of personal property belonging to a lessee of the judgment debtor which remained on the premises, where there was no demand by the lessee or refusal to turn over.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by Orlena Moudy against W. T. Bell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Trespass to real property and conversion of personalty.

On January 11, 1906, Orlena Moudy entered into a written lease with the William H. Moudy Manufacturing Company of a certain chair factory in the borough of Mt. Union, known as the Moudy Chair Company's plant, or the De Frehn Chair Company. By its terms she was to pay a rental of \$600 per year. At the time this property was rented to her, it was subject to a mortgage, given February 11, 1893, by the De Frehn Chair Company, a prior owner, to William McMurtre Spear and Robert E. Speer, in the amount of \$12,000. When the property was purchased by the William H. Moudy Manufacturing Company, the mortgage was still \$12,000, with interest. This amount was reduced until, in April, 1908, it was \$7,500. By an agreement between the William H. Moudy Manufacturing Company, and W. T. Bell, A. S. Welch, and others, who were the guarantors of the mortgage, it was to be paid at the rate of \$500 a year, with interest on the amount remaining unpaid. On April 12, 1909, a payment of \$500 became due. Mr. Moudy was unable to make this payment. On April 15, 1909, a levavi facias

was issued, and the property was sold, on May 14, 1909, to A. S. Welch. On the evening of the day of the sheriff's sale, A. S. Welch, W. T. Bell, and others went to the factory and took possession, placing locks and installing watchmen. Verdict for defendants by direction of the court, and judgment thereon.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

James S. Woods, W. H. Woods, J. W. Leech, and Harvey Roland, for appellant. Thomas F. Bailey and W. M. Henderson, for appellees.

PER CURIAM. [1] With the delivery of the sheriff's deed to Allen S. Welch, one of the appellees, there passed to him, and to those for whom he purchased the premises in controversy as trustee, the right to their possession, for appellant's lease was subject to the mortgage upon which the property was sold, and, the appellees having obtained peaceable possession of it, no trespass was committed. *Ledy v. Proctor*, 97 Pa. 486.

[2] As to the alleged conversion by the appellees of personal property belonging to the appellant, the court correctly instructed the jury that, under the evidence, there had neither been any demand for the same nor refusal to turn it over.

The verdict having been properly directed for the defendants, the judgment upon it is affirmed.

WALSH v. ALTOONA & L. V. ELECTRIC RY. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. STREET RAILROADS (§ 117*)—OPERATION—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries from jumping from the vehicle in which plaintiff was riding to avoid an impending collision with a street car, evidence held to present a question for the jury as to defendant's negligence.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

2. NEGLIGENCE (§ 93*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER OF VEHICLE.

Where plaintiff was the guest of her father, and the team drawing the vehicle in which she was riding was driven by her brother, who was not her servant or under her control when she was injured by jumping from the vehicle to avoid an impending collision with defendant's street car, any negligence of the driver, cannot be imputed to her.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 117*)—OPERATION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries from jumping from a vehicle driven by plaintiff's brother to avoid an impending collision with defendant's

street car, where the evidence tends to show that plaintiff's brother was a careful and competent driver, and that there was no imminent danger in permitting a capable driver to cross the street car track, the question whether the occasion required plaintiff to act differently, and whether she was negligent in permitting the driver to attempt the crossing, are for the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 99*)—OPERATION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, without her fault, was placed in danger of a collision between the wagon in which she was riding and defendant's street car by the negligence of defendant, and she had a well-grounded fear that the collision would result in serious injury to her, it was not negligence for her to leap from the wagon to escape the danger, though that was not the wisest or safest course.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

5. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where the verdict shows that defendant in a personal injury case was not injured by remarks of the judge as to the measure of damages, such remarks constitute no ground for reversing the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

Appeal from Court of Common Pleas, Blair County.

Action by Mary A. Walsh against the Altoona & Logan Valley Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trespass to recover damages for personal injuries.

On July 4, 1906, P. J. Walsh, a resident of Tyrone, Blair county, with his family, consisting of himself, his wife, four sons, and four daughters, spent the day driving in a wagon containing four seats, and drawn by two horses. The front seat was occupied by the father, a little daughter, and a son, aged 15½ years, who was driving. The second seat was occupied by the mother and another daughter. The third seat was occupied by the plaintiff, aged 23 years, her brother, aged 25, and a sister, aged 11. The fourth seat was occupied by two brothers. They spent the day in the country, and upon returning home in the evening, between 7 and 8 o'clock, crossed Washington avenue, in Tyrone, and drove up Tenth street parallel with the defendant company's car track toward Lincoln avenue, which was just a square above, keeping on the right-hand side. The track makes a short curve at the corner of Tenth street, and runs out Lincoln avenue to East Tyrone. When the team attempted to cross this sharp curve, a car came around the corner. Whether the car struck the wagon, or stopped before getting to the wagon, was in dispute. Plaintiff, Mary A. Walsh, seeing the car coming, jumped out of the wagon and injured her ankle.

The court charged in part as follows: "Possibly I would not take a thousand dollars to endure toothache for a week, but, at the same time, if the dentist injured my tooth, so that I had toothache for a week, it would not be fair and right, unless he did it willfully, to impose \$1,000 damage on that dentist. Then she would be entitled, if the injury was permanent, to damages for permanent inconvenience and permanent pain and suffering. If the testimony shows that she will endure pain and suffering for the injury, and if you come to this question of permanent injury, it would be your duty to be conservative in the matter. To illustrate my thought: Suppose that I was on the jury, and I concluded that the plaintiff should be entitled to \$100 a year, the most natural thought that would come to my mind would be that in order to give the plaintiff \$100 a year I should render a verdict of \$1,700, because if you make a calculation you will discover that \$1,700, if invested, will produce about \$100 a year; but that is not the basis to go on in determining the amount to be given for permanent injury, because this lady will die some time, and then there is no reason why there should be anything left for her parents or her heirs. And another calculation will convince you, if you will make it, that if you desire to give a party \$100 a year for, say, 11 years, we should give her \$1,000, because if you will make that calculation, and I went to a little trouble to make it while the attorneys were arguing the case, you will find that, counting the interest, \$1,000 will produce about \$100 for the 11 years. To illustrate the thought: The first year there would be the \$1,000 and \$60 interest; that would make \$1,060. Then subtract that \$100 from the \$1,060, you will have left as principal \$960; then the interest on that for the next year will be \$55.70, making \$1,011.70, and if you will follow that same principle out you will find that \$1,000 invested, the interest used as an annuity as given, it will exhaust itself in the course of some 12 years. I have not made the calculation exactly, but it is about 12 years that it will exhaust itself."

Verdict and judgment for plaintiff for \$3,687. Defendant appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thomas H. Greevy and E. G. Brotherlin, for appellant. A. V. Dively, for appellee.

MESTREZAT, J. We have examined this case with care, and, notwithstanding the 32 assignments of error filed by the appellant, we discover no reversible error in the record. Eighteen of the assignments allege error in the answers to appellant's request for instructions to the jury. These points were properly refused, because they assumed as facts matters in dispute, or asked for blind-

ing instructions. Three assignments complained, without cause, of the learned judge's charge, which was more favorable to the appellant company than the facts warranted. Nine of the assignments allege error in the court's answers to appellee's requests for instructions to the jury; one of them complaining that the court refused appellee's ninth point. Of the other two assignments, one alleges error in not withdrawing a juror, and the other in not entering judgment for the defendant non obstante veredicto.

[1] The case was properly submitted to the jury in a charge of which the appellee had more reason to complain than the appellant. There was ample evidence to warrant the jury in finding that the motorman was negligent. The abrupt turn of the track as it entered Tenth street from Lincoln street required the motorman to keep a careful watch along the track in front of him, and to announce with the gong his approach to the crossing where the accident occurred. From the crossing, the view of an approaching car on Lincoln street is obstructed by buildings, and the only notice of the approach of the car is the noise it creates, or the signal given by the motorman. The driver of the wagon and his father both testified that they listened, but heard no gong. Several other witnesses testified that they were in a position to hear, and that the gong was not sounded. In addition to this failure of duty on the part of the motorman, there was testimony which justified the jury in finding that at the time the car was turning on the curve into Tenth street the motorman was looking directly across that street, instead of along the track which was to his left; that passengers on the car saw the team before he did; and that he was not aware that the team was crossing until the conductor rang the bell, at the suggestion of a passenger on the rear platform, when it was too late to avoid the collision. The verdict shows that the jury believed this testimony, and therefore the motorman was properly convicted of negligence for which the defendant company was responsible.

[2] The appellee was the guest of her father, and the team was driven by her brother, who was not her servant or under her control. Under these facts, negligence of the driver of the wagon, if any, cannot be imputed to the appellee. *Jones v. Lehigh & New England R. R. Co.*, 202 Pa. 81, 51 Atl. 590; *Little v. Telegraph Co.*, 213 Pa. 729, 62 Atl. 848.

[3] Whether the appellee exercised the care of a prudent person in permitting the driver to attempt the crossing under the circumstances was for the jury, and not for the court. The test of the appellee's contributory negligence is, under our cases, whether she joined in testing a patent danger, or violated a fixed rule of law. Her brother, as was clearly established by the testimony, had knowledge of horses from his earliest years, and was a careful and competent driver.

There is no testimony to show that the horses were unruly, or were not gentle. The crossing was not in itself dangerous, and was only made so by the approach of an unexpected or unheralded car, running not oftener than every 20 minutes. This fact did not prohibit the public from using it, or render a party guilty per se of negligence in attempting to use it. It is equally true that the public used the right-hand side of the street when traveling in that direction, and the driver testifies that, on the occasion of the accident, he had to use the right side of the street, because there was a wagon on the other side approaching from the opposite direction, and he turned to cross the street car track as soon as the wagon had passed. With proper care on the part of the driver and motorman, a team could pass the crossing with perfect safety. There was testimony to warrant the finding that the driver and his father looked and listened before starting across. The testimony did not show that the car was visible to or heard by the appellee, or any other occupant of the wagon, when the crossing was attempted. There was no obvious or imminent danger in a passenger permitting a capable driver to make the crossing; and hence whether the circumstances under which the accident occurred required the appellee to act differently from what she did, and whether she was negligent in permitting the driver of the vehicle to attempt the crossing, were questions for the jury. In *Carr v. Easton City*, 142 Pa. 139, 21 Atl. 822, the guest of the driver and owner of a sleigh brought an action to recover damages for injuries sustained by being thrown from the vehicle. The following remark in the opinion, with appropriate changes as to the driver and vehicle, is applicable here: "She was a woman, not shown to have any special knowledge of driving or horses or sleighs, who had trusted herself to the guidance of her brother-in-law and his friend; and we cannot say, as matter of law, that the danger was so apparent or so serious that she was called upon to exercise her own judgment in opposition to theirs. All these matters are for the jury to decide, upon their view of reasonable care and prudent conduct, under the circumstances shown by the evidence."

[4] Whether the appellee was guilty of negligence in leaping from the wagon under the circumstances was likewise for the jury. She certainly had reason to believe that a collision between the car and wagon was imminent, and that it might result in serious consequences to her. While the appellant company contends, and its testimony supports the contention, that the car did not strike the wagon, there was evidence on the part of the appellee which, if believed, warranted the conclusion that there was a collision. If the appellee, without her fault, was placed in danger of a collision between the wagon and the car by the negligence of the defend-

ant company, and she had a well-grounded fear that the collision would result in serious injury to her, she, if acting in good faith and as a person of ordinary prudence, was not guilty of negligence in leaping from the wagon to escape the threatened danger, although it was not the safest or wisest course to pursue. Whether the facts existed which warranted her in attempting to thus avert the threatened danger was for the jury, under the evidence submitted.

[5] We are not convinced that the errors complained of in the second and tenth assignments did the defendant any harm. The amount of the verdict shows that the appellant was not injured by the illustration given by the learned judge in his charge as to the proper manner of estimating the damages. We do not approve of the language used by him in submitting the case on the question of damages, and complained of in the second assignment; but it is apparent that it worked no injury to the appellant in this case, and therefore the assignment is not sustained.

The judgment is affirmed.

SMITH v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. ABATEMENT AND REVIVAL (§ 54*)—DEATH OF PARTY—SURVIVAL OF ACTION—"ACTIONS FOR WRONGS DONE TO THE PERSON."

A husband's action for loss of services of his wife through injuries not resulting in death is not for wrongs done to the person within Act Feb. 24, 1834 (P. L. 78) § 28, giving to personal representatives the right to prosecute actions in which their decedent was a party plaintiff, except "actions for * * * wrongs done to the person"; the quoted phrase not being used to describe a type of action, but referring to actions for injuries to the person of the plaintiff decedent.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 54.*]

2. RAILROADS (§ 395*)—OPERATION—INJURIES TO PERSONS NEAR TRACK—ISSUES AND PROOF.

A statement of claim alleging that defendant's train of cars through the negligence of the defendant and its employes left the tracks on which it was being operated, and crashed into the home of plaintiff, causing her injuries, is supported by evidence that a defective condition of the tracks, which had existed long enough to put defendant on notice, caused a car to become derailed and run into the dwelling house occupied by plaintiff, producing the injuries of which she complained.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 395.*]

3. APPEAL AND ERROR (§ 742*)—RECORD—STATEMENT OF CASE.

Assignments of error complaining of instructions and rulings which are unrelated to, and in no way suggested by, the statement of the question involved, will be dismissed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 360; Dec. Dig. § 742.*]

Appeal from Court of Common Pleas, Luzerne County.

Action of trespass by Mary Smith, administratrix of the estate of Anthony W. Smith, and in her own right, against the Lehigh Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trespass by Mary Smith, administratrix of the estate of Anthony W. Smith, deceased, and Mary Smith in her own right, against the Lehigh Valley Railroad Company. When the action was instituted, Anthony W. Smith, the husband of Mary Smith, was a plaintiff, but he died before trial, and his administratrix was substituted.

The statement of claim averred, inter alia, that on January 25, 1906, the defendant company was operating a train of cars on its railroad in the vicinity of the plaintiffs' home; "that the said train of cars, through the negligence and carelessness of the said defendant and its employes, left the tracks of the said defendant company on which it was then and there being operated by the said defendant company and its employes, and crashed into the said home, where the said plaintiff was then and there sitting with her baby in her lap. The impact and shock of the said crashing train was so great that the said plaintiff was thrown thereby from the chair on which she was sitting violently and with great force against another chair, and was severely injured." Mary Smith claimed for physical injuries and for pain and suffering, and her husband, Anthony W. Smith, for expenses incurred for medicine, medical and surgical attendance, and nursing to his wife, as well as for loss of her earnings, services, and companionship. Verdicts for Mary Smith, individually, \$2,000; and for Mary Smith, administratrix, \$500, and judgments entered thereon. The defendant has appealed.

Errors assigned were: (1) Refusal to enter judgment non obstante veredicto. (2) Instruction to the jury: "In estimating the damages to be awarded the estate of her husband, the jury are to allow it for the expenses incurred by Anthony Smith in his lifetime in curing his wife and also for the loss of her services to him as the husband of said Mary Smith as the natural result of the accident complained of, and in considering the loss of services the jury may also estimate the loss of her companionship caused him by her injuries up to the time of his death, to wit, August, 1909." (3) Refusal of binding instructions for the defendant. (4) Refusal to instruct the jury that the failure of plaintiff to produce and read the testimony given by Anthony W. Smith at the former trial warranted them in presuming that it was damaging to her case, and in instructing that, as either side might offer the

testimony, the failure of the plaintiff so to do would not warrant more than an inference that such testimony might be damaging. (5) Refusal to instruct if the jury believed that Mrs. Smith was up and about on the day that the accident happened and thereafter, with nothing apparently the matter with her, "their verdict should be for the defendant," and instructing that, if they believed the testimony to that effect, it would go to impeach the credibility of the plaintiff, and, if from such impeachment "you will disbelieve her entirely, your verdict should be for the defendant." (6) Refusal of defendant's request for charge: "The allegation of negligence in plaintiff's statement being that defendant 'was operating a train of cars,' and that 'the * * * train of cars through negligence and carelessness of the * * * defendant and its employes left the track * * * on which it was then and there being operated by the defendant company and its employes,' proof that the car left the track on account of a defective condition of the defendant's road-bed does not sustain the plaintiff's allegation, and the verdict must be for the defendant, unless the jury find that the derailment of the car was due to the defendant's negligence in the operation of the train of cars," which was declined without reading. (7) Overruling defendant's objection to the admission of certain testimony. (8) Sustaining plaintiff's objection to defendant's offer of certain testimony.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

J. B. Woodward, for appellant. John T. Lenahan, James McQuade, and James L. Lenahan, for appellee.

MOSCHZISKER, J. This is an action instituted by a wife and husband under section 1 of the act of May 8, 1895 (P. L. 54), to recover for personal injuries to the former and consequential losses to the latter. Pending the action the husband died, and his wife was appointed administratrix of his estate. She continued the suit and obtained two verdicts, one for \$2,000 in her own right, and the other for \$500, as the personal representative of the estate of her deceased husband. Judgments were entered on both of these verdicts, and the defendant has appealed.

The questions involved as printed in the appellant's paper book suggest but two points for our consideration: The first is: "Does action brought by husband for negligent injury to wife not resulting in her death survive to his personal representatives?" To start with, "at common law, a cause of action by a husband to recover for personal injuries to his wife, and for loss of her services and for medical expenses resulting from such injuries, did not survive the death of

either party." 21 Ency. of Plead. & Prac. 341. Generally speaking, a right of action to recover damages for injuries done to person or property did not survive; but this rule was relaxed by the statute of 4 Edw. III, c. 7, and its supplements, so that thereafter, in certain instances, personal representatives had the same remedy as the decedent himself. While these old English statutes were declared to be in force in Pennsylvania, and were given a liberal construction, still it was held that they had reference only to wrongs which had inured to the benefit of the defendant or increased the assets of his estate at the expense of the personal property of the plaintiff's decedent. *Penrod v. Morrison*, 2 Pen. & W. 126; *Lattimore v. Simmons*, 13 Serg. & R. 183. But the act of February 24, 1834 (P. L. 77), provided, by section 26: "The executors or administrators of any person who at the time of his decease was a party, plaintiff, * * * in any action * * * shall have full power, if the cause of action doth by law survive to them, to become party thereto, and prosecute * * * such suit * * * to final judgment * * * as fully as such decedent might have done if he had lived. * * * " And, by section 28: "Executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, for libels, and for wrongs done to the person. * * * "

[1] The words, "except actions for * * * wrongs done to the person," as used in this statute, do not describe a type of action, but mean actions to recover for wrongs in the nature of physical injuries done to the person of the plaintiff decedent; and in interpreting this statute they have been so construed. *Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341. At the time the statute was passed, a husband had the common-law right "to commence and prosecute" an action in tort to recover for the loss of his "wife's society and services, and for expenses incurred." 21 Cyc. 1526; *Donoghue v. Consol. Trac. Co.*, 201 Pa. 181, 50 Atl. 952. Since the effect of the act of 1834, supra, was to make all actions which a decedent had the right to commence and prosecute survive to his personal representatives, other than those particularly excepted (*Miller v. Wilson*, 24 Pa. 114, 122), and since the act did not except actions of this character, a husband's right to recover damages for the loss of the services of his wife survives his death.

Before leaving this branch of the case, it may be well to note that the phrase "wrongs done to the person" in section 28 of the act of 1834, supra, and the phrase "injuries to the person" in section 18 of the act of April 15, 1851 (P. L. 674), are similar in meaning (*Moe v. Smiley*, supra), and that we have uniformly treated the latter as signifying injuries to the person of the plaintiff bringing

the action (*Birch v. Railway Co.*, 165 Pa. 389, 30 Atl. 826; *Taylor's Estate*, 179 Pa. 254, 36 Atl. 230; *Maher v. Traction Co.*, 181 Pa. 617, 37 Atl. 571; *Rodebaugh v. Traction Co.*, 190 Pa. 358, 362, 42 Atl. 953; *McCafferty v. Railroad Co.*, 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690; *Edwards v. Gimbel*, 202 Pa. 90, 39, 51 Atl. 357), and not as designating a type of action arising in whatever way from injuries to the person. The two sections referred to deal with a like subject, and there is no reason why the similar phrases used in each should not be given a like limited meaning. But if they were to be given a broader signification, and held to embrace all actions growing out of injuries to the person, then the verdict recovered by the personal representatives of the deceased husband would fall within the remedial provision of section 18 of the act of 1851, *supra*. However, looking at the question for determination in the light of our decided cases, we are brought to the conclusion that the phrases must be construed as before stated; that the act of 1834, *supra*, saved the action of Anthony W. Smith from abating by his death, and that his suit could be "prosecuted" by his administratrix "as fully as such decedent might have done if he had lived."

[2] The second question involved as stated by the appellant is, "Can plaintiff recover on proof of negligence not alleged in her statement filed?" The defendant contends that the testimony adduced was not sufficient to support the averment in the statement describing the occurrence which brought the injuries upon the plaintiff, Mary Smith. The testimony was sufficient, if believed, to justify the jury in finding that a defective condition of the defendant's tracks, which had existed for a sufficient length of time to put it on notice, caused one of its cars to become derailed and run into the frame dwelling house occupied by the plaintiff, thereby throwing Mrs. Smith to the floor, and producing the injuries of which she complained. Under these circumstances, we cannot say that the *allegata* and *probata* did not agree, or that there was not sufficient evidence to sustain the verdict, if the jury saw fit to accept the testimony of the plaintiff and her witnesses.

[3] The first, second, third and sixth assignments which cover all of the matters comprehended in or suggested by the statement of the questions involved, are overruled. The other assignments which complain of instructions and rulings unrelated to these matters and in no way suggested by the statement of the question involved are dismissed. *Willock v. Railroad Co.*, 229 Pa. 526, 79 Atl. 138. If the appellant desired the points covered by these latter assignments reviewed, it would have been sufficient, after stating the main questions for

determination, had counsel added a few words to this effect, "Correctness of instructions as to the effect of nonproduction of certain testimony, and concerning the condition and conduct of plaintiff after accident; rulings on admission and rejection of testimony." If those instructions and rulings were necessarily involved in or suggested by the principal questions stated, then this course would not be required, or desired. While we do not specifically pass upon the assignments in question, we will say that we are not convinced that the court below fell into any reversible error.

The judgment is affirmed.

NEWINGHAM v. J. C. BLAIR CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. NEGLIGENCE (§ 124*)—ACTION—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a tinner and roofer while working in the employ of a contractor on defendant's building from the giving way of a portion of a fire escape, where the defendant had instructed the workmen to go to the roof by a fire escape and not by elevator nor by stairway, evidence that plaintiff was inside the building after the direction to use the fire escape was given was properly excluded as irrelevant.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 124.*]

2. NEGLIGENCE (§ 126*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to an employé of a contractor from the giving way of a fire escape on defendant's building, evidence that defendant had notice and intended to give warning of the dangerous character of the fire escape was properly excluded as irrelevant and immaterial.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 126.*]

3. APPEAL AND ERROR (§ 215*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—INSTRUCTION.

That testimony was misquoted by the trial judge in his charge cannot be complained of on appeal, where the court's attention was not brought to it before the jury retired.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215; * Trial, Cent. Dig. §§ 683-685.]

4. NEGLIGENCE (§ 65*)—CONDITION OF PREMISES—CARE REQUIRED OF PLAINTIFF.

The fact that the employé of a contractor of defendant's building used an elevator or stairway within the building at times, in disregard of orders of defendant, did not affect his right to rely on the fire escape which he was ordered to use being in a proper condition.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 65.*]

5. TRIAL (§ 260*)—INSTRUCTIONS.

In an action for injuries from the giving way of a fire escape on defendant's building, the refusal of a charge that if the plaintiff jumped 3½ feet from the top of the fire wall to the floor of the fire escape, and thus subjected it to an undue strain, he could not recover, was not error where the court instructed that it was for the jury to say whether plaintiff acted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the way an ordinarily prudent person under the circumstances, would have acted, and that, if the negligence of the plaintiff contributed in any way to his injury, he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. APPEAL AND ERROR (§ 216*)—PRESENTATION OF QUESTIONS TO TRIAL COURT—INSTRUCTIONS.

The failure to give instructions guarding the effect of the Carlisle Mortality Tables as evidence cannot be complained of on appeal where counsel fails to request such instructions on trial, or to call the court's attention to the omission.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; * Trial, Cent. Dig. §§ 627, 628, 630-641, 660-676.]

7. NEGLIGENCE (§ 134*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries from the giving way of a fire escape on defendant's building while plaintiff was in the employ of a contractor engaged by defendant, evidence that the vice president of defendant company gave directions that the workmen should not go through the building, but should use the fire escape to reach the roof, that the plaintiff in the discharge of his duties had occasion to descend, and, while on the fire escape, one of the platforms gave way, causing his injuries, and that the accident was due to defective construction which would have appeared had there been a proper examination or inspection, was sufficient to sustain a verdict for plaintiff; there being no evidence of any inspection of the fire escape.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

8. NEGLIGENCE (§ 32*)—CONDITION OF PREMISES—INJURIES TO LICENSEES.

The owner of property owes to an independent contractor and his servants at work thereon, not the absolute duty of having the premises safe, but the duty of exercising reasonable care to have them in a safe condition, and it is incumbent on the owner of premises on which persons come by invitation, express or implied, to maintain them in a reasonably safe condition for the contemplated uses thereof and the purposes for which the invitation was extended.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

9. NEGLIGENCE (§ 121*)—ACTIONS—PRESUMPTIONS.

Though Act May 2, 1905 (P. L. 359) § 22, provides for an inspection of fire escapes, it will not be presumed, in an action against the owner of a building for injuries from the falling of a defective fire escape, that he had complied with the law, where there is no evidence of such inspection, and there is proof that the accident would not have happened if there had been a proper inspection.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 121.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by Frank E. Newingham against the J. C. Blair Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Trespass for personal injuries. The facts appear by the opinion of the Supreme Court.

At the trial James Sleeman, being on the stand, was asked this question: "Q. Had

you seen Newingham frequently in the building during the time this work was going on? (Objection.)

"Mr. Bailey: We propose to show by the witness that the plaintiff was in the building 'A' of the defendant a day or two before the accident, and subsequent to the Tuesday before the accident, for the purpose of showing that if there was any inhibition or restriction in his movements by an officer of the company, to wit, that he should not use the stairways or elevators in the building, that he did not obey those instructions and was inside of the building, and it comes to the question of his exercising due care in leaving a safe way of departure from the building and going on the fire escape where he was injured, and also for the purpose of affecting the credibility of the plaintiff, who testified that subsequent to the Tuesday, when he was told by Hershey that he should not use the stairways or elevators of the building, he was not in said building.

"Mr. Waite: That is objected to as utterly immaterial, irrelevant, and inadmissible as to how much the plaintiff was in the building on another day. The plaintiff did not testify that he had not been in the buildings on other days, so it does not contradict him. He simply states in his examination that he did not remember to have used the inside of building 'A' on the morning of the day on which he was hurt, but he did not testify that he had not been in building 'A' on other days; but, even if he had been, it would tend to contradict him only on an immaterial point.

"The Court: Objection sustained. Evidence rejected. Bill of exceptions sealed for defendant."

William Hassenfue being on the stand, this offer was made.

"Mr. Bailey: I propose to show by the witness on the stand that he passed over the fire escape at the point where the accident occurred a number of times before the accident occurred; that he had intended to speak to Mr. Woolheater of the J. C. Blair Company and to his own employes, but overlooked it, for the purpose of showing that that omission on the part of the witness is what produced the accident which forms the basis of this action, that it was his negligence which prevented the proper supporting of the fire escape and which was the proximate cause of the plaintiff's injury.

"Mr. Waite: That is objected to, because, if the evidence was even to go to the jury, it would only show contributory negligence on the part of the plaintiff's employer, which would not relieve the defendant from its negligence, if the jury believe it was negligence, and if the negligence contributed to this accident.

"The Court: Objection sustained. Evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence rejected. Bill of exceptions sealed for defendant."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. S. Dalzell and Thomas F. Bailey, for appellant. H. H. Waite and Jas. S. Woods, for appellee.

POTTER, J. In this action the plaintiff sought to recover damages for injuries which he sustained through the alleged negligence of the defendant company. He was a tinner and roofer, in the employ of a contractor who had engaged to copper flash the roofs of certain buildings for the defendant. There were three ways of gaining access to the roofs—by the elevator, by the inside stairway, and by the fire escape. The evidence tends to show that shortly after the work began the vice president of the defendant company gave directions that the workmen should not go through the buildings, but should use the fire escape to reach the roof. On the morning of June 6, 1908, the plaintiff was on the roof, in the discharge of his duties, and had occasion to descend. While on the fire escape, one of the platforms gave way beneath him, and he fell, and was severely injured. The defendant company was charged with negligence in failing to maintain the fire escape in a safe condition, and in requiring plaintiff to use an unsafe way of passage. Upon the trial, a request for binding instructions in favor of defendant was refused, and the case was submitted to the jury, who returned a verdict in favor of the plaintiff for the sum of \$7,175. From the judgment entered thereon defendant has appealed.

[1] In the first assignment of error counsel complain of the action of the court below in excluding defendant's offer to show that plaintiff was in one of the buildings of defendant a day or two before the accident, and after the direction had been given to use the fire escape in order to reach the roof. We see no error in the exclusion of this offer. Its purpose was evidently to show that plaintiff did not obey the orders which had been issued prohibiting the use of the elevator and the stairway. But the offer of proof, as made, fell short of that end. It was merely a proffer to show that plaintiff was in the building. If he was, it would not necessarily follow that he used the elevator or the stairway; and, even if he did do so, the relevancy of that fact to the issue being tried is not apparent.

[2] The second assignment is to the overruling of an offer to show that plaintiff's employer had passed over the place, and had noticed, and intended to give warning of, the dangerous character of the fire escape at the point where the accident occurred. The offer was properly excluded, as immaterial. If there was any neglect of the kind indi-

cated, on the part of the employer, its effect would not be to relieve the defendant of its own responsibility.

[3] In the third and fourth and assignments it is alleged that the trial judge in charging the jury inadvertently misquoted certain testimony. Our examination of the printed records leads us to think that the court was substantially correct in the statements made. But, if in the opinion of counsel for defendant a mistake was made, it should have been brought to the attention of the court before the jury retired; otherwise, the matter is not properly assignable for error. *Kuntz v. N. Y., etc., R. R. Co.*, 206 Pa. 162, 55 Atl. 915; *Commonwealth v. Razmus*, 210 Pa. 609, 60 Atl. 264.

The assignments from the fifth to the eleventh, inclusive, complain of portions of the charge and of the answers to points relating to the extent of the injuries and to the measure of damages. In none of these do we see any substantial error. There was ample evidence as to the probable permanence of the injuries. Dr. Northup testified that the probability of recovery was very unlikely; and, again, that it was doubtful. Dr. Hoffman testified that he considered plaintiff to be permanently injured, and did not believe that he would be able to do any laborious work. Dr. Chisholm said on cross-examination that the probabilities were that plaintiff would not ever fully recover from his injuries.

[4] The refusal of defendant's ninth point is made the subject of the twelfth assignment of error. We do not find that this point accurately states the testimony of Mr. Koch. An examination of the record does not show that he said positively that he never instructed any of the employees of the contractor to use the fire escape, but only that he testified that, to the best of his recollection, he did not tell Mr. Hershey not to use the elevator, or that he must use the fire escape. There was some evidence tending to show that plaintiff used the elevator, and on one occasion used the stairway between two of the upper floors, after he had been notified not to do so. Plaintiff, however, denied this. But even if he did use the elevator or stairway at times, in disregard of orders, that fact would not affect his right to rely upon the fire escape being in a proper condition, when he was ordered to use it. His action would not have affected the fact, if the jury found it to be such, that defendant's manager had not only invited, but ordered, the employees of the contractor to use the fire escape. In the shape in which the ninth point was presented, it was properly refused.

In the thirteenth assignment of error complaint is made that the trial judge failed to give the jury certain instructions; but it does not appear that counsel for defendant made any request for any such instruc-

tions. This specification is not therefore to be sustained. *Kaufman v. Pittsburg, etc., R. R. Co.*, 210 Pa. 440, 60 Atl. 2.

[5] In the fourteenth assignment it is suggested that the court below erred in the answer made to defendant's tenth point, which requested the trial judge to charge that if the jury believed that plaintiff jumped a distance of $3\frac{1}{2}$ feet from the top of the fire wall to the floor of the fire escape, and thus subjected it to an undue strain, he could not recover. While the trial judge refused the point as put, nevertheless he instructed the jury that it was for them to say "whether the plaintiff acted in the way an ordinarily prudent person under the same circumstances would have acted." We think this was a fair submission of the question involved to the consideration of the jury. More especially is this true in view of the fact that in affirming the very next point for charge offered by counsel for defendant the jury were instructed that, if they believed that the negligence of the plaintiff contributed in any way to his injury, there could be no recovery in this action.

[6] In the fifteenth assignment of error it is alleged that the court, "having admitted the Carlisle Tables of Mortality, erred in not carefully guarding the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question." This specification is subject to the same criticism as that made upon the thirteenth assignment, in that it does not appear that counsel made any request upon the trial for any such instructions. It is undoubtedly true that, where mortality tables are admitted in evidence, the jury should be cautioned not to accept the results set forth in the tables as conclusive; and they should have been directed to take into consideration the circumstances affecting the duration of the life in question. It would have been better if the trial judge had given such instructions. But we do not regard the omission in this case as amounting to reversible error. The testimony showed that plaintiff was in excellent health prior to the accident, so that, if the matter of his expectancy of life had been referred to by the trial judge in his charge, the evidence as to the age and physical condition of the plaintiff would have justified the jury in adopting the most favorable view of the probabilities of the continuation of his life. Counsel made no request for instructions as to the weight to be given to the evidence obtained from the mortality tables, nor did they call the attention of the trial judge to his omission to charge upon that subject. We do not think the failure to so charge is sufficient to justify a reversal of the judgment.

[7] In the sixteenth and seventh assignments of error complaint is made of the refusal by the trial judge of binding instruc-

tions in favor of defendant, and of his refusal to enter judgment for defendant non obstante veredicto. These specifications raise broadly the question of the plaintiff's right to recover. In support of their contention that defendant owed no duty to plaintiff in the way of keeping the fire escape in safe condition, counsel for appellant cite the case of *Callan v. Pugh*, 54 App. Div. 545, 66 N. Y. Supp. 1118. But an examination of that decision shows that it was put upon the ground that the excavation which caused the fall of the arch was not made under the owner's direction, nor did it appear that he had notice of the dangerous condition of the arch. Apparently it had been weakened by excavations which were being made by an independent contractor. The distinction between such facts and those of the case now before us is obvious. They also cite *Maguire v. Magee*, decided by this court, but reported in 13 Atl. 551. There the injury resulted from a defective scaffold, of a temporary character, erected by a contractor for the use of his own employes alone. In the case of *Myers v. Electric Illuminating Co.*, 225 Pa. 387, 74 Atl. 223, the decision was based on the fact that the danger from uninsulated wires was an obvious one, of which the plaintiff was held to have assumed the risk. In the argument of the case at bar, counsel rely strongly upon *Hotchkin v. Erdrich*, 214 Pa. 460, 463, 63 Atl. 1035, 1036 (10 L. R. A. [N. S.] 506), where the plaintiff was injured by a fall caused by the giving way of a round of a ladder inside a chimney, which he was ascending in order to perform some work at the top. But in that case it was said: "The testimony does not show any direction to the plaintiff by the defendant to use the inside ladder, but it does show permission, or possibly an invitation, to do so." In the present case there was not only an invitation by the defendant company to use the fire escape, but there was, according to the testimony for the plaintiff, an express direction to make use of that means of access to the roof, and a prohibition of the use for that purpose of the elevator or of the inside stairway. It was further pointed out in that case that the same degree of attention is not required in caring for a place seldom used, as is requisite in the maintenance of a passageway frequently called into use. In that case no occasion for inspecting the ladder fastened upon the inside of the chimney had arisen for some nine years. In the present case the defect was in a fire escape which from its very nature, and by reason of the purpose it was intended to serve should have been kept in safe condition for use at all times. To be sure, the use which the defendant company directed should be made of it by the plaintiff was not the ordinary office of a fire escape, but it was apparently not an improper use, and, at any rate, it was placed at the disposal of

the plaintiff and his fellow workmen by the express direction of the officer of the defendant company. In making use of the fire escape, as directed and required, the plaintiff had a right to rely on the presumption that the defendant had performed its duty in providing a reasonably safe means of access to the roof. The fire escape was under the circumstances to all intents and purposes, an outside stairway. If, instead of making use of it, the plaintiff had been instructed to take the inside stairway, and had been injured by the giving way of an improperly constructed platform, it would hardly be contended that the defendant would not be liable for the results. The fact that the fire escape temporarily transformed at the direction of the defendant into a stairway was located outside of the building, rather than inside, cannot change the principle involved. The decision in *Hotchkiss v. Erdrich* is put expressly upon the grounds, first, that there was no direction to the plaintiff to use the old ladder inside the chimney; second, that the crude iron rounds on the inside of the chimney wall did not constitute, under the circumstances, such an appliance as the defendant was required to inspect and keep in repair; third, that plaintiff did not in that case rely on any presumption that the crude ladder was in safe condition, but, instead, proceeded to test and inspect it himself as he ascended it, thus acknowledging and assuming the risk of its being defective. No one of these conditions, or anything similar thereto, is to be found in the case at bar.

[8] In *White's Supplement to Thompson on Negligence*, § 979, what seems to be a sound general rule is thus expressed: "It is the rule that the owner of property owes to an independent contractor and his servants at work thereon the duty of exercising reasonable care to have the premises in a safe condition for the work, unless the defects responsible for the injury were known to the contractor. It is to be observed that the owner is not charged with the absolute

duty of having the premises safe. His duty is discharged by the exercise of reasonable care." And in 21 *Am. & Eng. Ency. of Law* (2d Ed.) 471, it is said: "All the authorities agree that it is incumbent upon the owner of premises upon which persons come by invitation, express or implied, to maintain such premises in a reasonably safe condition for the contemplated uses thereof and the purposes for which the invitation was extended." The underlying principle of these general statements has been recognized and enforced in our own cases. For example, in *Pottstown Iron Co. v. Fanning*, 114 Pa. 234, 6 Atl. 578, the plaintiff was a brakeman employed on a train of the Reading Railroad Company, which, while lawfully thereon, was wrecked by the collapse of a defective trestle owned and operated by the defendant. The latter was held liable for the damages resulting from the death of the plaintiff. And in *Pender v. Raggs et al.*, 178 Pa. 337, 35 Atl. 1135, the owners of a building which was undergoing alteration were held liable to an employé of the contractor who was making the alterations for injuries resulting from the fall of a wall, which (as found by the jury) became unsafe from the act of the owner.

[9] It is suggested in the argument that because section 22 of the act of May 2, 1905 (P. L. 359), provides for an inspection of fire escapes, it is to be presumed that defendant had complied with the law, and that the fire escape here in question had been duly inspected and approved. There is no evidence, however, of any such inspection. The record shows the positive testimony of David Hershey that the accident was due to defective construction of the fire escape which would have appeared had there been a proper examination or inspection. We are satisfied that, under all the evidence, this case was for the jury, and that in the manner of its submission there was no substantial error.

The assignments of error are therefore dismissed, and the judgment is affirmed.

JURGENS v. BOOTH et al.

(Supreme Court of New Jersey. Dec. 4, 1911.)

*(Syllabus by the Court.)***COUNTIES (§ 134*)—EXPENSES OF ELECTION—LIABILITY.**

The Geran act (P. L. 1911, p. 322) does not relieve boards of freeholders of the duty of paying the expenses of a general election, held in and for the whole county, imposed upon them by section 180 of the general election law (P. L. 1898, p. 317).

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 202; Dec. Dig. § 134.*]

Application by the State, on the relation of Frederick Jurgens, for writ of mandamus to Richard W. Booth and others. Rule to show cause made absolute.

Argued November term 1911, before GARRISON, PARKER, and BERGEN, JJ.

J. H. Harrison, for relator. Wm. A. Lord, for defendants.

GARRISON, J. This is an application by an election officer for a mandamus to compel the auditor and collector of Essex county to draw a warrant and pay to him the money due him for services and lawful expenses incurred at a general election held in and for the entire county in November, 1911.

The duty to make these payments must be found in the Geran act (P. L. 1911, p. 276) and such parts of the pre-existing election laws as were not repealed by that act.

It is perhaps not possible absolutely to harmonize these statutes, if strict effect be given to every word by which the Legislature has sought to express its will. The paramount purpose thereby expressed, however, may be arrived at by a construction that does the least violence to the language employed.

Section 180 of the general election law (P. L. 1898, p. 317) clearly places the duty in question upon the county in which a general election is held.

Section 64 of the Geran act (P. L. 1911, p. 322) provides that the board now charged with this duty shall pay any additional expense made necessary by this (the Geran) law. This provision, and especially the word "additional," indicates with sufficient clearness that the duty imposed upon the county by the existing law was increased, which, of course, negatives the idea that it was supplanted.

The duty of the freeholders to meet the expenses of a general election therefore continues, and is recognized as continuing by the Geran act.

As opposed to this view is section 10 of the Geran act, which provides that "the board or body having charge of the finances in each municipality shall provide for the

expenses of carrying out this act in their municipality, except as herein otherwise provided."

The force of this section, as antagonizing the construction just indicated, is weakened by several considerations: First, it may be said that a county is a municipality within the meaning of this section; secondly, it may be said that it is not, and that the section deals only with elections not co-extensive with the whole county; thirdly, it may be said that it is "herein otherwise provided" viz., by section 64; and, lastly, if sections 10 and 64 cannot both stand, the later section overrides the earlier.

In the view we take of these statutes, the Geran law does not relieve the freeholders of the duty of paying the expenses of a general election held in and for the whole county, imposed by section 180 of the general election law.

The rule to show cause is made absolute, and a peremptory mandamus may issue according to its terms.

STATE v. BOWMAN.

(Supreme Court of New Jersey. Nov. 29, 1911.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1011*)—REVIEW—CERTIORARI—GROUNDS.**

A defendant under indictment applied for a writ of certiorari to remove into this court said indictment, also the order under which a special term of the oyer was held, also an order disqualifying the sheriff from selecting the grand jury, and also an order appointing elisors to select and summon the grand jury, by which the defendant was indicted, for the purpose of basing a motion to quash the indictment upon such extraneous matters.

Held, that the writ would not be allowed for the purpose of enabling the court to entertain a motion to quash, based upon grounds extraneous to the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. § 1011.*]

Frank Bowman was indicted for illegal voting, and applies for a writ of certiorari. Denied.

Argued November term, 1911, before GARRISON, PARKER, and BERGEN, JJ.

George A. Bourgeois and Gilbert Collins, for the motion. Edmund Wilson, Atty. Gen., for the State.

GARRISON, J. The defendant, being under indictment for illegal voting at a general election held in Atlantic county, of November 8, 1910, applies for the allowance of a writ of certiorari to remove into this court not only such indictment and its caption, but also the order under which a special term of the oyer of that county was held on July 5, 1911; also the order of said court, disquali-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

fyng the sheriff of said county from selecting and summoning a grand jury to serve at said special term, and the proceedings on which such order was based; and also the order appointing elisors to select and summon a grand jury at said special term, by whom the said defendant was indicted. The avowed purpose of the defendant (and the sole object of the writ applied for) is to move in this court to quash the said indictment, not for anything that appears upon its face or by its caption, but solely upon the ground that the grand jury, by whom the indictment against him was found, was not legally selected or summoned under the several orders and proceedings he now seeks to have brought before this court for review. Presumably the testimony necessary to support some of the contentions advanced will be sought to be taken under a rule in such certiorari, with the expectation that upon the preponderance of testimony, or by drawing the proper inferences therefrom, this court will determine the facts, and apply the law to the facts thus established.

In the case of *State v. Rickey*, 9 N. J. Law, 293, Ford, J., in overruling an offer to read affidavits upon a motion to quash an indictment, said: "This is a motion to quash an indictment, and comes in the place of a demurrer, and therefore I can see no reason why we should depart from the rules applicable to demurrers. * * * I think, therefore, that the affidavits cannot be read." He also said in the same connection, "If the indictment is sufficient upon the face of it, we cannot quash."

This last statement, which is not an accurate one as applied to the power of the court, was probably intended as a declaration of a settled judicial policy; the power of this court to draw into it a criminal cause at any stage for any lawful purpose can hardly be questioned, in view of the constitutional intrenchment of its historical powers. The settled policy to which, we take it, Mr. Justice Ford alluded has been continued to this day by the allowance of the writ of certiorari to bring into this court, for the purposes of a motion to quash, indictments that on their face, or by their caption, appeared to be incapable of supporting a judgment of conviction. The two essential factors in this established exercise of discretion are, first, that the question thus calling for preliminary decision is spread upon the fact of the record; and, second, that, being thus established, it enables the allocatur to be withheld, where its probable effect would be merely to postpone the trial of the indictment.

It is evident, therefore, that where, as in the present case, the grounds of the motion to quash do not appear by the indictment or its caption, but are to be shown by matters aliunde, the essential factors of such

established discretion are conspicuously absent, and, if the judicial policy alluded to be well founded, should lead this court to refrain from interference with the orderly progress of the cause. Such a course deprives the defendant of none of the rights secured to him by the Constitution, to be worked out in the courts provided for that purpose; of these rights he is not in any sense deprived by our refusal to interfere with the orderly progress of the cause.

The matter for present decision is therefore not whether arguable questions may arise, if certain proceedings and facts that are not shown by the indictment or its caption are laid before us by the return to our writ, but whether, where such a course is necessary, in order to present such debatable questions, our writ should go, as it does in cases where we can see for ourselves on the face of the indictment a certain and sound basis for the exercise of our discretion.

The elaborate brief used by counsel of the defendant upon the argument dealt exclusively with the merits of the questions he sought the opportunity to raise in this court upon his view of the facts. Upon the argument, the Attorney General insisted with much earnestness that the court, in the exercise of sound discretion, should not allow its prerogative writ to be thus used as a premature substitute for the orderly processes of the criminal law, and he pointed out some of the many embarrassments in the administration of justice that must result from the general adoption of such a course.

This called forth a supplemental brief of counsel for the defendant upon this point, in which he cites and relies upon two cases (*State v. Nicholls*, 5 N. J. Law, 539, decided in 1819, and *State v. Rockafellow*, 6 N. J. Law, 332, decided in 1796), in each of which, after indictments had been removed into this court (the ground of the allocatur not being stated), the court entertained and passed upon objections going to the legality of the grand jury, arising upon state of facts shown in or omitted by the caption; the fact in *Nicholls' Case* being that no precept, such as was required prior to 1822, had been issued, while the *Rockafellow Case* was a demurrer to the indictment.

These cases are authority, therefore, upon a point that nobody questions, viz., the power of the court to entertain such objections; but, as authority or precedent for the allowance of a certiorari, for the sole purpose of entertaining a motion to quash upon grounds extraneous to the indictment or its caption, the cases cited are devoid of significance, because they are silent as to the grounds upon which the discretionary allowance of the writ was obtained.

Even if these cases could be cited as exercises of discretion, they would be practi-

cally valueless, because of the changes that have occurred, during the period of nearly a century that has elapsed since their decision, in the factors that enter into the discretion thus exercised. The population of the entire state then was hardly equal to that of a single city to-day; the calendar of this court in 1819 was probably not as large as that of a single branch of the court at a single term to-day; and the local courts were manned by judges unlearned in the law. These factors, and especially the last, might render it discreet, in 1819, for this court to assume a more extended oversight than it is now possible for it to do, in view of its congested list, or necessary for it to do, in view of the fact that the local tribunals are presided over by counselors of this court.

In the present case, this last consideration is unnecessary, since the indictment is in theoyer, where a justice of this court presides.

If one defendant under indictment may thus take in advance the judgment of this court upon debatable questions that may arise at the trial, or upon proper motions or pleadings in the trial court, all defendants may do so under like circumstances, else justice is not administered without respect to persons; and if all may do so the allowance of our writ and its prosecution in this court and the Court of Errors will mean a delay of from one to two years between the presentment of an indictment and its trial in cases where the contentions of the defendant were not well founded, which would quite often be the case, in view of the delay thus obtainable, and the fact that sound discretion in the allowance of our writ could not be exercised, as it is upon matters that are spread upon the face of the indictment.

Public policy admonishes us against setting on foot a procedure having such possibilities, not to say probabilities.

It is not a question of power, to be laid down as a rule of law, but of discretion, to be soundly exercised in the particular case.

The reasons that determine our discretion in the present case, which have been sufficiently indicated, constrain us to withhold our allocatur.

ALLGAIR v. BLEW et al.

(Supreme Court of New Jersey. Nov. 21, 1911.)

(Syllabus by the Court.)

INNKEEPERS (§ 4*)—LICENSES—REVOCATION.

The oath by which complainants are required to verify a complaint made under section 3 of the Bishops law (P. L. 1906, p. 201), amending section 10 of the Werts act (P. L. 1889, p. 82), must be based upon the personal knowledge of the affiants, which, if challenged, is in limine by an offer to prove by legal evidence that they did not possess such knowledge, pre-

sented an issue to be heard and determined by the statutory tribunal upon the question of its own jurisdiction; and the overruling of such an offer, by which such lack of personal knowledge was provisionally established, rendered nugatory a subsequent order for the revocation of a license as an order made by a body upon whom jurisdiction had not been conferred in the manner prescribed by the statute.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 6; Dec. Dig. § 4.*]

Certiorari to Court of Common Pleas, Middlesex County.

Proceeding by Jonathan M. Blew and others against Joseph Allgair to revoke his tavern license. From an order of revocation, Allgair brings certiorari. Revocation set aside.

Argued June term, 1911, before GARRISON, TRENHARD, and KALISCH, JJ.

John A. Coan and George S. Silzer, for prosecutor. J. Boyd Avis, for defendants.

GARRISON, J. This writ of certiorari brings up the order of the Middlesex pleas revoking the prosecutor's license to keep an inn and tavern.

The principal ground on which the prosecutor bases his right to have the final order of the pleas set aside is that the complaint on which the initial rule to show cause against him was issued did not confer upon the pleas jurisdiction to hear and determine whether his license should be revoked for the reason that the complainants by whose affidavit the matters and things contained in the complaint were verified had no personal knowledge whether they were true or false. The contention of the prosecutor is that the lack of personal knowledge in the affiants rendered them incapable of taking an affidavit that would constitute the "verification upon oath" of their complaint under the tenth section of the Werts act (P. L. 1889, p. 82) as amended by the Bishops law (P. L. 1906, p. 199). It is further contended by the prosecutor that when, upon a direct challenge of jurisdiction in this respect, the pleas overruled his offer to prove that the complainants had no personal knowledge of the matters specified in their complaint, the fact that they had no personal knowledge was established for the purposes of such challenge, and hence that the court, if the prosecutor was right as to his legal proposition, proceeded without having acquired jurisdiction under the statutes referred to.

In the determination of the correctness of these legal propositions, the first inquiry is: What must the statutory complaint and affidavit show in order to vest jurisdiction?

By a reference to the statutes cited, it will appear that, in addition to a specification of the illegal acts said to have been committed by the holder of a license, there are two other requirements, one required by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the express terms of the statute, the other by its imperative implications. The express requirement is that the persons who make and verify the complaint shall be residents of the township or municipality in which the license was used. The other requirement is that the commission of the illegal acts specified in the complaint shall be verified upon the personal knowledge of the complainants which is imperatively implied from the fact that the complaint in which such acts are specified shall be "verified by the oath of the complainant." Verification by oath in such a context means "proof"—i. e., evidence based on personal knowledge—and anything that falls short of this falls short of being proof as much in this proceeding as it would in a court of law.

This is established by the cases cited in the brief of counsel for the prosecutor. *Westfall v. Dunning*, 50 N. J. Law, 461, 14 Atl. 486; *Johnson v. Allen*, 55 N. J. Law, 401, 27 Atl. 1014; *Voight v. Excise Board*, 59 N. J. Law, 358, 36 Atl. 686, 37 L. R. A. 692.

This being so, it follows that where affiants do not on the face of their affidavit, state that it is made on belief merely or on information and belief, they in legal effect aver that it is made upon knowledge. If this be not so, the failure to state in the affidavit that it was made upon knowledge would render such affidavit nugatory in every proceeding where verification by oath was required. Where nothing is stated in the affidavit from which the capacity of the affiant to verify its contents can be gathered, one of two courses is open—either to discard such affidavit for failure to show the capacity to make it, or to assume in favor of its validity that such capacity exists, and is in effect averred to exist. The latter, which is the course generally pursued, carries with it the right to rebut such tacit averment as fully as if it had been expressly made. If this position in favor of the verification of the affidavit be not taken, the only alternative is to deny its validity upon its own showing.

In the present case, therefore, the view most favorable to the validity of the affidavit is that it avers not only that the complainants are residents of the locality, but that, as affiants, they have personal knowledge of the specific violations of the law which they are required to verify by their oaths.

It was, in part at least, to this end that the Legislature confined the right to make and verify the complaint to persons resident in the vicinity where the license was used; i. e., to persons who presumably would have personal knowledge of violations of the law, or, at least, would have both the opportunity and the incentive to acquire such knowledge. The double legislative purpose disclosed by this provision is, first, that holders of licenses shall not be open to attack by persons from all over the state, or, per-

haps, from other states, but only by persons immediately affected. This concerns the makers of the complaint qua complainants. The other purpose is that the authority of the license-granting body shall not be invoked by persons who, having both the incentive and the opportunity to acquire actual knowledge that alone would be of aid in such an investigation, have not seen fit to do so. This concerns the complainants qua affiants.

Having this latter purpose in mind, it is incredible that the Legislature provided or intended that the oath by which the facts essential to jurisdiction were to be verified should be the oath of persons who had no knowledge as to the verity or falsity of such facts. The required oath was intended by its terms to verify; i. e., "to prove to be true," "to establish the truth of" (*Webster's New International Dictionary*). It would be fatuous in the extreme for the Legislature, with this object in view, to provide for the making of an oath that could by no possibility verify or possess any element of verification.

Statutory jurisdiction must be acquired in the manner prescribed by the Legislature, or it does not exist at all. Under the statutes now before us, the pleas could no more absolve the complainants as affiants from the possession of the knowledge requisite to make them such than it could absolve them as complainants from the possession of the domicile requisite to make them residents of the township or municipality.

Taking, therefore, the complaint and affidavit in the present case as averring that the complainants had personal knowledge of the commission of the illegal acts specified and sworn to by them, the question whether such averment was in fact true or whether it was false, and the court through ignorance or design was being imposed upon, became as much a topic for preliminary determination upon the question of jurisdiction as the fact of the residence of the complainants would have been, if challenged in limine, as a ground why the court should not assume jurisdiction.

In point of fact, while the latter was not challenged, the former was by a direct offer to prove by the testimony of witnesses, and by calling the complainants themselves, that they did not possess any personal knowledge of the facts the verification of which by their oath was essential to the jurisdiction of the pleas.

Upon this branch of the case, therefore, our conclusion is that the legal propositions of the prosecutor upon the question of jurisdiction were entirely sound.

If the pleas, with this proposition and proffer of testimony before it, had heard the witnesses and decided, upon the evidence, in favor of its own jurisdiction, a different question would be presented. By

refusing, however, to hear the proffered testimony, the fact that the complainants did not have the personal knowledge required for the verification of their complaint was upon familiar principles established for the purposes of the court's action upon the question of its jurisdiction, and the assumption of jurisdiction, in view of such established fact, must rest either upon the ground that jurisdiction was conferred by the merely formal presentation of an affidavit that was admittedly untrue, or else upon the ground that jurisdiction could be taken upon the strength of allegations that in legal effect were not verified by the oath of any one, neither of which propositions has any semblance of soundness.

The right and duty of a court or of a tribunal that upon the proof of certain facts may assume jurisdiction to determine as a preliminary matter the question of its own jurisdiction is universally established. 11 Cyc. p. 700.

"The proof," said Van Fleet, V. C., in *Atlantic Trust Co. v. Consolidated, etc., Co.*, 49 N. J. Eq. 402, 406, 23 Atl. 934, 935, "in support of a jurisdictional fact must always be clear and convincing, for the court derives its power from the fact, and hence, until the fact is shown to exist, it has no power." Jurisdiction in fine in such cases rests upon the proof of facts, not upon a mere matter of form.

The opinion of Magle, Ch., in the case of *Borough of Park Ridge v. Reynolds*, 74 N. J. Law, 449, 65 Atl. 990, carries this duty of inquiry as to the truth of jurisdictional facts even further than is necessary for the purposes of the present case. In that case the Supreme Court had held that the justice to whom the jurisdictional petition of 25 freeholders was presented was not obliged to try and determine the issue raised by the denial of the truth of the facts stated, viz., that the petitioners were freeholders. 73 N. J. Law, 116, 62 Atl. 190.

The Court of Errors and Appeals in affirming this judgment upon another ground took occasion to say in the opinion above cited: "We are unable to approve the view that the Supreme Court justice who has directed the investigation may not be required to institute an inquiry into the truth of the affidavit upon which his jurisdiction has been invoked, at least to the extent of discovering whether he has been imposed upon." If the truth of facts duly verified by the oaths of persons possessing personal knowledge is, when challenged, a proper subject of preliminary determination upon the question of jurisdiction, it follows, a fortiori, that the possession of the personal knowledge essential to the making of the jurisdictional affidavit is likewise a proper subject for such determination.

In the present case, as already pointed out, the facts upon which jurisdiction was challenged were established by the overruling of the offer to prove them, and it is this, among other things, that distinguishes the present case from that of *Davis v. Repp*, 79 N. J. Law, 394, 75 Atl. 169, in which, as will be seen by the state of the case, there was no offer of testimony to prove that the affiants did not possess personal knowledge, but merely a request for permission to cross-examine the complainants who had not been called or examined as witnesses.

The denial of such a request can be supported on several grounds and had no tendency to establish the facts that raise the jurisdictional question we are called upon to determine.

The conclusion to which the foregoing considerations lead us is that the order revoking the prosecutor's license was nugatory because the pleas had not lawfully acquired the jurisdiction to hear and determine the controversy.

Having thus concluded that the pleas was without generic jurisdiction over the controversy, it is unnecessary to consider the other reasons which deal with the lack of specific jurisdiction to make the order of revocation because of alleged errors committed in the course of the proceeding. *Attorney General v. Sooy Oyster Co.*, 78 N. J. Law, 394, 397, 75 Atl. 211.

The order of the Middlesex pleas revoking the license of the prosecutor is set aside and for nothing holden.

CARLING v. CARLING.

(Court of Chancery of New Jersey. Dec. 13, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 327*)—FOREIGN DIVORCE—EVIDENCE OF RESIDENCE—WEIGHT AND SUFFICIENCY.

In a suit for divorce, a plea in bar was filed by the defendant, setting up a previous decree, adjudging a decree a vinculo between the parties by a court of another state, in a suit brought therein by the defendant, claiming residence in that state, against the complainant. Upon the complainant in the present suit contending that such decree was obtained by the defendant's fraudulent representation that he was a bona fide resident of that state, evidence examined, and *held*, that the plea was not sustained.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. § 327.*]

(Additional Syllabus by Editorial Staff.)

2. DIVORCE (§ 327*)—FOREIGN DIVORCE—DOMICILE OF PLAINTIFF.

The mere fact that one went to Dakota with the predominant purpose of securing a divorce would not prevent him from getting a valid divorce there, provided he went *animo manendi*.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. § 327.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Bill by Anna M. Carling against W. Monroe Carling. Decree for complainant.

W. Holt Apgar, for complainant. Linton Satterthwait, for defendant.

STEVENS, V. C. This is a suit for divorce on the ground of desertion. To the bill the defendant has interposed a plea, in which it is averred that on December 19, 1904, he had been for more than six months a bona fide resident of South Dakota; that on that day he filed in the office of the circuit court of the Second judicial district, county of Lincoln, state of South Dakota, his complaint for divorce from complainant on the ground of extreme cruelty; that by the law of that state divorce may be granted on that ground, but not unless the plaintiff has been a bona fide resident for at least six months next preceding the commencement of the action; that no answer, demurrer, or appearance had been put in by defendant; and that after a hearing the court, on January 30, 1905, adjudged a divorce a vinculo between the parties. The sole issue is whether this adjudication constitutes a bar to the present proceeding. The contention is that the decree was obtained by the fraudulent representation that the defendant was a bona fide resident of Dakota.

[1] The parties were married July 11, 1895. The defendant is a physician, 38 years old. Prior to June, 1904, he and his wife had been living with defendant's mother at 230 South Clinton avenue, Trenton, N. J. They had quarreled a good deal, and defendant had, according to the weight of the evidence, offered complainant \$2,000 if she would leave his mother's house, and let him bring a suit for desertion. This she refused to do. About June 10, 1904, or a few days prior thereto, he left Trenton and went to Sioux Falls, S. D. He first lodged with a Mrs. Clark and then with a Mrs. Phillips. Mrs. Phillips says he came to her house on July 23, 1904, and that he roomed there until the following March; that he did not stay away any length of time, except on one occasion, for a week or two, when he went to Philadelphia. In March, 1905, probably, he went to Denver, in the state of Colorado, and in May or June of that year was awarded a certificate, authorizing him to practice medicine there. He took an appointment in the University of Denver as an assistant eye surgeon, and resided and voted in Denver until December 24, 1906, when he returned to Trenton, where he is now residing.

The bill in this case was filed on July 25, 1906. A plea was filed on October 26, 1906, and an amended plea on October 5, 1907. The defendant married again on November 13, 1907. He appears to have done so with full knowledge that the suit was pending. The question is whether he was a bona fide resident of Dakota for the six months prior to December 19, 1904, the day when he be-

gan suit. The divorce was granted on January 30, 1905.

[2] He appears to have left New Jersey with the intention of staying in the West for an indefinite time. He wanted to get away from his wife, and to be divorced from her. He doubtless thought that he could not get a divorce here, and that he could get one in Dakota. The mere fact that he went there with that as the predominant purpose would not have prevented him from getting a valid divorce there, provided he went *animo manendi*. Such was the decision in *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533. But, as was said in that case, if a person go "with the avowed object of living [there] to secure a standing on which to found a judicial proceeding, a violent presumption would arise that the animus of remaining was not definite, but was largely determinate upon the termination of such procedure, and that an actual and bona fide residence had not been obtained." In *Magowan v. Magowan*, 57 N. J. Eq. 324, 42 Atl. 330, 73 Am. St. Rep. 645, it was said by Chief Justice Gummere: "He [Magowan] says that his purpose in going to Oklahoma was to become a resident, but it is very clear that if such was his purpose he failed to accomplish it. To effect a change of domicile, not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence there must be added the *animus manendi*."

I think these quotations are applicable to the present situation. The doctor resided in Dakota for the statutory period, but not, as the evidence shows, *animo manendi*. He had no relatives, friends, or business acquaintances in Dakota. He had made no business or professional arrangement before going. He says that on his arrival in Sioux Falls he made application to the president of the state board, who allowed him to practice until he could pass that board, which he never took the trouble to do. He took a temporary position at Castlewood, a prairie village of three or four hundred inhabitants, to supply temporarily the place of one of the two doctors who practiced there; but it is evident from the testimony of his landlady, Mrs. Phillips, that this practice was not very engrossing. His other occupations consisted in playing golf and in doing some optical work in Sioux Falls. The fair inference from his own testimony is that he had no fixed intention of remaining. In his examination in chief, he says: "My intention was to go there and get 160 acres of land in the Rosebud Indian reservation at \$1.25 per acre, which was opened by the United States government at that time, for which I did make an application, and I had a little interest elsewhere in South Dakota, and—do you want to know anything more? Q. Yes; what was your intention in going out there? A. Well, that was my intention to go into this land business and my mining interest." He does not here state anything about prac-

ticing medicine, although he does mention it in his rebutting evidence.

The mining interest was little more than a myth. Such as it was, it consisted of "prospecting" in the Black Hills, which, he says, could be reached in a shorter time from New York than from Sioux Falls, and of \$200 in stock. He had visited these hills the year before. It does not appear that he revisited them, or that the stock ever acquired any value.

As to the land in the Rosebud reservation, it appears that immediately after reaching Dakota he went to some town, whose name he cannot recollect, and signed his name to some paper which would entitle him to a drawing, and, if he were the lucky man, to a valuable tract. He paid out no money for the privilege. He was not present at the drawing, and did not in fact draw anything. He at once lost all interest in the subject. Taking his own statement of the objects which were potential in inducing him to select Dakota as a place of permanent residence, it is apparent that they did not materialize. He might have decided to remain there for some other reason, but he did not. He appears to have very soon formed the purpose of going to Denver. Norman H. Squires, a perfectly disinterested witness with whom he played golf in July and August, 1904, says that in one of those months Dr. Carling told him that he thought he would like to go to Denver to practice. After failing to draw anything, what more likely than that, seeing no immediate opening in Sioux Falls, or elsewhere in South Dakota, he should make up his mind to go to Denver to practice his profession. The mention of such a determination to the acquaintances that he formed there may possibly explain why he brought his suit in Lincoln county, rather than in Minnehaha county, where his attorney had his office and he himself was living. The case, he says, was actually tried, not in open court, but before a judge at his residence in the town of Mitchell. Whether the trial took place in Lincoln county or in some other county does not clearly appear. It does appear that the action was not tried in the place of his residence, and of the reason for this mode of procedure the defendant can give no explanation. Now, the papers were served upon Mrs. Carling, in New Jersey, in time to defend. He could not therefore have intended to perpetrate the fraud practiced in the Doughty Case. *Doughty v. Doughty*, 28 N. J. Eq. 581. It is possible that Dr. Carling may not have cared to testify in open court, in Sioux Falls, to a fixed purpose to remain in Dakota if he had talked of his intention of going to Denver; but this is mere conjecture.

The doctor, to explain his conduct in leaving Dakota so soon after obtaining his divorce, says that his brother had lung trouble;

that in January, 1905, he went to Philadelphia after him, and that he took him to South Dakota. He adds: "I intended to stay there *until I could take my examination* [whether in Dakota or Colorado he does not say], but I decided to go to Colorado, which I thought would benefit my brother more than myself." The landlady, Mrs. Phillips, says that his brother stayed for a short time at her home, but that she never heard of the lung trouble. The brother himself is not called as a witness, and what became of him after he went to Denver, or what defendant was able to do for him, does not appear. Whether the Philadelphia trip was taken before or after the divorce was obtained, the defendant does not state with certainty. His vague statements in reference to his brother's health do not help him much. They do little more than indicate the ease with which he could change his purpose.

While it thus appears that the defendant gave up his residence in New Jersey, it does not appear that he took up a new residence in Dakota for any other purpose than to get a divorce. The animus manendi in Dakota is not proved. That defendant left New Jersey for the purpose of getting a divorce in South Dakota is perfectly plain. He had no other substantial reason for going. He had a practice in New Jersey, and he had none in Dakota. He had, as I have said, no business or professional engagement to draw him there. He had no friends or acquaintances there. On his own statement, it may be inferred that his intention to remain was conditioned on his drawing a government allotment in the Rosebud reservation. This he failed to do, and having failed he directed his attention to Denver. He spoke of going to that city within two months after he arrived in Dakota. His conduct during the fall of 1904 and the winter of 1905, so far from indicating an intention to remain in Dakota, rather indicates the contrary. He made no effort to secure a permanent position of any sort, or to settle down to the practice of his profession. He was able, within a month or two after reaching Denver, to secure a license to practice in Colorado, and, provided as he was with a New Jersey certificate, it is not likely that he would have found more difficulty in securing one that would have enabled him to practice in Dakota. His very vague statement, "I decided to go to Colorado [when he decided, he does not say], which I thought would benefit my brother more than myself," only emphasizes the absence of definite purpose to make Dakota his home. And so the violent presumption arising from his primary purpose in going to Dakota, and from his actually leaving Dakota shortly after he obtained the decree, is strengthened, rather than overcome, by his conduct and declarations during his compulsory six months residence there. The case does not differ in

principle from *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. Rep. 630; *Id.*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. I think the plea is not sustained.

LONG DOCK CO. v. STATE BOARD OF ASSESSORS.

**MORRIS & E. R. CO. v. SAME.
CENTRAL R. R. OF NEW JERSEY v. SAME.**

(Supreme Court of New Jersey. Nov. 20, 1911.)

(Syllabus by the Court.)

TAXATION (§ 493*)—ASSESSMENT—REVIEW BY COURT.

Where no principle of law is involved, and no preponderance of testimony exists in favor of the prosecutor, the judgment of the state board of assessors upon a question of value will not be disturbed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

Certiorari, on the relation of the Long Dock Company and others, to the State Board of Assessors to review assessment for taxes. Assessment affirmed.

Argued February term, 1911, before GARRISON, PARKER, and VOORHEES, JJ.

Collins & Corbin, for Long Dock Co. W. D. Edwards, for Morris & E. R. Co. George Holmes, for Central R. R. of New Jersey. R. V. Lindabury and James J. Murphy, for Jersey City. Warren Dixon, George L. Record, and Horace L. Allen, for City of Hoboken. Edmund Wilson, Atty. Gen., for the State.

GARRISON, J. The assessments for taxes brought up by these writs must be affirmed. No legal principle is involved. The value of property is the sole matter of dispute.

By a previous decision of this court that has been affirmed by the Court of Errors and Appeals (80 Atl. 1135), the principle was laid down that in the assessment of second-class railroad property the additional value imparted to such property by its use under a railroad franchise should not be included. *Long Dock Co. v. State Board of Assessors*, 78 N. J. Law, 44, 73 Atl. 53.

This principle the state board has observed in making the present assessment. The opinion in the case cited also held that the market value of terminal property due to its availability for railroad purposes generally was a legitimate basis for its assessment for taxation. This value the state board has assessed in the present case. The fact that the present assessment does not greatly vary from the previous one does not involve the violation of any principle of law, or show that the legal principles laid down for the guidance of the board have been disregarded. All that it shows is that in the judgment of the board the value of these terminal lands

for railroad purposes generally was substantially identical with their value under a special franchise for railroad use. That is a question of fact, and we cannot say that it is not so.

The valuation on which the present assessments were made is supported by the return of the state board to which the Legislature has given express authority "to use their personal knowledge and judgment as to the value of property." It is also supported by some of the testimony taken under these writs while opposed by other testimony so taken. We are unable to say that the latter testimony so preponderates as to overcome the judgment of the board and the testimony that supports it as to make it our clear duty to substitute our judgment for that of the state board upon a question of value. If it were a question of law, our opinion might be of more worth than that of an administrative board, but upon a question of value the presumption is rather the other way.

The values placed on these terminal lands by the state board will not be disturbed.

The assessments brought up by these writs are affirmed.

McNULTY v. MCCARTHY.

(Court of Chancery of New Jersey. Feb. 21, 1911.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 208*)—TRUST DEED—FUTURE CREDITORS.

After examination of the trusts created and declared in a trust deed dated April 1, 1895, in a creditor's suit to satisfy a judgment out of land conveyed by a judgment debtor (the settlor) to a trustee for himself and his children, where it appeared that the complainant's debt was contracted after 1902, and the judgment recovered October 25, 1905, held, that such deed is a fraudulent device as to all the future creditors of the settlor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 631, 633; Dec. Dig. § 208.*]

2. FRAUDULENT CONVEYANCES (§ 64*)—FRAUDULENT INTENT—SUBSEQUENT DEBTS.

Under the authority of *Washington National Bank v. Beatty*, 77 N. J. Eq. 252, 76 Atl. 442, the rule seems to be now settled in this state that a voluntary conveyance made with actual fraudulent intent is void as against any subsequent creditor of the grantor, although his debt was contracted long after the voluntary conveyance is made, and was not then contemplated by the grantor as a possibility.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 159-161; Dec. Dig. § 64.*]

3. FRAUDULENT CONVEYANCES (§ 812*)—SETTLING ASIDE—INTEREST OF GRANTOR.

As between the judgment debtor and the trustee and his children, such deed is valid and will be set aside only so far as is necessary to pay the complainant's debt.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 963-965; Dec. Dig. § 812.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. FRAUDULENT CONVEYANCES (§ 312*) — TRUST DEED—INTEREST OF GRANTOR.

So much of such deed as defined the trust further examined, and under it the settlor was *held* to take a life estate in the rents and income of the estate (which amounts to the same thing as an equitable life estate in the corpus), and his equitable interest is primarily liable for the debt, and should be exhausted before recourse is had to the interests of the remaindermen.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 963-965; Dec. Dig. § 312.*]

5. FRAUDULENT CONVEYANCES (§ 312*)—TRUST DEED—DEBTS OF GRANTOR—APPORTIONMENT AMONG REMAINDERMEN.

In case recourse is had to the interests of the remaindermen, provision may be made in the decree for apportioning the complainant's debt equitably among the different shares.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 963-965; Dec. Dig. § 312.*]

Bill by John R. McNulty against Eugene J. McCarthy. Decree for complainant.

Case heard on bill, answer, replication, and proofs taken in open court. Creditor's suit to satisfy a judgment out of land conveyed by a judgment debtor to trustee for himself and his children. Date of trust deed, April 1, 1895. Complainant's debt contracted after 1902 and judgment recovered October 25, 1905.

The land, which is situate in Jersey City, was conveyed as aforesaid by the defendant William Winberry, party of the first part named in the deed, to the defendant Eugene J. McCarthy, party of the second part, upon the following trusts:

"(1) That he (the party of the second part) will allow the said party of the first part to manage and control said property, as he may think best for the interest of his children hereinafter named and to collect and receive all of the rents and income from the same and apply same to such purposes as he may desire during the term of his natural life.

"(2) That he will at any time when requested in writing so to do by party of the first part, convey to Anna Winberry, daughter of said party of the first part, the property situate upon Wayne street, being the property hereinbefore second above described, to have and to hold to her, her heirs and assigns, forever.

"(3) That in case of the death of the said party of the first part without making such request, leaving said Anna Winberry him surviving, he will then convey said Wayne street property to her, to have and to hold, to her, her heirs and assigns, forever.

"(4) That he will at any time when requested so to do by said party of the first part in writing, convey to William Winberry, the son of said party of the first part, the farm situate in Rockland county, New York, being property hereinbefore first above described, to have and to hold unto said Wil-

liam Winberry, his heirs and assigns forever.

"(5) That in case of the death of said party of the first part before making the request to convey said farm to his said son, William Winberry, leaving his said son him surviving, he will then convey said farm to said William Winberry, to have and to hold unto him, his heirs and assigns, forever.

"(6) That he will at any time, when requested in writing so to do by the said party of the first part, convey to Mary E. Winberry, Ray Winberry and Eleanor Winberry, three of the children of the said party of the first part, the Gregory street property above mentioned, being the three lots and parcels hereinbefore last above described, to have and to hold unto said Mary, Ray and Eleanor as tenants in common and unto their heirs and assigns, forever.

"(7) That in case said party of the first part shall desire to have the three last mentioned lots conveyed separately and severally to said Mary, Ray and Eleanor, each to have one of them and shall so request in writing, designating which lot shall be conveyed to each of said children, he will make such conveyance accordingly, conveying one of said lots to said Mary, one to said Ray and one to said Eleanor, to have and to hold to each of them respectively, their heirs and assigns, forever.

"(8) That in case of the death of said party of the first part without requesting the conveyance of said Gregory street property, leaving said Mary, Ray, and Eleanor him surviving, he will then convey the said property to them as tenants in common, to have and to hold unto them, their heirs and assigns, forever.

"(9) In case of the death of any of said children of said party of the first part, without leaving lawful issue and before the conveyance to him or her of the property above described, as hereinbefore directed, then he will hold the property which would have been conveyed to such child so dying, if he or she had lived to receive such conveyance, in trust for the use and benefit of the surviving children of said party of the first part, to be conveyed to them as may be directed by said party of the first part, or if he fail to give such direction, then upon his death to be conveyed to said surviving children as tenants in common, to have and to hold to them, their heirs and assigns forever."

Charles H. Hartshorne, for complainant.
Charles J. Roe and Addison Ely, for defendant.

STEVENSON, V. C. (after stating the facts as above). [1] I. My conclusion of fact is that the whole trust in question was a fraudulent device as to all the future cred-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

itors of the settlor. It is, in my opinion, a transparent scheme to enable Mr. Winberry to enjoy the full control and use of all his property, or the more valuable part of it, while he could contract debts with impunity. In case a creditor should become urgent and proceed to apply to his debt whatever beneficial equitable interest Mr. Winberry reserved to himself in the trust estate, he (Mr. Winberry), according to the terms of the trust, could disappoint the pressing creditor by calling upon the trustee to convey the estate to his (Winberry's) children in the prescribed portions. Mr. Winberry thus had a string on the several portions which he intended to allot to his children which enabled him to remain practically the owner of his estate for his own uses and purposes, while he would have nothing to satisfy any debts which he might thereafter contract. It certainly would be discouraging to a creditor to undertake to reach the equitable life interest of Mr. Winberry when, at the end of an expensive litigation like the present one, the whole life estate could be terminated at the word of Mr. Winberry and the entire estate become vested in his children.

[2] In my judgment the law ought not to tolerate, and does not tolerate, such devices. The fraudulent intent extends to all future indebtedness. I think this is a case of actual fraud which directly affects all debts which Mr. Winberry might contract at any time after the trust conveyance was made.

[3] 2. As between Mr. Winberry and the trustee and his children the conveyance in trust of course is valid. The conveyance will be set aside only so far as is necessary to pay the debt of the complainant.

3. In my opinion under the first paragraph defining the trust, Mr. Winberry takes a life estate in the rents and income of the estate which amounts to the same thing as an equitable life estate in the *corpus*. He is expressly allowed to manage and control the property and to apply the rents and income to "*such purposes as he may desire during his natural life.*" It is impossible to find that there is any intention here that the income shall be applied only to purposes relating to the support or welfare of the children. The requirement that he shall manage and control "as he may think best for the interest of his children" indicates to my mind only a cunning intention to make it appear that the children are equitably interested in the income during Mr. Winberry's lifetime, while in fact such is not the case. This provision savors of fraud and deceit. Mr. Winberry is to manage and control the corpus for the interest of his children while he can apply the income to all "such purposes as he may desire."

[4] The equitable interest of Mr. Winberry is primarily liable for the debt and should be exhausted before recourse is had to the interest in remainder belonging to the children.

4. On account of the peculiar character of the trust by which the attempt is made to enable Mr. Winberry to distribute his estate among his children whenever his life estate is attacked, it may not be important to provide in the decree for the exhaustion of the life interest before recourse is had to the interests of the remaindermen. This matter may be determined upon settlement of the decree.

[5] In case recourse is had to the interests of the remaindermen, provision, perhaps, may be made in the decree for apportioning the complainant's debt equitably among the different shares. My recollection is that the share of one child consists of land situate in the state of New York. How far equality of burdens among the children may be incidentally effected while granting the complainant the relief to which he is entitled may also be determined upon settlement of the decree. This matter has not been the subject of argument, and possibly it may be proper to take some additional testimony. It occurs to me, whether an appeal is taken or not, that this matter may be reserved. If the complainant's debt is to be paid out of this entire estate, it may be surmised that the defendants may avoid having the decree adjust any equities *inter sese*, if they are all now of full age, by making arrangements satisfactory to themselves.

The foregoing memorandum was furnished to counsel as a sufficient exposition of the theory upon which the decree in favor of the complainant was based. If when this memorandum was prepared I had had the benefit of the opinion of Judge Dill, written for the Court of Errors and Appeals in the case of *Washington National Bank v. Beatty et al.* (June 21, 1910) 77 N. J. Eq. 252, 76 Atl. 442, the decree might also have been stood upon another ground. Probably the somewhat uncertain condition of our law, which the above-cited case cleared up, impelled me to avoid the discussion of several questions which were fully argued by counsel in regard to the nature of the fraudulent intent of the settlor requisite to make his gift void as against debts subsequently contracted, and not within the scope of his actual fraudulent intention. In this case of *Washington National Bank v. Beatty* the opinion contains what purports to be a deliverance of the entire court, which, although not necessary to the decision of the case, must, I think, be regarded as settling the law of the state so far as this court is concerned.

Under the authority of this decision, or this deliverance, this voluntary settlement by Winberry must be regarded as void as against the complainant's debt, which began to be contracted eight years later, and was plainly entirely beyond the contemplation of Winberry when the trust deed was made in 1895. The evidence satisfied my mind be-

yond all question that this voluntary conveyance in trust made in 1895 was made with actual intent on the part of the grantor, Winberry, to put his property where his then existing creditors could not reach it. The trust deed bears date April 1, 1895, and was recorded July 2, 1895, and on July 19, 1895, the creditors of Winberry settled with him for 50 cents on the dollar in cash and notes. I do not think that it is possible, under the circumstances proved in this case, to doubt the actual fraudulent intent of Winberry in making this voluntary conveyance in trust. Under the sweeping rule applicable to this case laid down by the Court of Errors and Appeals in the above-cited recent case, it seems to be unnecessary to enter into the question whether any of the indebtedness existing when the voluntary conveyance was made, and within the actual fraudulent intent of Winberry, remained unpaid when the complainant's debt was contracted, or when this suit was begun, or what the effect of such fact may be under our law or the law of other jurisdictions. Accepting what strictly speaking seems to be a dictum in the opinion of Judge Dill as an authorized deliverance of the Court of Errors and Appeals, the rule seems to be now settled in New Jersey that a voluntary conveyance made with actual fraudulent intent is void as against any subsequent creditor of the grantor, even though his debt was contracted long after the voluntary conveyance was made, and was not then contemplated by the grantor as a possibility. A voluntary deed having the taint of fraud, and being therefore voidable as to any creditor, seems to stand permanently as void against all future creditors of the grantor, however remote in time the creation of their debts may be from the making of the fraudulent conveyance, and however far removed they may be from any actual fraudulent intent of the grantor. As stated by Judge Dill, if the conveyance is shown to have been made with actual intent to defraud "any creditor either existing at the time when the conveyance is made or subsequently," then it follows that "the conveyance is proven to be fraudulent, and it may be set aside at the instance of any class of creditors without regard to the time when the debt came into existence."

BACHE et al. v. CENTRAL LEATHER CO.
et al.

(Court of Chancery of New Jersey. March 3, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 198*)—STOCKHOLDERS—MEETINGS—PROXIES—INJUNCTION.

A preliminary injunction will not be granted restraining the defendants from voting at

the annual stockholders' meeting for the election of directors' proxies upon 52,430 out of 729,980 outstanding shares of stock, upon the ground that there had been a severance of the right to vote from the vested title to and ownership of the stock, where it appeared that, if the questioned shares be deducted from the 476,500 shares for which the defendants had proxies there would still be left to them proxies for 424,070 shares against which nothing was alleged, or nearly 60,000 shares more than a majority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 767-776; Dec. Dig. § 198.*]

2. CORPORATIONS (§ 198*)—STOCKHOLDERS—MEETINGS—PROXIES.

The nature and characteristics of a proxy explained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 767-776; Dec. Dig. § 198.*]

3. CORPORATIONS (§ 201*)—STOCKHOLDERS—MEETINGS—JUDICIAL SUPERVISION.

A master of this court will not be appointed to supervise such election on the ground that inspectors of election had been appointed by the present board of directors and were mere employes of the company, subject to the direction of its officers and without independent judgment in deciding upon the admission or rejection of a challenged vote.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 765, 766, 774, 775; Dec. Dig. § 201.*]

4. STOCKHOLDERS' MEETINGS—INSPECTORS OF ELECTION.

The powers and duties of such inspectors of election defined.

Bill in equity by Julius S. Bache and others against the Central Leather Company and others. Heard on motion for preliminary injunction. Denied.

Robert H. McCarter and Henry Wollman, for complainants. Richard V. Lindabury and Edward M. Shepard, for defendants.

HOWELL, V. C. The complainants are stockholders of the Central Leather Company. They seek by their bill to interfere with the annual meeting of the stockholders originally called for February 23, 1911, by enjoining the defendants from voting thereat upon certain shares of stock, and to have the election of directors supervised by a master in chancery. The company was organized under the New Jersey general corporation law with an authorized capital of \$80,000,000, divided equally between common stock and preferred cumulative stock carrying a dividend of 7 per cent. annually. Of this authorized issue there are now outstanding 729,980 shares, of which the complainants own and represent about 180,000 shares. As the time for the annual meeting approached, the officers and directors for the current year sought proxies from the other stockholders to be voted on at the annual meeting. They have succeeded in securing proxies for voting 476,500 shares, which, it will be observed, is an amount largely in excess of one-half of the stock issued and outstanding. I assume that these figures are correct, because they are stated substantially in the same way in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a circular letter addressed by the proxy committee to the stockholders of the company which is copied and included in the complainants' affidavits, and therefore relied upon by them, and stated also unequivocally in the affidavits filed on behalf of the defendants. If these facts were all the facts in the case, it would be difficult to see how any injunction could lawfully issue to prevent the voting of any or all of the shares for which the present administration holds the proxies. The complainants, however, allege that there are 52,430 shares for which the proxy committee holds proxies which have no right to be voted by proxy for the reason that there has been a severance of the right to vote from the vested title to and ownership of the stock. It is said that the defendants, or some of them, borrowed shares from other shareholders and had them transferred on the company's books in the names of persons who were friendly to the management who then gave proxies to vote upon these shares, and that immediately thereafter the certificates for shares were returned to the true owners. In the meantime the directors, by resolution, closed the transfer books so that it became impossible to have the stock retransferred into the names of the owners, and so the proxy committee are enabled to vote upon this stock at the annual meeting without regard to the wishes of the true owner. And the position is aggravated, the complainants say, by the fact that they have become the purchasers in the meantime of 460 shares of this very stock which now belongs to them and which they allege will be voted against them at the annual meeting, and that they have no recourse whatever.

[2] I am of the opinion that it is unlawful, and a gross violation of the public policy of this state, to permit or contract for a separation of the voting power of corporate stock from its ownership. If a stockholder executes a proxy, the person to whom it runs is the stockholder's agent, and he must vote in accordance with the instructions given either openly or tacitly to him by the real owner of the shares. The agency is of such a character that it may be abrogated by the appearance of the shareholder in person at the meeting, or by the execution of a subsequent proxy which would cancel the former one; the whole situation being entirely under the control of the stockholder himself. The situation as to the stock complained of in this case is very different. Here the stockholder has divested himself of the right to vote at stockholders' meetings and has sold the right or given it away to persons who may vote it wholly in opposition to his wishes, and thus the power to appoint a proxy degenerates from a scheme for the best method of conducting the business of the company into a mere device for maintaining the control. The real stockholder, at the stockholders' meetings, has a right to have the other real stockholders present in person or by

proxy for the purpose of considering the well-being of the company. This result is not reached when the contest is one which is waged merely for control without regard to the best interests of the corporation. The authorities are *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Warren v. Pim*, 66 N. J. Eq. 382, 59 Atl. 773; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454.

[1] If the case turned upon this point, I think it would have to be decided in favor of the complainant, but it does not. If you deduct the 52,430 shares complained of from the 476,500 shares for which the management have proxies, there will be left proxies against which nothing is alleged for 424,070, which is nearly 60,000 shares more than a mere majority. If, therefore, an injunction should run against the voting of the 52,430 shares, it will cut no possible figure in the election for the reason above stated.

It is quite apparent that, if these figures are correct, there is nothing for an injunction to protect. There is no charge of fraud or collusion on the part of the present management, and there does not appear to be any irreparable injury growing out of the situation. It is said that the board of directors, by means of a proxy committee, have canvassed the whole field of stockholders for proxies running in the name of three of the officers and directors of the company to vote for the present management, and that at the same time the same board has appointed three inspectors of election, who are mere employes of the company and subject to the direction of the officers, and who therefore can have no independent judgment in making a decision upon the admission or rejection of a challenged vote, and that this amounts in law and in equity to appointing the present management to be judges in their own case. The practice referred to stands upon the ground of inveterate usage. It is sustainable only upon the ground that they hold the election fairly and honestly and neither commit or permit any fraud to be perpetrated upon the minority stockholders.

[4] Ordinarily speaking, the tellers or inspectors of the election at a corporation meeting perform only ministerial duties and, notwithstanding the elaborate by-law on the subject in this case, I do not see how they can be given judicial duties; they certainly cannot be given judicial duties which will override or in any way interfere with an inquiry by the Supreme Court into the regularity of the company's action.

[3] This view of the case makes it unnecessary for me to discuss the question of the appointment of a master in chancery to superintend the meeting, as was done by Judge Caldwell in *Bartlett v. Gates* (C. C.) 118 Fed. 66, and as was approved of by the Supreme Court of Pennsylvania in *Tunis v.*

Hestonville Railroad Co., 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665; but I am constrained to say that in my opinion the cases called to my attention on behalf of the complainants in this connection do not go to the extent claimed. Chancellor McGill, in *Archer v. American Waterworks Co.*, 50 N. J. Eq. 33, 24 Atl. 508, evidently meant to say that the power of the Court of Chancery to protect corporate elections would be exercised by means of injunctions, and such is undoubtedly the meaning of the opinion of Chancellor Pitney in *Warren v. Pim*, 66 N. J. Eq. 382, 59 Atl. 773. The statement made by Chancellor Runyon in *Lehigh Coal & Navigation Co. v. Central Railroad Company of New Jersey*, 85 N. J. Eq. 353, as to the exercise of the power of the court to provide for corporate elections, refers to the affairs of a railroad company which were being administered by the Court of Chancery by a receivership, which gave the court such control over the affairs of the company that it had power to order an election as part and parcel of its plan of management.

The motion will therefore be denied.

CHAMBERS v. PHILADELPHIA PICKLING CO.

(Supreme Court of New Jersey. Nov. 13, 1911.)

1. APPEAL AND ERROR (§ 119*)—REMITTITUR—TIME OF FILING.

The remittitur from the Court of Errors and Appeals was dated March 6th, when the opinion was delivered, but the file mark indorsed thereon by the clerk of that court was April 24th, 13 days after the case was actually retried below. *Held*, that the reasonable inference was that, though the remittitur was ordered by the appellate court on March 6th, it was not filed in the clerk's office by the attorneys until April 24th, after the case was actually retried below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4646; Dec. Dig. § 1191.*]

2. APPEAL AND ERROR (§ 1187*)—ENTRY OF REMITTITUR—JURISDICTION OF LOWER COURT—TIME OF ACQUIRING.

Where the remittitur was not actually filed until April 24th, the lower court did not have power to retry the case on April 11th, though the remittitur was ordered by the appellate court on March 6th; the record having been removed by the court of error, and the lower court having no jurisdiction till it is returned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4642; Dec. Dig. § 1187.*]

Action by Walter Chambers against the Philadelphia Pickling Company. On rule to show cause. Rule made absolute.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

Wilson & Carr, for the rule. Wescott & Wescott, opposed.

GUMMERE, C. J. [1, 2] This case was tried at the Camden circuit on April 11, 1911, in the absence of the defendant, and resulted in a verdict for the plaintiff. The case had been in the Court of Errors and Appeals on a review of a judgment overruling a demurrer. 79 Atl. 273. The remittitur from the Court of Errors and Appeals bears date March 6, 1911; the file mark indorsed upon it by the clerk of the Court of Errors and Appeals, however, bears date April 24, 1911, 13 days after the trial at the circuit. The reasonable conclusion to be drawn from these variant dates is that, although the remittitur was ordered by the appellate court on the 6th day of March (that being the date upon which the opinion of that court was delivered in the case), the plaintiff's attorney failed to file the remittitur in the clerk's office until the 24th of April. On this assumption, the trial was premature, for the writ of error removed the record into the court of review, and that record remained there until the remittitur was actually entered. *Welch v. Brown*, 42 N. J. Law, 324. Moreover, under rule 39 of the Court of Errors and Appeals, the record is not permitted to be actually remitted to the court below until after the expiration of 10 days from the date of the entry of the remittitur, without a special order of the court. Until the record was returned, the court below was without power to try the case. For this reason, the rule to show cause will be made absolute.

DAVIS v. PALMER.

(Court of Chancery of New Jersey. Jan. 27, 1911.)

(Syllabus by the Court.)

1. PARTITION (§ 79*)—ACTIONS—MODE OF ACTUAL PARTITION.

Partition Act (P. L. 1898, p. 666) § 65, expressly empowers the Court of Chancery in its discretion to grant the desire of tenants in common who elect to have their shares set off in one parcel without partition inter sese, and where the complainant is one of six equal tenants in common of the lands in question, and the defendants comprise the other five cotenants and unite in an answer joining in the prayer of a bill that a commission issue to make partition, but expressly declaring their election to have their shares set off to them jointly, and praying that the interest of the complainant be set off to him in severalty, the answer should be submitted to the master on the reference to him of the other matters.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. § 79.*]

2. PARTITION (§ 77*)—ACTIONS—MODE OF ACTUAL PARTITION.

Where one party holds five shares, and the other party holds one share, the question is, not whether the land can be divided into six shares of equal value, but whether the land can be divided into two shares having the ratio of value of five to one; or, in other words, whether a portion can be set off which will be one-sixth the value of the whole tract without prej-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

udice to the owners, and without disregarding any equities of the two parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–223; Dec. Dig. § 77.*]

3. PARTITION (§ 78*)—ACTIONS—MODE OF ACTUAL PARTITION.

The distribution by lot in such a case is impracticable, and not binding upon this court.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265–273; Dec. Dig. § 78.*]

4. FORMER DECISION FOLLOWED.

The practice approved and followed in *Wain v. Meirs*, 27 N. J. Eq. 351, 354, followed in this suit.

Bill in equity by Mark W. Davis against Emma L. Palmer for partition. Heard on motion to confirm the master's report. Decree entered.

George P. Rust, for the motion. Frank W. Hastings, Jr., and Frank P. McDermott, opposed.

STEVENSON, V. C. Objection is made to confirming the master's report because he has reported that partition cannot be made without great prejudice to the owners, whereas it is insisted that actual partition can and ought to be made. All the parties were before the court and were represented by counsel on the argument of this motion, the one party contending that the master's report should be confirmed, and the premises should be sold, and the other party contending that the master's report should be set aside or disregarded. No application was made to have the cause in any event sent back to the master for further consideration, and there seems to be no reason why the court should not dispose of the case in its present aspect without any further reference to a master.

1. The premises in question consist of a farm near Hasbrouck Heights, having a width of about 550 feet and a length of about 4,000 feet. The Pollify road runs through the easterly end of this long, narrow farm. The whole tract is adjacent to similar lands which are in the hands of real estate operators for "development," and it is no longer capable of being advantageously applied to farming purposes. Its value, about \$1,000 an acre, shows that it cannot any longer be dealt with as a farm or as farm lands. The complainant Mark W. Davis is one of six equal tenants in common of the above-mentioned farm. The defendants embrace the other five tenants in common.

2. Having in view the shape of the land and the number of tenants in common, there seem to be very strong grounds to sustain the report of the master to the effect that this tract of farm land cannot be actually divided into six parts without great prejudice to the owners. The main scheme for division, which was the subject of examination and argument before the master, seems

to involve the dividing of this long, narrow strip of land, one end of which just projects beyond the road into six strips, each of which would be less than 100 feet wide and about 4,000 feet long.

[1] 3. The reference, however, in this case was not the ordinary reference in an uncontested partition suit. The five owners who appear as defendants unite in an answer joining in the prayer of the bill that a commission issue to make partition but expressly declaring their election to have their shares set off to them jointly, and praying that the interest of the complainant be set off to him in severalty. This answer was or should have been submitted to the master; the reference having been made under rule 29. Probably the attention of the master was not called to this answer, and he may have supposed that the reference was in the usual form in uncontested partition suits. The depositions seem to have been taken upon the theory that any actual partition must be into six shares equal in value.

4. The rule in equity is well settled that where one tenant in common has improved a portion of the land or has wasted a portion, or where one party owns a larger share than the others, the partition often must be made so as to recognize all equities, and a division into shares of equal value may be impracticable and inequitable. *Polhemus v. Emson*, 30 N. J. Eq. 405.

[2] Where one party holds five shares and the other party holds one share, the question is, not whether the land can be divided into six shares of equal value, but whether the land can be divided into two shares having the ratio of value of five to one. Otherwise stated, the question is whether a portion can be set off which will be one-sixth the value of the whole tract without prejudice to the owners, and without disregarding any equities of the two parties.

[3] The distribution of parcels by lot in such a case, as well as in many other cases, where equity requires particular portions to be assigned to particular parties, is impracticable, and the use of the lot is not obligatory upon the Court of Chancery. *McMullin v. Doughty*, 62 N. J. Eq. 252, 257, 258, 49 Atl. 914, affirmed 63 N. J. Eq. 800, 52 Atl. 1132; *Dan. Ch. Pr.* (6th Am. Ed.) 1150, 1158.

5. Our present partition act (P. L. 1898, p. 666, § 65) expressly empowers the Court of Chancery in its discretion to gratify the desire of tenants in common who elect to have their shares set off in one parcel without partition inter sese. No reason has been suggested why the request of the five defendants set forth in their answer should not be granted. The master, as stated above, apparently did not consider such request. Unless some facts are hereafter disclosed, which do not now appear, these five defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r-Indexes

should be treated as a single owner of an undivided five-sixths share.

[4] 6. The practice approved and followed in *Wain v. Meirs*, 27 N. J. Eq. 351, 354, seems to be directly applicable to this case. A commission will issue in the usual form prescribed in that case, and, if the commissioners find that they cannot set off to the complainant a parcel equal in value to one-sixth the value of the whole tract without prejudice to the owners, they will so report.

EARL v. EARL.

(Court of Chancery of New Jersey. Nov. 8, 1911.)

(Syllabus by the Court.)

DIVORCE (§ 214*)—ALIMONY AND COUNSEL FEES—PRIMA FACIE CASE.

When a wife, in a suit for divorce against her husband, petitions for alimony and counsel fee pendente lite, her sworn statement alone in proof of the alleged matrimonial offense is insufficient; for, in order to obtain preliminary relief, she must make a prima facie case, and, as a divorce in this state is never granted upon the uncorroborated testimony of the complaining party, a prima facie case is not made by her affidavit unsupported by other evidence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 626-631; Dec. Dig. § 214.*]

Bill by Irma Leigh Earl against Binney Woodward Earl for divorce. Application for alimony and counsel fee pendente lite. Denied.

John H. Backes, for petitioner. Eckard P. Budd and Joseph H. Gaskill, for defendant.

WALKER, V. C. This is a cause for divorce for alleged adultery on the part of the defendant. After instituting her suit, the wife filed a petition for alimony and counsel fee pendente lite. On this application the only proof offered of the alleged matrimonial offense was the sworn statement of the wife. She testifies to facts, which, if true, point conclusively to the commission of adultery by the husband. He resists the application for preliminary allowances and denies on oath that he is guilty of the offense laid to his charge.

This is not a case in which the wife is required to preponderate in the proofs on the preliminary application in order to prevail, (as in the case of *Suydam v. Suydam*, 80 Atl. 1057), for she sues for divorce a vinculo in apparent good faith and is a favored suitor. But, nevertheless, in order to entitle herself to alimony and counsel fee pendente lite, she must make a prima facie case, and the testimony of the injured party alone does not make a prima facie case in a suit for divorce. In this state a divorce is never granted upon the uncorroborated testimony of the complaining party. *McShane v. McShane*, 45 N. J. Eq. 341, 19 Atl. 465; *Hires v. Hires*, 61 N. J. Eq. 491, 48 Atl. 598; *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71.

Therefore the oath of the petitioner alone is not a sufficient foundation for a decree, nor is it sufficient to entitle the petitioner to preliminary relief, for she must on that application at least show the court that she has such a case as, if proved on final hearing, will entitle her to the relief she seeks. And this, of course, is entirely aside from the defendant's denial.

In *Streitwolf v. Streitwolf*, 58 N. J. Eq. 570, at page 574, 43 Atl. 904, at page 906 (45 L. R. A. 842), Judge Adams, speaking for the Court of Errors and Appeals, said: "A husband is bound to support his wife, though she is separated from him, unless she is in fault. When in apparent good faith she sues him for a divorce or for separation, and sets forth a prima facie case, there is no presumption that she is in fault. She is therefore entitled to alimony pendente lite."

The motion for preliminary allowances must be denied; but, under the circumstances, the denial will be without prejudice to the renewal of the application on sufficient proof.

WASHBURN v. UNITED STATES CASUALTY CO.

(Supreme Judicial Court of Maine. Nov. 20, 1911.)

1. INSURANCE (§ 145*)—CONTRACT—ACCIDENT INSURANCE—RENEWAL—EVIDENCE—SUFFICIENCY.

A general insurance agent, pursuant to a long course of dealing with decedent and under instructions "never to let a policy expire unless told to," received a renewal receipt from an accident insurance company and attached it to decedent's policy, then in the agent's safe, charging the renewal premium to decedent, crediting the amount to the company, and attaching copy of the receipt to the policy register. Decedent intended to have the policy renewed, and understood that it had been. *Held*, that the policy was legally renewed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.*]

2. INSURANCE (§ 137*)—PREMIUMS—CREDIT—PRESUMPTIONS.

Credit is presumed to have been extended to insured for a premium, if the policy was delivered without requiring payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 239; Dec. Dig. § 137.*]

3. INSURANCE (§ 379*)—ACCIDENT INSURANCE—APPLICATION—WARRANTIES—ESTOPPEL BY AGENT'S ACT.

Under Rev. St. c. 49, § 93, providing that insurance agents shall be regarded as in the place of their principals, an accident insurance company is bound by its general agent's act in writing and signing an application, at applicant's request, containing representations as to applicant's occupation and habits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 999; Dec. Dig. § 379.*]

Report from Supreme Judicial Court, Somerset County, at Law.

Action by Lillian J. Washburn against the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

United States Casualty Company. On report. Judgment for plaintiff.

Assumpsit on an accident insurance policy for \$5,000, issued to Henry Washburn, the husband of the plaintiff, and payable to the plaintiff, as beneficiary, in event of the death of the said Henry Washburn, "resulting from bodily injury effected by external, violent, and accidental means." This cause has previously been before the law court on exceptions. See *Washburn v. United States Casualty Company*, 106 Me. 411, 76 Atl. 902. At the conclusion of the evidence in the second trial, the case was reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

George W. Gower and Turner Buswell, for plaintiff. Merrill & Merrill, for defendant.

WHITEHOUSE, C. J. [1] This is a suit upon an accident insurance policy for \$5,000 issued to Henry Washburn, payable to the plaintiff, as beneficiary, in the event of the death of the insured, "resulting from bodily injury effected by external, violent, and accidental means." It is alleged that the insured came to his death on the 21st day of February, 1908, as the result of such a bodily injury sustained on the 19th of the same month, and in this action the plaintiff seeks to recover the amount of the indemnity for the loss of life as stipulated in the policy. The case has previously been before the law court on exceptions to the ruling of the presiding justice ordering a nonsuit. *Washburn v. Casualty Company*, 106 Me. 411, 76 Atl. 902. The exceptions were sustained, and the case now comes to the law court a second time on a report of the evidence presented at the former trial and certain additional testimony introduced at the second hearing. Upon so much of this evidence as is legally admissible, the law court will now finally determine all questions of law and fact involved in the case.

It will be seen, from an examination of the former opinion in this case in 106 Me. 411, 76 Atl. 902, that the only question involved in the exceptions which was argued by counsel and considered by the court was, whether the original policy, which by its terms expired January 16, 1908, a month before the death of the insured, had been renewed according to the regulations and practice of the company, and the established course of business between its agent and the insured, so as to be legally in force at the time of the accident. It was then the defendant's principal contention that its liability terminated with the expiration of the original policy. But the opinion holds that the evidence then before the court was sufficient to warrant the conclusion that a

valid contract of renewal had been made between the parties, and that the policy was in force at the time of the death of the insured.

A careful examination of the additional evidence now before the court, in connection with the former testimony, fails to disclose any material fact tending in any degree to detract from or impair the force and effect of the original evidence before the court on exceptions. On the contrary, there is new and important evidence introduced by the plaintiff, which very materially strengthens the foundation upon which the former opinion was based, that the original policy had been legally renewed.

According to the former testimony, for 10 or 15 years prior to the date of the policy in suit, Mr. Griffin, the general agent of the company, had been intrusted with the entire charge of Mr. Washburn's insurance business, and kept all of his policies in his safe in a pigeonhole devoted exclusively to that purpose. Mr. Griffin stated that he had "explicit instructions" from Mr. Washburn "never to let a policy expire unless he was told to," and that under that instruction all of his policies had been renewed. It was contended in behalf of the defendant, however, that this instruction "never to let a policy expire" must be restricted in its application to the then existing contracts, and that it could not properly be extended to include new contracts of insurance, like the one in question, that might afterward be made. It further appeared that about a month before January 16, 1908, the date named for the expiration of the original policy, according to the usual course of business, Mr. Griffin received from the company a renewal receipt to continue the policy in force another year. Before the expiration of the policy Mr. Griffin duly countersigned this renewal receipt and attached it to the policy then in Mr. Washburn's pigeonhole in the safe, and January 16, 1908, charged the renewal premium of \$25 to Washburn and credited the amount to the company, and also attached a copy of it to his policy register. It was in evidence that Mr. Washburn was never required by the agent to pay cash for a policy, but paid the premium only on presentation of a bill therefor, after the policy had been deposited in the pigeonhole of the agent's safe. [2] Indeed, when a policy is delivered without requiring payment, the presumption is that a credit was intended and the policy is valid. *Miller v. Life Ins. Company*, 12 Wall. 303, 20 L. Ed. 398. From the evidence then before the court, it satisfactorily appeared that Mr. Griffin understood that he was expected to renew this policy, and from the whole tenor of his evidence, and especially from his letter acknowledging the receipt of the plaintiff's proof of loss, it was manifest that Mr. Griffin understood that the policy

had been renewed and was in full force at the time of the accident.

It was not so distinctly and conclusively shown, however, by direct evidence, that Mr. Washburn intended to have it renewed or understood that it had been renewed. But this evidence is now supplied, and all question upon that point removed by the testimony given in her deposition at this second hearing, by Miss Lord, who had been policy clerk and bookkeeper in Mr. Griffin's office for 13 years. In answer to interrogatories she testified as follows upon this branch of the case:

"Q. Were you acquainted with Mr. Henry Washburn in his lifetime?

"A. Yes, sir.

"Q. Shortly before his death did Mr. Washburn call at Mr. Griffin's office?

"A. Yes, sir.

"Q. Will you fix the time as nearly as you can?

"A. I can't say whether it was a week or two weeks before, but it was a very short time before his death.

"Q. Now, will you state what was said and done by Mr. Washburn at that time, and what you yourself did in connection with his business?

"A. I can't remember the exact words he said. Mr. Washburn came in and asked if Mr. Griffin was here, and when told he was not, said he had no special word to leave, except that he was going away on a short trip, and for Mr. Griffin to look after his insurance matters, as he always had. He asked some question about some insurance, I don't just remember what, and I went to the safe and got all his insurance papers—they were bound together—gave them to him, and he took them and ran them over in his hand. I don't know how much time he spent on them—I can't tell. He handed them back and started to go out, and came back and just repeated his injunction for Mr. Griffin to keep up his insurance, and remarked that he would do so anyway. That was all the conversation he had. I think Mr. Washburn's own words were for John not to let anything expire, if I remember his own words. That was what he always said.

"Q. Whether or not this policy, No. X12680, was handed by you to Mr. Washburn among the other policies?

"A. It was.

"Q. Whether or not at that time it had attached to it the renewal agreement A29650, countersigned by Mr. Griffin?

"A. It had.

"Q. To make my question clear, whether or not the renewal agreement had been countersigned by Mr. Griffin before that time?

"A. Yes, sir.

"Q. After Mr. Washburn had looked over his policies, as you have testified, what was

done with them, including the policy and renewal about which we have been talking?

"A. He returned them to me and I put them back in the safe."

It is thus made clear that there was a correlative obligation between the insurer and the insured, and the contract was legally renewed.

[3] But it is further contended in behalf of the company that the warranties, in the plaintiff's application for the policy and in the schedule of statements, that he was a "hotel keeper" and that he was "free from any intemperate habits," were not true.

It is proved beyond controversy, however, that Mr. Griffin himself, the defendant's general agent, wrote the application for the policy and under his general authority and implied request signed Mr. Washburn's name to it, and answered the interrogatories respecting his occupation and habits, in the absence of Mr. Washburn, and without any knowledge on his part of the nature of the answers. These facts are conclusive as against the company's contention upon this point.

It is provided by section 93 of chapter 49, R. S., that "such agents (of foreign insurance companies) and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company and waived by it as if noted in the policy." In *Marston v. Life Ins. Co.*, 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412, it was held in the case of a life insurance policy that where the application is drawn by the authorized agent of the company, and the answers to the questions therein are written by the agent in filling the application, without fraud or collusion on the part of the applicant, the company is estopped from controverting the truth of such statements in an action on the policy. See, also, *Hilton v. Phoenix Assurance Co.*, 92 Me. 272, 42 Atl. 412; *Hewey v. Insurance Co.*, 100 Me. 523, 62 Atl. 600.

As stated in the opinion in the case last cited: "It is incumbent upon the company to show that the misrepresentations were his (the applicant's), and not mistakes or misrepresentations of its own. * * * Otherwise it would be in the power of the company or its agents in such a case to fraudulently destroy the legal status of the policy so obtained."

It is conceded, however, that the warranty in regard to the applicant's occupation was true at the date of the policy, and it satisfactorily appears that, although he ceased to be a hotel keeper before the renewal of the policy, his change of occupation in no re-

spect increased the hazard. And whatever the truth may have been in regard to the use of intoxicating liquors by the insured, the evidence presented to the court is wholly insufficient to support the conclusion that he was a man of "intemperate habits" within the meaning of that term as used in policies of insurance and interpreted by the courts.

Judgment for the plaintiff for \$5,000, with interest from May 21, 1908.

FLETCHER-CROWELL CO. v. CHEVALIER et al.

(Supreme Judicial Court of Maine. Nov. 22, 1911.)

1. MECHANICS' LIENS (§ 48*)—RIGHT TO LIEN—MATERIALS FURNISHED, BUT NOT USED.

Under Rev. St. c. 93, § 29, giving a lien for materials furnished in erecting, etc., a building, one is not entitled to a lien for materials furnished, but not used in the construction of the building against which lien is sought.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 51; Dec. Dig. § 48.*]

2. MECHANICS' LIENS (§ 47*)—RIGHT TO LIEN—MATERIALS FURNISHED, USED AND AFTERWARDS TAKEN OUT.

Under Rev. St. c. 93, § 29, giving a lien for material furnished for a building, one is entitled to a lien for iron columns set in the building, but afterwards taken out at the owner's order on revision of the plans.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. § 47.*]

Report from Supreme Judicial Court, Androscoggin County, in Equity.

Action by the Fletcher-Crowell Company against Ovid Chevalier and others. On report. Judgment for plaintiff.

Bill in equity to enforce a mechanic's lien for materials alleged to have been furnished in the construction of a certain building in Lewiston.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

George C. Wing and George C. Wing, Jr., for plaintiff. McGillicuddy & Morey, for owner of building.

WHITEHOUSE, C. J. In this suit the plaintiff seeks to enforce a mechanic's lien for materials alleged to have been furnished to the defendants Chevalier and Ducharme in the construction of a building which they had contracted to erect for the defendant L'Union Musicale, the owner of the land, and for which they had agreed to provide all the materials and perform all the work.

This case, with three others against the same defendants, was referred to Mr. Justice Savage for determination. Upon his report a final disposition was made of the other three cases; the one at bar being the only case for the consideration of the court.

By agreement of the parties this case was "reported to the law court to determine for what amount this plaintiff has a lien upon the land and building described in its bill upon the facts stated in the referee's report, and to direct judgment accordingly."

The referee's report discloses the following facts and conclusions respecting the case at bar:

"The Fletcher-Crowell Company contracted with Chevalier and Ducharme to deliver on cars at Lewiston all the iron or steel work described in the account annexed to their bill in equity. It was all shipped at different times by railroad to Lewiston. Some of it consisted of special castings, made specially for this building, and not fitted to any other. Some of it was taken by Chevalier and Ducharme to the site of the building, and some of it still remains in the possession of the railroad company. A part of the steel was used in the construction of the building.

"After the building was partly constructed, owing to a heavy rainstorm and washout, a portion of the building settled, and required a rebuilding to some extent. The owners and the contractors disagreed as to which party the loss or damage should fall upon. The contractors were willing to stand a portion, but not all, of the expense of rebuilding the damaged portion. Thereupon L'Union Musicale prevented the contractors from going on with their work, under the existing conditions, as to rebuilding.

"Afterwards the plans of the building were remodeled, and the building was built one story lower than was at first contemplated. Owing to the change, some of the lumber furnished by Richardson, Dana & Co. and some of the special castings and other steel furnished by the Fletcher-Crowell Company were not needed and were not used. But the owner completed the building on its own account and used some of the Richardson, Dana & Co. lumber and some of the Fletcher-Crowell Company steel in the construction. For this lumber and steel the owner does not object to paying, or to having liens adjudged.

"The contractors, after they ceased working, notified the Fletcher-Crowell Company that they found themselves unable to continue the work, and directed that company to order the iron then in the possession of the railroad company to be reshipped. This was not done.

"A particular controversy exists as to two columns, ordered of and shipped by the Fletcher-Crowell Company. They were made in accordance with the specifications, and were actually set up in the building by the contractors. Later they were removed at the request of the building committee of L'Union Musicale, it being claimed that the columns had not been properly set.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"As to the claim of the Fletcher-Crowell Company, I find that this plaintiff under its contract with Chevalier and Ducharme furnished materials for the erection of the building to the amount of \$2,025.90. Of this, materials to the amount of \$1,720.60 were never used in the construction of the building, at any time, in any way. Two steel columns, for which \$140 is charged, were set in the building, and afterwards removed, as already stated. Materials to the amount of \$165.30 were used in the erection of the building, and remain in it.

"In the Fletcher-Crowell Company case I report the facts as above stated, for the judgment of the court on the law involved.

"If the court is of opinion that the Fletcher-Crowell Company has a lien for all the materials furnished for the erection of the building, whether used or unused, I award that it shall have a personal judgment and judgment for a lien upon the land and building described in its bill, with costs, each in the sum of \$2,025.90, with interest from September 21, 1910. If, however, the court is of opinion that the plaintiff has no liens for materials which did not enter into the construction of the building and become a part of it, then I award that its lien judgment aforesaid shall be for the sum of \$305.30, or \$165.30 only, with interest and costs as stated, according as the court determines that the plaintiff has, or has not, a lien for the two columns, set in the building and afterwards removed, as already stated."

[1, 2] Upon the facts thus reported two questions are presented for the determination of this court: First, whether the plaintiff is entitled to a lien for materials furnished to the amount of \$1,720.60, "which were never used in the construction of the building at any time in any way"; and, second, whether the plaintiff is entitled to a lien for the item of \$140 for the two iron columns that were set in the building and afterwards taken out by order of L'Union Musicale.

It is provided by section 29 of chapter 93 of the Revised Statutes that "whoever performs labor or furnishes labor or materials in erecting, altering, moving or repairing a house, building or appurtenances * * * by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands * * * to secure payment thereof with costs."

Whether it is necessary to prove that the materials furnished were actually incorporated in the building in order to create a lien upon it, under the above statute and others having substantially the same tenor and purpose, is a question not entirely free from difficulty and one with respect to which courts of equal respectability have reached different conclusions.

Many of the earlier cases upon the subject are collected and considered in 13 Am.

& Eng. Ann. Cas., p. 11, in a note to Central Lumber Company v. Braddock Land & G. Co., 84 Ark. 560, 105 S. W. 583. In the principal case it was held that, under a statute authorizing a mechanic's lien for the value of material furnished "for any building," the materials furnished must be actually used in its construction before the lien can attach. In the note Maine is placed in the category of 15 states that have adopted this rule; but an equal number of states are cited in support of the contrary view, that the lien exists as to all materials furnished in good faith, whether they actually become part of the structure or not. In 19 "Annotated Cases," p. 588, it is said in the note to the principal case that "the recent cases indicate a tendency of the courts to hold that the lien does not exist unless the materials were actually used in the erection of the building."

In support of this statement the following cases are cited: Potter Mfg. Co. v. Meyer, 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267; Niagara Oil Co. v. McBee, 45 Ind. App. 576, 91 N. E. 250; Gilbert Hunt v. Parry (1910) 59 Wash. 646, 110 Pac. 541; U. S. Water Co. v. S. S. Realty Co., 152 Mo. App. 300, 133 S. W. 371. Although the earlier cases in Indiana generally upheld the doctrine that the materials need not be actually used in the building, the court in that state in the recent case of Potter Mfg. Co. v. Meyer, supra, distinctly appears to have adopted the opposite rule. In the opinion it is said: "It is well settled, both in this state and elsewhere, that a materialman claiming a lien must ordinarily show that his materials were furnished for and were actually used in the erection of the building against which the lien is asserted."

The reasons for this rule and the warrant for placing Maine in the category of states that have adopted it are illustrated and stated in the following cases:

In *Lambard v. Pike*, 33 Me. 141, in speaking of a stove and funnel, the court said: "If placed in the mill, it would be but a fixture used for its comfortable occupation. To create a lien the materials must be used for erecting, altering, or repairing the building—must be so applied as to constitute a part of the building." In *Ames v. Dyer*, 41 Me. 397, in support of the conclusion that the molds of a vessel cannot be regarded as a part of the materials with which it is constructed, the court cited *Phillips v. Wright*, 5 Sandf. (N. Y.) 342, and quoted from the opinion as follows: "The whole theory of a lien for labor and materials rests upon the basis that such labor and materials have entered into and contributed to the production or equipment of the thing upon which the lien is impressed. * * * Can it be said that the materials are furnished for and towards building a ship, when no part of them enters into or becomes a part of the

ship?" In *Taggard v. Buckmore*, 42 Me. 77, it was held that materials sold by one party to another upon representation that they would be wrought into a vessel which was in process of construction by him, but which were not so used, would not create a lien on the vessel. In the opinion the court said: "The principle embraced in the statute is founded in natural justice, that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have security on the same, though changed in form and inseparable from all property. But justice does not require that he should be allowed the security in the same property for the price of materials which became no part thereof." See, also, *Baker v. Fessenden*, 71 Me. 293, in which it was held that the statute will not give a lien on a mill for labor performed in repairing machinery, "unless it was done on some portion of the realty," and *Hanson v. Publishing Co.*, 97 Me. 102, 53 Atl. 990, in which the underlying principle of the statute, as set forth in the foregoing cases, was reaffirmed by the statement in the opinion that "a lien is given upon the ground that the work has been a benefit to the realty and has enhanced its value."

It is true that the facts in these cases differ so materially from those at bar that the decisions are not authoritative precedents in support of the defendant's contention in this case; but they unmistakably indicate the trend of the judicial thought upon the question in this state.

In *Chapin v. Persse*, 30 Conn. 472, 79 Am. Dec. 263, the court said:

"The theory of the lien is that the party furnishing materials for the erection or the repair of buildings on credit retains his claim to them after they have gone into the building, and to enable him to enforce it his lien is spread over all the property with which the materials have become inseparably connected. Hence he is given a lien upon the whole building and the land on which it stands. But to give a lien for all the material sold for the purpose of going into the building, irrespective of the actual use of it for that purpose, might have the effect of creating a lien to the full value of the building, and the land on which it stands, in favor of parties whose property did not in fact any of it go into the building, and thus the persons who had in fact erected or repaired the building, or who had done work upon it, would be deprived of any advantage from the liens given them by the statute. Such surely ought not to be, and as we believe was never intended to be, the result in any case. We think, therefore, that, to entitle the furnisher of the materials to a lien, his property must not only be furnished for the erection or the repair of a building, but must actually go into the building and be used for that purpose."

In *Sweet v. James*, 2 R. I. 270, it was held that, "whatever may be the condition of the materials furnished, whether very rough or perfectly adapted to their purpose, * * * and from whomsoever they may have been originally purchased, and although kept by the contractor as merchandise, his lien is not affected by these considerations, provided only they are incorporated in the work contracted for." So in *Hinckley & Egery Iron Co. v. James*, 51 Vt. 240, it was held that "a mechanic's lien covers only such of the materials furnished as are attached to the realty, so as to be a part of it at the time the memorandum required by statute is filed in the town clerk's office."

In Massachusetts it is expressly provided by statute that a person has a lien for "materials furnished and actually used in the erection of the building." Rev. Laws 1902, vol. 2, c. 197, § 1.

See, also, *Small v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; *North v. Globe Fence Co.*, 144 Mich. 557, 108 N. W. 285; *Deardorff v. Everhart*, 74 Mo. 37; *McConnell v. Hewes*, 50 W. Va. 33, 40 S. E. 436; *Hill v. Bowers*, 45 Kan. 592, 26 Pac. 13; *Ryndak v. Seawell*, 13 Okl. 737, 76 Pac. 170; *Fitch v. Howitt*, 32 Or. 396, 52 Pac. 192; *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 513, 22 Pac. 217; *McAnally v. Hawkins Lumber Co.*, 109 Ala. 397, 19 South. 417; *Wardlaw v. Troy Oil Mhl.*, 74 S. C. 368, 53 S. E. 638, 114 Am. St. Rep. 1004.

The principles of equitable estoppel are not applicable to the facts of this case.

It is accordingly the opinion of this court that the plaintiff is not entitled to a lien on the land and building for the materials furnished to the amount of \$1,720.60, which were not used in the construction of the building, but for a personal judgment only against the contractors.

With respect to the "particular controversy" in regard to the two steel columns, valued at \$140, it appears from the findings of the referee that "they were made in accordance with the specifications and were actually set up in the building by the contractors," and that "later they were removed at the request of the building committee of the L'Union Musicale, it being claimed that the columns had not been properly set." There is no finding, however, that these columns were not in fact properly set in the building, or that they were not of suitable quality and dimensions and perfectly adapted to the purpose for which they were designed. They were in fact incorporated into the building and became a part of the realty. But it appears from the findings of the referee that after the building settled "the plans were remodeled, and the building was constructed one story lower than was at first contemplated." For aught that appears these columns were "a benefit to the building and enhanced its value" as it was con-

structed under the original plans. But they were removed by the owner, and so far as appears without the consent of either the contractors or the plaintiff, and without any failure of duty in that respect on the part of the plaintiff. The lien to which the plaintiff was entitled when the columns became a part of the realty was not thereby defeated.

The conclusion, therefore, is that the certificate must be:

Personal judgment for the plaintiff for \$1,720.60, with interest from September 21, 1910, against the defendants Chevalier and Ducharme only.

Judgment for the plaintiff against Chevalier and Ducharme for \$305.30, with interest thereon from September 21, 1910, and a lien therefor on the land and building described in the writ.

HILL v. DAY et al.

(Supreme Judicial Court of Maine. Nov., 1911.)

1. LANDLORD AND TENANT (§ 162*)—SUBTENANTS—DUTY OF LANDLORD—SAFETY OF PREMISES.

A landlord is under no greater duty to a subtenant respecting safety of the premises than to the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 162.*]

2. LANDLORD AND TENANT (§ 150*)—SAFETY OF PREMISES—LIABILITY OF LANDLORD.

A lessor of a dwelling house does not impliedly warrant that it is reasonably fit for use, and is not bound to make repairs unless he has expressly agreed to do so; the principle of caveat emptor applying.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536-557; Dec. Dig. § 150.*]

3. LANDLORD AND TENANT (§ 164*)—SUBTENANTS—LANDLORD'S LIABILITY.

The lessor of a dwelling house is not liable to a subtenant for injury caused by plaster falling, in the absence of a showing of an agreement by the landlord to keep the premises in repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

4. LANDLORD AND TENANT (§ 169*)—DEFECTS IN PREMISES—KNOWLEDGE—EVIDENCE—SUFFICIENCY.

Evidence in an action by a subtenant against a landlord for injury caused by plaster falling held insufficient to show that the landlord knew of the defective condition.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

5. LANDLORD AND TENANT (§ 164*)—INJURY TO SUBTENANT—LANDLORD'S LIABILITY—GRATUITOUS UNDERTAKING.

A subtenant, suing the lessor of premises for injury caused by plaster falling, cannot show liability under gratuitous undertaking by the landlord to repair and negligent performance of the work, in the absence of a showing that the subtenant was a party to the undertaking or knew of it before the accident.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

6. APPEAL AND ERROR (§ 1078*)—WAIVER OF OBJECTIONS—FAILURE TO BRIEF.

Exceptions not argued in exceptant's brief are deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Exceptions from Supreme Judicial Court, York County.

Action by Ester P. Hill against Frederick A. Day and another. Nonsuit, and plaintiff brings exceptions. Exceptions overruled.

Action on the case to recover damages for personal injuries alleged to have been sustained by the plaintiff, and caused by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a certain dwelling house owned by the defendant Day. Plea, the general issue. At the conclusion of the plaintiff's evidence, the presiding justice ordered a nonsuit. To this ruling and certain ruling excluding certain testimony the plaintiff excepted.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Mathews & Stevens, for plaintiff. John P. Deering, for defendant Day.

KING, J. This case comes up on exceptions to an order of nonsuit, and other exceptions by plaintiff to the exclusion of testimony. The action is to recover damages for personal injuries alleged to have been sustained by the falling of plastering upon the plaintiff from the ceiling in the kitchen of a dwelling house owned by the defendant Day.

Exceptions to the order of nonsuit.

The declaration alleges that the house was occupied by Clementine R. Foss (one of the defendants) under a contract with Day, and used by her as a dwelling house and for the letting of rooms. No evidence, however, was introduced as to any contract of tenancy between Mr. Day and Mrs. Foss. The plaintiff testified that she hired of Mrs. Foss a front room, with the privilege of using the kitchen for passing through to the back yard, and for some cooking and light house-keeping, and began her occupancy on November 10, 1908. On the 20th of November the plaintiff, having passed from the back yard through the kitchen with some clothes, came back into the kitchen and shut a door—presumably the door leading from the kitchen to the yard—whereupon a portion of the ceiling plastering fell upon her, causing the injuries complained of.

[1] If it be assumed that the relation of landlord and tenant existed between Mr. Day and Mrs. Foss with respect to the house in question, as alleged in the declaration, the fact that the plaintiff was using the kitchen by permission of Mrs. Foss would create no greater liability on the part of Day to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff than that which he was under to Mrs. Foss by virtue of the relation of landlord and tenant between them.

[2] The law is well settled in this state that in the letting of a dwelling house there is no implied warranty that it is reasonably fit for use, and no obligation on the part of the landlord to make repairs on the leased premises, unless he has made an express valid agreement to do so; but the tenant, on the principle of caveat emptor, and in the absence of any fraud on the part of the landlord, takes the property in the actual condition in which he finds it. *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886; *McKenzie v. Cheetham*, 83 Me. 548, 22 Atl. 469; *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229; *Whitmore v. Pulp Co.*, 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229.

[3] In the absence of any evidence in this case as to the terms of the tenancy of Mrs. Foss, it must be held that the defendant Day was under no obligation to keep the premises in question in repair, and that Mrs. Foss, and the plaintiff occupying by her permission, there being no fraud on the part of Day, took the house in the condition in which it was for better or worse. *Gregor v. Cady*, 82 Me. 136, 19 Atl. 108, 17 Am. St. Rep. 466. Accordingly the defendant Day was not liable to the plaintiff for her injuries if they resulted from neglect to keep the house in repair.

[4] But the plaintiff claims that the defendant Day is liable to her on the ground that the insecure condition of the plastering and consequent danger that it might fall was a secret defect—a trap—in the premises, known to Mr. Day, and the existence of which he did not communicate to his tenant Mrs. Foss, and of which she had no knowledge. This claim is not supported by the facts and circumstances in evidence.

We need not here decide the question whether, if at the time Day let the house to Mrs. Foss there was an existing danger that the plastering might fall and he had knowledge of it, it was his legal duty to inform her of it, because there is no evidence that any such danger existed when the tenancy of Mrs. Foss began, or, if it did then exist, that Day had any knowledge of it which he did not communicate to her, or that she did not otherwise have knowledge of it.

As has been noted, there is no evidence in the case relating to Mrs. Foss' tenancy. It does not appear how long she had been in occupation of the premises. It does appear, however, by the testimony of Judith K. Young, that when she began occupying some rooms in the house November 1, 1906—two years before the plaintiff's injuries—Mrs. Foss was then in occupation of the house. Day's duty and freedom from duty to Mrs. Foss, and consequently to the plaintiff, in respect to communicating information of any defects or dangerous conditions in the leased premises, must be determined as of the time he let the property to Mrs. Foss. If it does

not appear that he had knowledge of the defect at that time, then no such duty is shown. If he then owed no such duty to his tenant, no subsequent knowledge on his part of a defective condition of the premises would create that duty. The only evidence tending to show that Day had knowledge of the condition of the plastering before the plaintiff's injuries is in the testimony of Judith K. Young to the effect that, while she occupied rooms in this house from November 1, 1906, to April, 1907, she called Day's attention to a place in the kitchen ceiling, near where the plastering fell upon plaintiff, where there was a leak, and from which some plastering had then fallen. But that was after the beginning of Mrs. Foss' tenancy, for the witness testified that Mrs. Foss occupied the tenement at the time she went there and that she "hired with her."

[5] Further, the plaintiff alleged in her declaration "that the defendant Day had undertaken to remedy said dangerous condition and had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy." In support of this allegation the plaintiff testified that about a week or ten days after her accident Mr. Day was at the house, and Mrs. Foss called his attention to the leak in the kitchen, which presumably caused the plastering to fall, and that he said he had been up there to work on the roof with men, and Mrs. Foss replied, "You haven't stopped the leak yet." The plaintiff further testified that no work was done on the roof from the time of her injuries to the time of this conversation.

Assuming that this testimony would justify an inference that Day had, prior to the time of the plaintiff's injuries, undertaken to repair the leak in the roof, and, in the language of the declaration "had done the work so unskillfully and incompletely as not to make said kitchen safe for occupancy," that inference alone would not authorize the application of the principle which the plaintiff here invokes.

That principle is thus expressed in *Gregor v. Cady*, 82 Me. 137, 19 Atl. 108, 17 Am. St. Rep. 466: "And although the lessor's attention, after possession taken by the lessee, was called by the latter to the rickety condition of a portion of the premises, and he thereupon agreed to repair it, still he was under no obligation to fulfill his promise. But when, upon the request of the lessee, the lessor gratuitously undertook to make the repairs, and negligently and unskillfully performed the work, whereby the lessee was subsequently injured, the lessor became liable by reason of his misfeasance, provided he undertook to repair the particular part of the premises to which his attention was called and where the injury occurred." "If a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss through the want of due care, by which

damage ensues to the other party, an action will lie for this misfeasance." 2 Kent's Com. 570. "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." Note in *Coggs v. Bernard, Smith Lead. Cases* (6th Am. Ed.) 335. It will be seen that this principle is not applicable to the case at bar. If Day undertook to repair the roof before the accident to the plaintiff, there is no evidence that the plaintiff was a party to his gratuitous undertaking, or had any knowledge of it before her accident. To give the plaintiff a right of action against Day for misfeasance on his part, if he did actually enter upon the gratuitous service of repairing the roof, it must be proved at least that she had knowledge of his undertaking; otherwise, no confidence could have been induced in her by his acts, and, of course, without such knowledge on her part, it could not be held that she relied upon the assumption that he had exercised reasonable care and skill in the performance of that work. No such proof is made. It is therefore the opinion of the court that the evidence in behalf of the plaintiff was not sufficient to entitle her to a verdict against the defendant Day, and that the nonsuit was properly ordered.

[6] We assume that the plaintiff does not now urge the other exceptions taken, as no argument in their support is presented in the brief of plaintiff's counsel.

But we find no reversible error in the rulings excepted to. The testimony excluded was clearly incompetent and immaterial. "Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent." *Eaton v. Provident Association*, 89 Me. 58, 35 Atl. 1015:

The entry in this case must therefore be:
Exceptions overruled.

MAHONEY et al. v. HEALY et al.
(Court of Chancery of Delaware. Nov. 1, 1911.)

(Syllabus by the Court.)

EQUITY (§ 150*)—PLEADING—MULTIFARIOUSNESS.

W. C., while mentally incompetent, through the fraud of H., conveyed land to H., and transferred money in bank to R. T. C., and R. T. C. by will gave all his estate to H., who became executrix of R. T. C., and as sole beneficiary under the will of R. T. C. would receive the moneys which were obtained by R. T. C. from W. C. Held, a bill by grandchildren of W. C. to set aside the conveyance and transfer, brought against H. as an individual, H. as administratrix of W. C., and H. as executrix of R. T. C., was not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 371-379; Dec. Dig. § 150.*]

Bill in equity by Teresa C. Mahoney, and others against Margaret A. Healy, individually, as administratrix of Winifred Cotting-

ham, deceased, and as executrix of Robert T. Cottingham, deceased. Demurrer on ground of multifariousness overruled, and defendant ordered to plead to or answer bill.

The bill is demurred to on the ground of multifariousness. It was brought by certain grandchildren of Winifred Cottingham, deceased, having a common interest, to recover their shares in certain real and personal property obtained, as is alleged, from Winifred Cottingham while she was mentally incompetent through fraud of the defendant, Margaret A. Healy, and others unknown. In this way a deed conveying to the defendant, Margaret A. Healy, real estate in the name of Winifred Cottingham was obtained from Winifred Cottingham and Robert T. Cottingham, her husband, and money on deposit in a bank in the name of Winifred Cottingham was transferred to the joint names and control of Winifred Cottingham and Robert T. Cottingham, her husband. Afterwards Robert T. Cottingham, by will, gave all his property to his daughter, the defendant, who became executrix thereof, as well as administratrix of the estate of her mother, Winifred Cottingham. The suit is against Margaret A. Healy, individually, as executrix of Robert T. Cottingham, and as administratrix of Winifred Cottingham. By its prayers the bill seeks to avoid the deed for the land, and to require the defendant to account as administratrix of Winifred Cottingham for the money in her hands as executrix of Robert T. Cottingham, to the extent of the amount so obtained from Winifred Cottingham while she was mentally incompetent.

Saulsbury, Ponder & Morris, for defendants.

This bill is multifarious on several grounds: It united distinct demands against the same defendant in triple capacities; it joins demands pertaining to both real estate and personality against the same defendant in triple capacities; it sets forth matters so dissimilar as to require different decrees for their adjustment; in other words, there is misjoinder both of defendants and of demands. Story's Eq. Pl. § 271; Swift v. Eckford, 6 Paige (N. Y.) 22; Boyd v. Hoyt and Parcel, 5 Paige (N. Y.) 65, 78; Wilson v. Wilson, 23 Md. 162; Bovaire v. Seyfang et al., 200 Pa. 261, 49 Atl. 958, 960; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199; Latting v. Latting, 4 Sandf. Ch. (N. Y.) 31, 36; Hunn v. Norton, Hopk. Ch. (N. Y.) 344; Ward et al. v. The Duke of Northumberland and the Earl of Beverley, 2 Anst. 469; Kirkpatrick v. Cornin, 37 N. J. Eq. 54.

Robert H. Richards and Charles W. Bush, for complainants.

There can be no general rule as to what constitutes multifariousness, but each case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

must be decided according to its own peculiar circumstances, in the discretion of the court. Story's Eq. Pl. §§ 284, 530. Multifariousness consists in improperly joining in one bill several distinct and independent matters, and thereby confounding them. But the grounds must be wholly distinct from and independent of each other and if they are connected in any way, by having the same object, or relating to the same subject matter, they may be joined in the same suit; that is, in one bill. *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923; *Campbell v. Mackay*, 1 Myl. & Cr. 603; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147; *Randolph v. Daly*, 16 N. J. Eq. 313; *Potts v. Hahn* (D. C.) 32 Fed. 660. In accordance with the aim of equity to administer complete relief in one suit, a bill is not multifarious so long as it seeks to carry out a single object, although this necessitates the investigation of several matters and asks for relief of a complex nature and consisting of different elements. *Knikel v. Spitz*, 74 N. J. Eq. 581, 70 Atl. 992; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401. Though in general the administration of estates of two different persons cannot be joined in the same suit, where the parties interested in such estates are different, yet where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit will not be multifarious. 1 Dan. Ch. Pl. & Pr. 344. A bill is not multifarious where there are several complainants or several defendants, provided the parties (whether complainants or defendants) have a common interest touching the matter of the bill, although they claim under distinct titles, or have independent interests. Story's Eq. Pl. §§ 285, 534. And the same defendant may be sued in different capacities in one bill, for instance, as an individual and as an executor. *Beatty v. Hinckley* (C. C.) 1 Fed. 385; *Williams v. West*, 2 Md. 174; *Robinson v. Guild*, 12 Metc. (Mass.) 323. The purpose and object of this bill are single, viz., to secure for the heirs of Winifred Cottingham their respective shares of her estate. The fact that several kinds of relief are asked for in order to fulfill this object does not render the bill multifarious. 16 Cyc. 255; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147.

THE CHANCELLOR. It is easier to lay down general principles defining multifariousness than to apply them to particular cases. Courts will not, on the one hand, encourage an unnecessary multiplicity of suits, and, on the other hand, will not allow the plaintiff to join in his bill a multiplicity of different and distinct matters, so as to embarrass the defendant in his defense, or pro-

duce confusion, or to render the case complicated and difficult to be understood. Several matters perfectly distinct and having no relation one to the other, and no common foundation, cannot be united in one bill against one defendant. Story's Eq. Pl. § 271. A bill for an accounting against two distinct partnerships would be multifarious, though one of the defendants be a partner in both firms. *Griffin v. Merrill*, 10 Md. 364. So, too, it would be faulty to combine in one suit a claim against one as an individual and another claim against him in a representative capacity. *Davone v. Fanning*, 4 Johns. Ch. (N. Y.) 199.

There is but one purpose in the bill, based on one supporting fact, viz., to recover for the complainants their shares of the property of Winifred Cottingham, which would otherwise have come to them had not the defendant fraudulently taken advantage of the mental incapacity of Winifred Cottingham and caused her to convey and transfer all her property. The mental incapacity of Winifred Cottingham and the fraud of the defendant run through the whole bill, according to the allegations thereof. It is not the case where by several sets of fraudulent representations, by different persons, at different times, a person was deprived of several parcels of property now in the hands of several persons. In the absence of a combination, or conspiracy, a bill could not be maintained which would include all the offenders and all the property, for there would be a diversity of interests, of subject-matter, of proofs and of relief, and neither party defendant would be interested in, or should be affected by, the case against any of the other defendants. Where a person mentally incompetent is by the fraud of A. induced to convey land to A. and personal property to B., and B. gives to A. the property he obtained from the lunatic, a bill could surely be maintained against A. to recover both the real and personal property, and it would not be multifarious. None of the authorities submitted establish any rule which would make it multifarious. Yet this is substantially the case made by the bill. Margaret A. Healy is the sole beneficiary under the will of Robert T. Cottingham, and will actually receive, as such, a sum of money equal to about four-fifths of the amount of money of which Winifred Cottingham, while mentally incompetent, was defrauded by Margaret A. Healy by placing it under the control of Robert T. Cottingham.

There is but one person defendant, viz., Margaret A. Healy, and in this case the bill is not made multifarious by making her a defendant as an individual, as administratrix of Winifred Cottingham and as executrix of Robert T. Cottingham. Indeed, it is probably necessary to do so, for if Winifred Cottingham was mentally incompetent, then the money on deposit in the Wilmington Sav-

ings Fund Society to her credit, and removed therefrom by reason of the fraud of the defendant, must be accounted for by Margaret A. Healy as administratrix of Winifred Cottingham, and as executrix of Robert T. Cottingham she would also have duties to perform with respect to that money. As an individual she holds title to the real estate of Winifred Cottingham, alleged to have been fraudulently obtained, while Winifred Cottingham was incompetent.

The whole case concerning all the property hangs together properly (to paraphrase Lord Eldon's language), and there is not a misjoinder of two or more causes of suit in one action, or more than one defendant with different interests.

In *Beatty v. Hinckley* (C. C.) 1 Fed. 385, the beneficiaries in remainder under a trust brought a bill against one who was both executor of the deceased trustee and a grantee and holder of part of the trust property, the complainants seeking by the suit to recover from the estate and property of the deceased reimbursement for breaches of trust whereby the trust estate had been wasted. It was held not to be multifarious to join the claims against the estate of the trustee in the hands of his executrix, his widow, with the claim against the widow to account for the trust property improperly conveyed to and improperly held by her. The court said:

"The claims are not distinct. There is but one claim and that in favor of the orators against the estate of the testator in her hands as executrix. That property is claimed because as between her and the orators, it is a part of the same estate, to be reached in her hands in the same manner as any other part."

This case is instructive and helpful.

In *Attorney General v. St. John's College*, 7 Sim. 241, the Vice Chancellor said that one test to ascertain whether an information was multifarious, or embraced one object only, was to ascertain whether one defense can be made to the whole of it. Applying this test, it is clear that the bill now under consideration is not multifarious, because one defense can be made to the whole of it, viz., that Winifred Cottingham was not mentally incompetent, but sane when the alleged fraud was practiced on her.

In this case, then, as the combination of subject matter and parties cannot conceivably embarrass the defendant in making her defense, or produce confusion, render the case complicated or difficult to be understood, but will rather consolidate and simplify the determination of the rights of all parties in interest, the discretion of the court is not moved to declare the bill multifarious. The demurrer will be overruled and the defendant ordered to plead to or answer the bill within a time to be fixed.

Let an order be entered accordingly.

IN RE TOMLINSON.

(Orphans' Court of Delaware. Kent. Nov. 4, 1911.)

DOWER (§ 99*)—RETURN OF FREEHOLDERS—EVIDENCE OF FREEHOLDERS TO CONTRADICT AWARD—ADMISSIBILITY.

Freeholders, appointed to assign dower, may not, as witnesses, contradict on exceptions, their award, regular on its face and showing a full compliance with the order of the court, and show that the statements in their return were not true.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 342-344; Dec. Dig. § 99.*]

Petition of Ellen B. Tomlinson for assignment of dower. Heard on exceptions to the return of the freeholders appointed to assign dower. Return confirmed and approved.

See, also, 81 Atl. 468.

Argued before CURTIS, Ch., and BOYCE, J.

James M. Satterfield and Caleb S. Layton, for petitioner. James H. Hughes, for exceptant.

CURTIS, Ch. (delivering the opinion of the court). The freeholders having made return under the order for the assignment of dower, the defendant, William B. Tomlinson, filed exceptions to the award, which were of three kinds: (1) That the freeholders did not view the premises. (2) That they did not value the land in accordance with the order. (3) That the assignment was inequitable in amount.

At the hearing of the exceptions, the only witnesses produced were the freeholders, and objection was made to them as not competent witnesses to attack their own award, which was regular on its face and showed a full and particular compliance with the order of the court. Without argument the court declined to hear the testimony of the freeholders to contradict the award and show that the statements in their return were not true, the return showing full compliance with the order of the court for the assignment of dower. The court said that it was an unwise and unsafe proceeding to permit the freeholders, who were under oath, to deny what they had done, in the absence of allegations of fraud, or gross error. The decisions of the courts of the state are conflicting as to whether arbitrators, or referees, are to be admitted to testify on exceptions to awards.

In the following cases cited in 1 Del. Ch. 381 et seq., as notes to *Beeson v. Elliott*, the court refused to hear the testimony of referees on exceptions to an award: *Crain v. Lowber*, in the Supreme Court in 1804; *Spruance v. Poovy*, Supreme Court, 1829.

In *Bailey v. England*, 1 Pennewill, 12, 39 Atl. 455, where on exceptions to an award an offer was made to show by one of the referees that he had not understood certain matters connected with the case, Judge Grubb said:

"This is a case in which first thoughts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

will have to be best; referees' second thoughts after rendering their award will not do."

In other cases cited in the notes to *Beeson v. Elliott*, supra, it appears that the arbitrators were examined as witnesses, but whether after objection or by consent does not appear. *Miers v. Speer*; *McKinley v. Reynolds*. And in one other case, *Hudson v. McDonough*. 1 Del. Ch. 381, note, an arbitrator was examined without objection.

In *Allen v. Smith*, 4 Har. 234, the court held, over objection, that an arbitrator was a competent witness on exceptions to an award to prove the facts submitted to them and the grounds of their award.

In view of this contrariety of views, this court in this proceeding considers that the better and safer plan is to exclude the freeholders as witnesses to contradict or vary their own report in the absence of fraud. It does not seem wise to permit a commissioner to testify that statements in the return which he has signed are not true, in absence of some allegation of fraud, or gross error.

The return will be confirmed and approved.

RENEHAN et al. v. McAVOY et al.

(Court of Appeals of Maryland. June 24, 1911. Supplemental Opinion, Nov. 21, 1911.)

1. DEEDS (§ 54*)—VALIDITY—DELIVERY.

Delivery and acceptance is essential to the validity of every deed, and what is a sufficient delivery to transfer title depends largely on the facts of each case.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 116; Dec. Dig. § 54.*]

2. DEEDS (§ 56*)—DELIVERY—WHAT CONSTITUTES.

The test of delivery of a deed is the unconditional relinquishment by the grantor of the custody or control of the instrument.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 117-123; Dec. Dig. § 56.*]

3. DEEDS (§ 58*)—DELIVERY TO THIRD PERSON.

Delivery of a deed to a third person, in order to be operative, must be for the use and benefit of the grantee.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

4. DEEDS (§ 61*)—DELIVERY—SUFFICIENCY.

Where a grantor, after executing a deed which he intended should be operative only after his death, delivered it to his attorney to be kept for the grantor and at his death to be placed on record, and thereafter, believing that the attorney might die, took the deed to the register of wills and delivered it to the latter to be kept as the grantor's agent until his death, and then to be recorded, there was no valid delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

On Rehearing.

5. COSTS (§ 240*)—APPEAL—NOMINAL DEFENDANTS.

Where, in a suit to set aside a deed, all the defendants but two filed an answer admitting the matters alleged in the complaint and consented to the passage of a decree as prayed, and the decree being in favor of the defendants, those consenting were mere nominal defendants, and, not being represented on the appeal, should not be taxed with costs on reversal.

[Ed. Note.—For other cases, see *Costs*, Dec. Dig. § 240.*]

Appeal from Circuit Court, Howard County, in Equity; Wm. Henry Forsythe, Jr., Judge.

Suit by John Renehan and another against Joseph McAvoy and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

E. Allan Sauerwein, Jr., and Joseph L. Donovan, for appellants. John G. Rogers, for appellees.

BRISCOE, J. The controversy in this case arises over the validity of a certain paper writing, purporting to be a deed, dated the 10th day of March, 1902, and executed by Hugh McAvoy, late of Howard county, Md., in his lifetime, and delivered to the clerk of the circuit court for Howard county for record after his death by the register of wills of that county, in whose custody it had been left, by the grantor to be kept until his death, and then to be placed upon record.

The deed, as set out, in the record, is as follows: "This deed made this tenth day of March, 1902 by me Hugh McAvoy of Howard county, Maryland. Witnesseth, that in consideration of five dollars and other good considerations me thereunto moving I the said Hugh McAvoy do grant unto Joseph McAvoy and Elizabeth McAvoy, during their respective lives and no longer subject, however, to my life estate therein, all that farm situate, lying and being in Howard county, and described as follows, that is to say: the farm upon which I now reside, situated in the Third Election District of Howard County, which my father, the late Francis McAvoy devised to me, and all the additions which I have made thereto by purchase or otherwise, and I charge said farm with ten dollars for Masses to be said for the repose of my soul and those of my family; and after my death and the deaths of both my brother Joseph McAvoy, and my sister Elizabeth McAvoy and the charge aforesaid shall have been paid, I give and grant my said farm and all the additions thereto as aforesaid to my nephew Allie McAvoy Renehan for and during his natural life and after his death to the brothers and sisters of the said Allie McAvoy

Renehan equally share and share alike, but if any or all of said Allie McAvoy Renehan's brothers and sisters shall have departed this life during the life time of said Allie McAvoy Renehan, then I give and grant my said farm aforesaid to the descendants or descendant then living of said departed brother or sister per stirpes and not per capita, but should the said Allie McAvoy Renehan have children or the descendant or descendants of any deceased child or children living at his, said Allie's death, then I give to said child or children or the descendants of any deceased child or children living at his death the farm aforesaid per stirpes and not per capita.

"And I give, bargain and sell all of my personal property owned by me at the time of my death to the parties aforesaid upon the same terms and conditions as I have hereby given my real estate.

"And I do further charge my real estate given as aforesaid with the further sum of four hundred dollars to be paid by Allie McA. Renehan to my niece Annie Renehan wife of my nephew William Renehan at the death of the last of said life tenants Joseph and Elizabeth McAvoy.

"Witness my hand and seal.

"Hugh McAvoy. [Seal.]

"Witness: John G. Rogers."

The deed, it will appear, was executed and duly acknowledged by the grantor on the 10th day of March, 1902, before Howard D. Dunkel, a justice of the peace of the state in and for Howard county, and was recorded among the land records of that county on the 2d day of January, 1904, after the death of Mr. McAvoy.

It is admitted that at the date of the execution of the deed the grantor was capable of making a valid deed or contract, that he held absolute title to the property, that no rights of creditors, or other persons having liens, are involved, and the deed was properly executed under the laws of Maryland to pass real estate. But it is earnestly insisted upon the part of the appellants, certain of his heirs at law, that the deed is void, because it was never delivered, so as to perfect the instrument as a valid deed, and the grantees took no title to the property mentioned therein. The circuit court of Howard county upon hearing of the case, upon bill, answer, and proof, held the deed to be a valid instrument to convey real estate, and dismissed the plaintiffs' bill for a decree to vacate and annul the deed, and for a sale of the property for the purposes of partition among the heirs at law of the grantor. And it is from this order thus passed that this appeal has been taken.

[1] It is clear upon all the authorities that delivery and acceptance is essential to the validity of every deed, and what constitutes a sufficient delivery, to transfer and vest the title in the grantee, or to make it operative and effectual, as a deed depends largely upon the facts and circumstances of each partic-

ular case. The general and essential requisites to the validity of a deed under the facts and circumstances as indicated in this case have been settled by numerous and well-considered authorities. In *Duer v. James*, 42 Md. 498, affirmed by this court in *Hearn v. Purnell*, 110 Md. 485, 72 Atl. 909, it is said, to constitute a delivery of a deed, the grantor must do some act putting it beyond his power to revoke. There can be no delivery so long as the deed is within his control and subject to his authority. In the language of the Supreme Court in *Younge v. Guilbeau*, 3 Wall. 636, 18 L. Ed. 262, the grantor must part with the possession of the deed or the right to retain it. In *Clark v. Creswell*, 112 Md. 342, 76 Atl. 580, it was held there is a consummated delivery when the instrument has passed from the grantor, without right of recall, to the grantee or to some third person for his use.

[2] The test of delivery is the relinquishment by the grantor of the custody or the control of the deed. When he has formally executed and acknowledged it, and delivered it unconditionally to the grantee or one acting for him, the conveyance is completed and the title has passed.

[3] It is also settled by the great weight of authority in this state and in other jurisdictions that the grantor must part with all dominion and control over the deed at the time of its delivery to a third person, in order to make such act a sufficient delivery in order to divest the title, and the delivery to the third person must be for the use and benefit of the grantee. *Carey v. Dennis*, 13 Md. 18; *Owens v. Miller*, 29 Md. 144; *Lepoc v. Union Bank*, 32 Md. 136; *Younge v. Guilbeau*, 3 Wall. 636, 18 L. Ed. 262; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 13 L. R. A. 64, 21 Am. St. Rep. 131; *Note to Munro v. Bowles* (Ill.) 54 L. R. A. 865.

[4] In the case before us the deed after its execution by the grantor was placed in the hands of Judge John G. Rogers of the Howard county bar, with certain directions, as testified to by him. The testimony of Judge Rogers, as contained in the record, is as follows: "Mr. Hugh McAvoy came into my office on March 10, 1902, and said that he wanted a paper prepared. I asked him what kind of a paper he wanted prepared, and he said that he wanted to make his property over to Allie. I asked him what provisions he wanted in the paper, and at his direction I prepared that paper the deed. He signed it, and I witnessed it. Then I told him to take it down to Mr. Howard Dunkel's and acknowledge it. He returned with the paper, and gave it to me. I then asked him what he wanted done with it, and he said that he wanted me to keep it for him; at his death, to have it put upon record. I asked him why he did not have it put on record now, but he said that he had reasons for not doing so. I did not inquire into those reasons. He handed me the paper, and I asked him: 'You

have delivered this paper to me to be put on record in case of your death? And he said: 'Yes.' Then he went away. I took the paper and put it in a pigeon hole, and there it remained something over a year. Afterwards he came into my office, and said that he wanted the paper. I asked him what he wanted with it, as he had put it into my hands to be put upon record in case of his death. He said that he did not want to change it, but that it had occurred to him that something might happen to me, and then no one would know where the paper was. He said that he thought he had better take it and deliver it to the register of wills for safe-keeping. I said that this did not make any difference to me. Then he took it away with him." It is apparent, we think, according to all the authorities, that the placing of the deed with Judge Rogers, under the facts of the case, was not an effective and valid delivery. It was delivered to Judge Rogers, as stated by the grantor, "to be kept for him, at his death to be put upon record." It was subsequently recalled, surrendered to the grantor, and delivered by the grantor to the register of wills for Howard county. The evidence shows beyond all question that from what the grantor did and said he simply intended to constitute Judge Rogers as his agent for the custody of the paper, and he cannot, therefore, be treated in any sense as an agent or depository for the use and benefit of the grantees.

It is established by the overwhelming weight of authority that it is absolutely indispensable, in order to constitute a sufficient delivery, that the grantor shall part with control over the deed, and shall not retain a right to reclaim it. *Clark v. Creswell*, supra; *Brown v. Brown*, 66 Me. 816; *Woodward v. Camp*, 22 Conn. 457; *Ball v. Foreman*, 37 Ohio St. 132; *Hawes v. Hawes*, 177 Ill. 409, 53 N. E. 78; *Hammerslough v. Cheatham*, 84 Mo. 13; *Prutman v. Baker*, 35 Wis. 644, 11 Am. Rep. 592; *Bailey v. Bailey*, 52 N. C. 44; *Trask v. Trask*, 90 Iowa, 318, 57 N. W. 841, 48 Am. St. Rep. 446; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176.

The next inquiry then, is: Was the leaving of the deed by the grantor in the custody of Mr. Marlow, the register of wills, on the 5th of May, 1903, "for safe-keeping, and at his death to put it or have it put on record," a valid delivery of the deed? Mr. Marlow, who was called as a witness on behalf of the plaintiff, testified that he was register of wills of Howard county in the year 1903; that he knew Mr. McAvoy, and he gave into his keeping a paper writing, which he said was a deed or will, under the following circumstances: "Q. Did he tell you why he gave it to you, and, if so, what reason did he give? A. He told me that he wished to leave it with me for safe-keeping, and at his death to put it, or have it put, on record. Q. 9. Did you issue any receipt to him? A. I did. Q. 10. Then you accepted the paper for safe-

keeping? A. I did. Q. 11. As whose agent? A. Hugh McAvoy's. Q. 12. And you put the deed in the safe? A. I did. Q. 13. Was the deed sealed up? A. I do not remember whether the deed was sealed up, or whether I put it in the envelope and sealed it. Q. 14. Then you don't recall whether you knew the name of the grantee or not? A. I do not. Q. 15. I now show you a paper produced out of the custody of the register of wills in response to a summons duces tecum. Please state whether or not you can identify it. A. I can. Q. 16. In whose handwriting is that paper? A. Mine. Q. 17. What is that paper? A. It is a receipt which I gave Hugh McAvoy at the time he gave me the deed. It is dated at Ellicott City, Md., May 5, 1903, and reads, 'Received of Mr. Hugh McAvoy a deed left in this office by himself to be put on record at his death by register of wills,' and is signed by me: 'William H. Marlow, Register of Wills for Howard County.' Q. 18. On the back of that receipt are the following words: 'Deed left for record with register of wills, May 5, 1903.' In whose handwriting are those words? A. My handwriting. (Note.—The paper writing just shown the witness and read by him, with the notation on the back thereof, is now offered in evidence, and marked "Plaintiff's Exhibit Examiner No. 1.") Q. 19. Mr. Marlow, did Mr. Hugh McAvoy call for that paper during his lifetime? A. No, he did not. Q. 20. If he had called for it and surrendered the receipt, would you have given it to him? A. I would. Q. 21. During his lifetime, would you have given up the paper to any one other than Hugh McAvoy? A. I would not, except upon Mr. McAvoy's order. Q. 22. Would you have surrendered it to the grantee named in the deed, had he produced the receipt during the lifetime of Hugh McAvoy? A. I would not. Q. 23. You did not consider yourself in any wise the agent of the grantee, did you? A. I did not. Q. 24. It was not a part of your duty as register of wills to become custodian of deeds, was it? A. I should think not, and I so advised Mr. Hugh McAvoy at that time. Q. 25. Then, as I understand it, you took this deed for safe-keeping simply as an accommodation to Mr. Hugh McAvoy, and acted as his agent to hold the same for him, and put on record at his death, or would have given it back to him, had he so requested you? A. That's correct. Q. 26. Did you make any disposition of this deed during Mr. Hugh McAvoy's lifetime? A. I placed it in the safe and there it remained until his death. Q. 27. Did he ever call for it? A. He did not. Q. What became of it after death? A. Allie Renehan came in the office, produced the receipt which I had given to Mr. Hugh McAvoy, and which I identified a while ago. I thereupon opened the safe, took out the deed, and gave it to Allie Renehan, and told him to take it over to the clerk's office and have it put on record. Q. You know that Hugh McAvoy was dead at that time? A. Yes. Q.

And he left with you the receipt you had given to Hugh McAvoy, and which you identified? A. Yes. Q. And, when you went out of office as register of wills, you left that paper in the office? A. In the (the) safe in the office. Q. Did Mr. Hugh McAvoy at the time he brought this deed to you say anything about not wishing to surrender it until his death; and, if so, what did he say? A. He did not say anything about not wishing to surrender the deed, but he did say he did not wish to surrender his rights in the property until his death. Q. And that is the reason he did not want to put the deed on record? A. Yes; while he was living."

Upon cross-examination, he further testified in answer to the question: "Q. Did you gather from what Mr. Hugh McAvoy told you the occasion of the preparing of this deed and the names of the people involved in it? A. No, sir. Q. You had no reason to believe that the rights of other persons than Hugh McAvoy were involved in the paper that he delivered to you? A. From the remark of Mr. Hugh McAvoy, I should think there were. I think that he said: 'This is my will.' I am positive of it. He said: 'I do not want this put on record until after my death, as I intend to hold the reins while I live.' Q. And you kept the paper up to the time of his death, didn't you? A. I did. Q. And you considered yourself his agent? A. I did it for Mr. McAvoy, and for keeping the paper I charged him a fee of 50 cents, which is allowed by law, for the safe-keeping of wills, etc."

There was other testimony upon the part of both the appellants and appellee, but it reflects very little light upon this branch of the controversy, and we need not consider it here.

The same principles of law applicable to the conclusion we reached as to the delivery of the deed to Judge Rogers must control upon the facts of this case as to the delivery of the deed to Mr. Marlow. We think the evidence shows and the declarations of the grantor at the time of the delivery of the deed can admit of but one construction, and that is he intended to constitute the custodian of the deed as his agent, and not the agent of the grantees. His statement to the effect that he left it with Mr. Marlow for safe-keeping, and at his death to put it on record, that "I do not want this put on record until after my death, as I intend to hold the reins while I live, and I do not wish to surrender my rights in the property until my death," is conclusive evidence that the grantor did not intend to part with control or dominion over the deed, but retained the right to recall and revoke it at will. In *Carey v. Dennis*, 13 Md. 18, it was held under such circumstances, if the custodian, in whose custody the papers are placed, was the agent of the deceased, then it is clear, upon both principle and authority, that the agency was

revoked upon his death and could not afterwards be executed, and the validity of the transfer was thereby defeated. *Clark v. Creswell*, 112 Md. 339, 76 Atl. 579; *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865. In *Johnson v. Farley*, 45 N. H. 505, the court thus announced the rule: "To give effect to a delivery to a third person where the assent of the grantee may be presumed from the beneficial nature of the conveyance, it must be placed beyond the control of the grantor, and not put in the hands of a third person merely to be delivered to the grantee, for then such third person is merely the agent of the grantor, who, at any time before actual delivery to the grantee, may recall it; but it must be delivered to such third person as the agent of the grantee and received by him in that capacity, and then, if the law will, from the beneficial nature of the conveyance, presume the assent of the grantee, the delivery is complete and the estate passes at once." The numerous decisions of this court bearing upon gifts of savings bank deposits to take effect on the death of the donor and involving questions of a valid delivery are to the same effect. *Jones v. Crisp*, 109 Md. 34, 71 Atl. 515; *Taylor v. Henry*, 48 Md. 557, 30 Am. Rep. 486; *Whalen v. Milholland*, 89 Md. 207, 43 Atl. 45, 44 L. R. A. 208.

The testimony also shows that none of the grantees knew of the existence of this deed in the lifetime of the grantor, or that a deed had been delivered to any one for them. The possession of the receipt given by the register of wills for the custody of the deed was retained by the grantor. The evidence of the witnesses Joseph McAvoy, Wm. A. Renehan, and Aloysius Renehan, as to declarations of the grantor, in regard to this receipt, in the event of his death, is entirely too contradictory and insufficient to establish even a delivery of the receipt to the grantees, or that the grantor surrendered control of it in his lifetime. The deed itself is quite significant of the intention of the grantor in this respect, as it seeks to dispose of both realty and personalty as a testamentary paper, but, not being executed as the law requires, it obviously cannot operate as a will.

We cannot agree with the conclusion reached by the court below upon the record before us that there was such a sufficient delivery of the deed in this case, as measures up to the requirements of the law, to constitute this a valid and legal deed so as to operate to pass title to the property in question to the grantees, and for the reasons stated the decree of the court below, dated the 22d day of March, 1911, will be reversed.

We have considered the exceptions to the testimony reserved by the appellees here objected to, but they can in no way affect the decision of the case or the conclusion that we have reached that this is not a valid deed.

The decree of the circuit court for Howard

county will be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

Decree reversed, and cause remanded, with costs to the appellants.

Supplemental Opinion.

When this appeal was before us at the April term, 1911, of this court, the decree of the circuit court for Howard county, dated the 22d day of March, 1911, was reversed, with costs to the appellants, and the cause was on the 24th day of June, 1911, remanded for further proceedings, in accordance with an opinion filed in the case. Since the date of the decree that was remanded, Joseph McAvoy, Joseph Renehan, and certain others, appellees in this court and defendants in the court below, have filed a petition, asking for a modification of the decree of the 24th of June, 1911, as regards the imposing of the costs, and upon a further consideration of the proceedings and the petition filed herein we think that the decree heretofore passed by us should be modified to the extent of the costs, as heretofore determined. The bill of complaint was filed in the court below for the purpose of vacating and declaring null and void a deed from one Hugh McAvoy to Aloysius Renehan, and for a sale of the property and the distribution of the proceeds of sale among the heirs at law of the grantor.

[6] It appears that the real defendants and contestants in the case were Aloysius Renehan and Mary I. Renehan, his wife. All of the other defendants, the petitioners here, filed their answer in the court below, admitting the matters and facts set forth in the bill of complaint, and consenting to the passage of the decree as therein prayed. The decree below was in favor of the defendants, Aloysius and Mary I. Renehan, and the plaintiffs' bill was dismissed. The costs in the court below was decreed to be paid by the parties, complainants and defendants, except Aloysius Renehan and Mary I. Renehan, his wife. The interest of the appellees in the property is identical with that of the appellants. The plaintiffs appealed the case, and the defendants, other than Aloysius Renehan and wife, were merely nominal defendants, and were not represented in this court by counsel. We are therefore of opinion that the appellees other than Aloysius Renehan and Mary I. Renehan should not be made to pay the costs of the appeal to this court, but that the costs of this appeal should be paid by Aloysius Renehan and Mary I. Renehan, the substantial appellees, and the costs in the court below should be paid from the proceeds of the sale of the real estate. The former decree will therefore be modified to this extent, and the decree will be revised so far as it relates to the payment of costs.

Decree reversed as to costs, the costs in this court to be paid by Aloysius Renehan

and Mary I. Renehan, his wife, and the costs in the court below to be paid out of proceeds of sale of the real estate.

OBERHEIM et al. v. REESIDE et al.

(Court of Appeals of Maryland. June 23, 1911.)

1. EASEMENTS (§ 12*)—GRANT OF EASEMENT IN ALLEY—"LAID OUT."

Under the deed of U., the owner of the east half of a block, of the southern half of his land, the northern boundary line of the land conveyed being described as binding on a 10-foot alley "here laid out," and the grant including the use of this alley in common, "together with the use of any alley 10 feet wide to be laid out by U., extending northerly parallel to P. street from the northwest corner of" the land conveyed "to H. street," while the words "laid out," in reference to the latter alley, are used in the sense of constructed or improved, and not in their ordinary meaning of the adoption of out-lines or location, the alley being laid out in such sense by the deed, which clearly defines its location, the grantee's easement in the alley is not dependent on the grantor improving it, and is not lost by nonperformance of his personal covenant to do so (citing 5 Words and Phrases, 4037).

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-38; Dec. Dig. § 12.*]

2. WORDS AND PHRASES—"ALLEY."

An "alley" is simply a narrow passageway (citing 1 Words and Phrases, 342).

3. INJUNCTION (§ 37*)—TITLE—ESTABLISHMENT BY ACTION AT LAW.

Though, when the title relied on is controverted, and it appears that there is some ground for the objection, a court of equity, in a suit seeking relief by injunction as a determinative and not as an ancillary remedy, will not interfere, except for temporary protective purposes, till the question of legal title can be decided by a court of law, yet, where there is no denial of the claimed right to easement in an alley, except on a theory opposed to the terms of an express grant, a preliminary proceeding at law is unnecessary.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. § 37.*]

4. MUNICIPAL CORPORATIONS (§ 697*)—ENCROACHMENT ON ALLEY—ADEQUATE REMEDY AT LAW.

Legal remedies would be inadequate where the encroachments on an alley, sought to be enjoined by plaintiffs having an easement therein, would not only wholly exclude them from its use, but would render a connecting alley at the rear of their lots unavailable for the purposes for which it was designed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

5. EJECTMENT (§ 6*)—RECOVERY OF EASEMENT.

An easement in an alley would not be recoverable in ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 7-11; Dec. Dig. § 6.*]

6. ESTOPPEL (§ 93*)—EQUITABLE ESTOPPEL.

Plaintiffs' easement in an alley across defendant's land, being a matter of record and also known to defendant, they are not estopped to assert it, though they made no formal written protest against its obstruction till three months after defendant commenced to erect a house across it, but merely proposed to him to furnish a substitute, which he failed to do.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

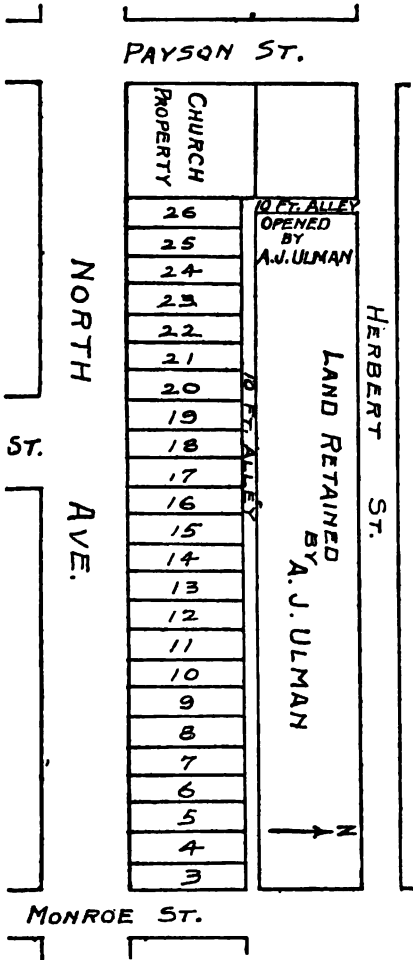
Appeal from Circuit Court No. 2 of Baltimore City, in Equity; Henry Stockbridge, Judge.

Suit by Charles Oberheim and others against Oliver H. Reeside and others. Bills dismissed, and plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and PEARCE, BURKE, and URNER, JJ.

George W. Dexter and William G. Towers, for appellants. Alfred J. O'Ferrall, for appellees.

URNER, J. The appellants are owners of renewable 99-year leasehold estates in four lots of ground fronting on North avenue, in Baltimore city, indicated, respectively, by the numbers 21, 22, 25, and 26 on the following plat, which was used in the case for the purposes of illustration:



The lots in question are subdivisions of a parcel of land which was formerly owned in fee by Alfred J. Ulman, and which comprised all of the block shown on the plat, except the two lots at the western end. On March 14, 1899, Ulman conveyed in fee the southern portion of his land to Elias A.

Blackshere, who subdivided it into the lots represented by numbers 3 to 26, inclusive. These were demised by Blackshere for the term of 99 years, renewable forever, to Marvin H. Murray, on January 24, 1900, and the latter erected on the lots a row of 24 dwelling houses. In the deed from Ulman to Blackshere, the rear line of the ground conveyed, running 333½ feet from the eastern limit of the church property shown on the plat to the western side of Monroe street, was described as binding on a 10-foot alley "here laid out," and the grant included the use of this alley "in common," "together with the use of an alley 10 feet wide to be laid out by Alfred J. Ulman extending northerly parallel to Payson street from the northwest corner of the above lot to Herbert street." These alleys are outlined on the plat. The lease from Blackshere to Murray conveyed the subdivided lots, together with the improvements, rights, and appurtenances, and the use in common of "an alley 10 feet wide to be laid out by Alfred J. Ulman to Herbert street, as mentioned in" the preceding deed. By mesne conveyances the four lots first mentioned, and the rights and appurtenances thereto belonging, were acquired by the appellants.

About the year 1906, the appellees became the owners of the northern portion of the Ulman land fronting on Herbert street. Their deed is not in the record, and the precise date of their acquisition of the property does not appear; but it is admitted that their title was derived through Ulman. In March, 1907, they began to erect upon the land a row of 20 dwellings. The western most house was located across and completely occupied the northern end of the space provided in the deed from Ulman to Blackshere for the 10-foot alley extending to Herbert street. A fence was constructed by the appellees along the rear or southern line of their lots, and this was projected across the southern terminus of the alley space, which was then entirely obstructed at both ends. The appellants have sought in this suit to prevent the completion of the obstructions, and to compel their removal.

It appears without dispute from the record that the alley extending from Monroe street on the east to the western end of the original Ulman land is too narrow to admit of the turning of teams, and that the outlet provided to Herbert street on the north is therefore essential to the use of the alley for its intended purpose as a means of access to the rear of the appellants' premises for garbage carts, delivery wagons, and other vehicles. The bill of complaint accordingly charges that the structures in course of erection by the defendants have destroyed the easement to which the plaintiffs claim to be entitled under the grants referred to as appurtenant to their respective premises.

The answer of the defendants neither admits nor denies the allegations of the bill as to the derivation of the plaintiffs' title. It denies, however, the plaintiffs' right to the use of the ground in controversy for the purpose of an alley, and asserts that no alley has ever been opened or constructed through the property upon which the buildings of the defendants were being erected, and that their land was not subject to any rights of way.

There was some conflict in the evidence as to the extent to which the area provided in the Ulman deed for the alley extending to Herbert street had been used for that purpose. It was testified by several witnesses that this space, though not graded or paved, has been regularly traveled by teams making deliveries and collecting material at the rear of the lots binding on the alley with which the one in controversy connected. There was other testimony to the effect that a part of the space intended for the alley had been obstructed for a number of years by deposits of building stone, and that it had never in fact been opened or used as a way. But it was shown by the witnesses for the defense that, prior to the erection of the defendants' row of houses, the whole of the ground lying between the southern tier of lots and Herbert street was vacant and uninclosed, and that this open space was customarily used by teams having occasion to visit the rear of the plaintiffs' premises and the other lots fronting on North avenue. It was disclosed by the evidence that the grade of the lots abutting on Herbert street, before the improvements by the defendants, was from one to five feet higher than that of the street. There appears to have been some excavation and grading in connection with the alley parallel with Herbert street, but there was no work of this kind ever done upon the bed of the alley now in dispute.

[1, 2] The main theory of the defendants is that the right of those deriving title from Ulman to the use of the last-mentioned alley depended upon its being "laid out," in the sense of being constructed and opened as an alley, by the original grantor of the easement. It is contended that the language, "together with the use of an alley 10 feet wide to be laid out by Alfred J. Ulman," amounted to nothing more than a personal covenant, binding the grantor alone, to establish a way appurtenant to the land conveyed, and that this obligation, not having been performed by the grantor during his ownership of what was proposed to be the servient estate, is not now enforceable against the present owners of the property. This contention does not give due consideration to the important fact that the Ulman deed expressly *grants the use of the way as appurtenant to the land since acquired by the plaintiffs*. If the phrase "to be laid out," upon which the defendants rely, is

to be construed as a covenant to make the defined area serviceable as a thoroughfare, and if the contractual duty was not actually performed, such a default could not impair the efficacy of the formal grant of the use of the ground for the purpose indicated. An "alley" is simply a narrow passageway. 1 Words and Phrases, 342. It may exist without any work of construction being done upon its bed; and an easement in an "alley 10 feet wide" may undoubtedly be granted and be operative, even though it be described as extending over ground not previously used for that purpose. It is perfectly apparent that the right thus conveyed in this case was one of great convenience and value to the property to which it was attached, and that it was absolutely necessary to be secured, in order that the alley first mentioned in the grant should be available at all for its intended uses. It would not be a reasonable construction of the terms of the conveyance to hold that the distinct grant of the easement could be defeated by the neglect of the grantor to prepare the alleyway for travel in accordance with his agreement.

It is doubtless proper to conclude that the words "to be laid out by Alfred J. Ulman," as used in his deed, imposed upon him some duty in reference to the improvement of the alley. The term "lay out," as ordinarily employed in such connections, has been judicially defined to mean the adoption of outlines or location, and not the work of construction or improvement. 5 Words and Phrases, 4037; Hough v. City of Bridgeport, 57 Conn. 290, 18 Atl. 102; Foster v. Boston Park Com'rs, 133 Mass. 321; Gaines v. Hudson Co. Ave. Com'rs, 37 N. J. Law, 14; Zinc Co. v. City of La Salle, 117 Ill. 417, 2 N. E. 406, 8 N. E. 81. In the present case, the deed itself "laid out" the alley, within the meaning just stated, by clearly defining its location; and hence it is probable that there was something further contemplated to be done by the grantor in this regard for the benefit of the grantee and his assigns. But to hold that the easement must be lost altogether, merely because some act was not performed that was designed to make it more serviceable, would be contrary to the plain import of the conveyance, and would be manifestly unjust. Upon the appellees' theory, if Ulman had died shortly after his grant, as he did seven years later, without having "laid out" the alley, it would have become thereby at once and perpetually barred to the grantee, regardless of the valuable consideration he had paid for its use. If the grantee had himself graded the alley, it could certainly not be said that his easement would still depend upon similar action by the grantor. It was undoubtedly competent for those entitled to the alley to waive the covenant for its improvement, and to use it in its primitive condition. As they did in fact use the ground designated, or the adjacent land

while vacant, for the purpose contemplated in the deed under which they claimed, it would not be a just disposition of the case to hold that they may now be deprived of their vested right by the present owners of the servient estate, simply because a personal covenant of the common grantor to "lay out" the alley had not been performed.

[3] In suits of this nature, where relief by injunction is sought as a determinative and not as an ancillary remedy, it is, of course, essential that the right of the plaintiff to the invaded estate should be free from any reasonable doubt or dispute. When the title relied upon is controverted, and it appears that there is some ground for the objection, a court of equity will not interfere, except for temporary protective purposes, until the question of legal right can be decided by a court of law. *Bernel v. Sappington*, 102 Md. 190, 62 Atl. 365; *Gulick v. Fisher*, 92 Md. 353, 48 Atl. 375; *Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635; *Whalen v. Dalashmutt*, 59 Md. 250; *Lanahan v. Gahan*, 37 Md. 106; *Amelung v. Seekamp*, 9 Gill. & J. 468; *Cherry v. Stine*, 11 Md. 27; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 489. Such a situation is usually presented where the title involved depends upon or is affected by adverse user, as in each of the cases just cited. But when the legal title sought to be protected is not doubtful, there is no occasion to require the parties to resort to a court of law for its adjudication. *White v. Flannagan*, 1 Md. 543, 54 Am. Dec. 668. In the case at bar, there is no dispute as to the execution and delivery of the deed granting the easement in question, or as to the valid acquisition by the plaintiffs of lands to which it was intended to be appurtenant. There is no issue of adverse user, and no denial of right, except upon a theory which is opposed to the terms of an express grant. We do not find here sufficient ground of objection to the plaintiffs' title to justify us in subjecting them to the expense and delay of a preliminary proceeding at law.

[4, 5] It is urged, however, that the injury complained of is not irreparable, and that the plaintiffs have an adequate legal remedy by an action for damages. The record shows, as already stated, that the alley has been completely obstructed. It is entirely and finally destroyed for the purposes it was intended to serve, if the structures erected by the defendants are permitted to be maintained. The rule has been repeatedly declared that, where a trespass works a destruction of the estate in the character in which the complainant was entitled to enjoy it, a proper case is presented for relief by injunction. *Baltimore Belt R. R. Co. v. Lee*, 75 Md. 600, 23 Atl. 901; *Schaidt v. Blaul*, 66 Md. 147, 6 Atl. 669; *Long v. Ragan*, 94 Md. 464, 51 Atl. 181; *Herr v. Bierbower*, 3 Md. Ch. 458; *Davis v. Reed*, 14 Md. 157; *Shipley v. Ritter*, 7 Md. 413, 61 Am. Dec. 371; *Shipley v. Caples*, 17 Md. 182; *Scully v.*

Rose, 61 Md. 414; *Baughner v. Crane*, 27 Md. 41.

In *White v. Flannagan*, *supra*, where the plaintiff's right of way to a wharf over a street was obstructed by the defendant, it was said by the court: "In judging of the application of the remedy by injunction, reference must always be had to the nature and character of the thing to be protected. * * * By throwing obstructions over the street, so as to prevent a passage along its bed, it is just as much destroyed as if it were covered by a house; in the language of the authorities, it is irreparable mischief, because it destroys it as a street."

The encroachments in the case before us not only exclude the plaintiffs altogether from the use of the way directly affected, but also render the connecting alley unavailable for the purposes for which it was designed. Under the conditions here existing, it is plain that legal remedies would be inadequate. The easement would not be recoverable in ejectment (*Callaway v. Forest Park Co.*, 113 Md. 7, 77 Atl. 141; *Nicolai v. Baltimore City*, 100 Md. 579, 60 Atl. 627; *Canton Co. v. Baltimore City*, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. [N. S.] 129), and actions of trespass could not, from the nature of the case, be expected to afford the plaintiffs suitable redress.

[6] The defendants charge that the plaintiffs were guilty of laches in failing to assert their right to the alley until the building by which it was obstructed had been nearly completed. It was proven that the erection of this particular dwelling was begun in March, and that a formal protest in writing was not sent by the plaintiffs until June 27th, when the house was under roof. It is to be gathered from the testimony of one of the defendants that before this letter was written the plaintiffs proposed that a space be left open at the rear ends of three of the lots, so that there would be room for teams coming into the alley from Monroe street to be turned around and driven back to the point of entrance. When this proposal was made, the ground was unfenced. There were some negotiations on the subject, but they were not brought to a definite conclusion, and the defendants proceeded later to build a fence across the southern end of the alley leading to Herbert street. The plaintiffs then sent their letter, demanding the removal of the obstructions. One of the defendants testified that when this communication was received about \$1,000 had been expended on the house at the northern end of the alley, and that it was finished at an additional cost of \$200. It is insisted that the plaintiffs are estopped by their previous inaction to now demand that the obstructions be removed.

It is a well-settled principle that mere silence as to rights of record does not create an estoppel. *Frazee v. Frazee*, 79 Md. 30, 28 Atl. 1105. In *Schaidt v. Blaul*, *supra*, an al-

ley was obstructed by the erection of a massive stone wall and a stable; the former having been finished, and the latter being in course of construction, when the owner of an easement in the alley applied for an injunction. The defense was interposed, among others, that the plaintiff, with full knowledge that the work was in progress, and that large sums of money were being expended upon it by the defendant, made no complaint of any kind until it was completed. It was contended that by this course of conduct the plaintiff was estopped to allege that his rights had been violated. In overruling this contention, and affirming the decree below, requiring the removal of the wall and stable, the court quoted from *Casey v. Inloes*, 1 Gill, 502, 39 Am. Dec. 658, as follows: "The doctrine that, where one stands by and sees another laying out money on property, to which he himself has some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one who claims under some trust, lien, or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice."

In the case here under consideration, the plaintiffs' rights were of record. The defendants had procured an examination to be made of the title to their land, and must therefore have had actual, as well as imputed, notice of the easement they were obstructing. While they have offered evidence tending to prove that the alley had not been graded or used along its defined course, yet they could see that this was not really necessary, so long as the adjacent ground remained vacant and uninclosed, and thus afforded an unrestricted means of access for teams to the plaintiffs' lots. They were aware that in closing the area of the alley leading to Herbert street, and in building a fence along the northern margin of the one extending to Monroe street, the principal value and utility of the entire way would be destroyed. It seems clear to us upon the facts that the defendants are not entitled to rely upon the principle of equitable estoppel in their opposition to the plaintiffs' efforts to protect their easement. We find in the case no superior equities in favor of the defendants upon the strength of which they should be permitted to continue the obstructions. The loss they may incur in the removal of the building and fence they have erected in the bed of the alley cannot be supposed to equal that which the maintenance of these obstacles inflicts upon the owners of the 24 improved properties to which the right of way is appurtenant. In our judgment, the

plaintiffs are entitled to the relief by injunction, for which they have prayed.

The learned court below dismissed the bill without prejudice to an action at law; but, as we have concluded that the case is a proper one for redress in equity, the decree will be reversed, and the proceedings remanded for a new decree in accordance with this opinion.

Decree reversed and cause remanded, to the end that a decree may be passed in accordance with this opinion; the costs to be paid by the appellees.

COLONIAL TRUST CO. et al. v. GERKE et al. (two cases).

(Court of Appeals of Maryland. June 24, 1911.)

APPEAL AND ERROR (§ 1097*)—DECISION ON FORMER APPEAL—LAW OF CASE.

A decision of the Court of Appeals on a prior appeal is the law of the case and is conclusive on the parties with reference to all subsequent proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

Appeals from Circuit Court of Baltimore City; Thos. Ireland Elliott, Judge.

Suits between Florence B. Gerke and others and the Colonial Trust Company, as administrator of Charles G. C. Ross, deceased, and others, for the construction of a will. A decree having been entered in conformity to the orders of the Supreme Court on a prior appeal (114 Md. 289, 79 Atl. 587), the administrator appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

H. Findlay French and Thomas Mackenzie, for appellant. Charles J. Wiener, Roger T. Gill, and Edward M. Hammond, for appellees.

BRISCOE, J. This case is brought into this court for the second time. There are two appeals in the record, but they present the same questions and are from the same decree. One appeal is on behalf of the Colonial Trust Company, administrator of Charles G. C. Ross, and the other is taken by the Colonial Trust Company and Thomas Mackenzie, trustees, under the will of Charles Gerke, deceased. On the former appeal, reported in 114 Md. 289, 79 Atl. 587, this court reversed the decree of the circuit court of Baltimore City and remanded the cause to the end that further proceedings should be had in conformity with an opinion filed in the case upon a proper construction of Mr. Gerke's will, declaring the rights of the parties thereunder. In the course of the opinion in that case, we held that the estate of Charles Gerke should be held in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trust, according to the terms of the will, and should be administered as a trust estate in the circuit court of Baltimore City under the orders of that court; that the administrator of Charles G. C. Ross, deceased, was entitled to one-eighth of the rents and income from the property subject to the provision in the will that the warehouse property, on Lexington street, should not be sold until after the death of the last surviving daughter of Charles Gerke, and his youngest grandchild shall have become of age. We further held, under a proper construction of the will, that Mr. Gerke's wife, during her life, and that his daughters, during their lives, should have full power to demand, receive, and collect the rents, interest, and income, to manage, control, and look after the estate, as though the same were their own absolutely. The case having been remanded, the circuit court of Baltimore City, in conformity to the opinion and decree of this court, on the 28th day of March, A. D. 1911, passed the following decree, to wit: "It is adjudged, ordered, and decreed that Charles G. C. Ross took an equitable interest in one-eighth of the rest and residue of the estate of Charles Gerke as mentioned in the third and subsequent paragraphs of his will, subject to the life estate of the wife of Charles Gerke in the whole property, and after her death to the bequest of the interest at 5 per cent. on \$6,000 in favor of Walter Duncan Gerke and his descendants, and to the further provision in said will that said estate shall be held in trust, and that the storehouse property No. 5 West Lexington street, in Baltimore City, shall not be sold until after the death of the last surviving daughter of said testator and his youngest grandchild shall become of age, and also to the provision thereof whereby his said daughter shall during their lives have full power to demand, receive, and collect the rents, interests, and income of the part or share to which they may be entitled, and to manage, control, and look after the estate as though the same were their own absolutely. And it is further adjudged, ordered, and decreed that the trusts created under the will of the said Charles Gerke, deceased, from time to time as the occasions require, shall be administered under the order of this court. And it is further ordered that the Colonial Trust Company, administrator of Charles G. C. Ross, deceased, is entitled to receive one-eighth of the net rents and income from the trust property subject to the provision of said will."

It will be seen, upon an examination of the opinion filed by us on the former appeal, that the decree appealed against here is not only in conformity with the views expressed in the opinion of this court, but is in part in the very language and terms of Mr. Gerke's

will, which we sustained and held that his property should be administered as a trust estate as directed by the will. It appears, further, that the questions raised on this record were presented and decided by this court on the former appeal, and, this being so, they are no longer open for review on the present record. The conclusion reached by this court on the former appeal was the result of a careful and thoughtful consideration of the rights of all the parties under the will, and we find no reason to disturb it, even if this case was now properly before us. In *Waters v. Waters*, 28 Md. 11, Chief Judge Bartol, in delivering the opinion, said: "No principle is better established than that a decision of the Court of Appeals once pronounced in any case is binding upon the court below and upon this court in the subsequent proceedings in the same case, and cannot be disregarded or called in question. It is the law of the case binding and conclusive upon the parties, not open to question or examination afterwards in the same case." If this were not so, controversies would be endless. "*Debet finis esse litium*," is the maxim, which has been invariably applied by this court, whenever this question has arisen. *Smith v. Shaffer*, 50 Md. 132; *Abraham v. Trust Co.*, 86 Md. 258, 37 Atl. 646; *Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321.

We find nothing in the decree appealed against that is either inconsistent with or materially different from the directions of this court on the former appeal, and, as the decree is substantially in accordance therewith, it will be affirmed, on both appeals, with costs to the appellees, respectively, in each case.

GOLDSBOROUGH et al. v. COBLENTZ et al.

(Court of Appeals of Maryland. June 24, 1911.)

1. TRUSTS (§ 204*)—SALE OF TRUST PROPERTY—ANNULMENT OF JUDICIAL RATIFICATION—EFFECT.

Where the court administering trust property annulled at the request of a purchaser an order confirming the sale, the court's protection of the purchaser terminated.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 204.*]

2. TRUSTS (§ 204*)—SALES OF TRUST PROPERTY—JUDICIAL POWER.

Where the court administering trust property annulled at the instance of a purchaser a confirmation of a sale by trustees, and granted them leave to institute further proceedings to effect a sale, the court was free to accept the highest bid offered.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 204.*]

3. TRUSTS (§ 200*)—ADMINISTERING TRUST ESTATES—PROTECTION OF INFANTS.

A court of equity administering a trust estate must on its own motion protect the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

terests of infants in the estate, and may refuse to ratify a sale, though no one objects thereto. [Ed. Note.—For other cases, see Trusts, Cent. Dig. § 268; Dec. Dig. § 200.*]

Appeal from Circuit Court, Frederick County, in Equity; Edward O. Peter and John C. Motter, Judges.

Proceedings by Emory L. Coblentz and another, trustees, for the confirmation of a sale of trust property. From an order overruling exceptions to the sale, interposed by Charles Goldsborough and another, they appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, and STOCKBRIDGE, JJ.

Thomas N. Copenhaver and Wm. H. Surratt, for appellants. Albert S. Brown and Alfred J. Carr, for appellees.

STOCKBRIDGE, J. On the 10th of May, 1910, Julian S. Carter, professing to act for and on behalf of the appellant Charles Goldsborough, entered into a written agreement with Emory L. Coblentz and W. Harry Halter as trustees, by which Mr. Goldsborough was to purchase from the trustees two lots of ground on Eutaw place and one on Linden avenue for the sum of \$12,250. The Eutaw place properties were part of a trust being administered under the circuit court for Frederick county, while the Linden avenue property was under the jurisdiction of one of the equity courts of Baltimore city. For this reason, on or about the 7th day of July, a new contract for the sale of the Eutaw place properties was entered into for a named consideration of \$7,250. This second agreement was dated as of the same date as the original contract, and signed by the same persons as the first agreement, and by Mrs. Fannie Fitzpatrick, the cestui que trust for life. The sale as proposed to be made by the second agreement was finally ratified and confirmed by the court on the 28th day of July.

Then followed a succession of correspondence and interviews between Emory L. Coblentz, one of the trustees, and Caughy, Hearn & Carter, as representing the supposed purchaser, Goldsborough. These disclosed an objection to the title on the part of the attorney of the purchaser, in response to which, on August 30th, the trustee, Coblentz, declined to recognize the alleged objection to the title, and proposed that "the whole matter might be considered off." Instead of this, further correspondence and interviews ensued, and some time in October an understanding was reached by which the wishes of Mr. Copenhaver acting as attorney for Mr. Goldsborough in the examination of the title were acceded to. These involved a material amendment of the equity proceeding under which the trustees were to make title, and which took the form of an order passed on

the 18th of October, 1910, rescinding and annulling the order of July 28th, which confirmed the sale negotiated between the trustees and the appellant Goldsborough, and authorizing the withdrawal from the files of the petition of the trustees for the ratification of the sale, and granting leave to the trustees to institute such further proceedings as they might desire to effect a sale of the property. At this point the relative positions of the parties were the same as they had been on the 7th July, when the second agreement for a sale was made.

At some time, the date of which is not entirely certain, but prior to the taking of the testimony under the new proceedings which had been begun, the valuation of the Eutaw place properties was at the suggestion of Mr. Caughy changed from \$7,250 to \$8,250, but the record does not disclose any written agreement entered into at this new price. It is the undisputed testimony in this case that at the interview between Mr. Caughy and Mr. Coblentz, at which the agreement was reached to take the proceedings suggested by Mr. Copenhaver, Mr. Coblentz stated that one effect of the proceeding would be to "involve a risk of Mr. Goldsborough being subjected to competitive bids." The attention of Messrs. Caughy, Hearn & Carter or their counsel was called to this condition in the letters of Mr. Coblentz of October 24th and October 25th. The new equity proceedings were completed, and on the 3d of December a decree was entered directing the sale of the Eutaw place properties at public or private sale, and, if by the latter mode, providing that the sale should not be for a less sum than \$8,250. On December 8th Mr. Coblentz wrote a letter to Messrs. Caughy, Hearn & Carter, stating that the sale of the properties in question had been reported to Mr. Goldsborough, but that the trustees had received an offer of \$8,300 from Francis L. Klemm on behalf of George L. Kelly. It was not true, as stated in the letter, that the sale had been reported to Mr. Goldsborough, and two days later Mr. Coblentz corrected this statement in a letter to Caughy, Hearn & Carter, and proffered an explanation of his prior statement, and on the same day filed a report of sale of the property to Kelly. To this sale Mr. Goldsborough excepted, and from the order overruling his exceptions this appeal has been taken.

The facts have been thus detailed at some length because a full understanding of them will materially aid in reaching a sound conclusion.

The appellant relies upon four propositions:

[1] (1) That the final ratification on July 28th of the proposed sale to Goldsborough gave him a title which the faith of the court was pledged to protect. This ignores the fact

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

that in compliance with his own request that ratification had been set aside and annulled, and whatever protection the court had theretofore placed itself in a position of owing was at an end.

(2) That the original contract for the Eutaw place and Linden avenue properties was indivisible. The complete answer to this is that the parties had by agreement divided it.

[2] (3) This is based on the matter of inadequacy of price. This is not a question which enters into the present case at all. When the order of October 18th had been passed, there was no bid whatever before the court, and the court was free to accept the highest bid offered, from whomever it might come.

[3] (4) That no party in interest is in court objecting to the acceptance of Mr. Goldsborough's bid. That is entirely immaterial. The fact that no one appears and objects can never justify the court in committing a wrong, and especially when, as in this case, there are the interests of infants which a court of equity is bound of its own motion to protect.

There had been no concealment of any material fact from the court, and the only manner in which the court could perform its plain duty was to authorize and approve a sale at the highest price offered for the properties, which was the bid of George L. Kelly. The present case is closely analogous to the case of *Neale v. Peverley*, 114 Md. 198, 78 Atl. 1102, decided at the October term, 1910, and the law applicable to the present controversy is fully laid down in that case, and the authorities there cited.

The order of the court below from which this appeal was taken is therefore affirmed with costs to the appellee.

FRICK et al. v. DENISON et al.

(Court of Appeals of Maryland. June 24, 1911.)

WILLS (§ 731*)—DEVISEES—ALLOWANCE OF COUNSEL FEES.

The interest of devisees should not be charged with counsel fees paid to an attorney employed by executors for services rendered in determining whether their individual accounts were properly allowed to the estate in the executors' accounts, and to enable the executors to state their accounts with the estate as individuals.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 731.*]

Appeal from Orphans' Court, Baltimore County.

Application by Charles C. Denison and another, executors of Robert M. Denison, deceased, for authority to employ counsel to aid in stating an account, and to pay such counsel from the assets of the estate. From an order granting the application, Mary D. Frick and another appeal. Reversed and remanded for further proceedings.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Walter H. Buck and C. Baker Clotworthy, for appellants. Osborne I. Yellott, for appellees.

PEARCE, J. This is an appeal from an order of the orphans' court of Baltimore county authorizing Charles C. Denison and Jasper M. Berry, Jr., executors of Robert M. Denison, deceased, "to employ Osborne I. Yellott as their counsel to aid them in stating a new first administration account, and in the further administration of said estate, * * * and to pay to said Osborne I. Yellott out of the assets of the estate the sum of three hundred dollars, the same to be in full compensation for all services heretofore rendered by him to the executors in their capacity as such, and to cover, as well, all services which may be hereafter rendered by him in the preparation of the new first administration account which the court has this day on another petition of said executors ordered to be stated." In order to a proper understanding of the merits of this appeal, it will be necessary to state somewhat in detail the character of the administration and the particular features of the settlement of the estate which have led to this controversy as to the allowance out of the estate of this counsel fee to the executors. Robert M. Denison died in April, 1909, possessed of a handsome real and personal estate, and leaving a last will and testament by which he devised and bequeathed to his two sons, Robert M. Denison, Jr., and Charles C. Denison, as joint tenants, a certain farm in Baltimore county with all the personal effects thereon, and to his two daughters, Mrs. Mary C. D. Frick and Mrs. Rebecca C. D. Warfield, as tenants in common, three parcels of land in Baltimore city, and the whole residue of his estate, real and personal, to his said four children, share and share alike, they being his only heirs at law, and his wife having predeceased him. He directed in his will, however, or expressed his wish, that none of the property devised or bequeathed by the residuary clause should be disposed of before January 1, 1914, without the consent of each of said children, and he appointed Charles C. Denison and Jasper M. Berry as his executors. This will was admitted to probate April 27, 1909, letters testamentary were granted same day, and on the same day also an agreement under seal between the said four children was filed with the will, that, in the distribution to be made of said personal estate after payment of debts and expenses, one-fourth part thereof should be distributed to each child, and that the real estate should be appraised as therein provided, and divided into four equal parts, and that one-fourth part thereof as so di-

vided should by, interchange of conveyances be vested in each child in such manner as he or she should designate, and the executors assented in writing to the carrying out of said agreement.

The deceased had a large and valuable real estate in Baltimore city, and also had a farm in Queen Annes county and several farms in Baltimore county, and also in Anne Arundel county. In 1886 the real estate firm of J. M. Berry & Son, of which Jasper M. Berry, Jr., was a member, took charge of the collection of the rents of the Baltimore city property, except one parcel, and since the dissolution of that firm by the death of the senior member in 1906 Jasper M. Berry, Jr., has conducted the business under the firm name and continued to collect said rents up to the death of Mr. Denison. Charles C. Denison for about five or six years before his father's death, acting under a power of attorney from him, had charge of the real estate other than that in Baltimore, and collected and accounted for the rents therefrom. On April 19, 1910, the executors presented to the orphans' court an account which they intended and believed to be a correct and final administration account, and which was passed by the court on that day, showing aggregate receipts of over \$180,000, and a balance for distribution of over \$147,000, accompanied by a distribution to each of the four children of \$36,857.22, which distribution was ordered by the court, and the executors were ordered to grant and convey to the respective distributees the several leasehold properties included in the said distribution. Releases were prepared at the same time by Mr. D. H. Emory, who had been employed by an agreement of all the parties, and these were presented for execution. Robert M. Denison, Jr., executed his release, it being understood that certain small errors in the account were to be adjusted without restating the account, and desired the distribution made at once, and the executors were also desirous of making immediate distribution, but desired the releases to be concurrently delivered, the above-mentioned small errors to be adjusted at the same time. The administration account did not in terms purport to be a final account, though supposed by the executors to be a complete administration of the estate, subject to the correction of said small errors, and the releases tendered for execution exonerated the executors from any suit or demand "for or on account of the said sum of money paid as aforesaid, and the distribution as aforesaid." On May 14th Col. Clotworthy wrote the executors that he had been retained by Mrs. Frick and Mrs. Warfield to examine the administration account, and he specified certain matters to which he objected, and in regard to which he desired information.

These matters were as follows: (1) Receipts from board of horses at the home

farm, which were thought to be too small. (2) An amount of \$642.51 as received from J. M. Berry & Son representing collections of rents. This was thought to be too small, and a general statement of the accounts was desired relating to these rents during the existence of the agency. (3) That commissions were erroneously allowed to the executors on \$2,025 representing items in which the decedent had only a life estate; also on \$4,720 representing an error in carrying out the appraised value of certain securities, aggregating \$134.90. (3) Amount paid for servants' wages, \$135, supposed to be inadvertently allowed after the death of Mr. Denison. (5) Mr. Emory's fee of \$1,000, which it was objected should not be allowed out of the estate. (6) An allowance of \$5,213.30 to the National Marine Bank, thought to require explanation in view of Mr. Denison's large means. (7) An inquiry as to a quantity of barley which he was informed had been sold, but not accounted for.

Mr. Berry replied on May 20th that the items for horse board included all of which he had any information. He explained that, four days previous to the death of Mr. Denison, J. M. Berry & Son paid out \$1,510.92 on account of burnt district benefits to certain property of Mr. Denison, thus materially reducing the amount in their hands. He conceded the error in commissions offering to correct it by checks to each party for a proportionate amount. He replied that no wages were paid servants after Mr. Denison's death; explained that Mr. Emory's employment was under an agreement between the heirs filed in court, and providing for its payment out of the estate; explained that the claim of the Marine Bank was for a note representing a loan to Mr. Denison duly proved by the officers of the bank, and that his information was that all the barley had been fed to the stock. On May 19th Gen. Warfield wrote Mr. Berry, inquiring if partial releases could not be accepted, so that the leasehold property could be turned over pending the arrangement of other matters, and on the 20th Mr. Berry replied that, in view of Col. Clotworthy's communication, they deemed it best for all concerned that the distribution when made should be final, and on the 24th of June wrote Gen. Warfield that he had concluded it was best for all concerned that Col. Clotworthy's office should take up with Mr. Yellott as their counsel all matters arising out of said administration, to which Gen. Warfield acceded by letter of June 27, 1910. From this date down to January 16, 1911, the matter drifted along in correspondence, when Messrs. Lemmon & Clotworthy wrote the executors that, unless distribution was made by the 23d inst., they would be compelled to take such action as they should deem advisable. In the meantime the executors had furnished Col. Clotworthy's office with a copy of all the accounts between

1906, the date of the dissolution of the firm of J. M. Berry & Son, and the death of Mr. Denison in 1909, with an itemized account of the board of horses, with cancelled checks on National Marine Bank and seven books of check stubs from 1902, also with a statement of barley since ascertained to have been sold, amounting to \$93.60, and constituting an error to that extent. In the letter of January 13, 1911, complaint is made that Messrs. Lemmon & Clotworthy are not satisfied with "certain items in the account filed," particularly the item of \$642.51 as paid by J. M. Berry & Son; also receipts from board of horses and barley. No mention was made in that letter of any other disputed items mentioned in the letter of May 14th, and it would seem from that fact, and from the absence of any allusion in the testimony to the other items in the letter of May 14th, that those objections were abandoned. The letter of January 13th, however, does say that they contend "the estate should be larger," and it does appear from the testimony of Mr. Buck of the firm of Lemmon & Clotworthy that there has been discovered an item of \$309.92 in the accounts with J. M. Berry & Son which is charged against Mr. Denison when it should have been credited to him, thus making a difference of \$619.84 against Mr. Denison's estate. The executors conceded the error of \$134.90 in the commissions, and of \$93.60 for barley sold, and offered to settle these items by checks for one-fourth of the total amount to Mrs. Frick and Mrs. Warfield upon execution and delivery of the releases prepared, but this was refused because Gen. Warfield states that Mr. Berry told him he would consider the releases to be full and final and to preclude taking up other matters objected to and disputed by the executors.

Upon receipt of the letter of Messrs. Lemmon & Clotworthy of January 13, 1911, Mr. Yellott replied, submitting alternative propositions for settlement of the matters in dispute. (1) By adjustment of the same amicably in a supplementary account, distributions to be made concurrently under both accounts, upon execution and delivery of full releases. (2) By filing a petition for the rescission of the account passed, on account of certain conceded errors, and the stating of a new account and distribution thereunder, but retaining a cash sum sufficient to protect the executors in event of continued litigation. (3) Submission of all questions to the orphans' court as arbitrators.

The appellants accepted the second proposition, and on January 26th the executors filed a petition accordingly conforming to the agreement of the parties, rectifying the employment of Mr. Yellott by the executors, as counsel to aid them in closing up the estate, stating their view of the existing situation, and the services already performed, and further to be performed by Mr. Yellott in the matter, and praying for authority to employ

Mr. Yellott to assist them "in preparing a new administration account and to direct and advise them in obtaining accountings from J. M. Berry & Son and Charles C. Denison individually," and to authorize them to pay him reasonable compensation for such services. Accompanying this petition was a certificate of Messrs. D. H. Emory and Edwin J. Farber, members of the bar, to the effect that from their knowledge of the character of the services rendered and to be rendered by Mr. Yellott in the matter \$500 would be a reasonable compensation therefor. Robert M. Denison, Jr., answered, saying that he regarded the account stated as fair and just with the exception of certain minor inadvertent items which were proposed to be and should be adjusted without the expense of a new account, but that, if an adjustment could not be reached without a new account, he believed that the expense of counsel was a proper charge against the estate; but objected to the payment out of his share of the estate for any lengthy investigation of accounts between the estate and J. M. Berry & Son and Charles C. Denison individually. Mrs. Frick and Mrs. Warfield answered, setting forth their dissatisfaction with the accounting between the executors and J. M. Berry & Son, alleging that the necessity of a new account was due solely to errors of the executors which should not be corrected at the expense of the distributees, and alleging that the services performed or to be performed by Mr. Yellott are for and on behalf of Charles C. Denison and Jasper M. Berry, Jr., to the compensation for which the distributees should not be made liable. Thereupon, and upon the testimony taken, the order was passed from which this appeal was taken.

There is nowhere in this record any charge or imputation of wrongdoing or bad faith on the part of Messrs. Denison and Berry or either of them, either in their respective individual accounts with Mr. Robert M. Denison during his life, or in the stating of their administration account. There is, however, evidence of several conceded errors against the estate, not known to the executors until discovered by the appellants upon examination of the administration account. Mr. Buck, who examined such papers and statements as were submitted by Mr. Berry in reference to his individual accounts with the deceased, testified that he found in these numerous errors in addition, and a single charge of \$309.92 against the estate which should have been a credit to the estate, and Mr. Berry was not called to deny or explain any of these alleged errors. The evidence is that from 1886 to Mr. Denison's death in 1909, when he was far advanced in years, his annual rentals passing through Mr. Berry's hands were about \$15,000, a transaction alone which demanded careful and accurate bookkeeping, and there is no evidence that his books or accounts were destroyed

by fire or lost otherwise, though it does appear that he had not preserved these books and accounts. Mr. Charles C. Denison had charge of his father's affairs for a number of years before his death, just how many does not appear in proof, under a power of attorney drawn by Mr. Berry, but there is nothing to show what accounts he kept of his receipts from Mr. Berry or from any other source. There is evidence, however, that Mr. Charles C. Denison stated to these appellants in 1908, before his father's death, that as such agent he had received no detailed statement of these rents since 1904, and that he was then warned of possible future trouble by reason of that fact, and that he co-operated with Gen. Warfield in an effort to secure such a statement from Mr. Berry, but without success. The administration account when prepared showed that that account, of which no statement had been rendered for five years, was closed by a single entry of a sum of \$642.51 among "accounts paid," without any explanation that it represented a balance due on that rental account, or how that sum was ascertained to be the amount due to close the account.

When attention was called to the small amount of that item, as compared with the regular annual or monthly receipts, the only explanation given was that the amount in hand had been reduced only a few days before Mr. Denison's death by the payment of benefits on property in the burnt district, but that was obviously no adequate explanation of the application of large amounts through a period of several years. Mr. Denison did not testify at all, though he was in charge of his father's financial affairs for a number of years, and Mr. Berry was not called in rebuttal of any testimony given by Mr. Buck or Gen. Warfield, or to show that there was no occasion or reason for inquiry into these accounts. It is true that it would not have been appropriate to embody in the administration account itemized accounts running through a series of years, but all the information that existed as to the basis of accounting between J. M. Berry & Son and Charles C. Denison as the agent of his father was in the possession of those gentlemen, one or both of them, and we think it is obvious that the appellants had a right to demand the exhibition to them of all the sources of information open to either Mr. Berry or Mr. Charles C. Denison; none of those sources being accessible to the appellants. If these sources of information were imperfect, either through the neglect or misfortune of those who were charged with the duty of so keeping those accounts that they should show the true state from time to time, upon demand made, that could not alter the rights and duties of the respective parties to this controversy. It is quite clear that Mr. Yellott was called into this case as counsel for Messrs. Denison and Berry in a controversy with the appellants relating almost exclu-

sively to their own individual accounts with the estate of the decedent, and that in that respect their interests were adverse to those of the appellants.

It is equally clear that Messrs. Lemmon & Clotworthy came into the case as counsel for the appellants seeking to enforce a demand against the appellees. There was between them a plain conflict of interest, and this conflict was the same after as before the passage of the order appealed from. The appellants were in no way responsible either for the errors existing in the account stated, or for the difficulties encountered by the executors in explaining their individual accounts with the estate, and we are unable to perceive upon what just principle the appellants can be required to contribute to the compensation of counsel whose original employment was confessedly adverse to the interests of the appellants, and whose further employment under the order of the orphans' court is to enable Messrs. Berry and Denison in their individual capacities to state and exhibit an accounting which they were under obligations to render to the representatives of the estate whoever they might be. The fact that they themselves were the executors could not alter the situation, and their obligation to render an account was the same as if the appellants had been appointed as executors. It may be that the services of counsel are necessary to enable them to do this, but that is no fault of the appellants, and does not justify the imposition of any part of the costs of those services upon those who are entitled to the accounting.

We do not question the value of Mr. Yellott's services, which have doubtless been arduous, nor the measure of his compensation, which appears to be reasonable. The only question with which we are concerned is by whom they should be paid. We are not here considering whether a new administration account will result in increasing the amount for distribution, but at whose expense that investigation shall be conducted, as the situation is now made to appear. We are not to be understood as determining that the orphans' court has in no case the power to allow counsel fees to executors or administrators in estates involving intricate and difficult questions of accounting between an estate and third parties, or even with the executors or administrators themselves, nor that they can, only allow such fees for the literal "recovery or security of some part of the estate." That question may properly be reserved until it actually arises; but, if it should be conceded *ex gratia* that such power does exist, we are of opinion that the exercise of the power could not be justified in the existing situation.

Order reversed in so far as the same directs the payment of any counsel fee to the executors out of the assets of the estate, and case remanded for such further proceed-

ings in the statement of the new administration ordered by the orphans' court, as said court shall deem proper, the costs of this appeal to be allowed out of the estate.

LEAVERTON v. ALBERT.

(Court of Appeals of Maryland. June 23, 1911.)

1. JUDGMENT (§ 68*)—VACATING JUDGMENT BY CONFESSION—JURISDICTION.

The court entering a judgment by confession on a note has jurisdiction to hear and determine a motion to strike the judgment on the grounds that the note and judgment were procured by fraud and duress.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 116; Dec. Dig. § 68.*]

2. JUDGMENT (§ 407*)—EQUITABLE RELIEF—RES JUDICATA.

A refusal to strike out a judgment by confession on a note, on the ground that the note and judgment were procured by fraud and duress, bars a bill in equity to vacate the judgment based on the same grounds and supported by the same evidence.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 407.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit by Matilda Leaverton against Anton J. Albert. From an order dissolving a preliminary injunction, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Robert H. Simpson and Edwin Higgins for appellant. S. S. Field, for appellee.

BURKE, J. On the 6th of January, 1910, a judgment by confession for the sum of \$916.68, with interest from that date and costs, with a stay of execution until August 15, 1910, was entered in the superior court of Baltimore city against the appellant in favor of the appellee. On August 12, 1910, three days before the expiration of the stay, the appellee filed a motion to strike out the judgment. On the day the motion was filed a writ of fieri facias was issued upon the judgment; but subsequently, upon petition, the court passed an order restraining execution. On November 5, 1910, after hearing testimony upon the motion, the motion was overruled by the court. It is important on this appeal to understand the precise reasons upon which the appellant relied in support of the motion to strike out the judgment. These are set forth in the petition which she filed in the court below, which is as follows: "(1) That on or about the 6th day of January, 1910, the defendant herein signed a note representing the sum of \$916.68, and on the same date a judgment by confession was duly recorded in favor of Anton J. Albert, the plaintiff herein, for \$916.68. (2) That the defendant alleges and avers that she is not

indebted and never was indebted to the said Anton J. Albert in the sum of \$916.68 with accrued interest thereon amounting to \$34.38, or any other sum of money. That said Anton J. Albert never gave any adequate consideration or good or valuable consideration for said note. That the said Matilda Leaverton never received any consideration whatsoever for said note; but that the said Anton J. Albert took advantage of the youth and inexperience of the said Matilda Leaverton, who has just passed the age of maturity, whereby he obtained said note and confessed judgment, which this honorable court should strike out and set aside. (3) That said note and confessed judgment aforesaid was wrongfully and fraudulently obtained, and that knowledge of the fraudulent circumstances, the purposes and transactions of the said Anton J. Albert in the premises, have quite recently come to the notice of the said Matilda Leaverton, so much so that the said transaction was found to be fraudulent and is contrary to equity and good conscience, and that the said Anton J. Albert should be required to render an account of his transactions with the said Matilda Leaverton, who should also be granted a hearing in order that this honorable court may ascertain how he obtained the aforesaid judgment by confession, because the said Matilda Leaverton is not bona fide and justly indebted to the said Anton J. Albert. That she was given no money or other consideration by Anton J. Albert for said note, because the said Matilda Leaverton is not indebted to the said Anton J. Albert in the sum of \$916.68 with \$34.38 accrued interest thereon, or any part thereof. Because the said note was procured by fraud and duress. Because the said judgment by confession was procured by fraud, deceit, duress, and irregularity. Because the said Anton J. Albert refuses and declines to render an account showing the method and procedure whereby he obtained the confessed judgment aforesaid. Because said confessed judgment was not the free and voluntary act of the said Matilda Leaverton."

On November 10, 1910, the appellee filed a bill in the circuit court of Baltimore city, in which she prayed: (1) That the appellant may be required to answer the bill under oath; (2) that the judgment be vacated and declared void; (3) that the appellant, his attorney and agents, be enjoined from further proceedings in the matter of the judgment until the final adjudication of the cause, and for other and further relief.

The grounds upon which the appellant relied for the relief prayed for are substantially the same as those set up in the motion to strike out the judgment, except in two particulars. The additional reasons appear in the sixth and seventh paragraphs of the bill, as follows: "Sixth. That in making up the

amount of said claim in the alleged judgment by confession there were large sums of usurious interest charged, which fact has been quite recently brought to the knowledge of your oratrix. Seventh. That your oratrix is informed, and she avers, that the actual amount of indebtedness by her mother to said defendant upon which said judgment is based is, to wit, about \$360, instead of the sum of \$916.68 with interest thereon, which said sum of \$360 your oratrix is prepared to pay."

A preliminary injunction was issued upon the bill. The defendant answered denying all the material averments of the bill, and moved for a dissolution of the injunction. The testimony upon this motion was taken in open court before Judge Niles, who dissolved the injunction, and held that, upon the evidence contained in this record, "the plaintiffs have had their day in court. The whole case which is made on their behalf before me was made, or might have been made, when the same parties asked Judge Harlan in the superior court in the exercise of the quasi equitable jurisdiction of that court to strike out the judgment." This appeal was taken from the order dissolving the injunction.

The record shows that the same testimony, and none other, was given in support of the allegations of the bill in this case as was given in support of the motion to strike out the judgment, which the plaintiff in these proceedings seeks to have vacated and set aside.

[1, 2] Except as to the question of usury which the bill charges, there can be no possible doubt as to the jurisdiction of the court upon the motion to strike out the judgment. That court had the undoubted right to hear and determine every question presented on this record, except perhaps the question of usury, and there seems to be no doubt that Judge Harlan did hear and determine on that motion *all the questions* presented by this appeal, and, having determined those questions adversely to the appellant, she cannot retry in this suit any question which the court upon the motion had jurisdiction to decide. In *Telford v. Brinkerhoff et al.*, 163 Ill. 439, 45 N. E. 156, the court said: "A bill in equity to set proceedings at law after judgment is always examined with jealous scrutiny. The general rule is that no relief will be granted where the matter upon which the claim to relief is found was litigated in the original action. Accordingly, where a party moves for a new trial, and fails, he cannot then, upon the same facts, apply to the same judge for an injunction, and retry his case in equity; nor will a court of equity, as a rule, set aside a judgment because it is founded on perjured evidence. 1 High, Inj. (3d Ed.) 113; Haynes, New Trials & App. 340; Collins v. Butler, 14 Cal. 226; U.

S. v. Throckmorton, 98 U. S. 61 [25 L. Ed. 93]. 'A judgment will not be enjoined upon grounds which had been relied upon on a motion for a new trial, and which had on such motion been held insufficient.' 1 High, Inj. (3d Ed.) § 115; Matson v. Field, 10 Mo. 100. When courts of law and equity have concurrent jurisdiction over a question, and such question is decided at law, equity will not re-examine it." *Wabash R. R. Co. v. Mirrieless*, 182 Mo. 126, 81 S. W. 437; *Md. Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077.

It is said in *Whitehurst v. Rogers*, 38 Md. 503, that the plea of *res adjudicata* is founded upon the maxim "that it is the interest of the state that there should be an end of litigation," and that "no man should be twice sued for the same cause," and it was further said that, "however numerous the questions involved in a suit, if they are tried and decided, the renewal of litigation for any one of the same causes violates these cardinal principles of public policy as much as if the suit presented but one single issue."

The appellant having submitted all the questions involved in this appeal under the motion to strike out the judgment, she is concluded by the decision on all questions which the court hearing the motion had the right to decide, and she cannot retry any of those questions in this suit.

We have carefully examined the evidence contained in the record, and, assuming without so deciding, that the court had no jurisdiction upon the motion to strike out the judgment on the ground of usury, we find no sufficient evidence to justify us to disturb the judgment on that ground. What the real state of the account between the appellees and Elizabeth Gerock, the mother of the appellant, was, it is difficult to say. The transactions between them which culminated in this judgment were evidently confused and complicated; but there is no evidence that would warrant the court to disturb the judgment on the ground of usury. The order appealed from will be affirmed.

Order affirmed, with costs.

CONOCOCHIEAGUE CLUB OF WASHINGTON COUNTY v. STATE.

(Court of Appeals of Maryland. June 24, 1911.)

1. INTOXICATING LIQUORS (§ 55*)—SOCIAL CLUBS—SALES—LICENSES.

Under Laws 1908, c. 380, prohibiting the sale of liquor without a license, declaring that it is the intention of the act that licensees under Code Pub. Gen. Laws 1904, art. 56, shall be subject to the act, and that the license imposed by the act shall be, in addition to the license required by article 56, section 102 of which prohibits any club from selling liquor without having first obtained the oyster license provided for by sections 80 and 91, a social club maintaining a clubhouse where refreshments and liquors are sold to its members exclusively, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

holding an oyster house license, is selling liquor to its members, and must procure a license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 55.*]

2. **INTOXICATING LIQUORS (§ 64*)—SOCIAL CLUBS—SALES—LICENSES—“PERSON.”**

Laws 1908, c. 380, making it unlawful for any “person or persons” to sell liquor without a license, and providing that the applicant for a license must declare that he is a citizen of the United States, and the application must contain a statement of the extent of his residence in the county, is not limited to natural persons, but includes a corporation, and an incorporated social club maintaining a clubhouse and selling liquor to its members is within the act.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 64.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Appeal from Circuit Court, Washington County.

The Conococheague Club of Washington County was convicted of selling liquor without a license, and it appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, JURNER, and STOCKBRIDGE, JJ.

C. A. Little, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

PATTISON, J. The Conococheague Club of Washington County was indicted in the circuit court for Washington county for violation of Acts 1908, c. 380. The indictment contains two counts. In the first the defendant, being at the time a licensee to sell spirituous and fermented liquors under article 56 of the Code of Public General Laws of the state of Maryland, as therein alleged, is charged with unlawfully selling whisky without first having obtained a license therefor, as provided by the act above mentioned. The second count is like the first, except that the defendant is charged with the sale of lager beer.

To the first count of the indictment the defendant pleaded: “The said the Conococheague Club of Washington County is a corporation formed under the general incorporation laws of the state of Maryland. That its charter was granted to it on the 2d day of November, A. D. 1895. That the said corporation so formed is an association for the maintenance of an association or club for social purposes and for the promotion of the interests of literature, science, and art, and to have a clubhouse to be used for the objects above mentioned. That the term of existence of said corporation is limited to 40 years, and that the said corporation is formed upon the articles, conditions, and provisions herein expressed and subject in all particulars to the limitations relating to corporations which are contained in the General Laws of the state. That the said charter further provides ‘that the present members of the said Conococheague Club, and such as may hereafter become members

of the same by virtue of the constitution and by-laws thereof, adopted or hereafter adopted, shall compose said corporation, and exercise the functions and franchises thereof.’ That the said corporation has no capital stock. That the corporation is managed by a president, vice president, secretary, and treasurer and twelve governors elected by the members, all of whom constitute the board of management of said club, and that new members of said club are elected by the board of governors after such new members have been proposed by one member of the club, seconded by another, and after their names have been posted in the clubhouse for at least 10 days. That the said corporation has adopted a constitution, and passed certain by-laws for its better government and regulation. That the said corporation is the owner of its clubhouse on West Washington street in Hagerstown, Md., and near the center of the city, a valuable piece of real estate which it has since its corporation used and occupied as its home, and for purposes for which it was incorporated. That the said corporation transacts no business of any kind whatever for the purpose of making any profit directly or indirectly for itself or for its members, and that its only income is the money derived from entrance fees, annual dues, money paid for members for such meals, refreshments, and liquors as they may get and consume at the clubhouse, and money paid by members of the club for the use and occupation by them of sleeping rooms in said clubhouse, and money derived from such additional assessments, fines, and penalties as may be from time to time imposed upon the members under its rules and by-laws. That the money received from these various sources is expended in paying the current expense of the corporation, taxes on its clubhouse, and keeping the same in proper repair, procuring food, refreshments, and liquors to take place of that consumed and used by the members, in paying the subscriptions for the magazines, periodicals, and newspapers kept in the clubhouse for the use of its members, and in paying the interest on the indebtedness of the said corporation. That the said meals, liquors, and refreshments used and consumed by the said corporation and its members at its clubhouse are bought by the corporation, kept in the clubhouse under the charge of its steward, who is an employé of the corporation. That the members of the club can procure from the corporation through its said steward such meals, liquors, refreshments, and the use of such sleeping rooms as they may desire by calling for them and paying the price fixed by the regulations of the corporation, and that the price so paid as fixed is fixed and paid, not for the purpose of making any profit either directly or indirectly, but merely for the purpose of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

covering the outlay thereof by the corporation and the expenses attendant upon and the keeping and serving thereof at the said clubhouse and with the funds received from other sources of the maintaining of said clubhouse, and that the funds derived from such furnishing of spirituous and fermented liquors to members as aforesaid is insufficient to pay the cost and service thereof, and that, to meet the excess of such costs, funds from other sources must be used. That no persons, other than the members of the said club, are given access to said clubhouse. That no persons other than the members of said club can procure said meals, refreshments, liquors, and rooms from the said corporation. That the said corporation previous to this indictment took out the oyster house license provided for in section 102 of article 56 of the Code of 1904, which was in force at the time of said indictment. That at the time and place stated in the said indictment the said Joseph C. Byron was a member of the said Conococheague Club, and as such procured a drink of whisky from the steward, drank it then and there, and paid the price therefor fixed by the corporation."

To the second count the defendant pleaded a like plea, the only difference being that in the second plea the admission is that the member procured beer from the defendant, as charged in that count.

To these pleas the state demurred. The demurrer was sustained, and a judgment thereon entered for the state, and the defendant was sentenced to pay a fine of \$100 and costs.

[1] The statute, for the violation of which the defendant is indicted, provides that: "It shall not be lawful for any person or persons to sell spirituous, fermented or intoxicating liquors in Washington county, state of Maryland," until he shall have complied with the conditions and requirements contained therein, and shall have obtained a license therefor from the clerk of the circuit court for Washington county. The cost of such license, "if the proposed place of sale is located in Hagerstown or within one and one-half miles of the corporate limits thereof," being "the sum of five hundred dollars in addition to the sum required by law to sell such liquors under the provisions of article 56 of the Code of Public General Laws of the state of Maryland." Section 325e of the above-mentioned act, near the end thereof, provides that: "It is the intention of this act that licensees to sell spirituous and fermented liquors under article 56 of the Code of Public General Laws of the state of Maryland * * * shall in all respects be subject to the conditions, provisions and penalties of this act." Section 102 of article 56 of the Code of Public General Laws of the state of Maryland (Acts 1890, c. 282, § 89a), thus referred to, provides: "It shall

not be lawful for any club or for any corporation heretofore formed or hereafter to be formed under the General Laws of this state or under any special law, to give, barter or sell spirituous or fermented liquors or lager beer to any member of said club or corporation, or to any other person, without having first taken out an oyster house license therefor." The oyster house license referred to in the section last above mentioned is provided for by sections 90 and 91 of article 56, which are as follows:

"Sec. 90. If any person shall purpose to open, set up or keep an oyster house, cook shop, victualling house or lager beer saloon, or any place other than an ordinary, at or in which spirituous or fermented liquors or lager beer may be sold or bartered in less quantities than a pint, at any one time, he shall apply to the clerk of the circuit court for the county in which he may reside.

"Sec. 91. Upon such application the said applicant shall pay to the clerk of the circuit court of the county where he resides * * * the sum of fifty dollars for each and every such license."

It is contended by the defendant that by the facts pleaded it is not required by Acts 1908, c. 380, under which it is indicted, to obtain the license therein mentioned in order to enable it to legally dispose of to its members spirituous or fermented liquors in the manner mentioned in the plea, for the reason that such a disposition of it is not a sale within the meaning of the statute, and it is not a license within the meaning of section 325e, c. 380, Acts 1908. While, on the other hand, it is contended by the state that a disposition of it in the manner stated in the plea is a sale of the same within the meaning of the act, and that the defendant comes within the meaning of the statute and is required to take out the license therein mentioned before it can legally dispose of the spirituous and fermented liquors in the manner pleaded, and that the necessity for so doing is made certain by that part of section 325e above quoted.

In the case of *Selm et al. v. State*, 55 Md. 566, 39 Am. Rep. 419 (decided March 16, 1881), in which the defendant, the officer of a corporation known as the Concordia, incorporated under the General Incorporation Laws of this state, were charged with selling beer in violation of article 30, § 179, Code 1860, as amended and re-enacted by Acts 1866, c. 66, this court upon a statement of facts submitted to it similar to those contained in the defendant's plea herein held that the transaction was not a sale of beer within the intent and meaning of the Acts of 1866, and that it had no application to cases like the one before it. The court in that case said: "It will be observed that the license laws (Code, art. 57) which forbid the sale or barter of spirituous or fermented liquors without a license have never been

construed as applicable to social clubs where liquors are procured for the use of the members and are furnished to them in the manner described in the present case. We think it very clear that no license is required, for the reason that such a transaction is not a sale within the meaning of the license laws." In the case of *Chesapeake Club v. State*, 63 Md. 448, the defendant was charged with unlawfully having in its possession certain spirituous and fermented liquors, naming them, with the intent unlawfully to sell the same in violation of the provisions of Acts 1882, c. 112, known as the "local option law of Anne Arundel county." This local statute in express terms declared that all corporations or associations violating its provisions should be liable to indictment and punishment therefor. To this indictment a demurrer was entered upon the ground that such an indictment would not lie against a body corporate. The lower court overruled this demurrer. Upon appeal this court was evenly divided upon the question raised by the demurrer, all agreeing, however, that the case was improperly before it on demurrer.

The next of this class of cases before this court was that of *State v. Easton Social Club of Talbot County*, 73 Md. 98, 20 Atl. 783, 10 L. R. A. 64. In that case the state instituted proceedings under sections 255, 256, 257, and 258 of article 23 of the Code, charging the defendant corporation with misuse and abuse of its corporate powers and franchises, and asking for a forfeiture of its charter. The charge of misuse and abuse against the corporation in that case was that it had been selling spirituous and fermented liquors in violation of the local option law of Talbot county. The defendant answered, setting up as a defense to the charge made against it in the petition a state of facts similar to those pleaded in this case. The court there said, speaking through Judge Alvey: "Whether the facts admitted by the answer demurred to present a case of misuse or abuse of the corporate privileges and franchises, such as furnish a legal cause of forfeiture, depends upon the question whether the furnishing of spirituous and fermented liquors by the steward or manager of the club to the members thereof upon payment of the prices fixed by the regulation of the corporation constituted sales of such liquor in violation of the law. This question, whether the furnishing of liquor by a club to its members, as above stated, constitutes a sale in violation of the law, has been the subject of various and conflicting decisions of several of the appellate state courts of this country, but, after a careful examination and comparison of all the decisions upon the subject, we are decidedly of opinion that the furnishing of liquors by the club to its members for a price fixed by regulation, and paid by the member upon the receipt of the liquor, constitutes a sale, and is therefore in violation of the stat-

ute. That the revenues received by the club from the various sources mentioned in the answers become the property of the corporation would seem to be too plain to admit of a doubt. It is with this fund, or a part of it, that the liquors are bought by the corporation, and they are kept as the property of the corporation under its control to be disposed of at prices fixed by it. None but members, it is true, can obtain the liquor, but they can only obtain it by paying for it, and the money thus paid goes into and constitutes a part of the fund of the corporation. The parties are competent to contract one with the other; there being no principle to forbid a member of a corporation from contracting with or becoming a purchaser of property from the corporate body as a legal entity. And, that being so, the course of dealing as between the corporation and its individual members as stated in the answers present all the elements of an executed contract. The corporation, being the owner of the liquor, through its appointed agent delivers it to the member of the corporation on his request, and receives a fixed compensation in money therefor. The property in the liquor passes to and becomes vested in the individual member, and the money paid is received for and becomes the property of the corporation. Nothing more is or can be required to constitute a complete sale, and the fact that the sales were made without actual profit to the corporation is wholly immaterial, and affords no ground of defense to these proceedings. The statute alleged to have been violated provides that any person who shall sell spirituous or fermented liquors in the First, Second, Third, and Fifth districts in Talbot county on conviction thereof shall be fined not less than \$50 nor more than \$300, and be imprisoned in the House of Correction, etc. Acts 1884, c. 346. The word 'person' used in the statute is a generic term, and as such *prima facie* includes artificial as well as natural persons. This is the established rule of construction." *Germania v. State*, 7 Md. 1; *U. S. v. Amedy*, 11 Wheat. 392, 6 L. Ed. 502; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Rule 12 Interpretation of Code*, p. 3.

The case of *Selm et al. v. State*, *supra*, was much relied upon by the counsel for the appellees in *State v. Easton Social Club*, *supra*, but Judge Alvey in stating the distinguishing features of that case said: "The party was indicted for selling and disposing of beer on Sunday, and it was supposed that because the license laws had never been construed to apply to social clubs that, therefore, the law restraining the sale and disposition of liquor on Sunday was not intended to apply to them." While the views expressed by this court in the case of *State v. Easton Social Club* upon the question here presented has been held to be the law in some jurisdictions (*State v. Essex Club*, 53 N. J. Law, 99, 20

Atl. 769; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *Kentucky Club v. Louisville*, 92 Ky. 309, 17 S. W. 743; *People v. Soule*, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494), yet in others a contrary view has been taken (*Commonwealth v. Smith*, 102 Mass. 144; *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Tennessee Club of Memphis v. Dwyer*, 11 Lea [Tenn.] 462, 47 Am. Rep. 298). Judge Alvey in the *Chesapeake Club Case*, supra, in which the court was divided, in expressing the views held by him and Judges Irving and Stone, said of the *Siem Case* that: "It was thought that the case was not within the meaning of the act of 1866, because the license law had never been applied to social clubs. In other words, because the license law had never been construed to apply to such clubs, the Sunday law was supposed not to be intended to apply to them. Whether the reasoning was sound or unsound in the case to which it was applied, it is very clear that it can have no application whatever to this case." It is contended by the defendant that what was said by this court in the *Easton Social Club Case*, supra, holding that there was a sale of the liquor therein mentioned, should not be applied to this case. That there it was construing a statute that prohibited the sale, while here it is construing a statute which regulates the sale of spirituous or fermented liquors. We, however, cannot adopt this view, for, as was said by the state in its brief, a sale made under the one statute is no less a sale under the other statute, since the attending circumstances in each case are identical and the character of the transaction construed to be a sale in the *Easton Club Case* is entirely unaffected by the fact that in Washington county sales by licensees are authorized.

[2] The defendant also contends that the provisions of the high license law for Washington county (chapter 380, Acts 1908) indicate that it was intended to apply solely to individuals, and not to corporations, inasmuch as a corporation could not comply with some of the conditions required in making the application for license. These conditions were that the applicant "is a citizen of the United States, and a statement of the extent of his residence in the county." We think, however, this objection was settled by this court in the case of *State v. Maryland Club*, 105 Md. 585, 66 Atl. 667. There the traverser, a corporation, was held to be a licensee under chapter 278 of the Acts of 1906, which imposes upon the applicant for license the same identical conditions that are imposed upon the applicant by the statute involved in this case, and in that case the court said: "Social clubs are brought fully and completely within all the provisions of the act which in their nature are properly applicable thereto." Since the passage of Acts 1890, c. 282,

it has been unlawful for any club or corporation in this state outside of Baltimore city to give, barter, or sell spirituous or fermented liquors or lager beer to any member of said club without first having taken out an oyster house license therefor, without which license no person or body politic in this state is permitted to barter and sell spirituous or fermented liquors or lager beer in quantities less than a pint. In obedience to Acts 1890, c. 282, the defendant took out the oyster house license, and thus became a licensee, and, as contended by the state, was, as such, in all respects subject to the conditions, provisions, and penalties of Acts 1908, c. 380, including the requirement that it (the defendant) should take out the license provided for therein; for in the last-named statute it is expressly provided that "It is the intention of this act that licensees to sell spirituous and fermented liquors under article 56 of the Code of Public General Laws of the state of Maryland shall in all respects be subject to the conditions, provisions, and penalties of this act." From the statutes involved in this case, and from the decisions of this court from which we have quoted, construing the license law permitting and regulating the sale of spirituous and fermented liquors as they now exist, we have little or no difficulty in reaching the conclusion that in this case there was a sale by the defendant of the liquor named in the indictment, and that the defendant comes within the meaning of Acts 1908, c. 380, and is required thereby to take out the license therein mentioned.

From what we have said, it follows that there was no error in the ruling of the learned court below. We will therefore affirm the judgment.

Judgment affirmed, with costs to the appellee.

WEBER v. STATE.

(Court of Appeals of Maryland. June 24, 1911.)

1. LICENSES (§ 42*)—CRIMINAL PROSECUTION—BILLIARD TABLE KEEPERS—STATUTES.

Code Pub. Gen. Laws 1904, art. 56, §§ 8-10, imposing a license for keeping billiard tables, and Code Pub. Loc. Laws, art. 4, §§ 658-660 (Laws 1898, c. 123), title "Baltimore City," containing similar provisions, when considered with prior legislation on the subject and of a recognition of a pre-existing right of Baltimore city to impose a license, and of the provisions that the clerk of the court of common appeals in Baltimore city shall perform the duties imposed on the clerks of the circuit courts by Code Pub. Gen. Laws 1904, art. 17, as to the granting of licenses, require that a license for keeping billiard tables in Baltimore city shall be issued by the state, and the possession of a municipal license is no defense to the indictment charging a failure to procure a state license.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 42.*]

2. INDICTMENT AND INFORMATION (§ 111*)— STATUTORY OFFENSES—EXCEPTIONS.

Where, after general words of prohibition in a statute creating an offense, an exception is created in a subsequent clause or section, the exception must be interposed by accused as a defense, and the indictment need not negative the exception by express averment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

3. INDICTMENT AND INFORMATION (§ 111*)— STATUTORY OFFENSES—EXCEPTIONS.

The clause in Code Pub. Loc. Laws, art. 4, § 658 (Laws 1898, c. 123), title "Baltimore City," imposing a license for the keeping of billiard tables, that the section shall not apply to any billiard table kept for private use, is separate and distinct from the provision requiring a license, and an indictment charging a failure to obtain a license need not, by express averment, negative the keeping of tables for private use.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

Appeal from Criminal Court of Baltimore City; Henry Duffy, Judge.

Joseph Weber was convicted of keeping billiard tables without first obtaining a license therefor, and he appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

C. W. Perkins, for appellant. Charles Morris Howard, for the State.

URNER, J. The appellant was convicted in the circuit court of Baltimore city upon the following indictment: "The jurors of the state of Maryland for the body of the city of Baltimore do on their oath present that Joseph Weber, late of said city, on the 3d day of May, in the year of our Lord nineteen hundred and ten, at the city aforesaid, unlawfully did then and there keep and exhibit for use four billiard tables without first obtaining from the said state a license for the keeping and exhibiting for use then and there of the said four billiard tables, contrary to the form of the act of assembly in such case made and provided, and against the peace, government, and dignity of the state." A demurrer to the indictment was interposed and overruled. At the trial the traverser offered to prove that he holds a city license issued under an ordinance of the municipality. The action of the court below in excluding this evidence forms the subject of the only bill of exceptions in the record. This exception and the demurrer are intended to present the same question. They are both predicated upon the theory that the indictment charges a violation of certain sections of the Code of Public General Laws relating to licenses for the keeping of billiard tables, that these provisions are inoperative so far as Baltimore city is concerned by reason of the existence of local legislation on the subject, and that there is

no state license required within the city for this purpose.

The present general law relating to such licenses is embraced in sections 8, 9, and 10 of article 56 of the Code of Public General Laws of 1904, while the local law in question is contained in sections 658, 659, and 660 of article 4 of the Code of Public Local Laws, title "Baltimore City." Laws 1898, c. 123. It is provided by section 8 of article 56 of the General Code that "*a license may be granted to any person who may apply for permission to keep a billiard table, for which license there shall be paid the sum of fifty dollars, and for every additional billiard table kept by the same person he shall pay a license of twenty-five dollars; provided that all said additional tables shall be kept in the same apartment, and the word billiard table shall be construed to include pool tables; and provided further, that any person who shall keep a pool or billiard table where a charge is made for playing on the same, but the said charge is returned or is to be returned to the players to be exchanged with the owner of said table or his agent for money, drinks, cigars or any other articles of merchandise shall be considered as gambling, and such tables shall be deemed gaming tables for the purposes of this article, and the person so keeping such table shall be liable to the penalty or penalties prescribed by the Public General Laws for keeping a gaming table or other place of gaming or permitting gambling on his or her premises.*" Section 658 of article 4 of the Code of Public Local Laws (Laws 1898, c. 123) is identical with the portion of the general law which we have italicized. The local law has none of the other provisions of the section above quoted, but includes a proviso, which the general law does not contain, that "this section shall not apply to any billiard table kept for private use." The terms of section 9 of article 56 of the General Code and section 659 of article 4 of the Local Code (Laws 1898, c. 123) are exactly the same, and in the following language: "Any person keeping or exhibiting for use a billiard table or tables without first obtaining a license therefor shall, for each and every table so kept or exhibited, forfeit and pay the sum of five hundred dollars, one half to the informer and the other half to the state." Sections 10 of article 56 and 660 of article 4 of the respective Codes are alike in providing that "nothing contained in the two preceding sections shall impair the right of the mayor and city council of Baltimore to impose a further tax on billiard tables," but the former law also preserved this right to other municipalities. In the Codes of 1888 (P. G. L. art. 56, §§ 8-10; P. L. L. art. 4, §§ 641-643) the general and local provisions dealing with billiard table licenses were precisely similar, and were the same as those now

existing in sections 658-660 of article 4 of the Local Code, except that the general law included other municipal corporations in the saving clause contained in the last section. The general law was amended into the form it now presents in the Code by chapter 525 of the Acts of 1892, while the local law was re-enacted by chapter 123 of the Acts of 1898, which revised the charter of Baltimore city and recodified the miscellaneous statutes relating to that locality. Prior to the adoption of the Codes of 1888, there was no local legislation on this subject, except Acts 1826, c. 219, to which we will presently refer, and those codifications adopted without change the provisions of sections 6, 7, and 8 of article 56 of the Code of Public General Laws of 1860 as amended by Acts 1865, c. 56, and Acts 1870, c. 250. The details of these intermediate amendments need not be stated. The provisions of the Code of 1860 were based upon Acts 1798, c. 113, by which such licenses were originally imposed, as modified by Acts 1824, c. 64, and Acts 1826, c. 219. The act of 1798 authorized the county clerk to issue the license and directed the proceeds to be applied to county uses. The cities of Annapolis, Georgetown, Baltimore, and "the precincts of Baltimore" were excepted from the operation of this statute. In the act of 1824 there was no such exception, but there was a saving clause in favor of the right of the corporations of Baltimore, Annapolis, Frederick, and the commissioners of the town of Easton or of any other incorporated town to impose a further tax upon billiard tables. This act increased the license from \$50 to \$100, and directed that the money realized from this source be paid by the clerk to the treasurers, respectively, of the Western and Eastern Shores. At this period Baltimore city formed part of the territory of Baltimore county, but, a city court having been created by Acts 1816, c. 193, provision was made that "the requisitions of the Act of December Session 1824, c. 64, as they relate to the granting of licenses for permission to keep billiard tables in the said city, shall be and the same are hereby transferred to the city court of Baltimore, and that the clerk of the said city court shall be and he is hereby empowered and authorized to grant a license to such person or persons as may apply for permission to keep a billiard table, for which license there shall be paid the sum of one hundred dollars for the use of the state, and one dollar to the said clerk for his own use." Acts 1826, c. 219.

In each of the acts mentioned there was a fine prescribed for the keeping of billiard tables without licenses. In the act of 1798, the amount was \$150, one half to be paid to the informer and the other half to the county; while in the acts of 1824 and 1826 the amount was increased to \$500, of which one-half was to go to the informer and one-half to the state. The references we have

made to the history of the legislation involved in the present controversy will be useful as reflecting upon the question we are now to determine.

[1] The indictment charges a failure to obtain a license from the state. It is hence argued on behalf of the appellant that this accusation is necessarily predicated on the general statute, and that it cannot be supported under the local law, which, it is contended, contemplates the issuance of licenses by the city of Baltimore. It is only upon this theory that the question as to whether the general law is operative in Baltimore city becomes important. If both are intended to provide for licensing by the state, the conduct charged in the indictment is "contrary to the form of the act of Assembly" under the local, even though not under the general, statute. It is apparent, therefore, that the primary and perhaps the sole and controlling inquiry is whether the provisions we have quoted from the Local Code, under the title "Baltimore City," have lost the essential purpose of their original enactment by reason of their incorporation in that body of laws. In all of the legislation from which the Code provisions in regard to these licenses were derived it is perfectly clear that they were intended to be issued by and for the benefit of the state. Except for the codification of the laws there could be no possible ground for the suggestion that such licenses when issued within the limits of the city should be treated as being granted by the municipality. The act of 1898 did not make these provisions a part of the charter of Baltimore city. In fact, they are kept separate and distinct in that act from the legislation under the subdivision entitled "charter," which operates as a grant of municipal powers. They retain at the present time the place they were given in the local Code of 1888 as a part of the miscellaneous laws relating to this governmental division of the state. If, therefore, the city is now entitled to issue the licenses thus prescribed and to receive the revenue they produce, it is not because the authority for that purpose has been expressly delegated by the Legislature, but merely because the statute providing for the licenses, as an exercise of the state's prerogative, has been codified both as a local law for Baltimore city and as a general law for the state at large. We can have no hesitation in holding that the codification has not had such an effect.

There is nothing whatever in the terms of the act itself to indicate a legislative intent to exempt the keepers of billiard tables in Baltimore city from the necessity of obtaining a state license, but the contrary design is clearly apparent from the whole course of the legislation we have discussed, as well as from certain significant features of the existing law. The fines recovered for the violation of the act are directed to be divided equally between the informer and the state.

If the purpose of the codification had been to vest in the city the right to grant the specified licenses and to collect the prescribed fees, it is not to be supposed that the state would have denied to the municipality any interest in the fines exacted from those in default. There is, moreover, in the act a distinct legislative recognition of the pre-existing right of the city to impose such a tax; and it would consequently have been superfluous to provide by statute a license which might have been just as effectually imposed by ordinance. But the consideration we regard as the most conclusive is that the requirement for the license exists as the result of a direct, and not of a delegated, exercise of sovereignty, and that the state has indicated no intention to relinquish the benefits to its treasury ordinarily produced by such an exertion of its authority.

While the sections we have quoted from the Baltimore city article of the Local Code do not designate the agency through which billiard table licenses are to be issued, it is elsewhere in the same Code (article 4, § 363) expressly provided that the clerk of the court of common pleas in Baltimore city shall perform the same duties as are imposed upon the clerks of the circuit courts of the counties by sections 57 and 62 (now 61 and 66) of article 17 of the Code of Public General Laws with respect to "the obtaining of blank licenses, granting the same and returning an account thereof to the comptroller." There is also a constitutional provision (article 4, § 38) that "the clerk of the court of common pleas shall have authority to issue within said city all marriage and other licenses required by law, subject to such provisions as are now or may be prescribed by law." We accordingly hold that the license required by section 658 of article 4 of the Local Code, as enacted by chapter 123 of the acts of 1898, is contemplated to be issued by the state, and not by the city of Baltimore. The conclusion follows that an indictment charging a failure to obtain a license to keep a billiard table in that city "contrary to the form of the act of Assembly in such case made and provided" is not demurrable on the ground that it describes the license as being issuable by the state, and that to such a charge the possession of a municipal license is no defense.

In disposing of the question we have thus far had under consideration, we have not found it necessary to apply the rule that, "where the public general law and the public local law of any county, city, town or district are in conflict, the public local law shall prevail." Code P. G. L. art. 1, § 12; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Prince George's County v. Laurel*, 51 Md. 457; *Alexander v. Baltimore*, 53 Md. 100. As the

sections dealing with the subject in both the General and the Local Codes were originally and simultaneously derived, in identical terms, from the same statute, which provided a single licensing system, it is obvious that the Legislature did not intend to duplicate the licenses, and there can be no doubt that the local requirement for their issuance has exclusive operation within the limits of the city. Whether the provisions added to the general law by the act of 1892 are effective in Baltimore city is a question raised in the argument, which we do not find it necessary to now decide. But there is a clause which is now peculiar to the local law, though formerly included in both Codes, to which our attention must be directed. It is suggested that the proviso to the effect that no license shall be required for billiard tables which are kept for private use creates an exception which should have been negatived in the indictment.

[2] The settled rule under repeated decisions of this court is "that where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defense," and it is not necessary in such case that the indictment should negative the exception by express averment. *Parker v. State*, 99 Md. 201, 57 Atl. 677; *Kiefer v. State*, 87 Md. 567, 40 Atl. 377; *Stearns v. State*, 81 Md. 341, 32 Atl. 282. In *Kiefer v. State* there was an indictment under an act prohibiting the sale of intoxicating liquors by a licensee on Sunday, "except that if the licensee is a hotel keeper he may supply such liquors to be drunk in their rooms or with their meals to bona fide guests." It was held that the exception should have been negatived, but it was said by the court: "This section has a proviso with reference to the hours during which sales can be made, which is clearly a matter of defense, and it would not be necessary to negative it in an indictment for the violation of that part of the law. If the Legislature had intended this exception to only have that effect, it is but reasonable to suppose it would also have been placed in the proviso and not in the very heart of the law."

[3] In the present case the clause exempting those keeping billiard tables for private use from the necessity of obtaining a license is contained in a clause, formulated as a proviso, which is separate and distinct from the provision requiring the license, and under the rule we have quoted we can have no difficulty in holding that it was not necessary to negative in the indictment the ground of exemption thus specified.

We concur in the rulings of the learned court below, and its judgment will be affirmed.

Judgment affirmed, with costs.

CUMMINGS et al. v. WILDMAN.

(Court of Appeals of Maryland. June 24, 1911.)

1. TRUSTS (§ 161*)—TRUSTEES—BONDS.

Code Pub. Gen. Laws 1888, art. 16, § 205, as amended by Acts 1892, c. 241, providing that every trustee to whom any estate shall be conveyed for the benefit of creditors or to be sold for any purpose shall file with the clerk of the court in which the instrument creating the trust may be recorded a bond, and no title shall pass to any trustee until such bond shall be filed and approved, and no sale made by any trustee without such bond shall be valid, applies to a conveyance to trustees to sell, lease, or encumber land, and the trustees never having filed such bond received no title, and a conveyance by them is inoperative.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 161.*]

2 CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWER—RESTRICTION OF STATUTE—CONSTRUCTION.

Courts cannot modify or restrict the plain terms of a statute to meet the exigencies of a particular case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

3. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW.

Code Pub. Gen. Laws 1888, art. 16, § 205, as amended by Acts 1892, c. 241, requiring trustees to sell to file a bond before any title passes to them, is not in conflict with Const. Amend. U. S. 14, or Declaration of Rights, art. 23, prohibiting the deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.*]

Appeal from Circuit Court, Prince George's County; Fillmore Beall, Judge.

Suit by Horace S. Cummings and another against Joseph E. Wildman. From a decree for defendant, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

F. Snowden Hill, for appellants. T. Van Clagett, for appellee.

BRISCOE, J. This is an appeal from a decree of the circuit court for Prince George's county passed on the 30th day of March, 1911, upon a special case stated in accordance with rules Nos. 47 and 48 of the equity rules for the regulation of pleading and practice of the courts of equity in this state, and now sections 197 and 198 of article 16 of the Code of 1904.

[1] The questions stated and raised before the court below relate to the construction of certain title deeds, and the validity of the contract of sale and purchase between the plaintiffs and defendant, and were presented for decision by the following questions, set out in the record:

(1) Did section 205 of article 16 of the Code of Public General Laws of Maryland of 1888, and as amended by Act 1892, c. 241, and section 209 of the said article (or

either of them), apply to the deed from Richard Wainwright to Augustus Burgdorf and Frederick W. Pratt, trustees, and the sale made thereunder?

(2) Under the said contract of sale and purchase, is the plaintiffs' title to the piece of land therein described such as the defendant should take?

The court below held that the sale was null and void, and that the plaintiffs acquired no title to the property thereunder, and directed that the plaintiffs refund to the defendant the deposit of \$25.

The facts upon which the decision must turn are these: Richard F. Wainwright by his deed dated August 15, 1891, duly executed, acknowledged, and delivered by him to the grantees therein on said day, and by them recorded among the land records of Prince George's county, Md., on March 1, 1900, in consideration of \$51,350 paid to him by the said grantees, "granted, bargained and sold unto Augustus Burgdorf and Frederick W. Pratt, the survivor of them, his heirs and assigns forever," certain tracts of land therein described, situate partly in the District of Columbia and partly in Prince George's county, Md., "in and upon the following trusts and for no other use or purpose whatsoever, that is to say: First: To hold the same for the sole use and benefit of the persons who have contributed, and in the proportion contributed by each, to the purchase of the said land and premises, as tenants in common, and not as joint tenants, and their heirs and assigns, until the said land and premises shall be sold as hereinafter provided. [The persons who have contributed to the purchase are named in the deed.] Second: To subdivide the land, or any portion thereof, into lots, streets and alleys, in the discretion of the parties of the second part or the survivor of them. Third: To sell, lease or encumber the land and premises, the whole or any part thereof, upon such terms and conditions, in such manner and quality and quantity of estate and by such forms of instruments, as the parties of the second part, or the survivor of them, in their or his discretion, may deem most advantageous to the persons beneficially interested in the land and premises, and to convey the same by good and proper conveyance, either in fee simple or by deed of trust, mortgage or otherwise and without any liability on the part of the purchaser or purchasers, mortgagee or mortgagees, trustee or trustees, or any person whomsoever, to see to the application of the purchase, trust, mortgage or other money."

The trustees took possession of the land upon the delivery of the deed to them—that is to say, on August 15, 1891—and continuously held possession of the same until February 9, 1900, when they undertook to sell

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and convey, in fee simple, all the tract of land, subject to liens thereon then amounting to \$35,000 for \$10 and the satisfaction of the liens, to Horace S. Cummings, one of the plaintiffs herein, by their deed in the usual and legal form for such purpose, dated February 9, 1900, duly executed and acknowledged by them, and delivered by them to Cummings, and by him recorded among the land records on March 1, 1900, and Cummings thereupon took possession of all of the tracts of land. The trustees did not file any bond with the clerk of the circuit court for Prince George's county; and their sale to Horace S. Cummings was neither reported to nor finally ratified by the court. Thereafter Horace S. Cummings undertook to sell and convey a one-half undivided interest in fee simple in and to all of the tracts of land for \$10 and other valuable considerations to Arthur E. Randle, one of the plaintiffs herein, by his deed in the usual and legal form for such purpose, dated March 7, 1900, and duly executed and acknowledged by him, and delivered by him to the said Randle, and by him recorded among the said land records on September 8, 1902. On January 2, 1911, the plaintiffs Horace S. Cummings and Arthur E. Randle agreed to sell a part of the lands, the part located in Prince George's county, Md., to Joseph E. Wildman, the defendant herein, and the defendant agreed to buy said part by a written contract of sale which is in the following words and figures, viz.: "This writing, made this second day of January, 1911, witnesseth: That the undersigned, Horace S. Cummings and Arthur E. Randle, both of Washington city, in the District of Columbia, have agreed and do hereby agree to sell to Joseph E. Wildman, of Prince George's county, Maryland, and the said Joseph E. Wildman has agreed and does hereby agree to buy from the said Cummings and Randle, all that piece of land, being a part of 'Blue Plains' situate in Oxon Hill district, of Prince George's county, Maryland, described as follows: Beginning at a stone on Oxon creek, and with said creek (1) south 9° 30' west 12 perches; (2) north 77° west 31 perches to the mouth of Oxon branch; (3) north 15° 16' west 19.72 perches to the line of the District of Columbia and with said line (4) north 50° 9 perches to a stone, thence in a straight line to the beginning, containing 4.14 acres, more or less, for the price of two hundred dollars, of which twenty-five dollars has been paid by the said Wildman to the said Cummings and Randle as a deposit to be applied as part payment of the said purchase money, upon the following terms: Cash within thirty days from this date, otherwise deposit to be forfeited; and the title to be good, or no sale and deposit to be refunded."

On January 31, 1911, Joseph E. Wildman, defendant herein, by his letter of the same date, notified the plaintiffs that the title to the piece of land sold to him was not good,

and that he would not accept the same; and demanded the return of his deposit for the following reasons:

"(1) Because Augustus Burgdorff and Frederick W. Pratt, trustees, under deed from Richard F. Wainwright, dated August 15, 1891, and recorded among the land records of Prince George's county, Md., in Liber J. B. No. 10, folio 55, and under whom you claim, have never filed a bond, as such trustees, with the clerk of said court, as is required by section 205 of article 16 of the Code of Public General Laws of 1888, as amended by the Act of 1892, c. 241.

"(2) Because they have never reported their sale to Horace S. Cummings of the said tract of land, of which my purchase is a part, to the circuit court for Prince George's county, as is required by section 209 of the said article.

"(3) Because the said sale to Horace S. Cummings has never been finally ratified by the said court, as is required by the said section 209."

Upon this state of facts, it is contended upon the part of the appellants: First. That section 205 of article 16 of the Code of 1888, as amended by Acts 1892, c. 241, does not apply to the deed here in question, but only applies to a technical conveyance in trust for the benefit of creditors—that is, to an assignment of all of a debtor's property, in trust, for the benefit of all his creditors—and that the words, "or to be sold for any other purpose," following the words "for the benefit of creditors," relates only to technical conveyances and sales thereunder. Second. That, if section 205 of article 16 of the Code does embrace a deed of this character, then, so far as it affects this deed, the section is unconstitutional and void, and violates article 23 of the Declaration of Rights of this state, and section 1 of the fourteenth amendment to the Constitution of the United States. It will be seen that section 205 of article 16 of the Code of 1888 was repealed and re-enacted with amendments by chapter 241 of the Acts of 1892, but did not change that section of the Code as applicable to this case. The deeds were all executed since the Code of 1888, and prior to March 27, 1900, when the section was re-enacted by chapter 114 of the Acts of 1900, and now sections 221 and 222 of article 16 of the Code of 1904. This section (205) of the Code of 1888, as amended by Acts 1892, c. 241, and as applicable to this case, is as follows: "Every trustee, to whom any estate, real, personal or mixed, shall be limited or conveyed for the benefit of creditors, or to be sold for any other purpose, shall file with the clerk of the court in which the deed or instrument creating the trust may be recorded, a bond in such penalty as the clerk may prescribe, being as nearly as can be ascertained, double the amount of the trust estate, and with sureties to be approved by the clerk, conditioned for the faithful per-

formance of the trust, by the deed or other instrument reposed in such trustee, which bond shall be recorded in the office of said clerk; but when the sale is to be on a contingency, no bond need be given until the contingency happens; no title shall pass to any trustee as aforesaid, until such bond shall be filed and approved as aforesaid, and no sale made by any such trustee without such bond, shall be valid, or pass any title to such property or estate."

This section (205) now under consideration has been before this court in a number of cases, but they are in most part cases of deeds of trust for the benefit of creditors, where it is not disputed the section applied. *Stiefel v. Barton*, 73 Md. 409, 21 Atl. 63; *Gans v. Carter*, 77 Md. 1, 25 Atl. 663; *Fidelity & Deposit Co. v. Haines*, 78 Md. 457, 28 Atl. 393, 23 L. R. A. 652; *White v. National Bank*, 80 Md. 1, 30 Atl. 567; *Steel Co. v. Equitable Society*, 113 Md. 79, 77 Atl. 255. In *Moore v. Title & Trust Co.*, 82 Md. 290, 33 Atl. 641, it was held that, as it was not necessary in that case to record the deed of trust to affect the fund in controversy, the provisions of section 205 of the Code did not apply. In *Casualty Ins. Company's Case*, 82 Md. 563, 34 Atl. 778, it was said, as to section 205, art. 16, of the Code, which requires trustees to whom any property has been conveyed or limited for the benefit of creditors or to be sold for any purpose to give bond to be filed with the clerk of the court, it is only necessary to say that it has no application to a trust of this character. That section relates only to the assignment or conveyance of property for the purpose of sale, and it provides that no title shall pass to any trustee until such bond shall be filed and approved, and that no sale made by any such trustee without such bond shall be valid. In *United Rys. v. Rowe*, 97 Md. 658, 55 Atl. 703, we said that this section (205) did not apply to an assignment of the character in that case because it was not necessary to record the assignment to make it valid and operative, and it was not an assignment by a debtor for the payment of his debts. In *Philbin v. Thurn*, 103 Md. 342, 63 Atl. 571, it was said trustees appointed by will with power to sell property are not within the provisions of Code, art. 16, § 221, and it was not necessary that the trustee named in the will should give bond. In *Union Trust Co. v. Ward*, 100 Md. 98, 59 Atl. 192, where the deed of trust was given to secure the payment of an issue of bonds to a trust company, it was held, quoting the language of the reporter in the case, that the sale was invalid on account of the failure of the trustee to file a bond under Code 1904, art. 16, § 222, which provides that, when any estate shall be conveyed to a trustee as security for a debt or to be sold on a contingency, every such trustee, before making sale, shall file a bond and report all sales to the court, "and no sale made by any

such trustee without such bond shall be valid or pass any title to such estate." Judge Pearce, in delivering the opinion of the court, uses this language: "These provisions, first by the plainest inference, and again by direct and positive command, require that the bond shall be filed before the sale; and, after providing for the report of every such sale, it emphatically declares that 'no sale made by any such trustee without such bond shall be valid or pass any title to such property or estate.'"

While these cases as cited reflect upon the tendency of the courts in the construction of this and similar statutes in support of the validity or invalidity of sales made thereunder, we think the language used by this court in *Talbott v. Leatherbury*, 92 Md. 166, 48 Atl. 733, is conclusive against the contention of the appellants on this record. In *Talbott's Case*, supra, the deed created a trust to hold the property until a given time, and then convey it absolutely to the cestuis que trust, with an incidental power of sale, conferred by the deed. We said in that case the provisions of section 205 of article 16 of the Code were not intended to apply to deeds like the one now under consideration. That section requires every trustee to whom any estate, real, personal, or mixed, shall be limited or conveyed for the benefit of creditors or to be sold for any other purpose to file a bond before any title to the property conveyed shall pass to him. And we further said this section was obviously intended to apply only to deeds creating trusts for the sale of property whether the sale was to be made for the benefit of creditors or for any other purpose. The property in this case was conveyed to trustees "to sell, lease or incumber it," as the trustees might deem most advantageous for and to the persons beneficially interested in the land. It was to be held for the sole use and benefit of the persons who have contributed to the purchase of the land until the land should be sold, as therein provided. The persons beneficially interested are those who contributed their money to the purchase of the land, and who would be protected by the bond required by the statute. The property was conveyed to the trustees to be sold for the benefit of the grantors in the deed. The language of the statute is clear and positive that "every trustee to whom an estate * * * shall be conveyed for the benefit of creditors or to be sold for any other purpose, shall file the bond, and no title shall pass without such bond, and no sale without such bond, shall be valid or pass any title to the property."

[2] As was said in effect by this court in *Ward's Case*, supra, courts are as much bound as parties by a statute plainly and unequivocally expressing the legislative intent, unless it clearly violates some provision of the Constitution. It cannot by sustaining a sale say that the sale shall pass title to the property, when the Legislature

has said it shall not. Courts cannot nullify the requirements of the statute, which governs the instrument, the trustees, and the court alike. They cannot enlarge, modify, or restrict the plain language and terms of a statute to meet the exigencies of a particular case, nor uphold contentions, that would contravene the fundamental and imperative requirements of the statute itself. It will be seen by reference to the various acts of Assembly, upon this subject, since Acts 1874, c. 483, that various changes have from time to time been made in the provisions of section 205, but the requirement for bonding trustees has always been retained. This section as now codified (section 221, art. 16, Code 1904) reads as follows: "Every trustee to whom any estate, real, personal or mixed shall be limited or conveyed for the benefit of creditors or to be sold for the benefit of creditors or to be sold for any other purpose," shall file the bond as required, and no title shall pass, and no sale without such bond shall be valid, or pass any title to the property. We hold that the deed now before us falls within the terms of section 205 of article 16 of the Code of 1888, as amended by Acts 1892, c. 241, and that this section is not limited to conveyances creating a trust for the benefit of creditors alone, but was intended to apply to deeds creating trusts "for the sale of property for any other purpose," as provided by the terms of the act itself. We further hold that, as the trustees failed to file a bond as required by law, no title passed to them, and consequently the sale made by them, without having filed the bond, was invalid, and did not pass any title to the property.

[3] We think it is too well settled to admit of serious controversy that this class of legislation is free from all constitutional objection, and does not offend against either article 23 of the Declaration of Rights of this state, or section 1 of the fourteenth amendment of the Constitution of the United States. The cases relied upon by the appellants in their brief have no application to the principle upon which such legislation is based. The Legislature has the undoubted right to change and adopt rules of evidence, and to alter and modify the remedy for the enforcement of rights, and these are always further subject to modification and control by the Legislature. *Gibbs v. Gale*, 7 Md. 76; *Baughner v. Nelson*, 9 Gill, 308, 52 Am. Dec. 694; *Southerland v. Norris*, 74 Md. 326, 22 Atl. 137, 28 Am. St. Rep. 255; *Wilson v. Simon*, 91 Md. 1, 45 Atl. 1022, 80 Am. St. Rep. 427. The power of the Legislature to mould and provide at its pleasure the remedy in legal proceedings is fully sustained by the Supreme Court of the United States in a number of cases. *Ogden v. Saunders*, 12 Wheat. 349, 6 L. Ed. 606; *Webb v. Den*, 17

How, 576, 15 L. Ed. 35; *Hill v. Merchants*, 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994; *Valley Bank v. Craig*, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994.

For the reasons stated, the decree appealed from will be affirmed.

Decree affirmed, with costs.

McLEAN et al. v. WINDHAM LIGHT & LUMBER CO. et al.

(Supreme Court of Vermont. Windham. Oct. 9, 1911.)

1. CONTRACTS (§ 170*)—CONSTRUCTION—ACTS OF PARTIES.

A party to a contract who goes beyond the requirements thereof in circumstances of doubt ought not from that fact alone have his act given the effect of a concession as to his understanding of the contract as an aid to the court in construing the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

2. CONTRACTS (§ 153*)—CONSTRUCTION—EFFECT TO EVERY PART.

A contract must be so construed, if possible, as to give some effect to every part thereof.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

3. CONTRACTS (§ 147*)—CONSTRUCTION—MEANING OF LANGUAGE.

Ordinarily, the language of a particular provision of a contract will be construed in the light of its purpose as gathered from a consideration of the contract as a whole.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 743; Dec. Dig. § 147.*]

4. VENDOR AND PURCHASER (§ 215*)—BONA FIDE PURCHASER.

Where a vendor secured by mortgage on the premises for the unpaid price purchased the purchaser's equity with knowledge of the rights of a third person who had contracted with the purchaser for the premises, and who had agreed to pay the unpaid price subject to limitations, the vendor stood in no better position than the purchaser, and beyond the right to the payment of the mortgage indebtedness, the contractual obligations with the third person controlled.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 215.*]

5. VENDOR AND PURCHASER (§ 78*)—CONTRACTS—TIME AS OF THE ESSENCE.

The rule that time is not of the essence of a contract of sale of real estate where there is nothing special in the objects, subject-matter, or terms thereof, though a certain time is fixed for the execution of its terms, does not apply where the contract plainly discloses an intention to make exact performance as to time an essential element, when the failure to perform is willful or intentional, or the delay unreasonably prolonged, or when the party entitled to performance has been so injured that complete reparation is impossible.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121-125; Dec. Dig. § 78.*]

6. VENDOR AND PURCHASER (§ 78*)—CONTRACTS—TIME AS OF THE ESSENCE.

Equity will not treat time as of the essence of a contract of sale of real estate unless it affirmatively appears that the parties so regarded it, but time may be made essential by express stipulations or by an intention implied from the nature of the property or the avowed objects

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the parties, but it is not enough that a specified time for performance is named in the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121-125; Dec. Dig. § 78.*]

7. CONTRACTS (§ 147*)—CONSTRUCTION—INTENTION OF PARTIES.

The court in seeking the intention of the parties to a contract must give regard to the subject-matter of the contract and its language.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. § 147.*]

8. LOGS AND LOGGING (§ 3*)—CONTRACTS—CONSTRUCTION.

A contract for the sale of standing timber fixed the price at a given sum per 1,000 feet, and provided that payments should be made to the mortgagee of the land on which the timber stood as mortgage notes fell due. It also provided that, on discovering that there would not be sufficient timber to pay the amount of the mortgage, the purchaser might terminate the contract if this were done when a certain mortgage note fell due. There was no express provision of the contract requiring that, on failure to rescind, the purchaser should pay the amount of the mortgage, regardless of the amount of timber. *Held*, that the privilege of terminating the contract was a mere option, and, on failure to exercise it, the purchaser, though continuing to act under the contract, was not bound to pay the full amount of the mortgage, where there was a shortage of timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

9. CONTRACTS (§ 143*)—CONSTRUCTION—FAIRNESS OF AGREEMENT.

Where the terms of a contract leave its meaning in doubt, the court will adopt the construction which makes the contract equitable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 723; Dec. Dig. § 143.*]

10. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—CORRECTION OF DETERMINATION OF QUANTITY.

Where no action was taken on figures given by persons in scaling timber sold under a contract stipulating for the measurement of the timber by surveyors selected by the parties as a basis of settlement, an erroneous classification of timber by such persons could be corrected by the courts.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

11. HUSBAND AND WIFE (§ 25*)—CONTRACTS—AGENCY OF HUSBAND.

Where no question was made as to a husband's authority to act for his wife in the purchase of property, and a part of the consideration was paid by check in the name of a company consisting of husband and wife, and the wife did not urge that such payment was unauthorized, and no distinction was made between the husband and wife as to notice of the rights of a third person in such property, the wife, as well as the husband, took the property subject to such notice.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-154; Dec. Dig. § 25.*]

Appeal in Chancery, Windham County; Alfred A. Hall, Chancellor.

Suit by Henry A. McLean and another against the Windham Light & Lumber Company and another, in which the Jamaica Lumber Company filed a cross-bill against complainants and defendant named. From a decree, both parties appeal. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Gibson & Waterman, A. V. D. Piper, and J. K. Batchelder, for orators. Clarke C. Fitts, Hermon E. Eddy, and Kittredge Haskins, for defendants.

MUNSON, J. On the 1st day of September, 1906, Henry A. McLean and Hattie T. McLean, the petitioners herein, referred to in the contract mentioned hereafter as H. A. McLean & Co., conveyed to the Windham Light & Lumber Company, one of the defendants, hereinafter called the Windham Company, certain real estate in Jamaica, which included timber lands and a sawmill. On the same day the Windham Company executed to the McLeans a mortgage of said premises to secure the sum of \$17,000, specified in four notes: One for \$7,500, payable December 1, 1906; one for \$3,200, payable March 1, 1907; one for \$3,200, payable June 1, 1907; and one for \$3,100, payable September 1, 1907. On the 26th day of March, 1907, the first note having been paid when due, and the second note being then past due, and unpaid, the Windham Company sold to the Jamaica Lumber Company, the other defendant, hereinafter called the Jamaica Company, the timber standing on certain of the incumbered lots and the logs and lumber in the millyard, which sale was evidenced by a deed of the standing timber and a written contract between the parties. The construction and effect of this contract are the principal matters in dispute. The contract fixes the prices to be paid by the 1,000 feet, and provides that payment shall be made to H. A. McLean & Co., or their assigns of record, as the three unpaid notes of the Windham Company held by them become due, and proceeds as follows: "It being distinctly understood and agreed that each and every note after being paid shall be marked as canceled and immediately returned to" the Windham Company, and that "a partial release from the mortgage * * * securing said notes shall, at the time of payments, be entered for record at the office of the town clerk." It is provided, further, that, upon the delivery of the contract and deed, the Jamaica Company shall pay to the Windham Company the difference between the amount to be paid to H. A. McLean & Co. on the first note and \$4,000. The contract then provides for the selection of surveyors, "who are to measure all the timber purchased from time to time as mutually agreed except the lumber sawed," and to measure this lumber when loaded, and whose measurements are to be the basis of settlement. It is also provided that the Windham Company shall pay to the Jamaica Company "interest at the rate of 6 per cent. per annum for all money advanced until a sufficient amount of lumber and logs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have been measured to equal in value the amounts of the said advances," but that in no event shall any interest be paid after two years from the date of the contract. A further provision of importance to our inquiry is, with slight changes of form, as follows: Seven days prior to the maturity of the note due June 1, 1907, by notice in writing, the Jamaica Company shall have the sole right to terminate this contract, if at that time said company shall become satisfied that there is not timber enough remaining on said lots to equal in value the amount of the remaining payments to H. A. McLean & Co., or their assigns of record, figured on the above basis of price; but if the Jamaica Company so elect to terminate this contract, and at the time of its termination shall not have cut a sufficient amount of timber to equal the payments already made, then it shall have the right to continue cutting until the amount of timber so cut, together with the logs and lumber now in the millyard, shall equal in value the amount of the payments already made; but it is distinctly understood and agreed that such right is limited to a period of not over six months from said possible termination of the contract. It is further provided that, upon the receipt of such notice by the Windham Company, the Jamaica Company shall immediately reconvey to the Windham Company by warranty deed all such portions of the standing timber as remain after satisfying the Jamaica Company for such payment as it has made, and that a pro rata adjustment of taxes shall then be made between the two companies. The Jamaica Company did not terminate the contract as permitted by its terms, but continued the cutting, and made all the payments except the last. There was in fact an insufficiency of timber amounting, as found by the chancellor in general terms, to several hundred dollars. The Jamaica Company did not become satisfied of this fact until some time in August. The chancellor has found that it might have become satisfied of it within the time limited, in the exercise of due diligence, by going through the several lots and estimating the amounts.

Prior to August 31st, Henry A. McLean had negotiations with Piper, attorney of the Windham Company, regarding a purchase of its interest in this property; and, in pursuance of these negotiations, McLean and Piper went to Brattleboro September 2d, and saw D'Arcy, treasurer of the Windham Company, for the purpose of concluding the deal. The three then saw the cashier of the Vermont National Bank, at which the Windham Company's notes to the McLeans were payable, and learned from him that on the 31st day of August the Jamaica Company had sent to the bank a note for \$2,000, dated September 1st, together with a check for \$4,307.20, which were intended to pay the note from the Windham Company to the McLeans due September 1st, and another of its obligations not connected with this trans-

action. The 1st day of September came on Sunday, and the second was a legal holiday. The cashier declined to honor the note because it was dated on Sunday, and returned it to the Jamaica Company on the 3d. The check was not used, and was subsequently canceled. In the arrangement between Henry A. McLean and the Windham Company, McLean was to cancel a debt due him from the company of nearly \$400, and pay \$3,000 in cash. The note due the McLeans from the Windham Company on September 1st not having been paid because of the cashier's refusal to honor the note of the Jamaica Company as above stated, McLean did not have the means to pay the \$3,000; but he drew a check to the Windham Company for \$1,000 under date of September 3d, signing it H. A. McLean & Co., and receipted his bill against the Windham Company, and gave both check and receipt to D'Arcy. D'Arcy had with him deeds of the property, and these were placed in the hands of the cashier to be held in escrow until the amount agreed upon was paid. There was no other written memorandum of the transaction. When McLean and Piper returned to Jamaica on the evening of the 2d, Piper told Hollenbeck, a partner in the Jamaica Company, that its note was dated on Sunday, and that it would be returned to the company; and Hollenbeck saw McLean the same evening, and told him that they were going short of lumber, and did not want him to meddle with the property. Neither McLean nor Piper informed Hollenbeck of what had taken place at Brattleboro that day. The chancellor has found that some time previous to this, and pending the negotiations, McLean and Piper knew that the Jamaica Company claimed that the lumber was not holding out, and that there was a chance of a suit between the Jamaica Company and the Windham Company. On the 10th day of September Hollenbeck and his solicitor, C. C. Fitts, met McLean and his solicitor, E. B. Gibson, and Fitts then told Gibson that the Jamaica Company was ready to pay the note, if the McLeans would assign to it the note and mortgage without recourse. McLean declined to assign, and commenced this foreclosure proceeding the same day, and obtained an injunction thereon against the Jamaica Company on the following day. On the 17th the Jamaica Company moved for a dissolution of the injunction, and also filed a motion to be subrogated to the rights of the petitioners as against the Windham Company, and furnished a copy of this motion to the petitioners' solicitors. On the same day the chancellor ordered a suspension of the injunction upon payment to the clerk of the amount claimed to be due. On the 18th the Jamaica Company paid to the clerk the amount due on the mortgage, with costs. The petitioners took this money from the clerk on the 21st, and went directly to the town clerk's office and discharged the mortgage. On the 24th McLean met D'Arcy and A. P. Carpenter, an

attorney of the Windham Company, at Greenfield, Mass., and paid the \$2,000 remaining due on his purchase, and received newly prepared deeds of the property. The sum paid was deposited with Carpenter to protect McLean. The deeds were immediately forwarded to the town clerk of Jamaica, and were received and filed for record in the afternoon of the 25th. The cross-bill of the Jamaica Company, in which the McLeans and the Windham Company are made defendants, was served on Henry A. McLean in the evening of the same day. This prayed for an order restraining the defendants therein from completing their trade, and from changing in any way the record title of the mortgaged property, and for a final decree reinstating the mortgage and subrogating the Jamaica Company to the rights of the McLeans under it. The chancellor filed a decree sustaining the claims of the Jamaica Company, and appointed a special master to find the difference between the amount paid by the Jamaica Company on its contract with the Windham Company and the value of the lumber and timber, cut and standing, sold and conveyed to the Jamaica Company by the Windham Company; the difference representing the amount of loss sustained by the Jamaica Company. The master reported a difference of \$2,160.80, with an alternative finding of a larger amount.

It appears from the above statement that the relation between the Windham Company and the McLeans was that of mortgagor and mortgagee, and that the obligation secured was the payment of a certain indebtedness in installments; that the Jamaica Company bought of the mortgagor an interest in the incumbered property upon an undertaking to pay this indebtedness as it became due, with further provisions of obligation and limitation, all evidenced by a writing to which the McLeans were not a party; and that Henry A. McLean, one of the mortgagees, subsequently bought the mortgagor's equity in the property. The Jamaica Company claims to be subrogated to all the rights which the orators obtained by their mortgage from the Windham Company. The orators claim all the rights of the Windham Company through Henry A. McLean's purchase of that company's equity. So the case turns upon a determination of the rights of the Windham Company under its contract with the Jamaica Company. The orators contend that the agreement of the Jamaica Company, except for the right of rescission, was an unconditional undertaking to pay the three remaining notes, and thus free the property of the Windham Company from incumbrance; and that in completing the payment after the failure to exercise its option it did no more than the contract required, and so is not entitled to subrogation. The Jamaica Company contends that the extent of its payment on the mortgage was to depend upon the amount of lumber obtained; that the provision limiting the time for taking advantage of an in-

sufficiency of lumber is not of the essence of the agreement, and that its failure to give the stipulated notice does not disentitle it to relief in equity; that the payment to the clerk of the amount of the last note was not a payment of the note otherwise than in support of its claim to subrogation and to procure a suspension of the injunction; and that Henry A. McLean took the title of the Windham Company with notice, and can stand in no better position than his grantor. It is clear that McLean took his deed with notice of the claims of the Jamaica Company. It is also clear that the Jamaica Company's payment to the clerk was not a payment of the note in acknowledgment of an unconditional obligation to pay it.

[1] But that company, after becoming satisfied that there was an insufficiency of lumber, undertook to pay the last note on the day it became due, and was prevented from paying it solely by an accident. The orators argue that this was an interpretation of the contract by the Jamaica Company which the court will follow in determining its rights. But it is not every act of a party indicative of an understanding of the contract in accord with the claim of the other party that will be given this effect. One who goes beyond the requirement of his contract in circumstances of doubt ought not from that fact alone to have his act given the effect of a concession. In this case the Jamaica Company might reasonably consider, after its failure to terminate the contract within the time limited, that its safest course was to pay the amount of the remaining note at its maturity, and proceed with the cutting until the timber was exhausted; and having thus reimbursed itself as far as possible, and demonstrated the fact and extent of the insufficiency, seek such remedy as the case might then afford.

The orators contend, further, that any construction of the contract which would give the Jamaica Company the right of subrogation is made impossible by the express provision that each note, when paid, shall be marked as canceled and returned to the Windham Company, and that a corresponding partial release of the mortgaged premises shall be filed for record at the time of each payment. But we think this provision cannot be viewed apart from the other stipulations of the contract, and be accepted as a conclusive expression of the intention of the parties. It is true that, if the procedure agreed upon by the parties to the contract were carried out by the McLeans, each note would be canceled on payment and a proportionate part of the security be discharged. But the contract which provides for this final disposition of the notes and security is equally explicit regarding further rights of the Jamaica Company growing out of the payments. The Jamaica Company is to pay the notes as they become due, but is to have a longer time in which to get off the timber,

and to have interest on the sums advanced until a corresponding amount of timber has been secured, if secured within two years from the date of the contract. The Jamaica Company is given the option of terminating the contract at a certain time subsequent to the making of the first payment and before the second is due; and it is provided that if the contract is terminated under this provision, and the company has not at that time cut enough to equal the payments already made, it shall have the right, subject to a limitation of time, to continue cutting until the required amount is obtained. In view of these further provisions of the contract, we think it cannot be said that the provision for cancellation and release is conclusive of the construction and a bar to the Jamaica Company's claim of subrogation.

It is also claimed by the orators that the character of the payments made in taking up the notes is definitely determined by the further provision that, upon the delivery of the contract, the Jamaica Company shall pay to the Windham Company, in addition to such sums, the difference between the amount of the first note and \$4,000. The reasoning seems to be that the payment of this difference is an unconditional payment of a fixed amount; that the sums to which this is an "addition" must have been considered to be of the same character; and that this is inconsistent with the theory of payments depending finally upon the sufficiency of the lumber. But the Jamaica Company contends that this payment is not a payment in addition to the total as determined by the 1,000 feet, but an advance payment thereon, to be credited to the Jamaica Company in the final settlement. This view is favored by the fact that the payments to be made on the notes are spoken of as "advances." Whatever weight the orator's argument on this point may be entitled to when considered in connection with the entire contract, it is clear that the provision cannot be relied upon as of controlling effect.

But the orators contend that the mere fact that the contract contains a provision permitting the Jamaica Company to terminate it at a certain time, if then satisfied that there was not a sufficient amount of lumber to meet the payments on the mortgage, is enough to show that the construction they claim for the contract is correct. It is argued that the manifest purpose of this part of the agreement is to give the Jamaica Company an opportunity to relieve itself of a liability that would otherwise rest upon it. It is doubtless true that the provision allowing the Jamaica Company to withdraw from the contract at the time and for the reason stated affords some basis for the conclusion that a failure to take advantage of the privilege will make the company unconditionally liable. Whether this view is of sufficient force to overcome the effect of other features of the contract in ascer-

taining the construction must be determined upon a consideration of the agreement as a whole.

[2] The orators insist, moreover, that no effect is given to this provision unless the contract is construed as they claim; but we think this is a mistaken view. The contract, except for the right to terminate, requires the Jamaica Company to advance considerable sums at intervals of three months, and before receiving corresponding returns from the lumber, with its right to receive interest on these sums limited to a brief period; leaves it subject to a foreclosure of its interest on a failure to meet any payment when due, and liable to an injunction of its cutting at any time as an impairment of the security; and subjects it to the possibility of a payment in excess of the amount due on its purchase, which, on its construction of the contract, is to be recovered of the Windham Company after final settlement by such remedy as may then be available. Looking to these considerations alone, circumstances are conceivable in which the privilege of withdrawing from the contract before making the second payment, on its own judgment as to the probable result of the cutting, might be a substantial advantage to the Jamaica Company. So the construction contended for by that company is not at variance with the rule which requires that a contract be so construed, if possible, as to give some effect to every part.

In looking at the contract as a whole, we find a noticeable absence of clauses which might naturally have been inserted, some of which would have pointed directly to one conclusion or the other. The provisions fixing the prices of the lumber by the 1,000 feet, and providing for the measurement, contain no express recognition of any other provision that might affect the result. The provision directing the application of the avails in payment of the mortgage contains no express recognition of its relation to the provisions determining the purchase price. The stipulation regarding the notice contains no express requirement that the purchaser take measures to satisfy itself within the time limited as to the quantity of timber left standing. It is not stated in terms that in case of a failure to exercise its option the Jamaica Company shall become primarily holden for the payment of the mortgage. The contract contains no express recognition of a possibility that on final settlement there may be a balance against the Windham Company. There is no express recognition of the possibility that a balance of the purchase price may remain after satisfying the mortgage to go directly to the Windham Company.

The Jamaica Company contends that the provision for terminating the contract is simply a privilege given it in consideration of the agreements on its part. The argument

of the orators would make the provision an element of the consideration for which the Windham Company conveyed the property. The fact that the provision for a withdrawal on notice is in the contract shows plainly enough that the sufficiency of the timber to satisfy the mortgage had been a matter of discussion between the parties. If the negotiations resulted in such an understanding as is claimed by the orators, it is evident that the Jamaica Company might desire a better opportunity to judge of the amount of the timber before becoming holden irrevocably for the full payment of the mortgage. It is equally evident that, if a privilege of this nature were to be granted, the Windham Company might desire to have a time limit placed upon the privilege, the passing of which without action would determine that the property was finally disposed of and its mortgage provided for. But, if the understanding reached was that claimed by the Jamaica Company, we have seen that there were then substantial grounds on which that company might desire the privilege of terminating the contract. Which ever view may be taken, it is clear that the provision in question is not an undertaking of some further or different act to be done by the Jamaica Company, but a privilege of withdrawing from further performance, and that the benefit claimed in the right of the Windham Company is not one that would arise from an exercise of the privilege, but from a passing of the time without its exercise. If we look solely to this particular clause, and determine the scope of the provision by its letter, the course of the argument is plain. The language of the provision covers only the right to terminate the contract, and the failure to terminate the contract could add nothing to the obligations imposed by it. It would follow from this that, if the Jamaica Company is now liable for the full payment of the mortgage, it is because the other provisions of the contract made it so, and not because this provision introduced any new obligation, nor because the failure to act under it wrought any change in the contract as framed. Then, if the general provisions of the contract were held not to extend the ultimate liability of the Jamaica Company beyond the value of the lumber obtained, the case would be disposed of without reaching the question presented by the Jamaica Company concerning time as of the essence of the contract. But the matter cannot be thus disposed of without further consideration.

[3] Ordinarily, the language of a particular provision is to be construed in the light of its purpose, and the purpose is to be gathered from a consideration of the contract as a whole. The general provisions of this contract were framed upon the supposition that there was lumber enough to provide for the mortgage, and evidently con-

template a full payment of the mortgage by the Jamaica Company and a reimbursement of the company from the lumber when cut and measured. A question having arisen as to the possibility of an insufficiency of lumber, a further provision was inserted for the relief of the Jamaica Company in that event. This provision did not take the form of a contingent modification of the terms already agreed upon, but gave the purchasing company the right to terminate the contract on its later judgment regarding the quantity of lumber. The nature of the risk arising under the contract which the parties had in mind in making this provision was not expressed in words; so the clause affords no certain guide to the meaning which the parties attached to other parts of the contract. We find nothing in the contract that absolutely precludes the theory of either party as to the intended effect of this provision. It cannot be said that the orators' claim as to the purpose and effect of the provision is entirely without basis. The Jamaica Company was permitted to withdraw from the contract on account of a supposed insufficiency of lumber; and the most obvious injury that would result to the company from an insufficiency of lumber would be a payment in excess of its value and without other recourse. On the other hand, the permissive character of the provision, and its freedom from all suggestion of an ulterior effect, favor the claim of the Jamaica Company as to the nature of its obligation. Moreover, opposing conclusions may be drawn from certain omissions noticeable in connection with this particular provision. The privilege of terminating the contract carried with it the right to continue cutting until any advance payment was made good. But in this provision, agreed upon with the uncertainty of the quantity specially in view, there is no recognition of any further remedy if the lumber proves insufficient to cover the advance. It may perhaps be argued that this was because there was nothing in the situation to suggest a possibility that at the time the right was to be exercised there would not be lumber enough to equal the payments then made. The time fixed for the notice was May 25th, and the principal then paid would be \$3,200, and the principal to be paid \$6,300. However this may be viewed, it must be regarded as somewhat significant that the preparation of a paragraph on this subject did not lead to the incorporation of something suggestive of the possibility of a final settlement involving more than the elements of price and measurement.

[4] As security holders, the orators are entitled only to payment of the mortgage indebtedness. If they are entitled to anything more, it must be by virtue of Henry A. McLean's purchase of the Windham Company's equity. But, this purchase having

been made with knowledge of the Jamaica Company's contract and claim, the orators can stand in no better position than the Windham Company did. So the orators' rights are to be measured by the obligations of the Jamaica Company to the Windham Company as evidenced by this contract; and the situation in which the Jamaica Company was left by its failure to give the notice at the time appointed must be determined by our construction of the contract and the rules of law applicable to the subject.

[5] The Jamaica Company treats the case as presenting the ordinary question whether time is of the essence of the contract, and refers us to the rule as given by Pomeroy, which reads as follows: "In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for its completion, or for the execution of any of its terms, equity treats the provision as formal rather than essential, and permits a party, who has suffered the period to elapse, to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay." 3 Eq. Jur. § 1408. It is well settled, however, that the rule will not be applied when the contract plainly discloses an intention to make exact performance as regards time an essential element of the contract; nor when the failure to perform according to the requirement was willful and intentional, or the delay unreasonably prolonged; nor when the party entitled to performance has been so injured that complete reparation is impossible.

[6] It may be helpful to state more fully the principal rules by which courts are governed in applying this doctrine. The general rule in equity is that time is not of the essence of the contract, and equity will not treat it as of the essence of the contract, unless it affirmatively and clearly appears that the parties so regarded it. 1 Sug. Vend. (8th Am. Ed.) 410; *Secombe v. Steele*, 20 How. 94, 15 L. Ed. 833. It may be made essential by an express stipulation of the parties, or an intention to make it so may be implied from the nature of the property or the avowed object of the seller or purchaser. *Ahl v. Johnson*, 20 How. 511, 15 L. Ed. 1005. It is not enough that a specific time be named in the contract. The court is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. *Wald's Pollock on Con.* (Williston's Ed.) 627. It may be made such by a clear manifestation of the intent of the parties in the contract itself, or by a change in the value of the land or other circumstances which would make a decree for a specific performance inequitable. *Barnard v. Lee*, 97 Mass. 94.

The commonest application of this doctrine is in cases involving the execution of terms

preliminary to the transfer, where the party in default has performed or tendered performance after the time appointed, and seeks to enforce a specific performance by the other party. Here the controversy relates to the execution of the terms of deferred payment, and the relief sought is not a specific performance, but a subrogation to the rights of the holders of a mortgage regarding which the party seeking relief assumed certain obligations of payment by contract with the mortgagor. The question is not whether the party in default finally acted without unreasonable delay. The Jamaica Company became satisfied of the insufficiency of lumber some time during the month preceding the maturity of the last note, but it has never given the notice provided for by the contract. It has taken action with a view to the protection of its interests independent of the giving of the notice by paying into court the amount due on the mortgage. As far as the orators are concerned, as security holders, the payment must be treated as made in time, for the orators have taken the money and discharged the mortgage; and the Windham Company, as mortgagor, has suffered nothing from the fact that payment was not made on the exact day. Any loss it may have sustained must arise from some provision of broader effect than the mere requirement of time.

The real question is, What is the performance which the contract requires? The thing required is the payment of the mortgage as the notes become due. But what is the nature of the payment? It is a payment on account, for which the Jamaica Company is entitled to credit in the final settlement? Or is it a payment required of the Jamaica Company without reference to the amount of the lumber? Is the obligation of the Jamaica Company after the failure to exercise its option the same as before? The performance previous to the day fixed is upon the assumption that there will be lumber enough to reimburse the company, and the company is to continue cutting until reimbursed. But, if the lumber had then proved insufficient, would the Windham Company have been chargeable with the deficiency? At the time fixed the Jamaica Company could terminate the contract on the ground of an insufficiency of lumber. Does this mean that, if it proceeded with the contract, it took the chance of a deficiency?

[7] In seeking the intention of the parties, regard must be had to the subject-matter of the contract as well as its language.

[8] The principal subject-matter of this contract was a sale of the timber standing on certain lots. There was no undertaking on the part of the purchaser to pay a certain amount for the timber as it stood. The agreement, unless impliedly modified by the provision regarding the mortgage, is to pay for all the lumber by the 1,000 feet at prices specified. The measurements of chosen surveyors

are to be the basis of settlement. The mortgage covering the property is to be paid by the purchaser as the installments become due without regard to the amount then cut and measured. It would not be known with certainty whether there was lumber enough to cover the payment made on account of the mortgage until the final settlement. The Jamaica Company bought nothing but the standing timber. Its entire interest in the contract was in the gains to be acquired by the cutting, sawing, and marketing. When the timber was removed, the entire realty belonged to the Windham Company. If the Jamaica Company paid the mortgage, and the amount was more than the value of the lumber, it freed the property of the Windham Company from incumbrance, but acquired nothing for itself. If the provision for terminating the contract is given the effect claimed by the orators, the transaction will lose its distinctive character as a sale for a consideration depending upon the amount of the property; the agreement to pay so much per 1,000 feet must yield to the agreement to pay the mortgage; and the Jamaica Company will then pay for the standing timber at rates about 20 per cent. in advance of the scale of prices agreed upon. On the other hand, if the contract is construed as claimed by the Jamaica Company, the result to the Windham Company is not inequitable. There is no claim that the Windham Company lost an opportunity for a better sale through the omission to give notice, or was unfavorably affected by changes in the situation. If it has lost anything, it is in the failure to have over \$2,000 of its mortgage paid on account of property which did not exist. It must be remembered that the act appointed for a certain day was an act to terminate the contract, and not an act to carry forward the performance of the contract; that the omission of the act was the failure to exercise an option, and not a failure in the performance of a positive requirement; that the Jamaica Company has made no subsequent attempt to comply with the letter of the provision, but has undertaken to put itself in the position of having completed the contract; and that the controversy relates, not to the execution of the sale, but to the payment of the consideration. This but brings us back to the question regarding the nature of the payment which the contract calls for, and the answer to this will determine whether the excess of the payment over the contract value of the lumber is chargeable to the Windham Company. So the matter is one of accounting rather than of specific performance; and it is difficult to see how the case as claimed by the Jamaica Company calls for any direct application of the doctrine that time is not of the essence of the contract.

It is clear that the clause specifically under consideration gives the Jamaica Company the right to terminate the contract by notice at a certain time. If this provision were to be

viewed simply as an option, independent of its place in a contract in process of execution between parties sustaining the relation of vendor and purchaser, it would seem that the lapse of the time without giving the notice would determine the privilege, and that a notice subsequently given would be of no avail. See *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479. But this question does not arise, for the Jamaica Company has not undertaken to terminate the contract by giving the notice. If the contract plainly discloses an intention of the parties that the failure to terminate it for an insufficiency of lumber on the very day named should make the Jamaica Company chargeable with the removal of the incumbrance whatever the deficiency of lumber, then the time fixed is necessarily of the essence of the contract. But this is merely one of two opposite conclusions that may be arrived at from a consideration of the contract as a whole. The Jamaica Company stands upon the claim that by a fair construction of the contract the parties to it never contemplated that the purchaser should be or become absolutely holden to satisfy the mortgage. We think the question for determination may, with a sufficient recognition of the different phases of the inquiry, be stated as follows: Did the provision permitting the Jamaica Company to terminate the contract by notice at a given time, if then satisfied there was an insufficiency of lumber, sustain such a relation to the contract that the lapse of the time appointed without giving the notice made or left that company liable for the payment of the mortgage in full, regardless of the amount of the lumber and without recourse to the Windham Company? The original conception of the parties, as evidenced by the contract, was a sale of standing timber, to be paid for by the 1,000 feet when cut and measured, with an undertaking on the part of the purchaser to pay the mortgage covering the property in advance of the cutting, on account of the moneys coming due to the seller. The payments on the mortgage are called "advances," and are to draw interest until they are equaled by the value of the lumber measured. The parties were evidently dealing upon a supposition that there would be at least lumber enough to make good the payments on the mortgage. But provision was made for the Jamaica Company's withdrawal from the undertaking before making the second payment, if it became satisfied that there was an insufficiency of lumber. Various reasons for desiring this privilege, other than an understanding that the contract made it unconditionally liable, have already been suggested. The provision being in terms a privilege, the failure to act under it should not be held to charge the Jamaica Company with an increased liability without the support of some expression fairly indicative of such an intention. If we look upon the contract as entirely ambiguous, the result will be the same.

[9] When the terms of a contract leave its meaning in doubt, the court will ascribe to the parties an intention to enter into a fair agreement, and will adopt the construction which makes the contract equitable. *Royalton v. Royalton, etc., Co.*, 14 Vt. 311; *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89. We think the failure of the Jamaica Company to become satisfied of the insufficiency of lumber within the time limited, and its consequent failure to give the notice, did not subject it to a liability inconsistent with the general theory of the contract.

The view we have taken sustains the contention of the Jamaica Company that the initial payment made directly to the Windham Company was an advance payment on the total purchase price as determined by the measurements. The chancellor's order was properly construed by the master in excluding the orators' offers of evidence to show the actual value of the lumber.

[10] During the progress of the job, authorized persons severally representing the companies concurred in scaling the poplar logs as hard wood. The master finds that poplar is a soft wood. No intermediate action having been taken on the figures, there is no reason why the erroneous classification should not be corrected.

[11] It is said there is nothing to show that Mrs. McLean ever heard of this contract, or of any claim of subrogation by the Jamaica Company, and that she is entitled to hold her half of the money paid on the mortgage unaffected by subrogation. It is apparent from the manner in which the facts are presented that no question was made before the chancellor as to McLean's authority to act for his wife. The fact is found that a part of the consideration of the purchase of the Windham Company's equity was paid by a check of H. A. McLean & Co.; and there is no suggestion in Mrs. McLean's behalf that this was unauthorized. No distinction is made between the two in the findings bearing upon the matter of notice. The case states that the orators' solicitors had notice of the Jamaica Company's motion for subrogation, and that the orators afterwards took the money paid to the clerk and discharged the mortgage on the record. Enough appears to subject Mrs. McLean to the decree.

Decree affirmed, and cause remanded.

JOHNSON v. BELANGER.

(Supreme Court of Vermont. Caledonia. Nov. 13, 1911.)

1. COMPROMISE AND SETTLEMENT (§ 18*)—RESCISSI—RESTORATION OF CONSIDERATION.

Where one has received anything of value in settlement of a right of action, the settlement, though obtained by duress and fraud, bars recovery at law so long as it is not rescinded by an offer to return the consideration; but, where

the thing received as a consideration is of no value to either party, a rescission may be effected by one party notifying the other party that he repudiates the settlement, or by suing on the original cause of action.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 75-82; Dec. Dig. § 18.*]

2. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENTS—ORDERS.

Where a creditor draws an order on his debtor in favor of a third person for the amount of the debt, and the third person notifies the debtor, there is an equitable assignment of the debt, though the debtor neither pays nor accepts the order, and neither the debtor nor the creditor may defeat the rights of the third person.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

3. PARTNERSHIP (§ 311*)—DISSOLUTION—SETTLEMENT—RESCISSI—RETURN OF CONSIDERATION.

Where a partner, in settlement of firm affairs on the dissolution of the firm, delivered to the copartner an order on a debtor of the partner for an amount due the copartner; and the debtor admitted an indebtedness in a sum less than the amount of the order, the copartner, seeking to rescind the settlement on the ground of fraud, must return the order.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 311.*]

Exceptions from Caledonia County Court; Alfred A. Hall, Judge.

Action by C. C. Johnson against Thomas Belanger. There was a judgment for plaintiff, and defendant brings exceptions. Reversed, and judgment for defendant for costs.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Robert W. Simonds and J. Rolf Searles, for plaintiff. Harland B. Howe and Herbert W. Hovey, for defendant.

POWERS, J. The partnership which had existed between the plaintiff and defendant was dissolved in 1908. No settlement of their partnership deal was effected until February 22, 1909, when, as the plaintiff's evidence tended to show, the sum of \$150 was agreed upon by them as the amount due the plaintiff from the defendant. At the same time, and as a part of this settlement, it was agreed that the defendant should assign to the plaintiff an account against Geo. P. Barrett & Co., which he assured, the plaintiff would amount to more than the sum named, and that the plaintiff should accept such assignment in full satisfaction and discharge of this balance so agreed upon. Accordingly, the defendant gave the plaintiff an order on Barrett & Co., therein directing that firm to pay to the plaintiff the amount due the defendant on account. And the plaintiff gave the defendant a writing therein agreeing to accept this account in full settlement of accounts to date. The plaintiff presented the order to Geo. P. Barrett, who was doing business as Barrett & Co., and he refused to ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cept it, claiming an offset on account of certain matters growing out of his deal with the defendant. Disregarding these claims, Barrett & Co. then owed the defendant \$145.50. Barrett testified, in effect, that there was then due the defendant a balance of only \$34.90. Without returning, or offering to return, the order referred to, the plaintiff brought this action of assumpsit, and claimed at the trial to recover the balance of \$150 as upon an account stated. The defendant pleaded the general issue with a notice setting up the order as an accord and satisfaction. The plaintiff claimed the right to recover upon the account stated without regard to the alleged accord and satisfaction, on the ground that he was induced to accept the order by the fraudulent representations of the defendant—and this was one of the issues tried out before the jury.

It was conceded at the trial that the plaintiff had never returned the order, nor offered to do so until just as the trial began, and that it was then refused by the defendant.

[1] At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved for a verdict on the ground that, in view of this failure to return the order, this action could not be maintained. It was said by this court in *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758, that it may be taken as settled in this state that, when one has received anything of value in settlement of a right of action, the contract of settlement, although obtained by duress and fraud, is a bar to a recovery at law so long as it is not rescinded by an offer to return the consideration, in so far as it lies in the power of him who would rescind to do so. But that if the thing received as a consideration for the release is of no value, at law, a rescission may be effected on the part of him who has the right, by notifying the other party that he repudiates the settlement, or by instituting legal proceedings against the other party upon the original cause of action. And it is held that in order to obviate this necessity of restoration the thing received must be without value to either party. *Bassett v. Brown*, 105 Mass. 551; *Perley v. Balch*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56. In *Northampton Nat. Bank v. Smith*, 169 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283, the plaintiff, by mistake, paid the defendant a certain check of a third person after payment thereof had been stopped by the maker, and sued to recover the amount, without returning the check or offering to do so. It was held that the check, if unpaid, belonged to the defendant and would be useful and of value to him as an aid in establishing his claim against the signer, and that there could be no recovery. In *Spencer v. St. Clair*, 57 N. H. 9, and *Crosen v. Murphy*, 81 Or. 114, 49 Pac. 858, it is held that a note must be returned before suit

on the original cause of action, though the maker be insolvent. It comes to this, then: If this order is a thing of value, either to the plaintiff or to the defendant, its return, or what amounts to that, was a necessary prerequisite to a rescission of the contract of settlement—without which rescission no action can be sustained upon the account stated. If the order is without value to either party, the right of rescission did not depend upon its return.

[2] When a creditor draws an order upon his debtor in favor of a third person for the amount of the debt, and the latter gives the debtor notice thereof, it operates as an equitable assignment of the debt, though the debtor neither pays nor accepts the order. And in such circumstances neither the debtor nor the assignor can defeat the rights of the assignee. *Blin v. Pierce*, 20 Vt. 25.

[3] We are not called upon to say how it would be if there was in fact no debt for the order to act upon, or even how it would be if that question was in dispute; for here the evidence was uncontradicted to the effect that this order transferred an account of at least \$34.90. With the order outstanding, this amount, at least, could only be collected for the benefit of the plaintiff. No arrangement between the debtor and the defendant could defeat his rights. Until he surrendered the order, he alone could release this debt. Whether the defendant considered it good or otherwise when he gave it is immaterial. It operated as an equitable assignment of an account, the amount of which only was uncertain. The order was of value to the plaintiff in his hands, and would be of value to the defendant if returned to him, since he could then collect for his own use whatever amount was his due from Barrett & Co. Without a restoration of this order, though its acceptance was induced by fraud, the accord and satisfaction evidenced by the receipt hereinbefore referred to was binding and effective, and a verdict should have been ordered for the defendant.

Judgment reversed, and judgment for the defendant to recover his costs.

GRISWOLD v. WENTWORTH.

(Supreme Court of Vermont. Caledonia. Oct. 18, 1911.)

1. EVIDENCE (§ 135*)—FRAUD—EVIDENCE—ADMISSIBILITY.

In an action for fraud inducing a sale of goods, evidence of prior fraudulent representations inducing other sales of goods, not shown to be a part of a series of fraudulent acts, is inadmissible, especially where defendant has paid for such other goods.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 394; Dec. Dig. § 135;* Fraudulent Conveyances, Cent. Dig. §§ 830, 842, 861.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TRIAL (§ 53*)—RECEPTION OF EVIDENCE—EFFECT OF ADMISSION.

A plaintiff, suing for fraud inducing a sale of goods by him to defendant, may not justify the admission of evidence of prior representations inducing other sales, on the ground that at the time of the admission of the evidence it did not appear that defendant had paid for such other goods, but which fact plaintiff subsequently disclosed, especially in the absence of anything to indicate that plaintiff did not use the improper evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 124, 129; Dec. Dig. § 53.*]

3. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

A statement by a plaintiff suing for fraud inducing a sale of goods, that defendant had previously made representations similar to the representations inducing the sale in question, is improper as a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2157; Dec. Dig. § 471.*]

4. SALES (§ 52*)—FRAUD—EVIDENCE—ADMISSIBILITY.

Where, in an action for fraud inducing a sale, plaintiff testified that at the time of the sale defendant made false representations as to his financial standing, and that plaintiff relied thereon and extended credit for the goods which were not then delivered, the testimony of plaintiff's wife, who joined the parties immediately after plaintiff had decided to sell the goods, as to representations made by defendant in the presence of plaintiff, was admissible against defendant on the question of what the representations were.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 135; Dec. Dig. § 52.*]

5. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where plaintiff entered a remittitur covering everything but a specified claim, the court need not consider the pleadings or the evidence as to other claims.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

6. EVIDENCE (§ 472*)—STATE OF MIND—CONCLUSIONS OF WITNESS.

A defendant, in an action for fraudulent representations as to his financial condition inducing a sale to him on credit, may be compelled to testify as to his understanding at the time of what property was exempt as bearing on the question of intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2193; Dec. Dig. § 472.*]

7. DAMAGES (§ 199*)—ASSESSMENT BY COURT.

Where the court, on motion for a certified execution, ordered a conditional remittitur of damages found by the jury to a sum which, according to defendant's claim, the jury could find under the evidence, the action of the court was not objectionable as involving an assessment of damages because it allowed interest on such sum.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 520, 520½; Dec. Dig. § 199.*]

8. DAMAGES (§ 67*)—ACTUAL DAMAGES—ALLOWANCE OF INTEREST.

Damages allowed as an equivalent of legal interest are actual and not punitive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 135, 136; Dec. Dig. § 67.*]

Exceptions from Caledonia County Court; Fred M. Butler, Judge.

Action by H. F. Griswold against B. R.

Wentworth for deceit. There was a judgment for plaintiff, and defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

David E. Porter, for plaintiff. Robert W. Simonds and J. Rolf Searles, for defendant.

HASELTON, J. This was an action for obtaining goods under false pretenses. Two counts in trover and two in case were joined. One of the counts in trover was abandoned. In one of the counts in case the time was alleged with a *continuando*. Facts which the plaintiff's evidence tended to show were as follows: From May 13, 1903, to May 7, 1907, the defendant, Wentworth, frequently bought of the plaintiff, Griswold, small lots of grain. For these the defendant sometimes paid cash, or part cash, and occasionally he gave notes, all which he paid. On the date last mentioned, May, 7, 1907, the defendant and the plaintiff had a settlement in full which was completed through the giving of a note by the former to the latter. This note was paid when due. Within a week after this settlement, the defendant opened a new account with the plaintiff. This account ran for about a year—that is, until May, 22, 1908—when the defendant gave his note for \$122.16, the amount then due. Immediately thereafter the defendant started another account, which ran until March 27, 1909. On that date the defendant purchased of the plaintiff a bill of goods amounting to \$50.75, and on the same day he gave the plaintiff a note for \$127.13. This note covered the purchase of that date and also all the items of the amount which had accrued since the giving of the note of March 22, 1908. The two notes last mentioned, or renewals thereof, were returned by the plaintiff to the defendant January 20, 1910, and the next day this suit was brought. On trial, the plaintiff claimed to recover on account of the goods for which these two notes were given and on account of no other goods. The jury returned a verdict for the plaintiff for the amount of his claim. Thereafter the plaintiff moved for a certified execution, which the court refused to grant unless the plaintiff would file a remittitur which would reduce his claim to the amount of the item of May 27, 1909, \$50.75, with interest thereon. The remittitur was filed, and judgment was rendered for the amount of the verdict as so reduced.

[1] On trial, subject to objection and exception, the plaintiff was permitted to introduce evidence tending to show false representations made by the defendant in May, 1903, that these representations were relied on and induced the giving of credit to the defendant for grain at that time, and, under

objection and exception, the plaintiff introduced evidence tending to show false representations made by the defendant on occasions when notes, which had been paid, were given by him to the plaintiff in the course of the transactions of the parties between 1903 and 1907.

This evidence was not admissible unless it tended to show that the transactions in issue were a part of a series of fraudulent doings on the part of the defendant, and, in view of the payments and settlement covering this long period of time prior to the transactions in question, this evidence did not have that tendency. *Eastman v. Premo*, 49 Vt. 355, 24 Am. Rep. 142; *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315, 2 Atl. 162; *McCasker v. Enright*, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938.

[2] The plaintiff hardly claims otherwise; but he urges that there was no error for the reason that, as the bill of exceptions shows, at the time this evidence was received nothing had appeared with regard to any settlement or payments. But, as evidence of the payments and settlement came from the plaintiff, he cannot be held to have gained any advantage by keeping the court in the dark as to the real situation until the objectionable evidence had been received. There is nothing in the bill of exceptions to indicate that the plaintiff did not make the most of this improper evidence throughout the case.

[3] It appears from the exceptions that, subject to objection and exception, the plaintiff testified that whenever between May, 1903, and January 1, 1907, the defendant gave a note, he made representations similar to the representations that he made May 27, 1909, when he obtained the goods represented by the item of \$50.75; and that the plaintiff did not testify what those prior representations were, but only that they were similar to those made on the date last referred to. We think that to permit this testimony was error without regard to the holding already made, for the line between representations which the law deems fraudulent and those which it does not so deem is not so easily distinguishable as to be a matter of common knowledge, and representations which the law deems fraudulent and those which it does not so deem might well seem to a witness to be "similar."

[4] The plaintiff testified that at the time of the sale of the goods represented by the item of \$50.75 he and the defendant were alone, that they then talked over the defendant's financial standing, and that the defendant then made certain false representations about his property which the plaintiff relied on, and by which he was induced to give credit for the goods, though they were not then delivered to the defendant. The plaintiff's wife, who, as the evidence tended to show, joined the plaintiff and the defendant

immediately after the plaintiff had determined to let the defendant have the goods, testified, under defendant's objection and exception, to a conversation that she then had with the defendant, while all three of the persons named remained together, and that the defendant said: "Your husband is afraid he is not going to get his pay for this claim. He has refused to let me have it, but on consideration and our talk he has decided to let me have these goods, but I don't see why he should be so afraid that he ain't to have his pay for these goods. I own my farm and everything about me." She testified that at that time the defendant spoke about owning a span of horses, and that he said, referring to her husband: "He will have every cent that I owe him, and I have promised not to ask him to renew a note again. When the note is due, I shall pay it." The defendant argues that this evidence was inadmissible solely on the ground that the trade had been concluded, that before this talk the plaintiff had determined to give the defendant credit, and that therefore this talk, though in the presence of the plaintiff, could not have been relied on by the plaintiff. But, nothing more appearing than the bill of exceptions shows, we think it is fairly to be inferred that in the conversation, as testified to, the defendant was merely repeating what he had already said to the husband; that he was rehearsing the substance of "the talk" which he referred to as having induced the husband to trust him. It is highly improbable that, after having told the plaintiff his story, he then and there in the next breath proceeded, in the plaintiff's presence, to give any new or different account of his financial standing. So we think, as the matter was left, that the testimony of the plaintiff's wife was admissible against the defendant on the question of what the representations made to the plaintiff and upon which the plaintiff acted in fact were.

[5] The defendant objected to evidence as to items of goods other than the item of \$50.75 on the ground that under the pleadings there could be a recovery on account of but one transaction, and he had an exception to a ruling of the court admitting such evidence. The defendant also excepted to the submission to the jury of any question as to the right of the plaintiff to recover on account of such other transactions on the ground that there was no evidence that any goods except those represented by the item of \$50.75 were obtained by fraud. But, since such proceedings were had that the plaintiff entered a remittitur covering everything but the claim as to the item of \$50.75, we do not need to consider the state of the pleadings or of the evidence in respect to other claims.

[6] The plaintiff called the defendant as a witness and examined him as to his financial condition subsequent to May 1, 1907. All that the defendant complains of with respect

to this examination is that, as he claims, he was compelled to testify that during that period all his property was exempt from attachment, and that whether or not property is so exempt is a question of law. But the questions put by the plaintiff had reference to the understanding of the defendant, during the period in question, that his property was exempt, and the testimony that it was in fact exempt was volunteered by the defendant. Now the understanding of the defendant that his property was exempt might well bear upon the question of fraudulent intent, and so the only claim of error urged under this exception is without force.

[7] After reciting the motion for a certified execution, the conditional order of the court that the plaintiff file a remittitur of all of the verdict except \$50.75, and interest thereon, and after reciting that the remittitur was filed, and that judgment was rendered for the sum last named with interest, and that a certified execution was granted, the exceptions add, "to all of which the defendant was duly allowed an exception." All that the defendant complains of under this exception is that the court assessed the damages by way of interest; whereas, it was for the jury to do that. But the court did not assess the damages, but it ordered a conditional remittitur, of damages already found by the jury, down to a sum which, according to the defendant's own claim, the jury had a right to find under the evidence.

[8] The defendant further suggests that it was for the jury to say whether exemplary, or punitive, damages should be allowed. But damages allowed as an equivalent of legal interest are actual and not punitive; and what is said of exemplary, or punitive, damages is irrelevant.

The evidence erroneously received went as much in aid of the recovery of the damages not remitted as of those which were remitted, and, accordingly, judgment is reversed, and the cause is remanded.

LANG v. CLARK.

(Supreme Court of Vermont. Essex. Oct. 18, 1911.)

1. WITNESSES (§ 144*)—DISQUALIFICATION—SURVIVING PARTY.

P. S. 1589, disqualifying a party as a witness where the other party to the transaction is dead, did not disqualify the grantor of plaintiff's father, since deceased, to testify as a witness for plaintiff to having conveyed the land in controversy to plaintiff's father by a deed claimed to have been lost, and this the more where such deed was used only in aid of plaintiff's claim of adverse possession and not as a link in his chain of title.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 144.*]

2. ADVERSE POSSESSION (§ 71*)—CLAIM OF TITLE—DEED.

A deed may aid a claim of title by adverse possession, though no title in the grantor therein is shown.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.*]

3. WITNESSES (§ 282½*)—CROSS-EXAMINATION—MATERIALITY.

Where the grantor of plaintiff's father on cross-examination testified that he had not been a party to a suit against defendant relating to the land, and it was then admitted that he had been a party to a chancery suit involving the title to the same land, the court did not err in refusing to compel him to further state whether he was not a party to such bill.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 928, 990-992; Dec. Dig. § 282½.*]

4. EVIDENCE (§ 143*)—ADMISSIBILITY—MATERIALITY.

Where a witness in ejectment had previously stated that, after he had executed a deed to the land to plaintiff's father, he "expected" that the latter owned the land all the time until suit was brought, the court did not err in sustaining an objection for immateriality to a question whether he ever declared on oath that another was the owner of the land to his best knowledge and belief.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 143.*]

5. TRIAL (§ 59*)—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Defendant in ejectment could not as a matter of right inject a deed into the case on cross-examination of a witness, where the offer of the deed was neither direct nor cross-examination, and especially where it did not tend to show title.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 59.*]

6. EJECTMENT (§ 94*)—DESCRIPTION—EVIDENCE.

Where, in ejectment to recover lot 71 of the second division of lands in the town of Brighton, it appeared that defendant had paid taxes on the land as "lot 71," and he further testified that as lister of lands in that town for taxation he recalled to whom lot 71 had been set in the list, and in 1890 discovered that there was a break in the title to the lot, that he was familiar with the lots and ranges in that town, and that there was a lot "71" in the Second division, he was not entitled to a verdict on the ground that the evidence showed that the town was never allotted or divided, so that a description of land as "lot 71" in the Second division of lands in that town described nothing.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 94.*]

7. EJECTMENT (§ 109*)—RIGHT TO RELIEF—DIRECTION OF VERDICT.

Since in ejectment plaintiff is entitled to recover "according to his right," where there was evidence authorizing a recovery for at least part of the land sued for on a claim of adverse possession, defendant was not entitled to the direction of a verdict because of the alleged invalidity of plaintiff's record title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.*]

8. EJECTMENT (§ 110*)—TRIAL—INSTRUCTIONS.

An instruction in ejectment that plaintiff must show a right to the premises superior to that of the defendant was not objectionable as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

leaving the jury to infer that defendant must show some title.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 110.*]

9. APPEAL AND ERROR (§ 1066*)—REVIEW—INSTRUCTIONS—PREJUDICE.

Where in ejectment defendant's evidence did not tend to prove title by adverse possession, defendant was not prejudiced by an instruction that as the court understood the matter defendant did not claim that he had made out title by adverse possession.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where in ejectment there was no evidence that plaintiff's father died intestate and that plaintiff was his sole heir, the court erred in submitting to the jury whether plaintiff "or his ancestor" had made out title by adverse possession.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

11. TRIAL (§ 283*)—INSTRUCTIONS—EXCEPTIONS.

An exception to an instruction as given does not raise the question whether there was error in failing to give another or further instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 697; Dec. Dig. § 283.*]

12. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where in ejectment there was no claim or suggestion made during the trial that the rights of tenants in common were involved, defendant was not entitled to object to an instruction that, if plaintiff's father had acquired title to the property by adverse possession before he conveyed it to plaintiff, then the deed would be a conveyance of "the interest therein described," etc., because it contained nothing with reference to the rights of tenants in common to maintain ejectment against each other.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.*]

13. APPEAL AND ERROR (§ 1078*)—BRIEFS—ARGUMENT OF EXCEPTIONS.

An exception not argued in defendant's brief will be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

14. TRIAL (§ 252*)—INSTRUCTIONS—ABSTRACT REQUEST.

A request to charge on an abstract question of law not applied to the evidence was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

15. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse a request to charge the substance of which is covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

16. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In ejectment plaintiff testified that he knew nothing of a deed of the land from H. to his father until about the time a suit was started, and also that he did not know, and never knew, just where the lines were, apparently referring to the strip of the land on which certain haying was done. Held, that such evidence of plaintiff's ignorance did not

warrant an instruction that plaintiff at the time he cut the hay had no knowledge of any writing giving the land in question to himself or his father, and defining its limits, or of any definite monuments indicating such limits, and hence the jury must find that plaintiff was not occupying a part under a claim to the whole of a larger tract of definite limits, and could only recover what he actually occupied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

17. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS.

A request to charge in ejectment that it did not appear that any definite monuments had ever been erected by plaintiff, or any one through whom he claimed, and hence the jury must find that he could only recover to the limits of what he actually occupied, was properly refused under the rule that actual possession of a part of a lot may give constructive possession of the whole if it has boundaries sufficiently well indicated, without reference to who erected such boundaries on the land.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

Exceptions from Essex County Court; Willard W. Miles, Judge.

Ejectment by B. J. Lang against George L. Clark. Verdict for plaintiff, and defendant brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

George L. Hunt, Robert W. Simonds, and J. Rolf Searles, for plaintiff. H. W. Blake, for defendant.

HASELTON, J. This is an action of ejectment for "lot 71" of the Second division of lands in the town of Brighton. The case was tried by jury and the verdict was for the plaintiff for the possession of the lot and for damages and costs. Judgment was rendered on the verdict, and the defendant excepted.

At the outset the plaintiff claimed to be able to show a perfect record title; but on trial he abandoned this claim and relied upon title by adverse possession. He introduced, without objection, a deed from his father to him, executed April 27, 1893. The description in this deed was of an undivided half of certain lands including the lot in question. The plaintiff's counsel say here that upon reflection they take the view that the deed conveyed lot 71 in its entirety; but this was not their claim below; and the fair and natural construction of the deed is that above given it, the construction given it on trial by both parties and by the court.

[1] The plaintiff introduced evidence tending to show that between 1875 and 1890 S. D. Hobson deeded the lot in question to the plaintiff's father and grantor, A. J. Lang, by a warranty deed which was never recorded and which was lost. The evidence of the giving of the lost deed came solely from Mr.

Hobson, the grantor therein; and the grantee, the plaintiff's father, having died before the commencement of this suit, the defendant claimed that Hobson was disqualified from giving this testimony on the ground that he was the surviving party to the contract, or cause of action, in issue and on trial. P. S. 1589. But this statute did not disqualify the witness. In *Sowles v. Butler*, 71 Vt. 271, 44 Atl. 355, where the title to real estate was in question, it was expressly held that a grantor in the chain of title of one of the parties was not disqualified under the statute from testifying, although his grantee was dead. Still less was Hobson disqualified because the deed given by him to the plaintiff's father, who was dead, was used not as a link in a chain of title, but in aid of the plaintiff's claim of adverse possession.

[2] The defendant had a further exception to all this testimony of Mr. Hobson about the giving of the lost deed on the ground that no title to the land had been shown in Mr. Hobson. But a deed may aid a claim of title by adverse possession, although no title in the grantor therein is shown, and so this exception was not well taken.

[3] On cross-examination the defendant elicited from the witness, no objection being made, testimony to the effect that after he executed the deed he claimed no interest in the land, "expected" that Lang was the owner all the time until this suit was brought, never heard of any one else having any interest in the land until about the time this suit was started, when he heard of the defendant's claim to the land, and that he himself was not a party to a suit against the defendant relating to this same land. He was then asked if he was not a party to a bill in chancery that was brought against the defendant. To this question objection was made, and the reasons given were that it was asked to show the extent of the knowledge of the witness, and, in general, that if the witness had been made a party orator to a suit in chancery it was material whether he knew it or not. Defendant's counsel stated that they expected to make use of this chancery suit in their defense. Plaintiff's counsel then stated that a suit in chancery was brought and that the witness was made a party. By the statement of the plaintiff's counsel, and not previously, it appeared that the chancery suit talked about related to the land in question. After some discussion the court excluded the question. The witness had already testified that he was not a party to any suit against the defendant relating to this land, and, as it had appeared from an admission made in open court that this was not so, the defendant did not need to repeat, in substance, a question already put and answered. *State v. Donovan*, 75 Vt. 308, 318, 55 Atl. 611. If the plaintiff had sought to relieve his witness from the position in

which his testimony had placed him, a different question would have been presented. The bill in chancery is in no way made a part of the bill of exceptions. We find no error in the action of the court in respect to this cross-examination.

[4] The witness Hobson was, in further cross-examination, shown a paper bearing a signature which he identified as his. He was then asked if he claimed an interest in the land at the time he signed the paper. There was no evidence as to what the paper was, or when it was signed. The question was objected to and excluded. To its exclusion no exception was taken. The witness was then asked: "Did you ever declare upon oath that Mr. C. T. Fitzgerald was to your best knowledge and belief the owner of the land?" The witness was not permitted to answer this question, and the defendant excepted.

The testimony theretofore given by the witness as to what he "expected" about the ownership of the land after he gave his deed to Lang was brought out on cross-examination, and, except so far as it was a disclaimer of title and interest in himself thereafter, was of no sort of consequence, and the question which the court was asked to rule on was a prolongation of an immaterial line of inquiry. It was proper for the court to exclude the question.

The plaintiff as a part of his opening case called the defendant as a witness and showed by him that he had cut over the lot in question, and had a lumber camp on it, and that he had at all times from 1903 or 1904 down to the time of trial claimed to own the lot in question. This evidence as to claim was obviously for the purpose of showing, as a part of the plaintiff's case in ejectment, that the acts of the defendant on the land were possessory. Thereupon the defendant under examination by his own counsel testified that he had purchased lot 71 from Charles Fitzgerald, and he then offered in evidence a quitclaim deed of the lot from Charles Fitzgerald to himself dated January 22, 1903. This deed was received in evidence as tending to show what the defendant claimed. The defendant then further testified to the payment of taxes on 66 or 67 acres of the lot from 1903 down to the time of trial, and that in one or two years during that period he had paid taxes on 76 acres, the whole acreage of the lot. The defendant then offered a land contract dated April 20, 1862, by which one Woodbury agreed to convey the lot in question and other lots to one Pratt when the latter should have paid therefor certain sums of money. Nothing else was offered in connection with this deed, and it was excluded. Its exclusion was proper, as there was nothing about it or the offer of it to suggest its relevancy. The defendant then offered a quitclaim deed of the lot from Pratt to himself dated October 15, 1908, which was some

time after the suit was brought but before the trial. This was offered "to explain defendant's examination by the plaintiff in which he had testified that he had claimed title to the land ever since he got the deed from Fitzgerald and claimed title to the land at the time of the trial, and also as tending to show title, claim of title, and color of title in the defendant, the limits of the defendant's claim, and the nature of his claim."

[5] The deed was excluded as not being proper cross-examination and as being inadmissible under the offer. The offer of this deed was in no sense either direct examination or cross-examination of the witness; but the deed was offered as independent evidence, and as such the defendant could not, as matter of right, inject it into the case before the plaintiff rested. Besides, it was properly excluded under the offer, for it did not tend to show title, and so, in any view, the offer was too broad.

[6] At the close of all the evidence the defendant moved, on various grounds, for the direction of a verdict in his favor. One ground of the motion was based on the claim that there was nothing in the evidence tending to show that the town of Brighton was ever allotted or divided, and that so a description of land as lot 71 in the Second division of lands in that town described nothing.

The defendant had introduced evidence on his part that one C. T. Fitzgerald had paid taxes on "lot 71," and he had called a witness, one Parsons, and had had him testify to familiarity with the lot, its location and character, and the kinds of timber growing on it. And, in fact, the defendant himself had taken the stand and testified as to lot 71, what kind of a lot it was, told about what he had done on it, said he had a map of it, told about the line that joins it to lot 70, and what proportion of the timber on lot 71 he had cut and removed.

The defendant had further testified that he has been lister of the town of Brighton, and he recalled to whom lot 71 had been set in the list; that in 1890 he had discovered that there was a break in the title to lot 71. He had testified that the Second division lots in Brighton were supposed to be 76 acres each. He had testified that he was familiar with the lots and ranges in the town of Brighton, and that there was a lot 71 in the Second division. In fact, the defendant introduced a sketch showing a diagram of the lot and various things about it. On the defendant's own testimony "lot 71" was a good description of a definite tract of land, as good a description as "Blackacre" would be of a tract known and called "Blackacre." The motion could not prevail on the ground named.

[7] The other grounds of the motion for a verdict in favor of the defendant related to the title of the plaintiff to lot 71. But the

motion could not be granted on any of these grounds, for, without reference to the title to the whole lot, there was evidence to be submitted to the jury tending to show title in the plaintiff by actual adverse possession to 10 acres or so of the lot, and in ejectment a plaintiff is entitled to recover "according to his right," and, if the evidence warrants, he may recover possession of a part of the land sued for, though he may fail as to the whole. The defendant recognized this doctrine and the evidence to which it might apply in what he denominated the third ground of his motion for a verdict, for that was a claim that if the plaintiff had been in adverse, continuous, notorious possession of land in question for 15 years before the commencement of the suit, he had only been in possession of a narrow strip near the river that he had cut haystack bottoms off from, and had not been in possession of the whole, and that claim closed with a request, not that a verdict be directed for the defendant, but that the court direct the jury that the plaintiff could recover only the narrow strip indicated.

[8] There were some exceptions to the charge. The first was to an instruction by the court that the plaintiff in order to recover must show a right to the premises superior to that of the defendant. It is now claimed that this instruction was erroneous because it implied, or left the jury to infer, that the defendant must show some title. But neither the passage excepted to nor the charge as a whole is capable of the construction which the defendant fears may have been put upon it.

The defendant also excepted because the court said to the jury that he thought there was no evidence in the case tending to show that the defendant had title by adverse possession. In making this statement, however, the court was correct, as the transcript shows.

[9] The defendant excepted, likewise, to the statement of the court to the jury that, as the court understood the matter, the defendant did not claim that he had made out title by adverse possession. The defendant's counsel now makes the contention that: "Though the court might have been right in holding that the defendant's evidence did not tend to prove title by adverse possession, it was wrong to charge that he made no claim of title by adverse possession, as it may have raised an unfavorable presumption in the minds of the jury against the defendant." But we do not think that the defendant was prejudiced because the court did not tell the jury that the defendant had been making an unfounded claim.

The defendant also excepted to the charge of the court: "That the plaintiff claimed that he had taken possession under the deed, under color of title, from Mr. Hobson and laid claim to the entire lot." This exception seems to relate to the claim of the plain-

tiff asserted at the trial, and we gather that it was a correct statement of the claim so asserted, and was preliminary to a statement of what would be necessary to sustain the claim. Here was no ground for the exception.

[10] The defendant excepted to the charge of the court "in submitting to the jury the question whether the plaintiff or his ancestor had made out the kind of adverse possession required." This exception was taken on the ground "that there was no evidence in the case tending to show that the plaintiff was the heir of Andrew J. Lang, that Andrew J. Lang died intestate, or that B. J. Lang was his heir, or only heir, or only son."

We have examined the charge to see if it could be fairly considered that in referring to the plaintiff's ancestor the court meant, and was understood to mean, to refer simply to the plaintiff's father as the grantor in the deed of 1893 purporting to convey to the plaintiff an undivided half interest in the lot in question, and we think it probable that the court was not so understood and did not intend to be so understood. In the discussion of the defendant's motion for a verdict, made at the close of the plaintiff's evidence, the plaintiff's counsel, after referring to the deed from the father to the son of an undivided half interest, based a further claim of the plaintiff upon alleged testimony that the father died intestate, and that the plaintiff was his sole heir. The court had no recollection of such testimony, and the defendant's counsel then denied having heard any such testimony; but the plaintiff's counsel was positive about it, and, after again referring to the deed of 1893 of an undivided half, and being reminded by the court that that was a deed of an undivided half, counsel asserted that the plaintiff had the whole because he was the sole heir of his father who died intestate. The court said to counsel: "If that evidence isn't in, why, you are liable to get a reversal." One of the plaintiff's counsel thereupon said that he had no doubt at all about it, and the other of plaintiff's counsel said: "We are willing to take the chance." In disposing of the motion, the court stated that it acted upon the assurance of counsel for the plaintiff that the evidence was as they claimed it to be.

At the close of all the evidence the motion was renewed, and nothing was then said to indicate that the plaintiff had in any way changed his claim as to how the evidence stood, nor that the court had ceased to rely upon the assurances of the plaintiff's counsel in that regard. But there was in fact no evidence that the plaintiff's father died intestate, and that the plaintiff was his sole heir, and the matter stood as the defendant's counsel now claim, and as they claimed before the court at the time of taking the exception now under consideration. The plaintiff's counsel evidently thought that they had introduced evidence which they had fail-

ed to offer, and the court, misled by their assurance, erroneously charged as to the bearing of possession by the plaintiff's ancestor upon the right and title of the plaintiff.

The court charged the jury that, if the father had acquired title to lot 71 by adverse possession before he gave the deed of 1893 to his son, then that deed would be a conveyance of "the interest therein described" as complete as if the father's title had been by actual deed.

[11] The defendant excepted to this portion of the charge, claiming that it was erroneous because it contained nothing with regard to the rights of tenants in common to maintain ejectment against each other. But an exception to an instruction as given does not raise the question of whether or not there was error in failing to give some other, or further, instruction. *Lynds v. Plymouth*, 73 Vt. 218, 50 Atl. 1083; *Morrisette v. C. P. Ry. Co.*, 76 Vt. 267, 56 Atl. 1102.

[12] During the trial there had been no claim or suggestion that the rights of tenants in common were involved in the case, and this is conceded, and for that reason the defendant cannot complain of a strict application of the rule above stated.

[13] The defendant excepted to the failure of the court definitely to submit to the jury the question whether Hobson gave a deed of the fee of lot 71 to the plaintiff's father, and to the failure of the court to instruct the jury that, if they failed to find that Hobson did give such deed, then their verdict should be for the defendant. We do not find that this exception is referred to on the defendant's brief, and we therefore treat it as waived. We do not say that that question should not have been submitted to the jury.

The remaining exceptions to the charge, set out in the bill of exceptions and relied on, raise no questions which have not been, in substance, already considered.

The defendant presented six written requests to charge. With the first and last of these requests the court complied to the satisfaction of the defendant. To the failure of the court to comply with the other four the defendant excepted.

[14] The defendant's second request was an abstract proposition of law, a single sentence taken from an opinion of this court, without reference to the matter of the context, and with nothing to indicate how the jury were to apply it to the evidence in the case. It was not error for the court to decline to give it.

[15] The defendant's third request related to the necessary elements of the adverse possession claimed by the plaintiff, and we think that, so far as it was applicable to the evidence, it was in substance complied with. It called for a charge upon the subject of abandonment after title has been gained by adverse possession; but we are referred

to no evidence that would have made an instruction upon that point pertinent.

[16] The defendant's fourth request was as follows: "It appears that plaintiff at the time he cut the hay upon the land had no knowledge of any writing giving the land in question to himself or his father and defining its limits, or of any definite, or noticeable marks, or monuments, indicating such limits. Therefore you must find that the plaintiff was not occupying a part under a claim to the whole of a large track of definite limits, and that he can only recover what he actually occupied." It does appear from the plaintiff's own testimony that he knew nothing of the deed from Judge Hobson to his father until about the time this suit was started. As to the plaintiff's knowledge of marks, or monuments, the part of the transcript to which the defendant refers us shows that he admitted that he did not know, and never knew, just where the lines are "down there," apparently referring to the narrow strip on which the haying was done. Unless there is evidence to which the defendant has not called our attention, the court would not have been justified in attributing to the plaintiff the degrees of ignorance recited in this request, so we assume that the court was warranted in denying the request.

[17] The defendant's fifth request, the last one not complied with, was this: "It does not appear that any definite and noticeable monuments, or marks, have ever been erected by the plaintiff, or any one through whom he claims. Therefore you must find that he can only recover to the limits of what is actually occupied." But actual possession of a part of a lot may give constructive possession of the whole lot, if it has boundaries sufficiently well indicated by whomsoever those boundaries may have been "erected" or indicated upon the land. So the court would not have been warranted in complying with the request under consideration.

Judgment reversed, and cause remanded.

BELL'S ESTATE et al. v. ST JOHNSBURY & L. C. R. CO.

(Supreme Court of Vermont. Caledonia.
Nov. 13, 1911.)

1. APPEAL AND ERROR (§ 1073*)—DECREE—ERRONEOUS STATEMENT—PREJUDICE.

An erroneous statement in a decree that a suit to impose a lien on the earnings of a railroad had been consolidated with a prior suit to foreclose a mortgage securing bonds by way of recital only in the statement of the history of the case was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

2. JUDGMENT (§ 252*)—PRAYER FOR RELIEF.

An amended bill in a suit to recover for services and materials furnished for the repair

and operation of a railroad while in the hands of receivers prayed that the court would decree complainants' claim to be a lien on the earnings of the road in the receivers' hands, and that the bondholders should be restrained from taking possession of the road or appropriating or diverting any of its net earnings from the payment of complainants' claims until they should be paid in full, concluding with a prayer for general relief. In a supplemental bill it was alleged that, by foreclosure of the mortgage, defendant, the purchaser at foreclosure sale, was substituted for the original mortgagors, and that it was its duty to pay complainants' preferred claim; that the personal property of the road, when it passed into the hands of receivers, and the earnings while the road was operated by the receivers, were more than sufficient to pay all the debts of the road constituting a lien on such property and earnings; that it was the duty of the receivers to have paid all the income in full in discharge of preferred claims; and that, as defendant had taken the road with its improvements, it was bound to pay the lien creditors the amount of the fund illegally converted to their use by the receivers to the amount due complainants. *Held* that, since the general prayer for relief was sufficient to obtain all relief consistent with the general frame of the bill, the relief prayed was sufficient to sustain a decree following the net earnings of the road in the hands of receivers, and enforcing their application to the payment of complainants' claims in the hands of defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

3. RAILROADS (§ 30*)—RECEIVERS—NET EARNINGS—APPLICATION TO PREFERRED LIENS.

Where receivers of a railroad applied their net income to improving and repairing the property, instead of paying preferred claims for services and materials furnished during their operation of the road, which application inured to the benefit of bondholders, who organized defendant corporation to succeed to the ownership of the property through a purchase on foreclosure proceedings, defendant itself became liable for the payment of complainants' claims.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 30.*]

4. LIS PENDENS (§ 24*)—PURCHASE OF PROPERTY PENDENTE LITE.

Where railroad bondholders instituted foreclosure proceedings and organized defendant corporation to take over the property, which transfer was accomplished after suit brought by complainants to impose a lien for services and materials rendered in the repair and operation of the road before and at the time it passed into the hands of receivers, defendant was a purchaser pendente lite and took the property subject to a lien in favor of complainants subsequently imposed thereon.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38-46; Dec. Dig. § 24.*]

Appeal in Chancery, Caledonia County; E. L. Waterman, Chancellor.

Suit by James D. Bell's estate and others against the St. Johnsbury & Lake Champlain Railroad Company. Decree for complainants, and defendant appeals. Affirmed.

Argued before ROWELL, C. J., and MUNSON, and WATSON, JJ., and HALL and STANTON, Superior Judges.

Young & Young, for appellant. George W. Wing, for appellees.

STANTON, Superior Judge. The orators are preferred creditors and their original bill under the provisions of section 102 of chapter 28 of the General Statutes was brought to recover for services rendered and material furnished to keep the railroad now owned by the defendant in repair, and to run the same, before and at the time it went into the hands of receivers on October 18, 1877. In the opinion handed down when this case was before the court in 1902 (76 Vt. 42, 56 Atl. 105), and in the case of Poland v. Lamolle Valley R. R. Co. et al., 52 Vt. 144, referred to herein as the Poland Case, there is a complete history of all matters connected with this litigation and the issues and questions involved, a repetition of which is unnecessary. In accord with the opinion of the court in 76 Vt. 42, 56 Atl. 105, a mandate was sent down directing that a proper decree be entered for the orators, save the one whose claim the court had disallowed, with costs. A decree was entered by the court of chancery May 6, 1908, and it was therein adjudged and decreed that the debts of the orators were and are, and until paid shall continue to be, a first and paramount lien upon the net earnings of the railroads while operated by the receivers; that the defendant pay to the clerk of the court for the benefit of the orators on or before July 1, 1908, the sum of \$28,986.60, with interest thereon from the 3d day of December, 1907, being the aggregate amount due the several orators with interest to the last-named date, and the costs of the orators, taxed and allowed at the sum of \$596.93; that in default of said debts claims and costs being paid by July 1, 1908, the lien upon the said net earnings of the defendant shall continue until full payment is accomplished; and that the cause shall be kept upon the docket of the court of chancery until said claims are fully paid, with leave to the orators to apply to the court for all necessary and needful orders to effectuate the payment of their several claims. The case is now here on an appeal by the defendant from this decree of the court of chancery relative to the form and extent of the decree, and the first claim made is that the case is not consolidated with nor is supplementary to the Poland Case.

[1] In this the defendant is correct, and it is obvious that it was an error to state as was stated in the decretal order of 1902 that this case is supplementary to and is consolidated with the Poland Case, but the error was perfectly harmless, and could not in any degree have influenced the court in its holdings in the case as reported in 76 Vt., 56 Atl. No attempt has been made to show that it did, or that defendants have been harmed by it, and what is said about it in the decree here appealed from is only by way of a recital of the decretal order of June, 1902, in the statement of the history of the case, and is not a part of the adjudication in the decree.

[2] It is asserted by the defendant that the orators' bill does not ask for a lien on defendant's real estate, nor on the net earnings that accumulated while defendant's railroads were in the hands of the receivers. The orators' amended bill filed June 5, 1880, contains a prayer that the court will order and decree that the debts due the orators are a lien on the earnings of the roads in the receiver's hands; that the bondholders should be restrained from taking possession of the roads or appropriating or diverting any of the net earnings from the payment of the orators' claims until they should be paid in full, and concludes with a general prayer for relief. In orators' supplemental bill filed December 7, 1880, after stating that orators were not permitted by the court to intervene in the Poland Case, but were allowed to enter their suit as an original action, it is alleged that by foreclosure of the mortgages the defendant was substituted for the original mortgagors, and that then it was its duty to pay the preferred debts of the orators; that the personal property of the railroads, when they went into the hands of the receivers and the earnings of the roads while they operated by the receivers, were more than sufficient to pay all the debts of the roads that were a lien on such property and earnings; that it was the duty of the receivers to have paid all the income of the roads in discharge of such claims as were by the statute given preference; and that, as the defendant had taken the road with its improvements, they should pay to the lien creditors the amount of the fund illegally converted to their use by the receivers to the amount due the orators on their preferred claims in this suit. The foregoing is in substance the general frame of the orators' bill, and the "general prayer for relief is sufficient to obtain all relief consistent with the general frame of the bill." Therefore all the relief which is adapted to the case may be granted under this bill and its general prayer for relief, and it is sufficient to uphold this decree and allow equity to follow the net earnings, and lay hold of them to enforce their application to the payment of the orators' claims. *Danforth v. Smith*, 23 Vt. 247; *Eureka Mfg. Co. v. Windsor Mfg. Co.*, 47 Vt. 430; *Coffrin v. Cole*, 67 Vt. 226, 31 Atl. 313; *Western Union Tel. Co. v. Bullard*, 67 Vt. 272, 31 Atl. 286.

In the recital of facts upon which the adjudication in the decree is based it is stated concerning the masters' report as follows: "That said masters ascertained and reported that the net earnings of the receivership made during its continuance, and subject to the lien of the orators according to the mandate of the Supreme Court in this cause, on the 1st day of July, A. D. 1880, were \$39,496.78, subject to such deductions as the court should adjudge ought to be made therefrom on the facts found and reported by them." The defendant submits that the

words, "And subject to the lien of the orators according to the mandate of the Supreme Court in this cause," should be eliminated from the paragraph, for that the mandate of 1885 did not authorize that matter to be referred to the masters, and that the finding is entirely outside their powers and of no avail to the orators. But the statement is immaterial and harmless. To quote it in the decree has not the slightest tendency to injure the defendant, nor to influence the adjudication in the decree.

[3] The statements in the decree that the several debts of the orators named in the masters' report should continue to be a first and paramount lien upon the net earnings of the railroads, while they were operated by the receivers, or so much thereof as may be necessary to pay the debts of the orators, and, if the net earnings are not sufficient to pay the debts in full with costs of this suit then it should be applied pro rata to such payment, is in accord with the law of the case, and is a relief to which the orators are entitled, as it is consistent with the form of the orators' bill and the power of a court of equity. The masters' report is full authority for the assertion in the decree that "the receivers expended all their income in running and improving the road except the sum of \$6,922.18 of cash on hand and due from agents which was turned over to defendant," and therefore the defendant's objection to the statement of facts as to the disposition of the net earnings is not well founded.

The defendant's special objections numbered 6 to 11, inclusive, are answered by the facts found by the masters and the law of the case, and in considering these objections, and with especial reference to the last four, we hold that the decree conforms to the mandate, and that there is no clause in the decree that is vital to its existence but is warranted by the established facts in the case and the holdings of the court.

[4] It is urged by the defendant in its objections to the chancellor's decree that, before any decree is made creating a lien on its real estate, the present bondholders or mortgagees should be cited in and heard. These bondholders took their holdings after the final decree in the Poland Case and the taking over of the property by the defendant. They took their securities with the knowledge that orators' case was pending, and the claim that was thereby made. They are not entitled to notice and hearing now, for their interest is subject to the case that was pending when they came to have an interest in the property. They secured their holdings after the bill in this case was brought, and while this litigation was pending. The maxim, "*pendente lite nihil innovetur*" applies, and there has been no change so far as these orators' rights are concerned, and they stand as they stood when their original bill was filed. As the

right of the orators to maintain this bill to reach the net earnings has been heretofore adjudged and determined in this very case, the only question now open for consideration is whether the decree appealed from is according to the mandate sent down when the case was last here. 76 Vt. 42, 56 Atl. 105. That mandate was that a "proper" decree be entered for the orators, without stating what would be a proper decree.

In addition to what has already been said as to what is contained in the decree, it, in effect, besides ordering that the debts of the orators are a lien on the net earnings, adjudges and decrees that as those earnings were used by the receivers in making permanent improvements on the roads or were passed over to the defendant when it took possession of the roads, whereby it took and had the benefit of said net earnings in the improved condition of the property and in the cash and accounts and other personal property passed over to it, the defendant must restore said net earnings, or so much thereof as is necessary to pay the orators at the time named in the decree, in default of which the lien on the net earnings is to continue until payment is made. The decree is proper and adequate in all respects, except that it should have charged the defendant first with the sum of \$6,922.18, the cash and agents' accounts that were turned over to it by the receivers, it being the amount remaining of the net earnings of the receivership, after deducting the sum paid out of the same for running and improving the roads; and, second, the decree should have charged the mortgage security with the restoration of so much of the net earnings as is needed to complete the payment of orators' claims in full out of the fund that was diverted from the payment of said claims and devoted to the expense of improving and running the road, and thus improving the mortgage security, for that fund is chargeable therewith in equity. This has often been held by the Supreme Court of the United States, as is shown by *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 285, 20 Sup. Ct. 347, 358, 44 L. Ed. 458, which reviews the former decisions of that court, and states the law to be that, "when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use."

This case comes fully within that principle, for the defendant was organized in the interest of the bondholders that were secured by the Poland mortgage, and in that interest took possession of the mortgaged property under the decree of foreclosure, and is still in possession, management, and control thereof for all purposes of this case. The amount of the net earnings under the

receivership as established by the court was \$35,563.50, and of this \$28,641.32 was used by the receivers in running and improving the road, and thereby enhanced the mortgage security, and the balance of \$6,922.18 was paid directly to the defendant in cash and agents' accounts.

Cause remanded, with direction that the decree be so altered as to charge the defendant with the payment to orators of the amount of cash and agents' accounts that were turned over to it at the time it took possession of the road at the termination of the receivership, and that the decree be further altered so as to charge the property that constituted the mortgage security with the restoration of so much of the net earnings as is needed to complete full payment of orators' aggregate claims with interest thereon. In all other respects the decree is affirmed.

Let new time of payment be fixed.

HASELTON and POWERS, JJ., disqualified.

KENNETT et al. v. TUDOR et al.
(Supreme Court of Vermont. Windham.
Oct. 16, 1911.)

1. EVIDENCE (§ 264*)—ADMISSIONS—CONSTRUCTION.

Defendants executed chattel mortgages to G. and W. and also gave a lien note on the same property which was afterwards transferred to plaintiff K. Afterwards, in 1908, defendants bought machinery from plaintiffs, giving them a mortgage for the price, which included the personalty covered by the G. and W. mortgages, and in the same year defendants sold all of the property to plaintiffs. In 1909 the G. and W. mortgages were assigned to D., who still holds them, and he went to New Hampshire, where plaintiffs lived, and tendered plaintiff K. the full amount of the lien note and demanded the property covered by the mortgages for the purpose of foreclosing them, which K. refused, and D. sued him in trover in New Hampshire to recover the property, which suit is still pending. Plaintiffs' suit is for deceit in selling the property to plaintiffs, concealing the existence of the G. and W. mortgages. Plaintiff K. was asked on cross-examination whether he intended to contest D.'s suit against him on the ground that the mortgages were invalid, whereupon plaintiffs' counsel conceded that such mortgages were valid in New Hampshire, when the court excluded the question asked on the ground that plaintiffs' admission was sufficient to protect the defendants. *Held*, that plaintiffs' admission that the G. and W. mortgages were valid in New Hampshire was equivalent to the admission that K. did not intend to contest the trover suit on the ground of the invalidity of the mortgages, and bound plaintiffs as much as K.'s answer could have done, so that it was not error to exclude the question to K.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 264.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE—MODIFYING CONTRACTS—BILL OF SALE.

In an action for deceit in selling plaintiff certain property, including a mill and machin-

ery, etc., while he concealed the existence of two mortgages thereon, defendants offered evidence, for the expressed purpose of rebutting plaintiffs' claim that they were deceived, to the effect that a certain sum paid defendants at the time of the sale was paid for work done for plaintiffs, and that the agreement at the time of the sale was that the mill, building, and machinery were to be turned over to plaintiff, and that machinery purchased by the defendant but not paid for was to be paid for by plaintiffs or with money furnished by them, which matter was not settled on the day of the sale, and that certain machinery sold was to be paid for at what it was worth more than the two mortgages thereon, which was left undetermined because the amount of mortgages was not known at the time of the sale. *Held*, that the evidence offered was properly excluded as tending to impeach the bill of sale, going beyond the purpose of negating deceit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2080-2047; Dec. Dig. § 441.*]

3. FRAUD (§ 49*)—ACTIONS—PROOF—PROOF OF CONTRACT.

In an action for deceit in selling property which was, in fact, incumbered, proof of the contract of sale, though merely as a matter of inducement, was essential.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 44; Dec. Dig. § 49.*]

4. PLEADING (§ 382*)—PROOF—GENERAL ISSUE.

At common law, anything is admissible under the general issue which shows that defendant is not guilty of anything giving rise to the cause of action alleged, so that, in an action for deceit, a plea of not guilty operates to deny all of the facts alleged in the inducement as well as the deceit itself.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1280-1294; Dec. Dig. § 382.*]

5. FRAUD (§ 59*)—DAMAGES—MEASURE—NOMINAL DAMAGES.

In an action for deceit in selling property, concealing the existence of mortgages thereon, plaintiff was only entitled to nominal damages where it appeared that he had not himself paid off the mortgages, since he might never suffer any actual damage, as defendant might pay the mortgage debts, or the mortgagee enforce them against defendant personally.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

6. APPEAL AND ERROR (§ 1175*)—DISPOSITION—RENDITION.

Though upon deciding, on an appeal in an action for deceit in selling personalty, concealing mortgages thereon, that plaintiff was only entitled to nominal damages, not having paid off the mortgages, the general practice would require rendition of judgment on appeal for nominal damages, all of the issues having been disposed of below, the Supreme Court will not render judgment for plaintiff for nominal damages, since such judgment would bar a recovery for any amount plaintiffs might have to pay to discharge the mortgages; the deceit being merged in the judgment and not being a continuing wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

7. APPEAL AND ERROR (§ 1201*)—REMAND—PROCEEDINGS IN LOWER COURT—AMENDMENT OF PLEADINGS.

Upon remand of an action for damages for deceit in selling property by the concealment of mortgages thereon after decision on appeal that plaintiff was only entitled to nominal damages

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not having himself paid the mortgages, plaintiff may amend the declaration so as to recover actual damages by showing payment of the mortgages on the property purchased.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

8. APPEAL AND ERROR (§ 1201*)—REMAND—AMENDMENT OF DECLARATION—APPLICATION FOR LEAVE.

Upon remand of a case, plaintiff should ask leave in the trial court to amend the declaration so as to recover actual damages which he is entitled to recover under the decision on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

9. APPEAL AND ERROR (§ 1172*)—DISPOSITION—REFUSAL IN PART.

Where the decision below was correct, except that it allowed actual damages when only nominal damages were recoverable, judgment will be reversed only as to damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action by A. Crosby Kennett and another against George A. Tudor and another. Verdict and judgment for plaintiffs. Affirmed in part and reversed and remanded in part.

This is a case for deceit in the sale of personal property. Trial was had on the second count, to which the general issue was pleaded. Verdict and judgment for the plaintiffs, who live in New Hampshire, while the defendants live in Vermont.

In December, 1900, the defendant George A. Tudor gave a mortgage to one Gibson on certain personal property that he owned. In April, 1904, he gave a mortgage to one Ware on certain other of his personal property. In January, 1903, he gave a lien note to the Lane Manufacturing Company on certain of his property. In November, 1907, he moved all of said property to Albany, N. Y., and went there with his son, the other defendant, where they both engaged to do certain work for the plaintiffs under a written contract, and where both remained until February, 1908, when they returned to Vermont, leasing said property in the mill in Albany that they had been operating on the plaintiffs' land. In December, 1907, the Lane Company's lien note was transferred to the plaintiff Kennett, who still holds the same. In January, 1908, the Gibson mortgage and the Ware mortgage were assigned to one Daley, who still holds the same. On February 13, 1908, the defendants bought over \$8,000 worth of machinery, etc., of the plaintiffs and gave them a mortgage thereof, which mortgage also included all of the property covered by the Gibson and the Ware mortgage and the Lane Company's lien. On December 4, 1908, the defendants sold and delivered all of said property to the plaintiffs,

and gave them a bill of sale thereof. The validity of said mortgages and lien note was not questioned by either party, and the plaintiffs conceded that the two mortgages held by Daley were valid incumbrances on the property covered by them, both in Vermont and New Hampshire. It appeared that Daley, by virtue of his said mortgages, went to New Hampshire and tendered to Kennett the full amount due on the Lane Company's lien, and demanded of him the possession of all the property described in said mortgages for the purpose of foreclosing them, which tender Kennett refused, and refused to deliver the property, though he did not question the tender. Thereupon, on February 6, 1909, Daley sued Kennett in trover in New Hampshire for the property, and that suit is still pending.

The property sued for is sufficient in value to pay both of said mortgages and said lien.

On cross-examination of Kennett, he was asked if he intended to contest Daley's suit against him on the ground that said mortgages are invalid. Plaintiffs' counsel said they did not claim that, but were willing to concede their validity. Defendants' counsel said they ought not to be bound by any concession the plaintiffs' counsel might make; that it was material to show whether the plaintiffs claimed in this case that said mortgages were valid here, and seek to recover the value of them, and at the same time intend to defend the trover suit on the ground that they are not valid. Plaintiffs' counsel then conceded that said mortgages are valid in New Hampshire, and constitute a valid incumbrance on the property that was taken from Vermont to New Hampshire. The court said the concession was ample, and excluded the question.

The plaintiffs' evidence tended to show that on December 4, 1908, when they bought the property of the defendants and took their bill of sale thereof, they made a final settlement with the defendants and passed receipts, and bought all of the property covered by the bill of sale, but were deceived and cheated by the defendants because part of the property was subject to the Gibson and the Ware mortgages, of which the defendants did not inform them.

As tending to rebut the plaintiffs' claim that they were thus deceived and cheated, the defendants offered to show by the defendant Ernest Tudor (who had testified that \$300 were paid to the defendants at the time of the sale to the plaintiffs) what that money was paid for. On objection by the plaintiffs, the defendants offered to show by the witness that it was paid for work they had done for the plaintiffs; that the arrangement was that the plaintiffs were to have the mill and machinery, a schedule of which was attached to the back of the mortgage of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

February 13th; that the mill building was to be turned over to the plaintiffs; that the machinery that the defendant George had bought on his own credit, and which was not paid for, was to be paid for by the plaintiffs themselves, or they were to pay George for it so he could pay; that that was not settled that day because they did not have the bills there; that it was left that day under that arrangement; that the machinery that was brought from Vermont was to be paid for at what it was worth more than the Gibson and the Ware mortgages, but that it was left unsettled because they did not know the amount of those mortgages; that they came home to Vermont, and Daley was sent to New Hampshire by the holders of those mortgages, and when he came back he had the bill of sale. This offer was objected to as undertaking to impeach the bill of sale and as immaterial and irrelevant. The court ruled that under the pleadings the defendants could not go back of the bill of sale to open up the trade, which was evidenced by the writings. The witness was then asked to state fully the arrangement and agreement between the parties in regard to the machinery and the payment for it. This was objected to, and the court said it had already ruled that the parties had made a contract in writing, and had stated the rule as to contracts, and excluded the question. The contract referred to in these rulings was the bill of sale. The defendants were permitted to testify fully to conversations covering the Gibson and the Ware mortgages, and were not denied the privilege of showing conversation tending to impute to the plaintiffs knowledge of the existence of those mortgages at the time the bill of sale was given.

The plaintiffs have neither paid nor offered to pay said mortgages, nor any part thereof; and so the defendants requested the court to charge that they could recover only nominal damages. The court refused thus to charge, but charged instead that in the circumstances, and under the concessions in the case, the general damages would be the amount of said mortgages, and the jury found accordingly. The defendants excepted to the rulings adverse to them.

Argued before ROWELL, C. J., and WATSON, MUNSON, HASELTON, and POWERS, JJ.

H. G. and F. E. Barber, for plaintiffs.
Chase & Daley, for defendants.

ROWELL, C. J. [1] The plaintiffs' concession that the Gibson and the Ware mortgages are valid in New Hampshire, and constitute valid incumbrances there on the property that was taken from Vermont, was equivalent to a concession that Kennett did not intend to contest the trover suit on the ground that they are invalid. This being so, the concession bound the plaintiffs

in this case as much as Kennett's answer to the like effect would have bound them, and so the defendants got what they asked for, namely, Kennett's intention in respect of that ground of defense. No copy of the second count is furnished us. All we know about it is, as stated in the exceptions, that it alleges fraud and deceit in the sale of December 4, 1908. Nor have we a copy of the bill of sale, but we assume that it has the necessary elements of a contract of sale, for it was so treated below.

[2] Taken thus, the court was right in excluding the testimony of Ernest Tudor, for it would have gone beyond the purpose for which it was offered, namely, to rebut the plaintiffs' claim that they were deceived and cheated as alleged, and have tended to impeach the contract itself for nonconsummation, which was not within the purpose for which the testimony was offered, which purpose is the same as the claim here made for its admissibility.

[3] And though the contract may be but matter of inducement, yet proof of it was essential in order to show a relation between the parties that would make the deceit actionable. *Slack v. Bragg*, 83 Vt. 404, 411, 78 Atl. 148.

[4] The plaintiffs also contend that the ruling was right because the plea of not guilty operates as a denial only of the deceit alleged, and not of the facts stated in the inducement. This is so under Reg. Gen., Hil., 4 Wm. IV., to which they refer, but not so at the common law, where, in case, anything is admissible under the general issue that shows that the defendant is not guilty of anything actionable in respect of the matter charged in the declaration. *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125. And it does not appear that that scope of the issue was restricted here to the injury of the defendants, for they were permitted to testify fully to conversations covering the Gibson and the Ware mortgages, and were not denied the privilege of showing conversations tending to impute to the plaintiffs knowledge of the existence of said mortgages at the time the bill of sale was given.

[5] As to damages: The defendants claim that it was error to refuse their request to limit them to a nominal sum. The plaintiffs claim that the full amount of the mortgages was the proper measure, in support of which they rely upon three Vermont cases, namely, *Bowman v. Parker*, 40 Vt. 410; *Houghton v. Carpenter*, 40 Vt. 588; and *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367. But none of them are in point. *Bowman v. Parker* was case for fraudulent representations in the sale of certain shares of the capital stock of the Vermont Marble Company. The court said that the general rule of damages in actions of that character is the difference between the value of the property as it really was at the time of the sale, and what

its value would have been had the representation for which the seller is found liable been true. The case does not show what the representations were; but the opinion says they were representations affecting the value of the stock, by which is evidently meant the intrinsic value. Here the representations did not affect the intrinsic value of the property. *Houghton v. Carpenter* was case for breach of warranty in the sale of butter. The rule of damages was said to be the difference between the value of the butter at the time of sale, and what its value would have been had it been as warranted. There the butter was not as warranted, but was much inferior in quality; and there the warranty went to the intrinsic quality of the article sold.

Shanks v. Whitney was case for deceit in the exchange of real estate. The defendants' property was subject to a large mortgage that was about to mature. The plaintiff fully informed them that, if he made the exchange and the mortgage could not be replaced, he should be obliged to let the property go on it, as he was not able to raise the money to pay it. They assured him that it could be replaced, and that they then had a man who would do it, and that they would turn that opportunity over to him. A street and a sidewalk ran over the property, and they told the plaintiff that the circumstances were such that the municipality was legally bound and ready to pay therefor. All of these representations were false to the knowledge of the defendants; but the exchange was made on the faith of them, after which the plaintiff made diligent effort to replace the mortgage, but could not, and the defendants did not nor would try to help him, nor give him the name of any one who would, and so he was forced to and did let the property go on the mortgage. The court applied much the same rule there as the court applied here; but there the rule was adapted to the case, for the plaintiff had suffered all the damage he recovered, while here the plaintiffs have suffered no actual damage, and may never suffer any, for the defendants may pay the mortgage debts, or Daley may enforce them against the mortgagor personally and let the security go free.

Indeed, there is no difference between this case in respect of damages and cases on covenants against incumbrances, which are broken, if ever, when the covenant is made, and give rise to a claim for nominal damages, but to no more unless more have been sustained. It is not enough that here the plaintiffs conceded the validity of the mortgages, and virtually conceded that Kennett does not intend to defend the trover suit on the ground of their invalidity, for that did not pay those debts, nor discharge the mortgagor therefrom, nor preclude Daley from collecting them of him by a personal judgment thereon, nor debar Kennett

from defending Daley's suit on the ground of the invalidity of the mortgages. The court erred, therefore, in not confining the plaintiffs to nominal damages as requested.

[8] This being the only error, the general practice would require a final judgment here for nominal damages; no issue to the jury remaining undisposed of. But we do not render such a judgment, as it would bar recovery by the plaintiffs of what they may have to pay to free their property from the mortgages; for the deceit is the cause of action, and would merge in such a judgment and thereby become extinguished as a further cause of action; for it is not a continuing wrong divisible in point of time, and so a fresh wrong as often as fresh damage arises from it, but a terminated wrong not thus divisible, and consequently not capable of being demerged and made again to serve as ground for recovering fresh damage.

Thus, in *Adm'r of Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150, it is held that recovery in an action of trespass on the case by a father for loss of service of his minor son because of personal injuries occasioned by the fall of a bridge that the defendant was bound to maintain and keep in repair, was a bar to a second action for like damage sustained by reason of the same injury, though recovery in the first action was limited to damage sustained prior to its commencement, and the second action was brought expressly for such loss after the first action was commenced. The court said that to maintain a second action for fresh damage, when there is no new injury, would be novel in principle and not warranted by authority.

So in *Morey v. King*, 51 Vt. 383, the question was whether a party who had failed to recover all the damage he had sustained by a single breach of a contract, because he did not properly declare for a portion of them in a former suit, could maintain a second suit to recover what he did not recover in the first suit; and it was held that he could not. The court said that the general doctrine that a party cannot divide up an entire claim and maintain separate actions for each part, whether the claim arises from contract or tort, is well settled and elementary.

So in *Bullard v. Thorpe*, 36 Vt. 599, 606, 30 Atl. 36, 25 L. R. A. 605, 44 Am. St. Rep. 867, it is said that if a demand is split up, and a judgment recovered for a part, the legal proposition that a judgment for a part of an entire demand is a conclusive bar to any other suit for another part of the same demand is everywhere inflexibly maintained.

In the case at bar the actual damages lurk in the fact that the property is incumbered by mortgages that the plaintiffs will have to pay, and they should have paid them in season to recover therefor in this action; but by omitting to do so they split their damages into nominal and actual, and thereby made

a case against themselves for barring the latter if they have the former, and this they do not want to do, but want the judgment reversed as to damages, and the cause remanded with liberty to amend by alleging payment of the mortgages when made, so that recovery therefor may be had in this action; but, if such liberty is not granted, they ask leave to become nonsuit, for they agree, though the defendants do not, that a judgment for nominal damages will bar actual damages.

[7] So the question is whether it is allowable thus to bring in the question of actual damages at this stage of the case, and we think it is on the strength of *Potter v. Taylor*, 6 Vt. 676, as well as on general principles. That case was an action for the breach of a covenant against incumbrances. After the writ was issued, but before it was served, the plaintiff paid the incumbrance and was allowed to recover the amount in damages. The court said that the cause of action had accrued when the suit was commenced, and that, though the plaintiff would be entitled to nominal damages only but for the actual payment of the incumbrance, yet that that payment was not the ground of action, but only the consequence of it, and was a loss necessarily resulting from the breach of covenant that constituted the cause of action, and therefore was properly included in the damages recovered. It is true that there the incumbrance was paid before the writ was served, but such payment did not go to the perfection of the right of action, but only to the enhancement of the damages, and the court evidently did not regard the case as affected by the holdings that it is sometimes enough if the right of action is perfected before the service of the writ. So we see no distinction in principle between that case and this, though this is tort and that was contract.

In *Haskins v. Ferris*, 23 Vt. 673, which was trover, the plaintiff was allowed to amend by declaring for other property taken at the same time, on the ground that the taking was the cause of action, and that it might be presumed that he intended to sue for the whole cause of action in the first place. But here, that the plaintiffs intended to sue for their whole damage in the first place is more than a presumption; it is a fact, for they went for the whole on trial and got it.

In *Boyd v. Bartlett*, 36 Vt. 9, the original declaration counted on a covenant against incumbrances. A new count was allowed on a covenant of warranty in the same deed; it being held not to introduce a new cause of action. The court said that in practice amendments are allowed more liberally than formerly; that the matter of allowing them is, to a great extent, a question of fact, depending on the purpose and intent of the plaintiff in bringing the suit and framing the declaration.

Indeed, this court said long ago that an amendment to a declaration may be made if it does not change the form or the nature of the action nor introduce a new subject-matter. *Skinner v. Grant*, 12 Vt. 456. Here the amendment asked for would do none of those things, and consequently we think it allowable.

[8] But the plaintiffs should apply below for the leave asked, as was directed in *Allen v. Parkhurst*, 10 Vt. 557, 562. If that court grants the leave, it will fix the terms, as to which we say nothing.

[9] Judgment will be reversed only as to damages. *Marshal v. Dalton Paper Mills*, 82 Vt. 489, 505, 74 Atl. 108, 24 L. R. A. (N. S.) 128; *Austin v. Langlois*, 83 Vt. 104, 74 Atl. 489.

Judgment affirmed except as to damages, but reversed as to those, and cause remanded.

McKANE v. GORDON & HOAR.

(Supreme Court of Vermont. Washington.
Nov. 13, 1911.)

1. APPEAL AND ERROR (§ 266*)—TRIAL BEFORE COMMISSIONER—RULINGS—REVIEW—EXCEPTIONS.

P. S. 1794, providing that no exceptions to the report of a referee or questions as to the admissibility of evidence shall be considered on appeal unless they are stated in the exceptions to the report filed in the trial court, is merely declaratory of the prior rule of practice, and is applicable to a trial before a commissioner or an auditor, but such rule does not preclude a consideration of such questions as the commissioner submits in his report not raised by exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.*]

2. ATTORNEY AND CLIENT (§ 128*)—PLEADING—SPECIFICATION—PROOF.

Where plaintiff sued his former attorneys for money received, specifying an amount of cash received in the settlement of litigation, and giving credit for a commission of 20 per cent. on the judgment "as per agreement," the basis of the suit as shown by the specification was the money had and received by defendants to plaintiff's use, and hence the fact that plaintiff failed to prove the basis of the credit allowed did not preclude him from recovering so much of the fund paid to defendants as they wrongfully withheld without an amendment of the specification.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 128.*]

3. REFERENCE (§ 61*)—SCOPE OF INQUIRY.

On an issue as to the value of attorneys' services in prosecuting a case in the Supreme Court, the referee was not limited to the testimony of witnesses that the time charged for was actually spent, and that their per diem charges were reasonable, but was properly entitled to examine the briefs prepared to determine the time that ought to have been spent in their preparation.

[Ed. Note.—For other cases, see *Reference*, Dec. Dig. § 61.*]

4. ATTORNEY AND CLIENT (§ 124*)—FEES—DEDUCTIONS.

Where an attorney voluntarily deducted from his bill \$89.50, and it was thereafter deter-

mined that he had overcharged plaintiff \$165, the amount of his deduction should be subtracted from the overcharge under the rule that, where an allowance is voluntary, the debtor by refusing to accept the settlement proposed opens the whole question, and the creditor is at liberty to insist on payment of the amount discounted.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 124.*]

5. ATTORNEY AND CLIENT (§ 136*)—TERM AND ATTORNEY FEES.

Whether more than one attorney on the same side of a suit is entitled to charge term and attorney fees therein depends largely on the circumstances of the case, and involves a consideration of the facts for the determination of the trier.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 136.*]

6. APPEAL AND ERROR (§ 267*)—REVIEW—EXCEPTIONS.

Where plaintiff did not except to a judgment in an action against attorneys for money received because a check sent plaintiff for a balance was deducted from the amount the attorney was found to have overcharged him, he could not have the propriety of such deduction reviewed on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1572, 1581; Dec. Dig. § 267.*]

7. APPEAL AND ERROR (§ 712*)—FINDINGS—REVIEW.

An objection that an allowance for attorneys' services included charges made for services rendered on Sunday was not reviewable where there was no finding to that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2951, 2955; Dec. Dig. § 712.*]

8. APPEAL AND ERROR (§ 713*)—REFEREE'S REPORT—RECORD—CASE.

A reference in a referee's report allowing for attorneys' services to the expenses of the suit "as indicated by their [the defendants] accounts hereto attached" was insufficient to make the accounts a part of the report under the rule that papers outside the regular files in the case must be specially referred to and made a part of the case, or they will not be noticed on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 713.*]

9. ATTORNEY AND CLIENT (§ 124*)—MONEY COLLECTED—RETENTION—JOINT OR SEVERAL LIABILITY.

Plaintiff employed defendants, who were attorneys, to conduct certain litigation for him, but made no joint arrangement for their services. On judgment being recovered, a check for the amount was made out in the name of both attorneys, and on being indorsed by them the money was obtained, and defendant G. paid to the stenographer of defendant H. \$1,400, the same being H.'s account for services and disbursements, less a discount of \$89.50. From the amount left in G.'s hands he paid certain bills connected with the litigation, reserved an amount sufficient to cover a pending trustee suit, and sent plaintiff a check for \$107.55. Held, that defendants' liability for money received on plaintiff refusing to accept such settlement was several, and not joint.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 124.*]

10. JUDGMENT (§ 238*)—JOINT AND SEVERAL LIABILITY—JUDGMENT AGAINST ONE.

Where plaintiff sued two attorneys jointly for money received, and failed to establish a

cause of action as against one of them, he was nevertheless entitled to judgment against the other under P. S. 1530, declaring that plaintiff may have judgment against one or more of the defendants, though no joint liability is established.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 416; Dec. Dig. § 238.*]

Exceptions from Washington County Court: Alfred A. Hall, Judge.

Action by Terrance McKane against M. M. Gordon and Richard A. Hoar. Heard on report of a referee and auditor and defendants' exceptions thereto. Judgment for plaintiff, and defendants bring exceptions. Sustained in part and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

William N. Theriault and Fred L. Laird, for plaintiff. Richard A. Hoar, pro se. R. M. Harvey and M. M. Gordon, for defendant Gordon.

POWERS, J. The action is general assumpsit. Each defendant pleaded the general issue, and the defendant Gordon also pleaded book account in offset. The case was tried before one styled a referee and auditor, whose report was accepted, and judgment rendered thereon for the plaintiff. The case was argued before us on a bill of exceptions in behalf of the plaintiff, and bills in behalf of each defendant.

[1] It is stated in the plaintiff's bill that no exceptions were taken in his behalf before the auditor, nor to the report; that none were filed in the court below, nor any claim made in respect thereto until the rendition of the judgment. In these circumstances, so far as the rulings of the referee are concerned, nothing is presented for review except such questions as are expressly submitted by the referee in his report. By P. S. 1794, it is provided that no exceptions to the report of a referee or questions as to the admissibility of evidence shall be considered in this court, unless they are stated in the exceptions to the report filed in the court below. This statute is merely declaratory of the rule of practice as it has previously existed in this jurisdiction. Thus in *Graham v. Stiles*, 38 Vt. 578, a case decided long before the enactment of the statute, it was held that, if one would avail himself of an error of a referee in admitting evidence, he should file exceptions to the report based on such error. And in *Walton v. Walton's Estate*, 63 Vt. 513, 22 Atl. 617, and again in *Manning v. Leighton*, 66 Vt. 56, 28 Atl. 630, upon a citation of our own cases, and without reference or allusion to the statute, which had then been in force some years, it was held that this court would not review the rulings of a referee, unless some question was submitted by him, or exceptions to the report were filed in the coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ty court. The rule is the same when a trial is had before a commissioner (Wilder v. Stanley, 49 Vt. 105) or an auditor (Perry v. Whitney, 30 Vt. 390; Dexter's Adm'r v. Dexter, 37 Vt. 641; Hard v. Burton, 62 Vt. 314, 20 Atl. 269). This rule, it is to be observed, does not preclude a consideration of such questions as the referee submits in the report (Hogan v. Sullivan, 79 Vt. 36, 64 Atl. 234), of which there are several here presented which will be disposed of when reached. The facts found by the referee show that this plaintiff brought a suit against certain parties for the recovery of damages on account of injuries received while in their employ. He engaged the defendants to bring and conduct that suit, but this was by contracts with them severally, and not jointly. They continued to act as attorneys for the plaintiff in that litigation until final judgment was rendered therein. On June 2, 1906, the defendants in that suit drew their check for \$3,623.26, the amount of the judgment and costs, to the order of M. M. Gordon and Richard A. Hoar, these defendants, and delivered the same to the defendant Gordon, who indorsed the check and delivered it to the defendant Hoar, who also indorsed it. The check was then delivered to a Miss Price, defendant Hoar's stenographer, who for some unexplained reason indorsed it, and took it to the bank and obtained the currency on it. This currency she turned over to Gordon, and took his receipt for it. Thereupon Gordon paid her for Hoar the sum of \$1,400, the same being the amount of Hoar's account for services and disbursements less a discount of \$89.50. From the amount thus left in Gordon's hands, he paid certain bills connected with the litigation, reserved a sum sufficient to cover a pending trustee suit, and sent the plaintiff a certified check for \$107.55, therein stating that it was "in full to date." The plaintiff has never cashed this check, nor has he ever accepted the same, either in settlement or part payment of his claim.

The plaintiff filed a specification as follows:

In the above-entitled cause, the plaintiff specifies as the claim upon which he will rely in the trial of the same the following:

June 2. To cash received from Marr and Gordon, of Barre, Vt., for me in settlement of my judgment against them obtained in Washington county court, and affirmed by the Supreme Court.....	\$3,623 25
Less commission of 20% on judgment of \$3,450.00 as per agreement	690 00
	\$2,933 25

This specification was neither withdrawn nor amended during the trial.

[2] The defendants insist that, since the plaintiff failed to establish his claim that Gordon agreed to take the case on a contingent fee of 20 per cent. of the recovery, the plaintiff is out of court, and that he cannot recover on any other contract or

theory than the one covered by his specification, invoking the rule applied in *Aseltine v. Perry*, 75 Vt. 208, 54 Atl. 190, that a specification circumscribes the scope of the evidence and the plaintiff's right of recovery. But this claim is based upon a misconception of the ground of recovery set up in the specification. The basis of the suit as made by the specification is the money had and received by the defendants for the plaintiff's use—\$3,623.25. Against this sum the plaintiff admitted a credit amounting to \$690 on the basis of 20 per cent. of the judgment. Though the plaintiff failed to establish this basis of the credit allowed, he was not thereby precluded from recovering so much of the sum paid to the defendants as they wrongfully withheld. It is as if a plaintiff allowed as a credit on the amount claimed a specified sum for a horse received of the defendant, and it turned out in evidence that the sum named was incorrect, or the property received was something else. In such case a recovery could be had without amendment of the specification. In *Greenwood v. Smith*, 45 Vt. 37, it was held that a plaintiff is not precluded by his specification from recovery upon a cause of action not included therein, but covered by the declaration, and proper for specification if it grew out of the subject-matter of the specification actually filed, and the defendant admits such cause of action on trial. And in *Bates & Son v. Quinn*, 56 Vt. 49, an action of general assumpsit to recover money overpaid on settlement, it was held that the plaintiff might recover money belonging to him held by the defendant, though he failed to establish the special ground upon which he claimed to show the overpayment.

[3] So it became the duty of the referee to investigate and pass upon the defendants' accounts. Having done so, the referee reports that Gordon overcharged the plaintiff \$310, and that Hoar overcharged him \$165. These overcharges were made in connection with the preparation and argument of the case in Supreme Court. In reaching his conclusions regarding this, the referee examined the briefs prepared to determine the propriety of the charges in connection therewith. The defendants say that this was improper, and that it was his duty to find according to the undisputed testimony of the witnesses, who said that the time charged for was actually spent, and the per diem charges reasonable. But we think the referee did just right in dealing with the matter as he did. The briefs themselves would afford some evidence of the time spent and of the time which ought to have been spent in their preparation, having regard for the interests of the client being served. There is a plain intimation of the propriety of such action in the last point disposed of in *Carpenier v. Gibson*, 82 Vt. 336, 73 Atl. 1030.

[4] As we have seen, Hoar discounted his

bill \$89.50. The referee submits to the court the question whether that sum should be deducted from the overcharge of \$165. In rendering judgment below, the court allowed this sum to Hoar, thereby reducing the overcharge to \$75.50. The plaintiff says this was error, but we think it was correct. This allowance was but a voluntary credit, in effect conditioned upon the acceptance of the settlement as a whole. If the plaintiff chose to contest this defendant's bill, he opened the whole question, and Hoar was at liberty to insist upon payment of the amount discounted. It is like the situation presented in *Hard v. Burton*, 62 Vt. 314, 20 Atl. 269, wherein it was held that the plaintiff was not precluded from recovering what his services were worth, though he had charged them at a less sum.

The plaintiff claimed that as a matter of law both defendants were not entitled to charge term and attorney fees. And this question was submitted to the court. The referee allowed these charges as made, and they were included in the judgment below. In this we find no error.

[6] Whether more than one of the attorneys engaged on the same side of a suit is entitled to charge term and attorney fees therein is a question depending largely upon the circumstances of the case. It involves a consideration of the facts, which are for the determination of the trier. Here the referee has in effect found that such charges in this case were reasonable and proper, and we cannot disturb the finding. We have also seen that Gordon sent the plaintiff a check for \$107.55, which is now in the hands of the clerk. The referee submits to the court the question whether the amount of Gordon's overcharge should be reduced by the amount of this check. The court below deducted the check, making the amount in Gordon's hands which went into the judgment \$202.45.

[8] The propriety of this may well be questioned, for the plaintiff has not accepted the check, but the plaintiff did not except to the judgment on this ground, and so is not in a position to complain.

[7] The plaintiff objects to the judgment below because he says it includes charges made for services rendered on Sunday. But there is no finding to that effect.

[8] In speaking of the expenses of the suit, the referee says in the report that they were paid by the defendants "as indicated by their accounts hereto attached." This is not sufficient to make the accounts a part of the report, and consequently, though they may show that part of the charges are for Sunday work, we cannot look into them. Such papers, being outside the regular files in the case, must be specially referred to and made a part of the case, or they will not be noticed. *Wheelock v. Sears*, 19 Vt. 359.

[9] Both defendants excepted to the judgment on the ground that, under the finding that there was no joint employment of the defendants, no judgment could be rendered against them. That the plaintiff made no arrangement with the defendants jointly is not conclusive of the question. The action is based upon the implied promise arising from the receipt of the plaintiff's money. The character of this obligation is to be determined from the particular facts and circumstances involved. A contract is not joint merely because two or more are parties to it on the same side. Though it be joint in form, if the real rights and interests of the obligees among themselves be several and not joint, this fact will ordinarily control. So it was held in *McIntosh v. Zaring* (Ind.) 38 N. E. 321, that where several attorneys were employed to contest a will, and the contract, though signed by all, provided that a specified and different proportion of the recovery should be paid to each, they could not join in a suit for their pay. It is a question of intention, and the contract will not be joint if intended to be several. *Widner v. West. Un. Tel. Co.*, 47 Mich. 612, 11 N. W. 407. In determining this question, a consideration of the subject-matter, the purpose, the consideration, and all the circumstances attending the transaction becomes important. *Atlantic & St. A. B. Ry. Co. v. Thomas*, 60 Fla. 412, 53 South. 510.

The question presented here is not whether these defendants could have so conducted themselves with reference to the check as to become jointly liable for so much of its avails as were not properly accounted for, but whether they did in fact so conduct themselves. It is apparent that they had no joint interest in the judgment. The plaintiff says in his brief that the docket entries show that each of the defendants filed a notice of an attorney's lien. We might refer to these entries, though they are not made a part of the case (*Spaulding v. Warner*, 57 Vt. 654), but it is apparent that such liens, if asserted, were several, and not joint. Nor did any of the avails of the check come to their joint possession or control. The only connection which Hoar had with the check was for the purpose of indorsement. It does not affirmatively appear that his stenographer was acting for him when she took it to the bank and cashed it. But, assuming that she was, the method adopted discloses a plain intention of keeping the interests several, and not allowing them to become joint. The stenographer took all the money to Gordon, the leading counsel, and delivered it to him in exchange for his receipt for it. He then paid her the amount of Hoar's bill less the discount. All these circumstances point to a several liability and not to a joint liability, and we hold that such was the result.

[10] It does not follow, however, that the

defendants were entitled to a judgment. While it is true that at common law a plaintiff must recover against all the defendants or against none, and that he cannot have separate judgments against each (*Machine Co. v. Morris*, 39 Vt. 393), and if a plaintiff alleges a joint contract and fails to prove it, he falls altogether (*Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538). Since the enactment of P. S. 1530, a plaintiff may have judgment against one or more of the defendants, though no joint liability is established. In *Reynolds v. Field*, 41 Vt. 225, it is said, in effect, that this statute was intended to cover all cases wherein too many are sued, and that judgment may be taken against so many as are found liable. It is true that that was a case where one defendant was liable, and the other was not; but *Powers v. Thayer and Wait*, 30 Vt. 361, was a case wherein both defendants were liable, but for different amounts. It was held that there could be no joint recovery, but that the case came within the statute, and that the plaintiff might elect or the court order which defendant should be discharged. The judgment below against one of the defendants alone was affirmed.

Under the authority of these cases, it must be held that the plaintiff was entitled to a judgment against one of the defendants, and the case will be remanded that he may proceed in the county court as he may be advised.

NOTE.—The foregoing opinion was read at the October term, 1911, and the case held pending a conference of counsel, who now announce a settlement of the case; and it is so entered.

STATE v. DROWN.

(Supreme Court of Vermont. Windsor. Nov. 10, 1911.)

1. CRIMINAL LAW (§ 261*)—PLEA—NECESSITY.

P. S. 2264, provides that in criminal cases, where accused on arraignment refuses to plead, he shall be treated as pleading not guilty, and the trial shall proceed accordingly. *Held*, that where defendant had not in fact pleaded to the information, but was tried without being called on to plead, the conviction was void, though the court mistakenly stated that the plea was not guilty, and ordered that plea to be entered, and the trial was had on that theory.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 612, 613; Dec. Dig. § 261.*]

2. COURTS (§ 116*)—RECORD—AMENDMENT.

Where the record, showing a plea of not guilty by accused, was incorrect, the court's refusal to order the same corrected by amendment on motion was an abuse of discretion.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 116.*]

Exceptions from Windsor County Court; Fred M. Butler, Judge.

J. M. Drown was convicted of rape, and he brings exceptions. Reversed and remanded.

Argued before ROWELL, O. J., and WATSON, MUNSON, HASELTON, and POWERS, JJ.

Homer L. Skeels, State's Atty. Charles Batchelder, L. E. Sherwin, and Thos. W. Moloney, for respondent.

WATSON, J. The respondent, found guilty of the crime of rape, moved that the verdict be set aside and a new trial granted, for that the cause was submitted to the jury before he was put to plead to the information. To the overruling of the motion, respondent excepted. The clerk made a minute on his docket, showing that the respondent pleaded not guilty. The respondent moved for an order, directing the clerk to amend and correct the record in this respect. This motion was also overruled and exception saved.

On this branch of the case, the facts, found by the court, are presented. It appears therefrom that on July 24th, five or six respondents were severally formally arraigned, and pleaded to informations. The state's attorney then gave notice that this case would be the first for trial. On July 25th other respondents were formally arraigned, and pleaded to informations.

The court inquired of respondent Drown and his counsel, present in court, whether they had received a copy of the information, and would be ready for trial at 2 o'clock in the afternoon. Whereupon the respondent, by his counsel, stated that his plea was or would be not guilty, but, not having had a copy of the information 24 hours, as provided by statute, and not being able to get his witnesses, he would not be ready until the next morning.

Soon after the opening of court on the 26th, the respondent and his counsel being present, the court inquired if the respondent was ready for trial, and receiving an affirmative reply from the counsel the court directed the clerk to call a jury. After the jury had been impaneled, the clerk, not finding a minute of the plea on the information, inquired in the presence and hearing of the respondent and his counsel if the respondent had pleaded to the information, and, hearing no response, each of the judges understanding and believing that the respondent had pleaded on the previous day, the presiding judge announced that the respondent had pleaded not guilty. Thereupon the jury was sworn by the clerk, and the clerk, in the presence and hearing of the jury, and of the respondent and his counsel, read the information, and stated that: "Upon this information, the respondent has been arraigned and pleaded not guilty, and puts himself upon the country for trial, which country, gentlemen of the jury, you are." Neither the respondent nor his counsel in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 81 A.—41

terposed any objection, and the trial then proceeded, resulting in a verdict of guilty.

It is found that the court was mistaken in believing that the respondent had been formally arraigned and pleaded not guilty; and that in fact he was not formally arraigned.

It is further found that the respondent and his counsel knew and understood that the court was laboring under the impression that the respondent had been formally arraigned and pleaded not guilty, and when it was so announced in court, after 24 hours from the time a copy of the information had been delivered to him had elapsed, they remaining silent and making no objection to the recording of such plea, it was then and there so recorded by the clerk.

[1] It is contended by the respondent that without an arraignment and plea there was no issue which could be determined by the jury; and that to put him on trial without arraignment and plea, before trial, was to deprive him of due process of law. On this question, the Supreme Court of the United States has spoken, and we are controlled thereby.

The Criminal Code of Utah (Comp. Laws 1907, § 4811) requires that in the prosecution for felonies the respondent must be "personally present at the trial." In *Hopt v. Utah*, 110 U. S. 579, 4 Sup. Ct. 202, 28 L. Ed. 262, the trial of challenges was permitted to take place in the absence of the accused. The government argued that the trial of the indictment began after and not before the jury was sworn, and consequently that the respondent's personal presence was not required at an earlier stage of the proceedings. It was held that the trial commenced at least from the time when the work of impaneling the jury began. It was argued that the right of the accused to be present before the trial was waived by his failure to object to their retirement from the courtroom, or to their trial of the several challenges in his absence. It was held that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. Thereon the court, speaking through Mr. Justice Harlan, said: "The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which accused holds to the public, as of the end of human punishment. 'The natural life,' says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty.

Neither can be lawfully taken, except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is, not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one, whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial; that is, at every stage of the trial, when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

In *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, the record did not show that the accused was ever formally arraigned, or that he pleaded to the indictment, unless all this was to be inferred from the order, made at the opening of the trial, and as soon as the accused appeared, reciting that the jury were selected, impaneled, and sworn "to try the issue joined," and from the statement in the bill of exceptions, that the jury were "sworn and charged to try the issue joined."

The opinion, written by the same learned justice, after noticing many authorities, states it to be the prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before the trial can be properly commenced, and that, unless this fact appears affirmatively from the record, the judgment cannot be sustained; that, until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try, and the fact that he did so plead should not be left to be inferred from a general recital in some order that the jury were sworn "to try the issue joined"; and that the record should be a permanent memorial of the issue tried, and show whether the judgment, whereby it was proposed to take the life of the accused, or to deprive him of his liberty, was in accordance with the law of the land.

It is further said: That these views seem to be the necessary result of the federal statute (Rev. St. § 1082 [U. S. Comp. St. 1901, p. 722]), which provides: "When any person indicted for an offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty

on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury." That this statute proceeds upon the established principle that, before a criminal trial can be legally commenced, there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. That the section of the statute quoted requires the entry of the plea before the trial commences. That neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecution for infamous crimes. That the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance, in the administration of the criminal law. That due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed, and that the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial was taken in the trial court. Otherwise the judgment will be erroneous. The judgment was reversed, and the case remanded, that the respondent might be properly arraigned and plead to the indictment, and for further proceedings in conformity with law.

In substance and effect, the federal statute quoted above is not materially unlike the statute of this state, passed in February, 1787, which reads: "That in all criminal cases, where the party indicted or complained of shall, on being arraigned, obstinately refuse to plead and be tried in due course of law, such standing mute shall be adjudged to amount to, and be, a proper traverse or denial of the facts charged in the indictment or complaint, and the trial shall thereupon proceed in like manner, and the same judgment shall be given against the said party, if found guilty, as if he, she, or they had, on being arraigned, duly plead, and in proper form respectively put themselves on their trial." Statute of 1787, p. 104. This statute, without material change, has hitherto thus remained. P. S. 2264. By statute of 1797, c. 9, § 37, it is provided: "That every person indicted for any crime mentioned in this act, who shall have duly pleaded to the indictment found against him, and put himself on the country for trial, shall be permitted peremptorily to challenge six of the jurors, and as great a number further, as he or she can show good cause for challenging."

The law of section 2274 of the Public Statutes is in substance the same, though the form of the verb is changed from the present

perfect to the present tense. These provisions of our statutes, like the federal statute, clearly contemplate and require that the respondent shall plead to the information or the indictment, or, in a case proper therefor, that a plea be entered for him, before the trial commences; that is, before the work of impaneling the jury begins.

In the case at bar, this was not done. The respondent was not called upon to plead, and he did not plead, to the information at any time before the trial. It follows that there was no issue legally before the jury, and that the proceedings had did not conform to due process of law. Peculiarly applicable here is the principle declared in the Hopt Case, and reaffirmed in the Crain Case: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

[2] Clearly the record showing a plea of not guilty by the respondent was incorrect, and the refusal by the trial court to order the same corrected by amendment, on respondent's motion, was an abuse of discretion which will be revised in this court. With the record so amended, the verdict is erroneous, and the motion to set it aside, and for a new trial, should have been granted.

The defects in the information urged under the motion in arrest of judgment, if defects they are, can be easily remedied by amendments on remand of the case.

Judgment reversed, and cause remanded.

IN RE RHODES' ESTATES.

Appeal of SMITH.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. APPEAL AND ERROR (§ 704*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where assignments of error complain of rulings of the orphans' court on requests for findings of fact and conclusions of law, but the record fails to show the submission of any such requests, or rulings thereon, or exceptions to the rulings, the assignments will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2939-2941; Dec. Dig. § 704.*]

2. HUSBAND AND WIFE (§ 14*)—CONVEYANCES TO HUSBAND AND WIFE—ESTATE BY ENTIRETIES.

Where a father conveys premises to his daughter and her husband, and acknowledges to have received of them \$6,000, of which \$3,700 is stated as representing the daughter's share in the father's estate, the grantees take an estate in entireties, and, in case of the daughter's death before her husband's, he takes the premises in fee simple.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 73, 74; Dec. Dig. § 14.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. HUSBAND AND WIFE (§ 14*)—CONVEYANCES TO HUSBAND AND WIFE—"ESTATE BY ENTIRETIES."

An "estate by entireties" is one held by husband and wife by virtue of title acquired by them jointly after marriage.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 73, 74; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 3, p. 2414.]

Appeal from Orphans' Court, Blair County.

In the matter of the estates of Nancy Rhodes and Hugh D. Rhodes, deceased. From a decree vacating the appointment of David W. Smith as trustee to sell the real estate of Nancy Rhodes, he appeals. Affirmed.

Petition to restrain trustee from selling an interest in real estate and to vacate appointment proceedings, assimilated to equity procedure under act of May 19, 1874 (P. L. 206).

In addition to the facts stated in the opinion of the Supreme Court, it appeared that Nancy Rhodes died intestate on January 12, 1901, and that Hugh D. Rhodes, her husband, died on March 1, 1907, leaving a will by which he bequeathed his estate to his next of kin. After the death of Hugh D. Rhodes, the next of kin of Nancy Rhodes petitioned the court for the appointment of a trustee to sell the interest of Nancy Rhodes in the lands in question. David W. Smith was thereupon appointed such trustee. Subsequently, upon the application of the executors of Hugh D. Rhodes, the court vacated the decree appointing the trustee, and decreed that the land in question belonged wholly to Hugh D. Rhodes at the time of his death.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. I. Woodcock, for appellant. J. Lee Plummer, for appellee.

POTTER, J. [1] Of twelve specifications of error filed by counsel for appellant, only one has any basis in the record. Eleven of the specifications complain of various rulings of the court below upon alleged requests for findings of fact and conclusions of law. But the record does not show that any such requests were submitted to the court, or that there were any rulings upon them, or any exceptions to any rulings. These specifications will not therefore be considered.

[2] The only exception shown on the record is to the final decree, and this is made the subject of the eleventh assignment of error, and raises the material question involved in this appeal; that is, as to whether the words of a certain devise or grant of real estate gave a title by entireties or as tenants in common. By his deed executed and delivered on April 7, 1883, Jacob B. Smith conveyed certain premises therein described to

his daughter "Nancy Rhodes and her husband Hugh D. Rhodes." In the receipt the grantor acknowledges to have received "of the above-named Nancy Rhodes and her husband Hugh D. Rhodes, the sum of \$6,000 (in which \$3,703.21 being her interest in said estate) lawful money of the United States, being the consideration money above mentioned in full." The court below found that this conveyance was made as part of a plan by which Jacob Smith made division of a large portion of his property among his children prior to his death. The learned court further found: "There is nothing upon the face of the deed which indicates that Hugh D. Rhodes was to have but a life interest, and we are of the opinion that the testimony taken in connection with the deeds that were offered in evidence is not sufficient to show that the intent existed between the parties to take otherwise than according to the legal presumption. The deed on its face acknowledges that the grantees paid the sum of \$6,000, and that \$3,703.21 was paid by Nancy Rhodes. The testimony of Mr. Hoover supports the contention, which is not seriously disputed by the petitioners, that \$2,300 was paid by Hugh D. Rhodes. We have therefore a conveyance made to a husband and his wife, each contributing a portion of the purchase money, the wife dying prior to the husband. Under these conditions what estate vested in the husband at her death?" He answered the question by holding that the deed conveyed an estate by entireties, and that upon the death of the wife the husband, as survivor, took the fee simple. With this conclusion we quite agree. The facts of this case bring it squarely within the definition of an estate by entireties.

[3] The estate vested in Nancy Rhodes and Hugh D. Rhodes when they were husband and wife. In *Bramberry's Estate*, 156 Pa. 628, 632, 27 Atl. 405, 407 (22 L. R. A. 594, 36 Am. St. Rep. 64), it is said: "A tenancy by entireties arises whenever an estate vests in two persons, they being when it so vests husband and wife." The title was acquired by them jointly after marriage. This fits the definition in *Alles v. Lyon*, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791: "An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage." The historical background of the doctrine of estates by entireties and its present status in Pennsylvania is shown in a clear and concise opinion by Judge Henderson in *Hoover v. Potter*, 42 Pa. Super. Ct. 21. It is true that the law looks at the character of the transaction as well as at the form of conveyance. If the deed be made merely in partition of land in which either husband or wife had already acquired

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

a vested interest, it is in such case merely substituting a divided share for an undivided one. See *Stehman v. Huber*, 21 Pa. 260; *Taylor v. Birmingham*, 29 Pa. 306. In *Dexter v. Billings*, 110 Pa. 135, 141, 1 Atl. 180, 183, it was held, as set forth in the syllabus, that a deed by a brother to his sister and her husband jointly for her interest in her father's real estate would not divest her title as beneficial owner of the whole share, unless it was shown affirmatively that she intended to make to her husband a gift of a joint interest. Mr. Justice Sterrett said: "If the transaction was in fact an amicable partition and the deed for the wife's purport had been made to her husband alone, he would not have thereby become the beneficial owner of the land. He would have held the title for her and not for himself." But in these cases the wife or husband had an undivided interest in the land before the partition; and the conveyance only separated that interest and conveyed no new estate. In the present case Nancy Rhodes had no estate in the premises prior to the execution of the deed from her father to her and to her husband. The intention may be made clear in a deed that the grantees, even though husband and wife, are to take estates in severalty. In illustration of this distinction, see the discussion in the opinion in *Young's Estate*, 166 Pa. 645, 31 Atl. 373. Another case in which the intention not to create an estate by entireties was apparent was that of *Bedford Lodge I. O. O. F.*, No. 202, v. *Lentz*, 194 Pa. 399, 45 Atl. 378. The deed there was to husband and wife, but the language of the habendum shows that they were intended to take different estates. No such intention appears in the case now before us. The father evidently intended to convey the lands described to his daughter and her husband jointly for the consideration of \$6,000, of which sum there was paid by the husband \$2,300 in round numbers, and the balance was intended to represent the amount of his daughter's interest in his estate. Under the terms by which the estate was created, if the husband had predeceased his wife, she would have taken the whole of the estate. But, as the husband survived, he took the estate in fee simple. We think the conclusion reached by the learned judge of the court below was correct.

The decree is affirmed.

ECKELS et al. v. WEIBLEY et al.
(Supreme Court of Pennsylvania. July 6, 1911.)

1. NUISANCE (§ 23*)—SUBJECTS OF RELIEF.

Where the court finds that defendants were about to engage in the horse and cattle business in an exclusively residential section of a

borough which was not yet compactly built up; that they had erected a large shed and proposed to erect a large barn; that the capacity of the proposed yard would be for from 40 to 50 head of cattle and 30 to 35 head of horses; that defendants planned to deal in western cattle and horses to be delivered to them by rail, necessitating a practically constant driving of cattle and horses in and out of the yard and along the streets; that they intended to hold occasional public sales and exhibits on the street; that such operations would result in the breeding of great quantities of flies, would engender noxious odors and occasion disturbance and noise, and render the enjoyment of plaintiff's property uncomfortable and detrimental to health; that such use was an unreasonable use, and the use of the particular property was selected for the sole reason that it was near the residences of defendants, and the business could be conveniently conducted by them—it is proper to issue an injunction restraining the threatened nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 55-59; Dec. Dig. § 23.*]

2. NUISANCE (§ 23*)—ACTUAL OR THREATENED INJURY.

Though an injunction will not issue to allay mere fears, yet if there is reasonable ground to apprehend the establishment of a nuisance by defendant which he has power to commit, which nuisance will be reasonably certain to impair the health and comfort of those complaining, an injunction will issue.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 55-59; Dec. Dig. § 23.*]

Appeal from Court of Common Pleas, Cumberland County.

Bill in equity by Mervin Eckels and others against Walter Weibley and another to restrain a threatened nuisance. From a decree granting the injunction, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

Conrad Hambleton, Jasper Alexander, and John W. Wetzel, for appellants. Paul Willis and F. B. Sellers, Jr., for appellees.

BROWN, J. [1] The injunction appealed from followed findings by the court below that the defendants were about to engage in the horse and cattle business in an exclusively residential section of the borough of Carlisle, but not yet compactly built up; that for the purpose of doing so they had erected on a lot owned by them a shed 140 feet in length and 14 feet wide, and were about to build a barn in connection with it 60 feet long and 40 feet wide; that the capacity of the proposed stockyard would be for from 40 to 50 head of cattle and for from 30 to 35 head of horses; that the defendants proposed to deal in western cattle and horses, to be delivered to them by rail, and such delivery would necessitate a practically constant driving of both cattle and horses in and out of the yard and over the public streets of the borough; that they proposed to occasionally hold public sales of cattle and horses on their premises and to exhibit and sell them on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Graham street, on which their yard fronted; that the operation of the yard as proposed by the defendants would result in the breeding of great quantities of flies, would engender noxious odors and occasion disturbance and noise, would render the enjoyment of the plaintiffs' property uncomfortable, and be detrimental to their health; that the use of their property by the defendants for the large business which they proposed to carry on in the sale and exchange of cattle and horses was an unreasonable use of it, and it was selected by them for the purpose of carrying on their business for the sole reason that it was near their residences, and their business could, therefore, be more conveniently conducted by them at that point. The argument of counsel for appellants, in pressing for a reversal of the decree, is largely directed to an effort to show that the foregoing facts ought not to have been found. After a review of all the testimony, we have not been convinced that error was committed in any of the findings complained of. There was testimony in support of all of them, and it was for the court below to weigh the evidence and to determine what facts had been established by it. This the learned trial judge did, and his eighteenth finding of fact is that he had arrived "at the clear and certain conclusion, from all the evidence in the case, that the operation of the proposed yard would work irreparable injury to the complainants by rendering their homes uncomfortable and endangering their health."

[2] The second complaint of the appellants is that the injunction was issued before the existence of a nuisance maintained by them had been established as a fact by a trial at law. At the time the bill was filed no injury had been sustained by the appellees. Nothing had been done by the appellants for which an action at law could have been brought. Actual irreparable damages, actual depreciation of property, did not exist. It was to prevent these consequences and the perpetration of a wrong, for which no adequate remedy existed at law, that this proceeding was properly instituted. *Wier's Appeal*, 74 Pa. 230; *Joyce on Nuisances*, § 419; *High on Injunctions* (3d Ed.) § 23. To sustain the appellants' contention would be to disallow the remedy of injunction in cases where a nuisance had not already been set up, but is merely threatened. While it is true that an injunction will not issue to allay mere fears and apprehension, nevertheless, if it be shown that there is reasonable and just ground to apprehend the establishment of a nuisance, threatened by a defendant and which he has power to commit, and it is reasonably certain that the health and comfort of those complaining will be impaired by the threatened act, the writ will go out. No remedy in an action at law would be adequate in such a case. To hold that such a nuisance as the

court below found would follow from what the appellants proposed to do could not be prevented in advance of its actual existence would be but little better than a mockery of justice to those to be affected by it. *Wahle v. Reinbach*, 76 Ill. 322. "The reasons for preventing a prospective mischief are at least as cogent as those for abating a present one. In the latter instance the courts act more readily because they are sure of their ground. The evil is visible. But the call for protection against an apprehended injury, reasonably certain to befall, is as imperative as that for relief from one now felt. Nor is the complainant required to wait until some harm has been experienced or to show with absolute certainty it will occur. One requirement would make the remedy largely useless and the other impracticable. *Miley v. O'Hearn* (Ky.) 18 S. W. 529. While perhaps proof that it is inevitable or will necessarily ensue may be properly demanded, when nothing more than discomfort is anticipated, when danger to health or life is threatened, a reasonable certainty is enough, *Wood on Nuisances*, § 100. A party does not have to stand by until his family have sickened or died." *Holke v. Herman*, 87 Mo. App. 125.

The assignments of error are overruled, and the decree is affirmed, at appellants' costs.

PENNSYLVANIA R. CO. v. KEALLY.

(Supreme Court of Pennsylvania. July 6, 1911.)

CARRIERS (§ 196*)—CARRIAGE OF GOODS—CHARGES—DEMURRAGE.

An affidavit of defense, in an action to recover demurrage charges for the detention of cars, which alleges that defendant was not in fault as respected the detention of any of the cars, that he wished to unload them within the free time allowed, but was prevented from doing so by the railroad company, stating the causes which brought about such prevention, is sufficient, though the statement of claim gives specific information as to the detention of each car, and the charges therefor; it not being necessary for the affidavit of defendant to specify in detail the facts respecting the detention of each of the cars.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 196.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of assumpsit by the Pennsylvania Railroad Company against Charles L. Keally, Sr., doing business as Charles L. Keally, Sr., & Co. From an order discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The following opinion of Carnahan, J., states the case:

"The plaintiff company, being a corporation of the state of Pennsylvania, and engaged as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a common carrier in the business of transporting goods and merchandise, transported certain car loads of goods consigned from points beyond the state of Pennsylvania to the city of Pittsburg, and in its statement claims that it delivered the same to the defendant on the plaintiff's public sidings at the Pennsylvania line's produce yards in Pittsburg; the defendant having procured the said shipments to be consigned and shipped to him by the respective consignors. On the arrival of these cars, from time to time, at the produce yard, which was the place of delivery, as claimed by the plaintiff, the defendant was given due notice.

"The plaintiff company has had continuously from June 1, 1903, in effect a system of storage charges applicable to cars containing goods of consignees delivered at this produce yard. A schedule showing these charges was duly filed with the Interstate Commerce Commission, according to which it appears that for each car, not unloaded within 48 hours from the time it is placed in position for unloading (Sundays and legal holidays excluded), no charge is made; for the next succeeding two days, there is a charge of \$1 per car per day, or fraction thereof; for the next succeeding two days, there is a charge of \$3 per car per day, or fraction thereof; and for each succeeding day, there is a charge of \$4 per car per day, or fraction thereof. In addition to these charges, there are the usual car service charges.

"For cars consigned to the defendant, and delivered to him at this produce yard, and not unloaded within the time allowed by the rules of the plaintiff company, the plaintiff claims of the defendant the sum of \$1,566, with interest, and attaches to its statement two exhibits; the one showing the dates of the placing of the cars, the initials and numbers thereof, the time when each car was unloaded, the time of detention of each car after the expiration of the free time of 48 hours, and the amount of the charges therefor in accordance with its schedule of charges; and the other showing the schedule of charges as filed with the Interstate Commerce Commission. Bills for these amounts having been rendered to the defendant from time to time, and payment thereof having been refused, the plaintiff brings suit to recover the same, with interest.

"The defendant has filed three affidavits of defense. Briefly stated, he claims that he has paid to the plaintiff \$1 per day for each car unloaded and remaining in the yards beyond the free time of delivery, as provided by an act of assembly of the commonwealth of Pennsylvania, approved May 24, 1907 (P. L. 229), and that these additional charges are illegal, unjust, unreasonable, discriminatory, and in violation of the act of Congress approved February 4, 1887, c. 104, 24 Stat. at Large, 379 (U. S. Comp. St. 1901, p. 3154), entitled, 'An act to regulate commerce,' and its supplements; that the charges

claimed are not embraced within the interstate commerce act, but are subject to the statute of Pennsylvania; that it was the duty of the plaintiff to furnish sufficient facilities to enable the defendant to remove his produce from the cars within the free time allowed under the schedule of rates so fixed; that it failed to provide such facilities, the effect of which was to prevent defendant from unloading his cars within the free time allowed; that had such facilities been afforded he would have been able to remove his goods from the cars within the 48 hours allowed; that in the produce yards the tracks were not sufficient in size, nor did said yards contain sufficient trackage, to enable defendant to unload the cars and remove the contents in time to escape the additional charges for storage; 'that through the said yards there is located a lead track of the plaintiff company upon which the shifting and hauling of other freight and produce often delays and prevents the switching of the produce cars from the lead track to the sidings in the yard, which delay prevented the defendant in this case from crossing the lead track, in order to get to the cars that contained his produce on the other side of the said lead track;' that all of these charges were made by the plaintiff 'as the proprietor of a public fruit and vegetable market, using its tracks and yards as a public market place for that purpose, under an arrangement with a few produce yard merchants to which affiant was not a party, whereby said merchants could, upon payment therefore, hold said cars at their pleasure, thus gaining for itself and the few with whom it arranged a monopoly of the produce business, to the detriment of all other shippers and consignees. In many instances, cars were held from 10 to 30 days. This unlawful practice resulted in a congestion of the yards at the time complained of to such an extent that defendant was unable to unload his cars, which he otherwise could have done within the free time.'

"The plaintiff entered a rule on defendant for judgment for want of sufficient affidavit of defense, and on July 7, 1909, this rule was argued, and the same was discharged, without, however, an opinion being filed.

"In making the order discharging the rule from judgment, this court considered for the purpose of the case, as it then was presented, that the charges were legal, reasonable, not discriminatory, and were not within the prohibitions of the act of the commonwealth of Pennsylvania, approved May 24, 1907 (P. L. 229); the business being interstate commerce. In the various affidavits of defense, it appears that the defendant claims that the delays for which these charges are made were occasioned by the plaintiff itself. In other words, the defendant claims that it was impossible for him to comply with the rules of the company, and unload within the free time allowed, because of the obstructions plac-

ed in his way by the plaintiff company itself. If the defendant is able to prove that such was the fact, the plaintiff would not be entitled to recover. We do not overlook the fact that the plaintiff in its statement gives specific information as to the detention of each car, and the charges therefor; but we do not consider that it is necessary for the defendant in his affidavits of defense to specify in detail the facts respecting the detention of each of these cars. It is sufficient to aver that he was not in fault as respects the detention of any of said cars, and that he desired to unload them within the free time allowed, and he was prevented from doing so by the plaintiff itself, stating the reasons and causes which brought the prevention. The defendant, in our judgment, having averred sufficient to enable him to go to trial, we were of course constrained to refuse the rule for judgment, and therefore discharged it."

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

George Stuart Patterson, James R. Miller, and Patterson, Sterrett & Acheson, for appellant. W. A. Stone and L. K. & S. G. Porter, for appellee.

PER CURIAM. The order discharging the rule for want of a sufficient affidavit of defense is affirmed on the opinion of Judge Carnahan.

PHILLIPS v. KLEINMAN et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

BANKRUPTCY (§ 179*)—ADMINISTRATION OF ESTATE—ACTION TO SET ASIDE CONVEYANCE.

Where a trustee of a bankrupt brings a bill in equity against the bankrupt's wife to set aside a deed as a fraud on creditors, and the evidence shows that the land was bought for \$4,000 from the parents of the husband, that 2,000 thereof was paid by the wife's father, who took a mortgage for that amount, and the balance was secured by a mortgage to the husband's mother, that the title was taken temporarily in the husband's name, with an agreement to convey to his wife, that subsequently the wife's father voluntarily satisfied his mortgage, and on his death left her \$2,000, which she gave to her husband, he having previously paid off the mortgage to his mother, the evidence requires a finding that the husband held the title as trustee for his wife, and had properly executed the trust by a conveyance to her; his insolvency under such circumstances being immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 179.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Ferd H. Phillips, trustee of Edward Clarence Kleinman, bankrupt, against Emma Kleinman and others, to have a conveyance of real estate set aside as in fraud of creditors. From a decree for plain-

tiff, defendants Emma Kleinman and another separately appeal. Reversed, and bill dismissed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. A. Stone and Wilson & Evans, for appellants. Frederic Walsingham Miller, for appellee.

BROWN, J. On March 29, 1906, Edward C. Kleinman conveyed to his wife, Emma Kleinman, 3½ acres of land situated on Neville Island, Allegheny county. Two years and nine months afterwards he filed his petition in the United States Court to be adjudged a voluntary bankrupt, and, in the following July, his trustee in bankruptcy filed a bill in the court below to set aside his conveyance to his wife, on the ground that it was made for the purpose of hindering, delaying, and defrauding creditors, and was therefore void under the statute of 13 Elizabeth. The main defense of the wife was that the beneficial interest in the land conveyed to her had never been in her husband, but was in her by way of a resulting trust. She and her husband have appealed from the decree that there had not been a resulting trust for her, and that the conveyance was in fraud of his creditors.

Certain facts were found by the learned chancellor below, which go to support the wife's claim that the husband had held title as trustee for her, and we shall first notice them. Edward C. Kleinman was married, on September 6, 1881, to Emma Pluchel, a daughter of John Pluchel, who at that time resided in the state of Ohio. In the fall of 1887, he came to Allegheny county to assist in the purchase of a tract of land from Hubert and Eliece Kleinman, the parents of Edward. They agreed to sell 10 acres for the consideration of \$4,000. Pluchel had with him \$2,000 in gold, and, at an interview at which he, Hubert Kleinman, his wife, Edward C. Kleinman, and his wife were present, a dispute arose as to how the title to the property should be made. Kleinman, the father, refused to sell, unless the deed was made to his son. Pluchel and his daughter insisted that the deed should be made to her, and it was finally agreed that the title should be taken in the name of Edward C. Kleinman, and no definite agreement was made that the title should ever be placed in Emma Kleinman, or that the beneficial interest in the land was hers at the inception of the title. A deed from Hubert Kleinman and his wife was executed and delivered on September 5, 1887, to Edward C. Kleinman, upon the payment of \$2,000 in cash by John Pluchel and the execution of a mortgage by the grantee to his mother for \$2,000, the balance of the purchase money. It did not appear how much interest, if any, Pluchel ever

received upon his mortgage. On December 31, 1894, he voluntarily executed a paper, acknowledging satisfaction of it, which he mailed to his daughter, Emma Kleinman, and she handed it over to her husband, who had it duly recorded in the recorder's office of the county. Pluchel died November 11, 1901, having by his will made the following provision for his daughter: "Fourth: To my daughter, Emma, intermarried with Edward Kleinman, in addition to the two thousand dollars I already advanced to her, I give, devise and bequeath to her and her lineal heirs the sum of two thousand dollars payable upon the death of my said wife, and she is to receive no more from my estate." On April 7, 1904, William Pluchel, executor of the will of John Pluchel, paid Emma Kleinman the \$2,000 given her by the foregoing bequest, and two days later she deposited it to her credit in a trust company. On the 27th of the next month, she paid this sum to her husband by her check of that date. The mortgage which Edward C. Kleinman gave to his mother be paid prior to the time he received the \$2,000 from his wife. Shortly after the purchase of the land, Emma Kleinman asked her husband to convey it to her, in accordance, as she alleged, with his agreement to do so, and she thereafter made the same request very frequently, but he as often did not do so. All of the foregoing facts were found by the learned chancellor below upon the testimony of the appellants, whom he must have regarded as credible witnesses. He failed, however, to find other most important facts supported by their uncontradicted testimony. As they were credible witnesses, with circumstances tending to corroborate their testimony, there ought to have been the following further findings: Some time prior to September, 1887, during a visit of Emma Kleinman to her father in Ohio, he said to her: "If you can find a place down there, I'll help you to buy it; I'll buy it for you. I think it would be a good investment for you." Subsequently E. C. Kleinman saw his father and mother, and they agreed to sell the 10 acres of land for \$4,000. John Pluchel then came on to Neville Island, and paid the \$2,000 on account of the purchase money. When the father of Edward said he would not sell, unless the title was put in his son's name, Pluchel replied that, as he was going to pay for the property, he did not propose to have the title put in the name of his son-in-law, and wanted it in the name of his daughter. The daughter said to her husband: "Now, my father is bringing the money, and is going to pay for this property. Why don't you get your father to consent to have that in my name?" To which he replied: "Now, here is a good chance for us to get some property. Let's try to get them to fix it up so as to put the title in me temporarily, and I will transfer it back to you later." When the title was put in his son's name, Pluchel insisted upon taking a mort-

gage for \$2,000 to protect his daughter's interest. When he sent her the power of attorney to satisfy the mortgage, he wrote that he had better satisfy it, as, if anything would happen to him, she might have to pay it, with interest. At the time the title was made to Edward C. Kleinman, he agreed with her that she should get the property back at any time she demanded it; that he would deed it to her at any time; and when she gave him the \$2,000, which she received under her father's will, she said to him, "Here is the balance of the \$4,000."

It is clear to us that the court below should have found that the husband held the deed in trust for his wife. It did not find that there had been no agreement that the title was in her, or that the beneficial interest in the land was hers at the inception of the title. The finding is merely that there was no such definite agreement. In the face of the testimony, the finding ought to have been that there was such a definite agreement, and we now so find. The wife paid with her own moneys, obtained from her father and her father's estate, the entire amount of the purchase money. Her father first paid \$2,000 directly for her, and subsequently she handed over to her husband the \$2,000 which she received from her father's estate, saying to him at the time she did so, "Here is the balance of the \$4,000." In answer to the contention that, as the testimony of the husband and wife was uncontradicted, it ought to be taken as true, the first reason given by the court below for not agreeing to this was that, while it was not contradicted by any witnesses, it was contradicted by the facts in the case, because it was in conflict with the deed and bonds and mortgages which were executed and delivered at the time the purchase was consummated. It is well contended by the learned counsel for appellants that there never was a resulting trust about which almost as much might not be said. Such a trust arises only when the grantee named in the deed is not the real owner of the property. Other findings of fact—with which we need not burden this opinion—were regarded by the court below as at variance with the claim that the husband had held the land in trust for his wife. What he did with other portions of the 10 acres, with her consent, was entirely consistent with her claim that he held title for her, and it is sufficient to say that no fact or circumstance found by the court below was inconsistent with that claim. As we are of opinion that the facts found, and which ought to have been found on the uncontradicted testimony in the case, clearly established a resulting trust, it is immaterial to consider the question of the husband's insolvency at the time he executed the trust by making the conveyance to his wife. If he was trustee, he could execute the trust, whether solvent or insolvent.

The decree of the court below is reversed, and the bill dismissed, with costs.

PHILLIPS v. KLEINMAN et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Ferd H. Phillips, trustee of Edward Clarence Kleinman, bankrupt, against Emma Kleinman and others. From the decree, plaintiff appeals. Appeal dismissed.

Argued before FELL, C. J., and BROWN, BLKIN, STEWART, and MOSCHZISKER, JJ.

Stone & Stone and Wilson & Evans, for appellant. Frederic Walsingham Miller, for appellees.

BROWN, J. The dismissal of this appeal follows the reversal of the decree. Appeal dismissed at appellant's costs.

RICK v. NEW YORK, C. & ST. L. R. CO.
(Supreme Court of Pennsylvania. July 6, 1911.)**1. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Where defendant railroad company issued a bill of lading for bar iron, loaded on a car on tracks of another railroad at the point of shipment, and collected the freight for shipping the iron to a point 82 miles distant, of which 80 miles was over defendant's road, and received the car at a junction, where after inspection it was returned for a defect in the draught bolts, and a few days later it was again delivered, inspected, and accepted, and hauled to another junction, where it was again jointly inspected by defendant and a third company, and afterwards hauled by the latter to its destination, and on the day after delivery to the consignee the plaintiff, an employé of the consignee, while helping to unload the car, was hurt by slipping on an insufficient covering of a hole chopped in the floor of the car, which was covered with iron, except the space around the hole, and nothing had been done to the car while in the possession of the third company and there was no evidence that there was any change in the position of the iron from the time it was loaded until it was unloaded, an instruction that there was no evidence that inspection of the car was made by an incompetent inspector, or that the defendant was negligent in the inspection, or in its employment of an incompetent inspector, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252.*]

2. PLEADING (§ 248*) — AMENDMENT — NEW CAUSE OF ACTION.

In an action for injuries from the use by defendant of a defective car, which was described in plaintiff's statement as "P. & L. E. R. R. Car, No. 2365," an amendment, describing the car as "P. B. & L. E. R. R. Car No. 2365 or P. & L. E. R. R. Car No. 2365," was properly allowed, since it did not state a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 696; Dec. Dig. § 248.*]

3. RAILROADS (§ 270*)—OPERATION—INJURIES TO LICENSEES—COMPANIES LIABLE—PRESUMPTIONS.

Where a railroad company acknowledges the receipt of iron to be carried on a particular car, and is required by its contract to take the consignment, it must be assumed, in the

absence of evidence to the contrary, that it did so by the car in which the iron was loaded and taken to its destination; and the fact that another company, under a traffic arrangement, did the switching to place the car on defendant's track is not proof that it furnished the car, nor that defendant did not furnish it, and does not relieve defendant from the duty to have the car efficiently inspected and kept in repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 865; Dec. Dig. § 270.*]

Appeal from Court of Common Pleas, Erie County.

Action by T. J. Rick against the New York, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant presented certain points, which, with the answers of the court thereto, were as follows:

"(6) There is no evidence that the defendant was negligent in the inspection of the car upon which the plaintiff was injured. Answer: Refused.

"(7) There is no evidence that the inspection of the said car was made by an inspector who was incompetent, or that the defendant was negligent in its employment of an incompetent inspector or inspectors who made the inspection or inspections. Answer: Refused.

"(8) The proof as to the car upon which the plaintiff was injured does not agree with the allegations that the plaintiff's original statement show, in that said car was P. & L. E. car, No. 2365, and the amendment made to the statement does not cure the discrepancy; it having been subsequent to the date at which the right of action was barred by the statute of limitation. Answer: Refused.

"(9) If the jury finds that the car upon which the plaintiff was injured was a P., B. & L. E. car, No. 2365, the plaintiff cannot recover. Answer: Refused.

"(10) It having been shown that the car on which the plaintiff was injured was not furnished to the shipper of the iron by defendant company, the particular act of negligence charged against the defendant company has not been proven, and the plaintiff cannot recover. Answer: Refused."

Verdict for plaintiff for \$5,500. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

Frank Gunnison, Henry E. Fish, W. P. Gifford, and A. O. Chapin, for appellant. John B. Brooks, Paul A. Benson, and Charles H. English, for appellee.

MESTREZAT, J. [1] The first and second assignments allege the court erred in refusing to instruct the jury there was no evidence that the inspection of the car was made by an incompetent inspector, or that the defend-

ant was negligent in the inspection of the car, or in its employment of an incompetent inspector. The evidence shows that the defendant company issued a bill of lading for the bar iron loaded on the car at Cleveland, the place of shipment; that it collected the freight for transporting the iron to its destination at Girard, Pa., a distance of about 82 miles, of which 80 miles were over the defendant's road; that it received the car at Newburg, a suburb of Cleveland, hauled it over its line to Wallace Junction, where it was delivered to the Bessemer Company, which hauled it to Girard, and delivered it on the private track of the consignee. When the car was first received by the defendant company, it was inspected, and a defect in the draught bolts being discovered it was returned to the Erie Company. In a few days thereafter, it was again delivered to the defendant, inspected and accepted, and hauled to Girard. At Wallace Junction, the car was inspected by the chief joint car inspector of the defendant company and the Bessemer Company, and delivered to the latter company. No defects were reported by the inspector. The next day the car was delivered to the consignee, and on the following day the plaintiff, in the employ of the consignee, while assisting to unload the car, stepped on an insufficient covering of a hole chopped in the floor, and was seriously injured. The hole was about 10 inches wide and 20 inches long. The floor was covered with the iron, except the space around the hole in the "northeast corner of the car." A witness for the defendant testified that nothing was done to the car from the time it left Wallace Junction till it was delivered by the Bessemer Company on the private siding of the consignee, where the plaintiff was engaged in unloading it at the time he was injured. This and other evidence amply warranted the court in refusing the defendant's sixth and seventh points embraced in the first and second assignments of error. The evidence shows that the hole in the floor was negligently and insufficiently covered by a board one-fourth of an inch thick, which should have been two inches thick. The car was therefore in a defective and unsafe condition when it arrived at Girard. When was the hole chopped in the floor, and defectively repaired by placing the thin plank over it? This question need not be answered to convict the defendant of negligence. It was the duty of the defendant company to inspect the car, and if found defective to reject it. This duty was recognized, and the car was refused when it was first offered to the defendant at Cleveland. The defendant company was not required either to receive or haul the car over its line, if it was in a defective condition. The inspector was incompetent or negligent in the performance of his duties, or the defect would have been discovered, and the floor would have been repaired and put in a safe condition.

We do not agree with the defendant's argument that it is reasonable to suppose that at the time the first inspection was made the iron with which the car was loaded covered the hole, so that the defect could not have been discovered without unloading the iron. There is nothing in the evidence to warrant the conclusion that there was any change made in the position of the iron in the car from the time it was loaded at Cleveland until it was unloaded at Girard. It was then found that the floor of the whole south end of the car was covered with iron, and the floor of the north end, except the part around the hole. The evidence fails to disclose any reason or purpose for changing the position of the iron after it was placed in the car on September 13, 1907, until it arrived at its destination, September 28th, unless, as suggested by the plaintiff's counsel, it was for the purpose of gaining access to the floor to make the hole, in order to reach the gearing of the car. It was delivered to the Bessemer Company at Wallace Junction at 6:10 p. m. on September 27th. If there was any shifting of the iron in the car, the defendant should have shown the fact. It is entirely improbable that the Bessemer Company shifted the iron during the very short time the car was in its possession, and that it did not do so appears by the defendant's testimony, which shows that nothing was done to the car while it was in the Bessemer Company's possession, except to move it from the junction to its destination at Girard. It is therefore probable, and the jury was justified in finding, that the iron was never shifted, or that, if it was shifted in transit, it was done by the defendant company, which should have discovered the hole, even if it did not make the hole and attempt to repair it. This is a fair inference from the evidence. The defendant's sixth and seventh points were properly refused.

[2] In the plaintiff's statement, the car in which the iron was shipped is described as "P. & L. E. R. R. car No. 2365." The court permitted the plaintiff to amend the statement so as to describe the car as "P., B. & L. E. R. R. car No. 2365 or P. & L. E. car No. 2365." The third and fourth assignments in effect question the correctness of permitting the amendment. The number of the car is the same, and the only change made by the amendment was in the letters on the car. There was no change in the cause of action, which was the alleged use of the defective car. The amendment was made simply to meet the uncertainty of the letters on the car, and was properly allowed.

[3] By its bill of lading, issued to the Bourne-Fuller Company, sales agent of the Rolling Mill Company, the defendant acknowledged the receipt of the iron at Cleveland, to be carried on car 2365, and to be delivered to the Girard Wrench Manufacturing Company at Girard, Pa. The defendant does not have a switch leading into the Union

Rolling Mills at Cleveland, and by a traffic arrangement the Erie Company switches to the defendant's tracks any car that the Union Rolling Mills wish to send over the defendant's road. It is immaterial who owned the car in question. It was furnished for the purpose of carrying the iron which the defendant company, in consideration of the freight charges paid it for the entire distance, agreed with the consignor to transport from Cleveland to Girard. Its contract required it to take the iron loaded at the mills; and hence it must be assumed, in the absence of evidence to the contrary, that it did so by the use of the car in which the iron was loaded and transported to its destination. The fact that the Erie Company did the switching to place the car on the defendant's tracks does not prove that it furnished the car, or that the defendant company did not furnish it, or relieve the latter company from its duty to have the car efficiently inspected and kept in proper repair. The Erie Company had no contract with the Rolling Mills Company or its sales agent to carry the iron from Cleveland to Girard. That company simply switched the car from the mill to the track of the defendant company, which by its bill of lading agreed to transport the iron from Cleveland to its destination. The fifth assignment is not sustained.

The sixth, seventh, and eighth assignments of error depend upon the correctness of the position assumed by the appellant in the other assignments, and are therefore not sustained.

The judgment is affirmed.

EVANS v. LOOMIS et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. INDEMNITY (§ 8*)—CONSTRUCTION OF CONTRACT—SCOPE OF LIABILITY.

An indemnity bond, given by the purchaser of corporate stock to the sellers, who were sureties on a note of the corporation, conditioned that if the corporation or the purchaser of the stock should pay the note within two years, and save the sellers from all loss or damage from liability incurred by them as sureties, the obligation should be void, otherwise to remain in full force and virtue, though the sellers of the stock were subsequently released from their liability on the note, and other security was taken by the payee, was sufficient to create a double obligation on the part of the purchaser, first, to pay the note, if not paid by the corporation, and, next, to indemnify the sellers as sureties.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 8*]

2. INDEMNITY (§ 12*)—CONSTRUCTION OF CONTRACT—SCOPE OF LIABILITY.

Where the purchaser of corporate stock gave an indemnity bond to the sellers, who were sureties on a note of the corporation, to pay the note, if not paid by the corporation debtor, and to indemnify the sellers as sureties, the acceptance of a second note by the payee,

which had plainly written on its face, "This note is collateral for one of like amount now past due," did not affect the liability of the purchaser of the stock.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 27; Dec. Dig. § 12*]

Appeal from Court of Common Pleas, Erie County.

Scire facias sur mortgage by George W. Evans, trustee of S. M. Keith, against Marion E. Loomis and others. From an order awarding distribution of fund, defendants appeal. Affirmed.

The court below found the following facts: (1) The Erie Cork Works, the name of which was changed to Erie Rubber Works, was a corporation located at Erie, Pa. (2) Prior to December 19, 1905, George W. Evans and B. B. Brown were stockholders in said corporation, and on that day they sold their stock to the defendants, Marion E. Loomis and A. T. Loomis, her husband, or to one of them. (3) At that time said Evans and Brown were sureties for the Erie Cork Works on a \$2,000 note held by Miss Sarah Keith, and it was then agreed that they would remain liable thereon, or on any renewals thereof, for two years, in consideration of which, said Marion E. Loomis and her said husband gave a bond and mortgage to said George W. Evans, as trustee, in the penal sum of \$4,000, conditioned in substance that the said Erie Cork Works, or the obligors in said bond and mortgage, would pay the said \$2,000 note on or before the termination of said two years, and save harmless the said Evans and Brown. The bond and mortgage recited said note, and the agreement of Brown and Evans so to remain sureties thereon; and, further, "that the parties of the first part * * * stood bound unto the party of the second part in the sum of \$4,000, conditioned for the payment of \$2,000, interest and damages, in manner following, to wit: Whereas the Erie Cork Works, of Erie, Pa., is indebted to Miss Sarah Keith, of Girard, Pa., upon a certain note in the sum of two thousand dollars (\$2,000), with interest thereon from the date of said note; and whereas, aforesaid George W. Evans, together with B. B. Brown, both of the city of Erie, Pa., are liable as sureties on said note for a period of two years from the maturity of the same, or upon any renewal thereof for the same period or upon any obligation that it may be necessary for said Erie Cork Works to give for the purpose of raising money with which to pay said note, in the event that said Sarah Keith requires the same to be paid: Now, if the said Erie Cork Works or the parties of the first part hereto shall pay the said obligation or obligations on or before the termination of the said period of two years and shall save and keep harmless the said George W. Evans and the said B. B. Brown from any and all loss or damage resulting to them by

reason of the liability incurred by them as aforesaid, without fraud or further delay, then this obligation to be void and of none effect, or else to be and remain in full force and virtue." (4) Said cork works became bankrupt, and a distribution of its assets paid \$360.80 to apply on said debt as of September 1, 1909, and the balance remains unpaid. (5) On May 29, 1908, the holder of the \$2,000 note made the following indorsement thereon: "For value received I hereby release Geo. W. Evans and B. B. Brown from any responsibility on this note as indorser or maker of the same. Miss S. M. Keith." (6) The only consideration for the release was the assignment of the bond and mortgage. The note on which said release was written was never delivered to Evans or Brown, but has continued in the possession of Miss Keith. (7) On February 1, 1908, the Erie Rubber Works, as collateral to the said note of \$2,000, gave another note to Miss Keith, for a like amount, with William C. Kraemer as surety; "but that had nothing to do with the said release written afterwards on the [original] note, as above stated, or with the assignment to her of said bond and mortgage." (8) No actual consideration was paid by Evans or Brown to Miss Keith for the release to them, excepting the assignment of said bond and mortgage. (9) Brown and Evans were not indebted to Miss Keith in any sum whatever at the time the note was given to her by the cork works, but were only liable as indorsers on the note in question. (10) At the time the said note was given, Brown and Evans were not indebted to the cork works in any sum whatever, as principal debtors, but became liable as indorsers on the note for the accommodation of said corporation. (11) A. T. Loomis and Marion E. Loomis were not indebted to the Erie Cork Works in any sum whatever on December 19, 1905, the time of the execution of the bond and mortgage to George W. Evans, trustee. (12) No part of the note was ever paid, except the sum of \$360.80, which was paid by the receiver of the Erie Rubber Works as a final and only dividend from the assets of the corporation, which is insolvent and without further assets. The court ordered that the plaintiff should be paid the balance of the \$2,000 note, with interest thereon, out of the fund in court, and that the surplus of the fund, if any, was to be paid to the defendants.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

E. L. Whittelsey, for appellants. L. E. Torrey and Gunnison, Fish, Gifford & Chapin, for appellee.

MOSCHZISKER, J. [1] The defendants contend that the liability created by the bond and mortgage referred to in the findings of the court below was one of indemnity only,

to save and keep harmless Evans and Brown from any loss or damage by reason of their liability as sureties or indorsers on the note to the use plaintiff, Miss Keith; that when the indorsers were released by the payee of the note the condition of the bond and mortgage was fully satisfied, and there could be no recovery thereon; while the use plaintiff contends that the contract was not for the sole purpose of indemnifying the indorsers, but that it was also for the purpose of making the obligors and mortgagors liable to pay the note; that the obligation to pay the note, and the obligation to indemnify the indorsers, were separate and independent conditions or covenants; and that the first could not be satisfied or affected by the release of the other. The court below decided in favor of the plaintiff, and we see no error in the result reached.

The contract recites the note of the cork works to Miss Keith, and that Evans and Brown were liable as sureties thereon; it provides: "Now, if the said Erie Cork Works, or the parties of the first part hereto [the defendants Loomis] shall pay the said obligation * * * [the note in question] and shall save and keep harmless the said George W. Evans and B. B. Brown from any and all loss or damage resulting to them by reason of the liability incurred by them, * * * then this obligation to be void, * * * or else to be and remain in full force and virtue." The language used is sufficient to create a double obligation, first, to pay the note, if not paid by the corporation debtor, and, next, to indemnify the indorsers on the note.

The fact that the defendant's obligation was given to a trustee, and not directly to the indorsers, lends force to the thought that it was intended to create such a double liability; otherwise there was no necessity for the use of a trustee. When called as a witness for the defense, Evans testified: "I was instrumental in getting the money from her [Miss Keith], and I did not want her to blame me." He and Brown (the indorsers on the note) had been large stockholders in the cork works, and when they sold their stock to the defendants Loomis, they were anxious, apparently, not only to protect their own interests so far as the obligation of the corporation upon which they were sureties was concerned, but they also desired at the same time to take care of and fully protect the interest of Miss Keith. It is easy to believe that the obligation then exacted from the defendants was made and entered into with this double object in view. Presumably, if the defendants Loomis had not undertaken to pay this debt of the cork works, upon which Evans and Brown were liable, the latter would have liquidated the obligation, added that much to the value of the works, and charged the defendants for their stock accordingly, so the latter were in no manner prejudiced by the assignment of the mort-

gage to Miss Keith, or by the release given to Evans and Brown.

The desire to carry out this thought of protecting Miss Keith was recognized by the trustee named in the contract up to the time of the acquittance of Evans and Brown. He testified that he assigned the bond and mortgage over to Miss Keith as security to her when she gave the release, and that their transfer was the only consideration for the release known to him. Since the bond and mortgage were given to the trustee and "his assigns," he had the legal right to assign them to the use plaintiff, and since the words used therein indicated that one of the purposes was to secure the payment of the note, Miss Keith had the right to assume that she could safely accept them from the indorsers as a substitute for their liability. The defendants did not offer any facts surrounding the creation of the bond and mortgage which would tend to indicate that it was not their intention to become responsible for the payment of the note to Miss Keith, if called upon. On the whole, we conclude that the court below fell into no error in holding that the obligation of the defendants was not simply to indemnify the indorsers, but was also to pay the debt to the holder of the note.

[2] The other note given by the corporation to Miss Keith, and indorsed by one Kraemer, referred to in the seventh finding of the court below, has plainly written upon its face, "This note is collateral for one of like amount now past due;" the reference being to the note upon which Evans and Brown were indorsers. A party may hold more than one collateral for the same debt. Under the circumstances, we cannot say that there was error in the conclusion that the acceptance of this note by the use plaintiff did not affect the question of the liability of the defendants.

We have discussed all the points suggested in the statement of the question involved, and necessary to the determination of this case. The assignments of error which comprehend these points are overruled; all others are dismissed; and the order of the court below is affirmed, at the cost of the appellant.

ZURAW v. HAMMERMILL PAPER CO.
(Supreme Court of Pennsylvania. July 6, 1911.)

MASTER AND SERVANT (§ 238*)—INJURY TO SERVANT—MANIFEST DANGER—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant, nonsuit held properly directed on evidence that plaintiff, having a safe place in which to work, voluntarily took an unsafe position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

Appeal from Court of Common Pleas, Erie County.

Action by Martin Zuraw, by his next friend, John Maras, against the Hammermill Paper Company. From an order refusing to take off compulsory nonsuit, plaintiff appeals. Affirmed.

The facts were as follows:

"Plaintiff was employed by defendant as one of a gang of men, engaged in unloading pulpwood from flat cars into a shed at defendant's plant. He worked nights, and at the time of the accident the men had unloaded one car and pushed it out, and were pushing a loaded car in, when plaintiff's foot was caught under a car wheel, and crushed. The witnesses spoke through an interpreter, and the facts were not perfectly developed.

"There was no faulty construction; the building or shed, where the wood was unloaded, was all right, and so was the track and the car; and the place was lighted by electricity. The car, when in place to be unloaded, came close to the shed, and in throwing off the wood pieces of bark and wood would drop down between the car and the shed, and from time to time were cleared up by the workmen, perhaps under the direction of the foreman. When the said loaded car was being pushed in, there was some such rubbish lying in there, and plaintiff claims to have stepped on it, and slipped under the wheel.

"Plaintiff was over 17 years old, and had been working at the same work and same place for 2½ months. He had helped to push out and in and unload over 100 cars, and knew about such rubbish accumulating there, and could have seen it, had he looked. Plaintiff, when hurt, was around in front of the car, and on the side next to the shed. In fact, he was in between the front end of the car and the shed. He was not in sight of the boss, and was not told by any one to go in where he was.

"The men were directed to push the car in, but he was not where he could assist much of any to that end. Manifestly the men should have kept to the rear of the car or on the outside, and not between it and the shed. The immediate work was pushing the car, and plaintiff had a safe place to assist at that, either in the rear or on the outside; and the defendant was not bound to anticipate that plaintiff would voluntarily put himself in a dangerous place between the car and shed, when the car was in motion, and, having a safe place in which to work, the defendant is not liable because plaintiff voluntarily took an unsafe place.

"The very narrow space between the shed and car was not a fit place to walk, even when free from rubbish; and there is nothing to show it was intended or suffered by defendant to be used for that purpose. And when the car was in position to be unloaded the bark and other rubbish between it and

the shed added nothing to the danger of the workmen engaged in transferring wood from the car to the shed. The rubbish was cleaned up from time to time, so as not to obstruct the track.

"I see no particular instruction that a young man would need in the work of throwing wood from a flat car into a shed, or in pushing a car. It was certainly not necessary to warn him that if he got his foot under a car wheel it would be hurt; and, besides, he had been employed there long enough to fully understand the situation. It was a most distressing accident, but, in our opinion, was not caused by any default on part of defendant. And now, March 28, 1910, the rule to take off nonsuit in above stated case is discharged."

Argued before FELL, C. J., and BROWN, MESTREZAT, MOSCHZISKER, and STEWART, JJ.

Chas. P. Hewes, for appellant. U. P. Rossiter, John Hampton Barnes, and Louis Rosenzweig, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Walling.

Appeal of DAILEY.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. ELECTIONS (§ 186*)—BALLOTS—IMPROPER MARKING.

At a municipal election, a ballot was cast containing a cross mark in the Democratic square, indicating a vote for all the candidates of that party, including a school director. Opposite the name of another person as a candidate for school director, another mark was made. *Held*, that under Act April 29, 1903 (P. L. 338), as well as Election Act June 10, 1893 (P. L. 419), which it amended, the entire ballot was illegal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. § 186.*]

2. ELECTIONS (§ 180*)—BALLOTS—STATUTES—IMPROPER MARKING—"MAY."

Act June 10, 1893 (P. L. 430) § 22, provides that the elector "shall" prepare his ballot by marking a cross above the name of a party if he desires to vote for every candidate of that party, otherwise by a mark opposite the party named. As amended by Act April 29, 1903 (P. L. 345), the section now reads: "If he desires to vote for every candidate of a political party, he may make a cross," etc. *Held*, that the employment of the word "may" in the amending clause gives no larger privilege as to the way of marking the ballot than the word "shall" in the original clause.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 180.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

Appeal from Court of Quarter Sessions, Erie County.

In the matter of the election contest for Select Councilman in the Fourth Ward of the City of Erie, Richard P. Dailey appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

Frank Gunnison and L. M. Torrey, for appellant. E. L. Whittelsey and P. Vincent Gifford, for appellees.

STEWART, J. At the municipal election held in the Fourth ward of the city of Erie on February 15, 1910, several ballots admittedly irregular were cast. We are concerned with a single one of these. It contained a cross mark in the Democratic square, indicating a vote for all the candidates of that party. Included among these candidates was Jacob Steinfurth, candidate for the office of school director. The ballot also contained a mark to the right of the name of John Heimburger that had been written into the ballot as a candidate for school director. The court below held it to be an attempt to vote for two persons for the same office when one only could be voted for, and therefore rejected it entirely from the count.

[1] The appellant who is a candidate for the office of select councilman on the Democratic ticket complains of this, and insists that under the law the ballots should be counted for himself and all other candidates on the Democratic ticket except the candidate for school director; that the irregularity went no further than to nullify the vote for that office. It will be observed that the irregularity is precisely the same as that which gave rise to the controversy in Newberry Twp. Election, 187 Pa. 297, 40 Atl. 822, where it was held that the ballot was wholly defective, and the court below was sustained in rejecting it from the count. That case arose under the election act of June 10, 1893 (P. L. 419). It is contended that the ruling there is inapplicable here because of the change effected in the law by the amending act of April 29, 1903 (P. L. 338). The difference in the language of the two acts relied upon as supporting this view is that in the earlier act the word "shall" is used, while in the later one the word "may" is employed in dealing with the same subject. Section 22 of the earlier act provides that the elector "shall prepare his ballot by marking, if he desires to vote for every candidate of a particular party, a cross in the circle above the column of such party, if otherwise he shall mark in the appropriate margin or place a cross (x) opposite the party named or political designation, or a group of candidates for presidential electors, and opposite the name of the candidate of his choice for each other office to be filled," etc. As amended by act of April 29, 1903, this section now reads: "If he desires to vote for every candidate of a political party, he may make a cross mark in the appropriate square,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

opposite the name of the party of his choice, in the straight party column on left of the ballot, and every such cross mark shall be equivalent to a vote for every candidate for the party so marked. If he desires to vote for an entire group of presidential electors, he may place a cross mark in the appropriate square, at the right of the name of the party of his choice. If he desires to divide his vote among candidates from different groups of presidential electors, he shall make a cross mark in the appropriate square to the right of the name of each candidate for presidential electors for whom he desires to vote. Provided, that a mark in the straight party column opposite the name of the party of his choice, shall also be counted as a mark for each presidential elector nominated by such party. He may vote according to the above provisions, for the candidate of his choice for each office to be filled, according to the number of persons to be voted for by him for each office, or he may insert in the blank space provided therefor, in accordance with section 14 of this act any name not already on the ballot," etc.

[2] A comparison of the two acts must satisfy that the primary object in amending this particular section was not to introduce substantial changes in the law, but rather to change the form of the ballot, and to make clear what before was inadequately expressed. Under the earlier act a choice of methods was allowed the elector when he came to prepare his ballot, notwithstanding the employment of the word "shall" in that connection. To vote a straight party ticket he could either place a cross mark in the circle above the party designated, or, no matter how many names of candidates appearing thereunder, he could accomplish the same result by placing his mark opposite the name of each. This much we have repeatedly ruled. The employment of the word "may" in the amending clause gives no greater privilege in this regard than the elector enjoyed before; he may still employ either method with like definite results as before; he may adopt both without invalidating his ballot, but, whether he adopt either or both, he

has exhausted his privilege; and if, having done this, he mark within the square opposite the name of a candidate for an office, for which the party of his choice has nominated another, it is an attempt to vote for two candidates for an office to which one only is to be elected, and the ballot is nullified. This is the doctrine of *Newberry Twp. Election*, supra, and we can discover no purpose in the amended act of 1903 to make any change in this respect. The difference in phraseology between the two acts signifies nothing more than a purpose on the part of the framer of the later act to improve on the literal structure of the earlier, and in this we think he was successful. While in acts of assembly the words "shall" and "may" are often of like significance, yet it not infrequently happens that they are not of equal appropriateness. Here, considering all that was intended by the act, the word adopted in the amending section, even though it add nothing by way of perspicuity, is yet the more appropriate.

The act of 1903 makes but slight verbal change in the amended section of the act of 1893. The section referred to provides that if a voter mark more names than he is entitled to vote for for an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted, for such office, but the ballot shall be counted for all other offices for which names of candidates have been properly marked. In *Newberry Twp. Election*, supra, where the ballot had the same irregularity as this, the contention was made under this provision it should be counted for all other offices than those duplicated; but it was there held, quoting from the opinion, "The difficulty in applying this section to the facts of this case is that none of the names of candidates have been properly marked."

We see nothing in the amendment to the section of the act here involved that exempts it in any way from the ruling in *Newberry Twp. Election*, supra, and, following that authority, we dismiss this appeal, and affirm the judgment of the court below.

STATE v. JOHNSON.

(Supreme Court of New Jersey. Nov. 27, 1911.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION (§ 137*)—OFFENSES AGAINST ELECTION LAWS—QUASHING INDICTMENT.

The act concerning elections requires the county clerk to preserve for a period of five years, after they are deposited with him registry lists used at an election and checked to indicate persons voting thereat. The act also makes it a misdemeanor for any officer to willfully or negligently violate any duty imposed on him by the act. The defendant was indicted for withdrawing, removing, and carrying away from the possession of the county clerk certain registers which had been used and checked at an election. *Held* that, if the clerk violated his duty in allowing the registers to be removed out of his possession through the procurement, aiding, and assisting of the defendant, it is not so manifest that no judgment could be rendered on the indictment that the discretion to quash it ought to be exercised.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 137.*]

Certiorari to review indictment for violation of election law by Enoch L. Johnson. Heard on motion to quash indictment. Denied.

Argued November term, 1911, before GARISON, PARKER, and BERGEN, JJ.

Edmund Wilson, Atty. Gen., for the State. French & Richards and Gilbert Collins, for defendant.

BERGEN, J. The writ allowed in this proceeding brings into this court from the court of oyer and terminer of the county of Atlantic an indictment against the defendant, and a motion is now made to quash it. The indictment, among other things, sets out that at a general election held in Atlantic county in November, 1910, the clerks of the respective boards of registry and elections, as required by law, kept a register of the voters, and checked the names written therein as the voters deposited their ballots, and, after the canvass of the votes, the registers so checked were filed with the clerk of the county of Atlantic to be there preserved by him for a period of five years. The indictment then charges that thereafter the defendant "unlawfully, willfully, and with evil intent, and without warrant in the law, did carry away, remove, and withdraw said registers from and out of the possession of the said county clerk." The argument for the defendant is that the taking, carrying away, and withdrawal of the registers unlawfully and with evil intent is not made a crime by the statute, and therefore the indictment sets out no punishable offense.

Section 67 of the act concerning elections (P. L. 1898, p. 271) requires the registry list to be deposited with the county clerk after each election, and section 1 of a supplement

to said act (P. L. 1908, p. 80) requires the county clerk to preserve such lists for five years. It seems to us that the duty imposed upon the clerk under the above legislation to preserve such registers in his office for the term of five years is a part of the election law intended to aid in insuring the purity of elections, and to assist in the discovery and prosecution of frauds, and that, if the clerk should allow such registry lists to go out of his possession during the forbidden period in such manner as to afford the opportunity to alter or mutilate them, it would be a violation of the act relating to elections, because in our opinion such registers are a part of the election proceedings. If the county clerk can allow the registers to be removed and carried away by any one who may apply for them, alterations and mutilations would be comparatively easy, and the registers become of small value as records of the manner in which the election had been conducted. We think it is clear that this legislation requires the county clerk to preserve these registers in the form he received them from the clerks of the board of registry and elections, and that he is not preserving such lists within the meaning of the act when he allows them to be withdrawn from his possession. He is to preserve them, and this is not done when he allows a person, without statutory authority, to withdraw them from his custody and control, and thus subject them to unlawful changes and alterations, and, if he does so, it is not so clear that he would not be guilty of a violation of the act concerning elections as to warrant the quashing of an indictment if one were presented against him for such neglect to preserve the registers, because the preservation is a duty which the law has imposed upon the county clerk, and under section 197 of the act to regulate elections (Revision of 1898, P. L. 1898, p. 237) "every public officer upon whom any duty is imposed by this act who willfully or negligently violates his said duty, or who neglects or willfully omits to perform the same, shall be deemed guilty of a misdemeanor." If such violation of the law by the clerk is an indictable offense, then, under section 2 of the supplement to the act regulating elections (P. L. 1905, p. 224), which reads, "Whoever at any election in this state shall in any way counsel, procure, aid, advise, assist or abet any official or person in any act which is contrary to the provisions of this act or to the act to which this is a supplement, shall be guilty of a misdemeanor," this defendant would be guilty equally with the clerk if he counseled, procured, aided, etc., that official in any act contrary to the provisions of the statute. That the indictment charges the defendant with doing the act as principal rather than as aiding and abetting the county clerk is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of no importance, because all who aid or participate in the commission of a misdemeanor are principals, and one indicted as a principal may be convicted as such, where the testimony limits his participation to aiding and abetting. *State v. Wilson*, 79 N. J. Law, 241, 75 Atl. 776. It does not appear to us that it is so manifest that no judgment can be rendered on this indictment that it ought to be quashed, and we prefer to follow the rule laid down in *Proctor v. State*, 55 N. J. Law, 472, 28 Atl. 804, that the discretion to quash an indictment on motion will not be exercised unless upon the clearest and plainest ground, but the defendant will be left to a demurrer, motion in arrest of judgment, or writ of error.

The motion to quash will be denied, and the indictment retained in this court for trial.

When this motion was argued, an application was also made for a special writ of certiorari to bring up some of the proceedings relating to the finding of the indictment, if the motion to quash was refused, in order that the defendant might have so much of the proceedings as related to the finding of the indictment brought into this court that he may have the opportunity to avail himself of all of the defenses he would be entitled to if the indictment remained in the oyer and terminer.

We think that the defendant is entitled to a writ sufficiently broad to accomplish this purpose, the scope of which will be fixed when the writ is submitted for allowance.

HUTCHES et al. v. BOROUGH OF HOHOKUS.

(Supreme Court of New Jersey. Nov. 21, 1911.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 9*)—NATURE OF POWER—AUTHORITY OF BOROUGH.

The borough of Hohokus, under the act of 1902, p. 574, being one of the boroughs included in the class of municipalities mentioned in said act empowered to purchase lands for public use, is, by virtue of such power to purchase, further authorized to condemn lands for such public use, by force of the act of 1903, p. 393.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*]

2. STATUTES (§ 51*)—ENACTMENT—FORM OF STATUTE.

The act of 1906, p. 553, amending the fifth section of the act of 1902, p. 574, is not in contravention of that part of paragraph 4, § 7, art. 4, of the state Constitution, which declares, "No act shall be passed which shall provide that any existing law, or any part thereof, shall be applicable by inserting it in such act," since it merely provides for a method of procedure by which the act, which is complete in itself, may be carried into effect.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 51.*]

3. STATUTES (§ 64*)—EFFECT OF PARTIAL INVALIDITY.

Where an object of the act is fully expressed in the title, an object, unexpressed in the title, if wholly distinct and separable from the expressed object, may be excised from the body of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 195; Dec. Dig. § 64.*]

4. EMINENT DOMAIN (§ 234*)—PROCEEDINGS TO TAKE PROPERTY—AWARD OF COMMISSIONERS.

The award made by the commissioners, without specifically setting out what portion of the sum awarded represents the appraised value of the lands, and what portion represents the damages sustained by the taking thereof, was in compliance with the settled law of this state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 592-603; Dec. Dig. § 234.*]

Application by Benjamin F. Hutches, Jr., and others for writ of certiorari, to review an award of commissioners, under the condemnation act of 1902, to the Borough of Hohokus. Proceedings by the commissioners affirmed.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

James T. Ackerman, for plaintiffs. J. W. De Yoe, for defendant.

KALISCH, J. A petition was filed by the borough of Hohokus to condemn certain lands described in said petition for park purposes, for the use of its inhabitants, under an act entitled "An act to provide for the purchase, construction, and maintenance of public parks by the cities and other municipalities in this state." P. L. 1902, p. 574. The fifth section of this act was amended by an act, approved May 17, 1906 (P. L. 1906, p. 553), entitled "An act to amend an act entitled 'An act to provide for the purchase, construction and maintenance of public parks by cities and other municipalities in this state.'" The amended section reads: "The lands purchased under this act may be paid for out of the proceeds of said bonds, and in case of condemnation, the mode of procedure shall be that provided in an act entitled 'An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use' (Revision of 1900), approved March twentieth, one thousand nine hundred."

[2] The plaintiffs in certiorari impugn the constitutionality of this amendment, contending that it is in contravention of that part of paragraph 4, § 7, art. 4, of the state Constitution, which declares: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable by inserting it in such act." The act of 1906 does not come within the letter or spirit of the constitutional inhibition here invoked. It simply provides for a method of procedure by which the act may

be carried into effect. This act is strictly in harmony with previous legislation of the same import, which has been repeatedly upheld by the courts of this state, and declared by them not to be within the constitutional interdiction invoked in this case. The explicit and unequivocal pronouncements of this court and of the Court of Errors and Appeals upon this topic do not leave this class of legislation open to any further practical controversy or discussion. *Campbell v. Board of Pharmacy*, 45 N. J. Law, 241; *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 49; *Christie v. Bayonne*, 48 N. J. Law, 400, 5 Atl. 805; *In re Haynes*, 54 N. J. Law, 24, 22 Atl. 923; *Kennedy v. Belmar*, 61 N. J. Law, 23, 38 Atl. 756.

[3] The plaintiffs in certiorari further contend that the act is unconstitutional, because it is in violation of paragraph 4, § 7, and article 4, of the Constitution, which declares, "Every law shall embrace but one object and that shall be expressed in the title," in that the title to the act of 1902 (P. L. 1902, p. 574) reads, "An act to provide for the purchase, construction and maintenance of public parks by cities and other municipalities in this state"; whereas, in the body of the act, the right of condemnation is added to the object stated in the title. It is obvious that the body of the act includes an object not expressed in the title. But this does not vitiate the entire act. That part of the act providing for condemnation is wholly distinct and separable from the right to purchase, and therefore leaves the right to purchase uninfected by its presence. The provision for condemnation may be excised without impairing the validity of the act. *Rader v. Township of Union*, 39 N. J. Law, 509; *Fagan v. Payne*, 75 N. J. Law, 854, 59 Atl. 568.

[1] That the validity of the condemnation proceeding cannot be upheld solely by virtue of the act of 1902 is conceded by the defendant, and has judicial support. *Griffith v. Trenton*, 76 N. J. Law, 23, 69 Atl. 29. But it is insisted by counsel for defendant that, by force of a supplement to the act entitled "An act relating to boroughs (Revision of 1897)," P. L. 1903, p. 393, which provides: "1. In all cases in which authority has been or may hereafter be given to boroughs to acquire lands for any public work, improvement, or use by purchase, it shall be lawful for such borough to condemn and take such lands in the manner and by proceedings provided by law"—and since, by the act of 1902, boroughs were empowered to purchase lands for public parks, etc., hence, by the act of 1903, the right to condemn lands was conferred on the defendant. This contention is well founded, and is supported by the decisions of our courts. *Phil. Safe Dep. & Ins. Co. v. Borough of Merchantville*, 75 N. J. Law, 452, 68 Atl. 170.

Another objection urged by the plaintiffs in

certiorari against the validity of the proceedings is that the act of 1900 (P. L. p. 79), which provides for condemnation of lands, does not provide for an appeal from the award of the commissioners, and is therefore in violation of that clause of the federal Constitution which declares that "no state shall deprive any person of life, liberty or property without due process of law." This objection is wholly without substance. The act of 1900 was amended by an act of 1909 (P. L. 1909, p. 225), whereby the express right of appeal is conferred upon any petitioner or owner of any land or property taken for public use from the report of the commissioners to the circuit court.

[4] The final objection is aimed against the award of the commissioners, because they have not set out specifically what portion of the sum awarded represents the appraised value of the lands, and what portion represents the damages sustained by the taking thereof. This has been held not to be essential. The award of the commissioners was in compliance with the settled law of this state. *Penn R. R. Co. v. National Dock Co.*, 57 N. J. Law, 86, 30 Atl. 183; *Bright v. Platt*, 32 N. J. Eq. 362; *Zimmerman v. Hudson & Nav. R. Co.*, 76 N. J. Law, 251, 71 Atl. 127.

The proceedings are affirmed, with costs.

PEER v. BLOXHAM et al.

(Supreme Court of New Jersey. Nov. 20, 1911.)

1. AFFIDAVITS (§ 18*)—EVIDENCE TO SUPPORT MOTIONS.

Affidavits on which a rule to show cause was founded cannot be used, after the rule is made, to support a motion not of course, or be read on hearing of a rule to show cause depending on extrinsic facts; proof by depositions taken on notice to interested parties being necessary after the granting of the rule to show cause. Practice Act (P. L. 1903, p. 537), §§ 196, 197, provided that upon four days notice, both parties may take affidavits or permitting the opposing party to give separate notice for taking depositions and providing for the examination and cross-examination of the witnesses and the taking of stenographic testimony.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 69-78; Dec. Dig. § 18.*]

2. AFFIDAVITS (§ 18*)—USE AS EVIDENCE—EX PARTE AFFIDAVITS.

The practice of taking ex parte affidavits to be used on argument of a motion is peculiar to the Chancery Court.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 69-78; Dec. Dig. § 18.*]

3. MOTIONS (§ 26*)—AFFIDAVITS—FILING.

The affidavits on which a rule to show cause is made must be filed as a basis for the rule upon entering it.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 26; Dec. Dig. § 20.*]

Action by Augustus L. Peer against Frank E. Bloxham and others. On rule to show cause why the proceeds of execution sale should not be paid to plaintiff in part satis-

faction of his judgment. Motion to make rule absolute denied, and rule extended as stated.

Argued November term, 1911, before GARRISON, PARKER, and BERGEN, JJ.

Joshua R. Salmon, for the rule.

PARKER, J. The meritorious question involved in this application relates to the respective priorities of execution creditors as against a fund of money in court, realized by sale under one or more of the executions. But as a matter of practice we cannot examine into or decide this question for the reason that no evidence appears to have been taken under the rule to show cause from which the rights of the respective execution creditors to the fund or their priorities can be determined. The plaintiff claiming the prior right to the fund, relies entirely on the affidavit upon which the rule to show cause was allowed, and no depositions have been taken thereunder in support of the rule, although express provision was made therefor.

[1] The present application is typical of numbers of similar ones that are constantly presented, and the frequency of such applications justifies a reiteration of the well-established rule that affidavits on which a rule to show cause is founded lose their efficacy as proof as soon as such rule to show cause is made, and that, after this, *ex parte* affidavits, whether made before or after the granting of the rule, are not competent to prove the facts necessary to support a motion not of course, or to be read on the hearing of a rule to show cause, depending on facts extrinsic to the record. Such facts can be brought before the court only by depositions taken on notice. *Baldwin v. Flagg*, 43 N. J. Law, 495, citing *Galbraith v. Cooper*, 24 N. J. Law, 219; *State v. Gardner*, 34 N. J. Law, 327, 329.

[2] The practice of taking affidavits *ex parte*, to be used on the argument of a motion, is peculiar to the Court of Chancery. *Baldwin v. Flagg*, *supra*. A later case is *Klein v. Adams Express Co.*, 61 N. J. Law, 530, 40 Atl. 445. [3] The affidavits on which a rule to show cause is made must be filed as a basis for that rule upon entering the same. *Galbraith v. Cooper*, *supra*. Upon the granting of the rule and in support of it, the moving party must repeat his proof in the form of depositions taken on notice to all parties interested. Four days' notice is required; and on such notice both sides may take depositions, or the opposing party may give a separate notice. Practice Act of 1903 (P. L., p. 537) §§ 196, 197. The witnesses are to be examined and cross-examined in regular course, and the testimony may now be taken stenographically in cases to which the practice act is applicable. *Id.* § 197.

Nothing of this kind was done in the present case, plaintiff relying on his original moving affidavit for his proof. The motion to make the rule absolute will be denied, but the rule may be extended until December 15th next, to the end that plaintiff may support it by depositions, and such documentary evidence as is required pursuant to the practice above indicated.

ALBERT v. HAEBERLY et al.

(Court of Chancery of New Jersey. May 28, 1906.)

(Syllabus by the Court.)

1. GIFTS (§ 47*)—INTER VIVOS—VALIDITY—BURDEN OF PROOF.

Where an absolute gift, without reservation of power to revoke, is made by a dependent member of the family to the dominant member, without any valuable consideration proceeding to the donor, the burden of proof is laid upon the donee to show that the donor had the benefit of competent and independent advice explaining the effect of the challenged transaction.

Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 85; Dec. Dig. § 47.*]

2. GIFTS (§ 49*)—INTER VIVOS—VALIDITY—SUFFICIENCY OF EVIDENCE.

Where the lawyer who drew the transfer of property from the dependent member of the family, and conducted the business incident to its execution, had for years previously been employed as counsel for the dominant member (who was the donee), had received his instructions for preparing the transfer in the presence of the husband of the donee, and in the matter of the transfer is not shown to have acted independently for the protection and advantage of the donor, the burden of proof cast upon the donee is not successfully carried.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 95; Dec. Dig. § 49.*]

3. FORMER DECISION CONTROLLING.

This case *held* to be controlled by the decision of the Court of Errors and Appeals in the case of *Albert v. Haerberly*, 68 N. J. Eq. 664, 61 Atl. 380, 111 Am. St. Rep. 652.

Bill in equity by Amelia Albert against Emily B. R. Haerberly and others. Final hearing on bill, answer, and proofs. Decree for complainant. Affirmed (74 N. J. Eq. 451, 70 Atl. 1100).

Bourgeois & Sooy, for complainant. William I. Garrison, for defendants.

GREY, V. C. (orally). I do not care to hear from complainant's counsel, because I am convinced that this case ought to be settled in the way I am about to determine it.

[3] I have listened with interest to the defendants' counsel to hear any suggestion why this cause is not substantially controlled by the decision of the Court of Errors and Appeals in the case of *Albert v. Haerberly*, reported in 68 N. J. Eq. 664, 61 Atl. 380, 111 Am. St. Rep. 652. The circumstances in this case differ very slightly from those which were before that court in that judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The present matter is the challenge by the complainant of the validity of a release in writing, made by her on October 16, 1902, to Mr. Charles Wells, an attorney at law of the state of Pennsylvania, of what was called a trust fund in his hands, with a direction to deliver the corpus of that fund to the defendant Mrs. Haeberly.

The circumstances under which this paper was made are as follows: William Robinson was the father of Lena and Amelia Robinson by a wife who died. He then married the defendant (now Mrs. Haeberly), who bore him one child, named Edna. William Robinson died intestate, leaving at his death his three children—Amelia Robinson, the complainant in this suit, Lena Robinson, her sister of the whole blood, and Edna Robinson, her sister of the half blood, an infant about two years old. Edna Robinson died about two years after the death of her father. There was litigation in the state of Pennsylvania between the representatives of the estate of William Robinson and his brothers, Charles and Augustus, touching the settlement of a brewery property, which had been held in partnership between them, which resulted in the final establishment of the right of William to one-third. The property consisted of both real and personal estate, and was of such a character that there was some uncertainty as to what part was realty and what personalty. Under the law of Pennsylvania, as it has been proven here, the real estate part of William Robinson's estate descended on his death intestate to his children, one of whom was his daughter Edna. Edna's portion, upon her death, an infant, and, of course, intestate, under the law of the state of Pennsylvania, as to the real estate, passed to her mother for life, and to her half-sisters Lena and Amelia in fee. The controversy in this case arises touching the transfer, or claimed transfer, on October 16, 1902, by Lena and Amelia, to their stepmother, the defendant Mrs. Haeberly, of their reversion in the fund arising from the sale of the real estate to the extent of Edna's share, the fee in which came to them on Edna's death. There has been, as has been stated, a considerable amount of flat contradiction in the testimony in this case. This is true, however, only of minor matters, for as to the essentials which I deem to be controlling the decision of the cause there is no dispute whatever. In matters of family contention it is not at all unusual to have members of the family of creditable appearance give testimony against each other which is directly contradictory. This is to a certain extent true in this case, but, touching the important phases settled by the Court of Errors and Appeals, the evidence presented by both sides is in harmony.

In the Court of Errors and Appeals case above cited the contention was between the complainant, Mrs. Amelia Robinson Albert,

and her stepmother, Mrs. Haeberly, who is the principal defendant in this suit. The complainant sought to set aside a conveyance of her share of her father's real estate, which Mrs. Haeberly, while Amelia was a member of her family, in December, 1902, had induced her to make herself (Mrs. Haeberly), without any independent, uninfluenced advice on the subject, by a deed of gift which contained no power of revocation. The Court of Errors and Appeals held that the circumstances proven showed that Amelia, though of age, was one of the family of which Mrs. Haeberly was the head and dominant member; that Amelia lived in an atmosphere of trust and confidence in Mrs. Haeberly; that it was an inequitable advantage taken of Amelia to accept from her an irrevocable conveyance of her lands, given without competent and independent advice, and without valuable consideration passing to her. On these grounds the Court of Errors and Appeals declared Amelia's conveyance of her lands made in December, 1902, to Mrs. Haeberly, to be void. In the case at bar Amelia seeks to set aside the transfer of her interest in the principal of her sister Edna's share of the lands, which Amelia made to Mrs. Haeberly on October 16, 1902. Amelia had come of age in August, 1902.

As above stated, it is affirmatively proven by both sides that on October 16, 1902, she was a member of Mrs. Haeberly's household. At that time Amelia was living, as she had for more than ten years, in entire harmony with her stepmother, accepting and obeying orders from Mrs. Haeberly as the head of the family. All the evidence tends to prove that Mrs. Haeberly was a positive woman, who understood and appreciated the fact that wealth was a means of power. She had conducted the lawsuit against her first husband's brothers, Charles and Augustus Robinson, for several years, and had finally won it. While her stepdaughters were under age she received \$1,000 a year from the guardian of each of them for their maintenance and education. Amelia says she was for years kept in ignorance of the fact that she had an independent fortune. In the settlement of William Robinson's estate, his widow (who had now become Mrs. Haeberly) secured for herself, as against her stepdaughters, every element of value to which her status as widow entitled her. Her personal appearance and bearing when she was giving her testimony accord with all the evidence which indicates that in the family she was easily "monarch of all she surveyed." A claim that she specially considered her stepdaughters was based on her assent to the correction of a clerical mistake in the settlement of the estate, which was only discovered after it had passed unnoticed through several courts. This correction was a matter of the simplest honesty, about equivalent to

the return of too large a sum of money given in change. Nothing in this indictment or in the case lessens the clear proof that Mrs. Haeberly dominated the family. On the other hand, Amelia, who was on the stand, is plainly wholly unacquainted with the modes in which business is managed. She did not know the meaning of the simplest legal language, or of words ordinarily used in the conduct of business. She is fairly intelligent and well educated, but on lines quite remote from bargaining, trading, or managing business. It is quite evident that in October, 1902, she was entirely under the tutelage and control of her stepmother, Mrs. Haeberly. The defendant Mr. Wells, the Pennsylvania lawyer, who had conducted the settlement of the William Robinson estate, and who had in his hands the Edna Robinson share of the fund which proceeded from the sale of the realty, testifies without hesitation that Mrs. Haeberly and her stepdaughters constituted a family in which harmonious affection was the controlling feeling to a degree that was distinctly noticeable. This condition and relation of the parties to this suit continued after Amelia came of age in August, 1902, and until the spring and early summer of 1903. There was no change in the family situation when Amelia came to her majority. There was then neither suggestion nor thought that she should be emancipated and depend upon herself. On October 16, 1905, she was still the submissive and obedient stepdaughter, and Mrs. Haeberly was the commanding head of the house.

[1] The Court of Errors and Appeals, dealing with this element, declared that under such circumstances the mere arrival of Amelia at the age of 21 years was of very little importance; that "the relationship existing between a loving parent and child is universally conceded to be one of trust and confidence, and during the youth of the child, and even after the child reaches her majority, when she continues to be a member of the parent's family, the parent ordinarily occupies the dominant position." The court goes on to say, as has been decided in many cases, that, where such a relationship exists, an irrevocable gift, made by one of the subordinate members of the family to the parent or other member who dominates the situation, must be characterized by certain incidents, and that the burden of proof to show that it was so characterized is cast upon the recipient of the benefits of the transaction. Mrs. Haeberly has received the benefit of this gift by the execution of the instrument, a copy of which is annexed to the bill of complaint. With that she must take the burden of showing that the incidents which are required by the law to make such transactions valid happened at the time when the transaction took place.

[2] This case varies slightly from the other in the attempt here made to show that

the young lady acted with the benefit of counsel. It is claimed that Mr. Wells was her counsel in this transaction. It is, however, quite clear that the relation of Mr. Wells to the complainant in making the settlement of October 16, 1902, was not (within the meaning of the decision cited in the previous case) that of counsel for Amelia. Up to that time Mr. Wells had never been her counsel. He had previously acted as counsel for the estate, in which the active persons employing him were Mrs. Haeberly and the guardians of Amelia and her sister. These young ladies might have protested and objected, and done all they could to prevent the employment of Mr. Wells, and their opposition would have been absolutely useless, for Mrs. Haeberly and the guardians might have chosen him as counsel in spite of all that Amelia and her sister might do. The fact of his employment to act for the estate did not put Mr. Wells in the attitude which the Court of Errors and Appeals declares the counsel of a junior and dependent member of a family should occupy in order to sustain a gift made to the dominant and controlling member of the family. Mr. Wells admitted that he had never prior to this transaction been independently employed by Miss Amelia Robinson to advise her and care for her interests.

The essence of the decision of the Court of Errors and Appeals is that, under the circumstances named, the dependent member of the family has a right to rely on the care and protection which have heretofore saved her from improvident and ill-advised action, and that the making of any irrevocable gift of large value to the dominant member of the family requires that the donor shall have the benefit of the counsel and advice of an experienced person, whose attitude is that of independent devotion to her advantage. In this case it is clear that there was no reason for Amelia's absolute transfer of \$9,000 or \$10,000 to her mother, except the family feeling of love and affection, and it is exactly that situation contemplated by the Court of Errors and Appeals when it declared that a gift made under such circumstances is voidable at the choice of the donor, unless, when she made the gift, she had the benefit of competent and independent advice.

Mr. Wells testifies that the complainant gave him his instructions to prepare the challenged instrument, but admits that Mr. Haeberly, the husband of the donee, was present when they were given. Mr. Wells had long served as the family adviser, and was in all probability selected by Mrs. Haeberly. He had successfully conducted a hard-fought litigation for her. He says he made no charge for his services at Atlantic City in arranging the settlement and transfer of the complainant's interest in Edna's share to Mrs. Haeberly. He certainly did not feel himself to be in the position of an independent adviser

of the donor-complainant, looking solely to her interests in the matter. The transaction involved the passage of an interest which the donor had never had in possession. The challenged instrument is not expressed in the form of a gift to Mrs. Haeberly, but in that of a statement of account with Mr. Wells, as trustee, and an agreement that all the property should be delivered over to Mrs. Haeberly, and that thereupon Mr. Wells should be discharged. At the time it was executed, the trustee, Mr. Wells, had in his hands \$19,000 (and a fraction) of securities, notes, and other evidences of value, the result of the sale of real estate, which had been divided off and ascertained to be the portion due to Edna Robinson. In Edna's share (dealing with it as real estate), under the law of Pennsylvania (which has been proven here), the mother, Mrs. Haeberly, had a life interest in the income, and Edna's two sisters, the complainant and Lena, had a right to the payment of the principal of the fund on Mrs. Haeberly's death. The effect of the disputed transfer (a copy of which is annexed to the bill) was to end the trust, as to the fund in the hands of Mr. Wells, and to empower him immediately to deliver over the principal of it to Mrs. Haeberly. This he has done, as she admits. Part of the fund was an evidence of debt with an ascertained value, part of it was in stock, which was delivered in kind. A part of the stock, 124 shares of the Central Brewing Company, has since been returned to the complainant. While the legal effect of the instrument is to transfer to Mrs. Haeberly the complainant's reversion in Edna's share of the real estate, that effect is not obvious on the face of the instrument. There was therefore the more reason that the complainant should have had competent advice from some one acting in her interest before executing it. She says she was entirely misled, and did not understand that she was making to her stepmother an absolute gift of the \$9,000 or \$10,000 which constituted the principal of the fund in Mr. Wells' hands.

In my view the elements referred to in the opinion of the Court of Errors and Appeals in the previous case are all here present: An absolute gift, without reservation of power to revoke, made by a dependent member of a family to the dominant member, without any valuable consideration proceeding to the donor, and without the donor's having the benefit of competent and independent advice explaining the effect of the challenged instrument. In such cases the gift is voidable at the option of the donor.

The accuracy and fairness of Mr. Wells' statement of account as between himself and the complainant, touching the moneys in his hands, has not been attacked by the complainant, either in the proofs or in argument. The whole case has been made to turn upon the efficiency of the transaction as a gift to Mrs. Haeberly. I feel constrained, under the rulings of the Court of Errors and Appeals, to hold that the settlement released of October 18, 1902, so far as it operated as a gift of the share of the complainant to her stepmother, the defendant Mrs. Haeberly, must be declared to be invalid.

Under the peculiar circumstances of this case, the defendant Mrs. Haeberly being entitled to the income of the fund during her life, there can be no decree for the delivery to the complainant of her share of the principal of the fund, for she is not presently entitled to have possession of it. There should be a decree that Amelia's portion of the fund be paid to a trustee, who should, I think, be nominated and appointed in this suit, to hold upon trusts, which accord with the interests of the life tenant and of Amelia, the holder of the reversion. I will not name the trustee at this time, because I think his selection should be the subject-matter of agreement between the parties, if that be possible. The defendant Mrs. Haeberly appears to have received from Mr. Wells, and to have, the whole of the fund. She will be directed to deliver to the trustee the portion of the fund which may be in kind, and to pay in money such additional amount as may be necessary to make the fund good as to the share of the complainant, Mrs. Albert, formerly Amelia Robinson. As none of the fund remains in the hands of the defendant Wells, and his good faith in accounting for it and paying it over are not impugned, there will be no decree that he pay any of it.

My impression is that no costs should go against Mr. Wells, because the litigation has been carried on in the interest of Mrs. Haeberly, and the contest has been made by her. The decree should be that she pay costs. As for Mr. Wells' claim to have cost against the complainant, my reading of his answer is that he did not content himself with defending his own position as trustee under the release and transfer, but that he has sought to aid Mrs. Haeberly in the maintaining of the validity of the transfer to her. I will not pass finally upon this matter, but, before I sign any decree, I will examine Mr. Wells' answer. If he was in his pleading an active litigant, and is defeated, I do not think I ought to allow him costs.

WOOD v. PRICE et al.

(Court of Chancery of New Jersey. Aug. 2, 1910.)

1. EVIDENCE (§ 332*)—ADMISSIBILITY—COMPETENCY.

On a petition of the wife of a mortgagor to have the surplus left after foreclosure held to answer a writ of sequestration issued in her pending suit for alimony, and to secure her inchoate right of dower, where the surplus was claimed both by a purchaser of the husband and a judgment creditor, evidence of the proceedings in the suit by the wife against the husband was competent against both purchaser and creditor to show that such a proceeding was pending, but not to prove the truth of the allegations therein.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 332.*]

2. DOWER (§ 46*)—INCHOATE RIGHT OF WIFE TO SURPLUS AFTER FORECLOSURE.

Where the wife of a mortgagor who has brought suit for alimony is after foreclosure entitled to subject the surplus to her inchoate right of dower, she is entitled to have one-third of it reserved, even though the mortgagor's judgment creditor has attached such surplus.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 46.*]

Action by Caroline Wood, as guardian, to foreclose a mortgage, against Robert A. Price and others. On petition of Alice C. Price to have surplus money held to answer writ of sequestration and to secure her inchoate right of dower in the mortgaged premises. Petition granted.

Charlton A. Reed, for petitioner. Vreeland, King, Wilson & Lindabury, for respondents Struble and Price.

PITNEY, C. Pending the determination of the petition of Jacob C. Price to have the surplus money in this cause paid to him as purchaser of the equity of redemption from the mortgagor, Mrs. Price, the wife of the mortgagor, filed her present petition, praying that the money paid into court by the sheriff in excess of the amount due to Martha E. Struble, defendant, a judgment creditor, should be held to answer any order which might be made in Mrs. Price's pending suit for alimony against her husband, Robert A. Price, the mortgagor, pursuant to the command of a writ of sequestration issued in that proceeding; and also praying that one-third of the whole amount of the surplus money might be impounded to secure Mrs. Price's inchoate right of dower.

[1] Upon the filing of this petition, an order was made requiring Martha E. Struble and Jacob C. Price to show cause why the relief prayed should not be granted to Alice C. Price, the petitioner. Upon the return of the order to show cause Mrs. Struble and Jacob C. Price appeared, and the matter has been heard before me upon proofs taken viva voce in open court. Besides the testimony of witnesses, there were introduced in evidence all the original files and proceedings

in the main foreclosure suit, including the pleadings, proofs, decree, writ of fieri facias, return, etc., the petition of Jacob C. Price for surplus money, and the orders made and testimony taken thereon, a previous petition of Alice C. Price respecting the surplus money, and the proceedings thereon, also all the proceedings and files in the pending suit of Alice C. Price on her bill for alimony, including the writ of sequestration and return thereof, and all other papers and proceedings therein.

Objection was taken to the introduction in evidence of the proceedings in the alimony suit, on the ground that they were not evidential as against Martha E. Struble and Jacob C. Price. They were admitted, however, not as tending to prove the truth of the averments made by Alice C. Price against her husband in the proceeding, but only for the purpose of showing that such a proceeding is pending, the nature and object of it, and what has been done in it by virtue of the issuing and execution of a writ of sequestration to fix a lien upon the mortgaged premises and upon the surplus money arising from the sale thereof.

Jacob C. Price's petition has now been disposed of by denying his prayer to have the surplus money presently paid to him as purchaser, but reserving his rights as against all other parties than Mrs. Price. The decision was that by the writ of sequestration issued in the alimony suit and by the execution of that writ upon the mortgaged premises a lien was secured in favor of Mrs. Price prior to the claim of Jacob C. Price as purchaser, and that Mrs. Price's lien is transferred to the surplus money, besides which she is entitled to have her inchoate right of dower protected.

By the final decree in the main cause, and by an order subsequently made under date April 12, 1909, disposing of Mrs. Price's previous petition herein, it was established that Martha E. Struble, as judgment creditor, was entitled to a lien upon the mortgaged premises next after the first mortgage of Caroline Wood, guardian, the complainant; and by the order just mentioned the sheriff was required to pay to Mrs. Struble the amount directed to be paid to her by the final decree and the execution issued thereon, less the sum of \$72 which had been paid to her on account of her judgment on June 15, 1908, and before the final decree. Prior to this order of April 12th, however, the sheriff had paid into court all the proceeds of sale that remained after satisfying the complainant's mortgage, with interest and costs. The money thus paid in, and to which Mrs. Price's petition is addressed, is \$5,260.34. The date of payment into court was April 5, 1909.

The amount due upon this date on Mrs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Struble's judgment is shown by the following statement:

Amount of judgment as established by final decree.....	\$2,519 06
Interest, July 10, 1906, to April 5, 1909, at 6%.....	111 39
Costs	7 56
Interest, July 20, 1906, to April 5, 1909, at 6%.....	32
	\$2,638 33
Deduct, as per order of Apr. 12, 1909	73 00
	\$2,566 33

The amount just stated, with accumulations of interest thereon from April 5, 1909, as computed according to the rules of this court, should be paid to Mrs. Struble.

[2] Out of the residue of the money paid into court Mrs. Price is entitled to have reserved one-third of the entire sum of \$5,260.34 (for, of course, her inchoate right of dower is not affected by Mrs. Struble's judgment), and such one-third, or \$1,753.45, should be held to secure Mrs. Price's dower, so that, in case she survives her husband, she may receive the income thereof during the remainder of her life. But the entire amount of money that was paid into court by the sheriff, after deducting therefrom the amount due to Mrs. Struble, is subject to the process of sequestration issued in Mrs. Price's alimony suit.

The order will be, therefore, that the sum of \$2,566.33, with accumulations from April 5, 1909, be paid to Mrs. Struble in satisfaction of her judgment, and that the residue of the money paid into court by the sheriff, such residue amounting to \$2,694.01, be transferred to the credit of the alimony suit, to be there treated as subject to the writ of sequestration and the proceedings thereunder, reserving, however, Mrs. Price's right to have \$1,753.45 out of this money retained to secure her right of dower in the event of her surviving her husband, and reserving Jacob C. Price's rights as against all other parties than Mrs. Price.

MAGOON v. FLANDERS.

(Supreme Judicial Court of Maine. Nov. 23, 1911.)

VENDOR AND PURCHASER (§ 350*)—CONTRACT TO CONVEY—EVIDENCE—SUFFICIENCY.

In an action to recover for breach of contract to convey land, evidence held to warrant a finding that plaintiff waived his right to purchase and held possession as a tenant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 350.*]

Exceptions from Supreme Judicial Court, Somerset County.

Action by W. E. Magoon against B. L. Flanders. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

Action on the case to recover damages for an alleged failure to convey real estate according to the terms of a written contract.

The plaintiff was allowed to amend his writ by adding a count for money had and received. Plea, the general issue in assumption, with a brief statement alleging that the "plaintiff waived any right to purchase the property described in his writ, if he ever had any such right, and by his conduct is estopped to claim any damages from said defendant." At the conclusion of the testimony the presiding justice ordered a verdict for the plaintiff for \$100.07, and the defendant excepted. It was stipulated in the bill of exceptions that, if the exceptions were sustained, judgment should be for the defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, BIRD, and HALEY, JJ.

Gould & Lawrence, for plaintiff. Butler & Butler, for defendant.

WHITEHOUSE, C. J. This is an action on the case to recover damages for an alleged failure on the part of the defendant to convey to the plaintiff certain real estate according to the terms of the following contract signed by the parties, viz.:

"In consideration of eight hundred and fifty dollars paid by W. E. Magoon on the following terms: Eight dollars per month for one year and three hundred dollars at the end of the year and the balance yearly—B. L. Flanders agrees to give said Magoon a good and sufficient title to the land and buildings thereon situated north of the Catholic cemetery on North St. in Skowhegan.

"Skowhegan, May 4, 1909."

The plaintiff was also allowed to add a second count for money had and received, under which he claimed to recover \$96 and interest, being the amount of 12 payments under the contract at \$8 per month.

The defendant contended that the plaintiff waived whatever right he had under the contract to purchase the property, and by his conduct was estopped to claim any damages from the defendant.

At the close of the testimony the presiding judge ordered a verdict for the plaintiff for \$96 and interest, with the stipulation that, if the exceptions taken by the defendant were sustained by the law court, judgment should be entered for the defendant.

It is the opinion of the court that the exceptions must be sustained.

There was sufficient evidence, if believed, to support a finding by the jury that the plaintiff's failure to receive a deed of the premises was due to his own breach of the contract, and not to any fault on the part of the defendant. It is conceded that the plaintiff failed to pay the \$300 at the end of the first year, and no explanation or excuse was offered for the failure, except that he did not have the money to pay it; but it does not appear that he asked for any further time or indulgence. On the contrary, the ev-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

idence would authorize the jury to find that in April, 1910, he accepted the proposition made by the defendant for him to occupy the place another year at the same "rental" of \$8 per month, if the defendant did not sell the property. The plaintiff admitted that he had not earned enough during the winter to pay his expenses, and when, at the beginning of the second year, the defendant found a purchaser for the property, the plaintiff does not appear to have made any objection to the sale, and for three weeks made no claim for damages, except the value of a henyard built by him, for which he accepted satisfaction from the defendant, without any suggestion that he would have liked more time to pay the \$300, and without any complaint that he had not been fairly treated by the defendant.

The written contract is silent in regard to the plaintiff's occupation of the premises during the first year. But the plaintiff was allowed to take possession upon the payment in advance of \$8 a month, a fair rental for the place. There was no suggestion that the plaintiff was to have the use of the premises for a year, rent free, if he failed to pay the \$300 at the end of the year without fault of the defendant. On the contrary, it appears from the defendant's testimony that near the close of the year, in April, 1910, the plaintiff asked for a reduction of "rent," and under the practical interpretation given to the contract by the parties, the jury would have been justified in reaching the conclusion that the monthly payments made by the plaintiff the first year were to be retained by the defendant as a fair rental during that time, if the plaintiff gave up possession by reason of his failure to pay the \$300, without fault of the defendant.

The practical result was that the plaintiff occupied the house for a year at a reasonable rental, and by leaving at the beginning of the second year, he sustained no damage for which the defendant was legally or equitably responsible.

According to the stipulation of the parties, the certificate must be:

Exceptions sustained.

Judgment for the defendant.

GARY v. GRAHAM et al.

(Supreme Judicial Court of Maine. Nov. 24, 1911.)

1. ATTACHMENT (§ 184*)—DISSOLUTION—EXECUTION OF RECEIPT.

An attachment of personalty is dissolved by the officer taking from the debtor, in lieu of the property, a receipt therefor promising to pay, on judgment for plaintiff, a stated sum or to redeliver the property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 586; Dec. Dig. § 184.*]

2. ATTACHMENT (§ 185*)—DISSOLUTION—BANKRUPTCY.

An attachment of personalty dissolved by the officer taking the debtor's receipt was not restored by an order by the referee in subsequent bankruptcy proceedings against the debtor, directing that the rights under the attachment be preserved for the benefit of the estate under Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 185.*]

3. BANKRUPTCY (§ 421*)—DISSOLUTION OF ATTACHMENT.

A claim against an attachment defendant having been discharged by his bankruptcy, there could be no liability on his receipt previously given the attaching officer, in which he promised that, after judgment for plaintiff, he would on demand redeliver the property to plaintiff or pay him a specified sum.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 421.*]

Report from Supreme Judicial Court, Aroostook County.

Action by Levi H. Gary against John H. Graham and others. On report. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Charles G. Briggs and Herbert W. Trafton, for plaintiff. Willis B. Hall, William P. Allen, Martin & Cook, and Hersey & Barnes, for defendants.

WHITEHOUSE, C. J. [1] This is an action of assumpsit upon a receipt given to the plaintiff, a deputy sheriff, for 250 barrels of potatoes attached by him on a writ as the property of the defendant Graham. By virtue of this receipt the defendants promised that, after judgment in favor of the plaintiff in the original action, they would, on demand, redeliver the potatoes to the plaintiff, or pay him the sum of \$500. Thereupon the plaintiff relinquished the custody of the potatoes to the defendant Graham. The writ, dated March 12, 1908, was made returnable at the next April term of the Supreme Judicial Court for the county of Aroostook, and was duly entered in court at that term and continued. On the 16th day of the following June, the defendant Graham filed his petition in bankruptcy, was adjudicated a bankrupt, and afterwards received his discharge in bankruptcy. On the 20th day of November, 1909, on petition of the trustee in bankruptcy of the defendant Graham, it was ordered by the referee in bankruptcy appointed by the United States District Court that the rights under the attachment of the potatoes should be preserved for the benefit of the estate, and that the trustees should make application to the Supreme Court of Aroostook county for permission to intervene in his capacity as trustee to become party plaintiff in the suit. Thereupon the trustee, having

received permission to appear as party plaintiff in the original suit, entered a discontinuance as to the defendant Graham, and was allowed to take a judgment in rem against the potatoes attached, and execution was issued thereon May 14, 1910. On the 18th of the same month the plaintiff, as deputy sheriff, demanded of the defendants who signed the receipt in question that they redeliver to him the property named in the receipt or pay the amount of the judgment. The defendants refused to comply with either alternative of this demand. The case is reported for the determination of the law court upon this statement of facts.

It is the opinion of the court that the action is not maintainable upon the facts stated in the report.

It has been repeatedly held in this state that where an officer who attaches personal property on a writ as the property of the defendant accepts from the debtor a receipt therefor containing a promise in the alternative to pay a given sum on demand, or redeliver the property, and thereupon the officer releases the custody of the property to the debtor and leaves it without removal, the receipt has the right to elect which of the alternative conditions he will perform, and consequently the attachment is thereby dissolved. *Gower v. Stevens*, 19 Me. 92, 36 Am. Dec. 737; *Weston v. Dorr*, 25 Me. 176, 43 Am. Dec. 259; *Waterhouse v. Bird*, 37 Me. 326; *Stanley v. Drinkwater*, 43 Me. 468. *Waterman v. Treat*, 49 Me. 310, 77 Am. Dec. 261; *Mitchell v. Gooch*, 60 Me. 113.

[2] It appears, however, that on June 16, 1908, within four months from the date of the attachment, the defendant Graham was adjudged a bankrupt, subsequently receiving his discharge in bankruptcy, and that upon the representation of the trustee in bankruptcy that the potatoes in question of the value of \$500 had been attached by the plaintiff, a deputy sheriff, as the property of the defendant Graham, and that the "attachment has never been discharged or released," it was ordered by the referee in bankruptcy that the "rights under said attachment be preserved for the benefit of the estate" by virtue of section 67 of the national bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). But it has been seen that upon the settled law of this state the attachment of the potatoes was dissolved by the officer's acceptance of the receipt as a substitute for the lien on the potatoes and his abandonment of possession to the debtor. The representation in the trustee's petition to the court of bankruptcy that "said attachment has never been discharged or released" was evidently the result of a misapprehension either in regard to the law or the facts. There were no existing "rights" to be preserved. The

attachment had been dissolved without the aid of the adjudication in bankruptcy. The United States statute in question was designed to preserve rights under attachments and liens that actually existed, and not to create rights under attachments that had ceased to exist at the time of the filing of the petition in bankruptcy. The obvious purpose of it was to preserve to the creditors property which they would otherwise lose by an adjudication in bankruptcy, and to prevent the intervention of other liens to their prejudice. The order issued under that statute did not have the effect to restore the attachment of the potatoes which had been lost before bankruptcy.

[3] Furthermore, by the terms of the receipt signed by the defendants, they could only be made liable by reason of a valid judgment against the defendant Graham in the original suit. There was no judgment against Graham, because the claim against him was discharged by his bankruptcy, and there was no property under attachment upon which a judgment in rem could be legally entered. As observed by this court in *Mitchell v. Gooch*, 60 Me. 113, supra: "Upon the dissolution of the attachment, as it is admitted that the goods attached went into the possession of the debtor, the officer does not require their possession for the purpose of returning them to him, for he has them. Nor does he need them to return to his assignee in bankruptcy, for he must look to the bankrupt who has the goods, and not to the officer who has them not."

The liability of the receiptor is limited to and determined by that of the officer. As the officer is not liable to either plaintiff or defendant in the suit on which the attachment was made, neither is the receiptor."

The certificate must accordingly be:
Judgment for the defendants.

FITZSIMMONS et al. v. HARMON et al.
(Supreme Judicial Court of Maine. Nov. 27, 1911.)

WILLS (§ 675*)—CONSTRUCTION—TRUST.

Under Rev. St. c. 76, § 1, authorizing disposition of property by written will, even a letter or other document containing directions for disposition of property cannot become a part thereof by reference, unless clearly described and referred to in the will as an existing document, and where testator devised his property to H., "to divide as seems to her best as I have told her my wishes in the matter," the trust declared by the will is too indefinite to be executed, and the will creates a resulting trust in favor of the heirs at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1587–1589; Dec. Dig. § 675.*]

Report from Supreme Judicial Court, Cumberland County, in Equity.

Bill by James H. Fitzsimmons and others against Isabelle C. Harmon, executrix, and

others, asking the court to construe and interpret the provisions of the last will and testament of the aforesaid Elizabeth Doherty. The defendant Harmon filed an answer, admitting the allegations in the bill, and joined in the prayer for a construction of the will. Heard on bill, answer, and evidence, and at the conclusion of the testimony the case was reported to the law court for determination. Decree for complainants.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, BIRD, and HALEY, JJ.

Connellan & Connellan, Joseph B. Reed, and John B. Kehoe, for plaintiffs. Reynolds & Sanborn and Charles H. Johnston, for defendant Harmon. Michael T. O'Brien, for defendant Theresa Fitzsimmons.

WHITEHOUSE, C. J. Elizabeth Doherty, of Portland, died on the 18th day of October, 1909, leaving a will which reads as follows:

"I, Elizabeth Doherty, being in my right mind at this date (October 13th, 1909), wishing to dispose of property now in my name, give, devise and bequeath my property of whatever kind to Isabelle C. Harmon to divide as seems to her best as I have told her my wishes in the matter, mentioning all relatives including my nephews.

"I name Isabelle C. Harmon as my executor."

In this bill in equity, brought by some of the heirs of the testatrix, the plaintiffs ask the court to construe and interpret the provisions of this will, and particularly to determine, first, whether the legatee and executrix therein named takes any beneficial interest under it; second, if the legatee named takes no beneficial interest, whether the will declares a trust sufficiently definite to be executed; and, third, if no such trust is declared, to whom shall the residue of the estate, after the payment of all debts and expenses of administration be distributed.

In her answer, Mrs. Isabelle C. Harmon, named as defendant in the bill, joins in the prayer of the plaintiffs for a judicial construction of the will.

The plaintiffs contend, first, that under the terms of the will Mrs. Harmon, the legatee and executrix therein named, takes no beneficial interest; second, that while the terms of the will clearly manifest an intention on the part of the testatrix to create a trust, the trust thereby indicated is not made sufficiently definite to be executed; and, third, that there is a resulting trust in favor of the heirs at law of the testatrix, and that the estate should be divided among them.

The privilege of making a disposition of property by will is created, and the exercise of it definitely regulated, by the statutes of this state. The leading provision is found in section 1 of chapter 76, R. S., and is as follows:

"A person of sound mind and of the age of twenty-one years may dispose of his real and personal estate by will, in writing, signed by him or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will."

The statute thus clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed. A bequest of personal property, as well as a devise of real estate, in order to be effectual, is required to be made by an instrument in writing signed by the testator and subscribed by three attesting witnesses. Even a letter or other document containing explicit directions for the disposition of property cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely described and referred to in the will as an existing document as to be readily identified as the particular paper intended by the testator. *Bryan's Appeal*, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, and cases cited.

In the case at bar it has been seen that the only wishes expressed for the guidance of the legatee in the distribution of the property had been given orally and they were not incorporated in the will. The language of the testatrix is: "I give, devise and bequeath my property of whatever kind to Isabelle C. Harmon to divide as seems to her best, as I have told her my wishes in the matter."

1. The phraseology employed in making this bequest to Mrs. Harmon utterly fails to disclose any purpose on the part of the testatrix to make an absolute gift of the property to Mrs. Harmon for her personal benefit. It is not given to her to consume, but to "divide." It expressly requires her to "divide" all the property thus bequeathed to her. The fact of the division is not left to her discretion, but imposed upon her as a duty. It gives her discretionary authority only respecting the manner of the division, having regard to the wishes orally expressed by the testatrix.

2. On the other hand, it is equally clear that the terms of the bequest do manifest an intention on the part of the testatrix to create a trust.

But the trust declared by the terms of the will is too indefinite and uncertain to be executed. "Among the essentials of a valid trust are that the precise nature of the trust which the donor intended to create should appear, and that the particular persons who are to take as cestuis que trust, and the proportions in which they are to take, should

be pointed out. If they are not, then the trust cannot be executed, and it must fail. Where the character of a trust is impressed upon the gift, and it fails, because ineffectually declared, and the cestuis que trust are not clearly designated, the trustee is not entitled to the gift for his own benefit. It was said by Lord Eldon, in *Morice v. Bishop of Durham*, 10 Ves. 521, 537, that, "though the trust is not declared; or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law." *Briggs v. Penny*, 3 Macn. & Gord. 546; *Warner v. Bates*, 98 Mass. 274; *Hess v. Singler*, 114 Mass. 56; 1 *Perry on Trusts*, 83; *Id.* (5th Ed.) 46; *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680.

In *Nichols v. Allen*, 130 Mass. 212, 39 Am. Rep. 445, the court said: "Two general rules are well settled: (1) When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin." *Briggs v. Penny*, 3 De G. & Sm. 525, and 3 Macn. & Gord. 546; *Thayer v. Wellington*, 9 Allen (Mass.) 283, 85 Am. Dec. 753.

But *Olliffe v. Wells*, 130 Mass. 221, is a case strikingly analogous to the one at bar. In that case the bequest submitted to the court for construction was as follows: "To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out the wishes which I have expressed to him or may express to him." In the opinion the court say: "The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols v. Allen*, 130 Mass. 211 [39 Am. Rep. 445]. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton v. Seaman's Friend Society*, 130 Mass. 91 [39 Am. Rep. 433]. * * * The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes

essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See *Lewin on Trusts* (3d Ed.) 75." See, also, *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149.

In the case at bar *Mrs. Isabelle C. Harmon*, the legatee and executrix, who wrote the will herself at the request of *Mrs. Doherty*, who signed it, was permitted to state in her testimony that she did not intend to use a dollar of the estate for her own benefit, and that in writing the will she "intended to so word it that she would not keep a dollar of it." It is not in question that in attempting to administer the trust she has adhered to that intention with scrupulous fidelity. But while the language of the will clearly manifests an intention to create a trust, it is the opinion of the court that for reasons above stated, under the salutary and time-honored rules governing the creation and execution of trusts, the terms of this bequest do not declare a trust sufficiently definite to be executed; that there is a resulting trust in favor of the heirs at law; and that the estate should be divided among them after the payment of debts and expenses of administration. Bill sustained, with one bill of costs for plaintiffs and one bill of costs for the defendants. Reasonable counsel fees shall also be allowed by the sitting justice to attorneys on both sides, to be paid from the estate and allowed to the executrix in her account.

Decree accordingly.

ROWE v. HILL LUMBER MFG. CO.
(Supreme Judicial Court of Maine. Nov. 27, 1911.)

MASTER AND SERVANT (§ 278*)—SAWMILL EMPLOYÉ — INJURY — NEGLIGENCE — EVIDENCE — WEIGHT.

In an action for injury to an employé while operating a swinging circular saw, evidence held insufficient to show negligence of defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 278.*]

On Motion from Supreme Judicial Court, Oxford County.

Action by *Wesley P. Rowe* against the *Hill Lumber Manufacturing Company*. Verdict for plaintiff, and defendant moves for new trial. Motion sustained.

Argued before *WHITEHOUSE, C. J.*, and *SAVAGE, SPEAR, CORNISH, BIRD*, and *HALEY, JJ.*

James S. Wright, for plaintiff. *Fred V. Matthews*, for defendant.

WHITEHOUSE, C. J. The plaintiff recovered a verdict of \$600 for an injury to his right foot, received while operating a swinging circular saw in the defendant's sawmill.

in which he was employed. The case comes to the law court on a motion to have the verdict set aside as against the evidence.

The plaintiff claimed to recover on the ground that the framework in which the cutting-off saw in question was hung and the means of operating it were defective, insufficient, and unsuitable in two respects—first, because the saw was so hung and adjusted that it had a lateral, wobbling motion to the extent of an inch or more, and, second, because the swinging framework in which the saw was hung was not provided with a rope or chain of a fixed length to prevent the saw from coming forward further than was necessary to cut off the log. No other failure of duty on the part of the defendant company is alleged in the writ.

But the plaintiff says at the time of the accident, April 29, 1909, he took hold of the lever and pulled the saw forward for the purpose of sawing off a log, and that the saw, "instead of cutting the log as it should and going back to its place, suddenly jumped and bounded forward beyond what it ought and was supposed to have done, and struck the right foot of said plaintiff," etc.

The plaintiff was a man 28 years of age, who, as a carpenter, was familiar with the use of tools and machinery. At the time of the accident he had been at work in the defendant's mill about six months, principally as a carpenter. In March preceding the accident he had operated this saw for a few hours in cutting up slabs. On the day in question the plaintiff and a fellow workman named McLucas, an experienced sawyer, were directed by the foreman to cut up some logs into shingle bolts. "He told McLucas he wanted us to go out and cut up some shingle timber." It is not claimed by the plaintiff that the foreman expressly requested him to operate the saw, and the foreman testified that "McLucas had always run it," and, in asking him to go out with the plaintiff and "cut up some shingle timber," he presumed that McLucas would operate the saw. The plaintiff's assistance was needed in handling the logs and bolts. But, without the request of any one, after a log had been placed on the platform, the plaintiff proceeded to verify the measure of a shingle bolt with his rule, and thereupon voluntarily seized the lever and undertook to operate the saw. He expressed no doubt about his competency to run it and asked for no instructions or suggestions in regard to it, and no complaint is made in the writ because instructions were not given him. He appears to have confidently relied upon his own knowledge of saws in general and his prior experience with this one in particular. The mechanism of the framework of the swinging saw and the means and method of operating it appear to have been simple and easily understood. Whatever dangers were involved in the operation of it must have been obvious to one of his age and experience. The absence of any chain or rope to prevent the saw from

coming forward beyond the point required to sever the log, which is alleged in the writ and claimed in argument to be a defect in the appliance, must also have been manifest to the plaintiff. In his testimony in both direct and cross-examination he gives an intelligent description of the swinging "ladder" in which this saw is hung, of the permanent framework to which the ladder is attached at the top, of the location of the pulleys and shafts, and of all the essential features of the machine. His testimony also discloses a clear understanding of the method of operating it. In answer to inquiries he states that the diameter of the saw was about 36 inches, and that the collar around the shaft was about four inches, leaving a free blade of the saw for cutting of about 15 or 16 inches, and explains that in sawing off a log 4 inches in diameter, the size of the one they were cutting off at the time of the accident, the saw would necessarily cut beneath its axis, and, revolving downwards towards the log, would have a natural tendency to draw the log towards it, but that this log was held in place in a trough between the two wheels of the "hedgehog" in which it was laid.

In giving an account of the accident, he says, that after this four-inch log was placed in position in the trough of the "hedgehog," he cut off the scarf-end, squared the end of it, and "Mr. McLucas would push it right along to measure off a single bolt, and I took my rule out and measured the bolt, 16 inches, took my hand and placed it right on the end of that bolt, reached up with this hand and pulled the saw. That saw came and cut the bolt half off, nearly half off as I recollect. Then it bounded forward like a flash, and cut my pants, and tore them down here, and pulled my foot in and cut it right across there. Then the saw thrashed around, and struck this piece of iron and stopped the saw in the side of this carriage." He subsequently explained that the saw "went through the stick—either cut or broke it off." With reference to his own position at the time of the accident, he states that his right foot when it was cut was on one of the logs that had been piled behind him and a foot from the log that came along the track on a level with the track; and that his other foot was on the left of the saw and his hand on the end of the log.

It conclusively appears, however, from an inspection of the model in evidence which represents the relative proportions of the original saw and framework that, if the right foot had been in the position stated by the plaintiff, the saw would have swung entirely clear of it, and it would have been mechanically impossible for the saw to injure it when it was in that position.

But the plaintiff's fellow workman, McLucas, the most experienced millman and expert sawyer in the defendant's mill, testifying as a witness for the plaintiff, states that he was perfectly familiar with the saw in question and its action under various cir-

circumstances, and that "it was in good shape and solid." He explains the manner in which it was deflected from a straight course and run onto the iron of the platform at the time of the accident by saying that there was a cleat or block nailed onto the platform in front to measure by, and the log to be cut off was pushed up against this block. It was his judgment that he himself pushed the log up against this cleat a "little mite hard" so that, when the saw had cut into the log some distance, it became bound in the scarf, and, when it cut and broke off the shingle bolt, it forced it endwise down into the slot on the left-hand side, and wedged the saw up against the iron on the platform at the right of it. He says, if the stick does not lie properly in its place, the saw will sometimes come forward rapidly when it cuts the stick, but he never used a rope to "tie it back" because he "rather not have it on." In his judgment the slight lateral motion of the saw would not tend to bind it in the log because "it would cut a wider scarf."

After a patient study of all the evidence and a critical inspection of the model exhibited, it is the opinion of the court that there is nothing in the case to justify the conclusion that the machinery in question was either defective, out of repair, or unsuitable for the work to be done by it, either in the particulars specified in the plaintiff's declaration or in any other respect. It had only been in use about two years at the time of the accident, and during all that time no complaint had ever been made by any of the workmen who operated it, that it was not reasonably safe and suitable for its purpose. The slight lateral motion of the saw and of its swinging frame is shown by uncontradicted testimony to be such only as is usually observable and to be expected in mechanism of that kind even after a short period of service; and it appears from the testimony introduced by the plaintiff as well as that introduced by the defendant that the employment of a rope or chain to prevent the saw from coming forward too far is not necessary to its safe operation, but is incompatible with the most effective and convenient use of it.

If the act of McLucas in pushing the log up against the "cleat" a "little too hard," can be deemed a negligent one, it was the negligence of a fellow servant. The existence of the "cleat" itself is not alleged in the writ or claimed in argument to be a defect. There is not sufficient evidence to support a finding that there was any failure of duty on the part of the defendant towards the plaintiff. The principles of law applicable to the different phases of the cases have been so fully considered and carefully distinguished in the recent decisions of this court that any discussion of them in connection with this motion for new trial must be deemed superfluous. See *Young v. Randall*,

104 Me. 135, 71 Atl. 647; *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106; *Jones v. Mfg. & Invest. Co.*, 92 Me. 565, 43 Atl. 512, 69 Am. St. Rep. 535; *Conley v. Am. Express Co.*, 87 Me. 352, 32 Atl. 965.

Motion sustained.

Verdict set aside.

NORTON et al. v. EMERY et al., Assessors.
(Supreme Judicial Court of Maine. Nov. 30, 1911.)

1. PROHIBITION (§ 1*)—NATURE OF REMEDY.

The writ of prohibition is an extraordinary judicial writ, directed to an inferior tribunal to prevent use or usurpation of judicial functions.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5668-5674; vol. 8, p. 7767.]

2. PROHIBITION (§ 3*)—RIGHT TO RELIEF—OTHER AND ADEQUATE REMEDY—TAXATION.

Under Rev. St. c. 79, § 6, par. 11, giving the Supreme Judicial Court equity jurisdiction on petition of not less than 10 taxable inhabitants to restrain exemption of property from taxation, a writ of prohibition under section 5 does not lie to prohibit town assessors from abating taxes pursuant to a vote at a town meeting exempting certain property from taxation.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 4-19; Dec. Dig. § 8.*]

Report from Supreme Judicial Court, Somerset County.

Petition by James M. Norton and another for writ of prohibition against Willis C. Emery and others, assessors. On report. Petition dismissed.

Petition for a writ of prohibition to restrain the assessors or selectmen of the town of Anson, and their successors, from abating certain taxes on a mill, etc., of the North Anson Lumber Company for a term of 10 years. The defendants filed a motion to dismiss the petition, and the case was reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Charles O. Small, for plaintiffs. Augustine Simmons, for defendants.

HALEY, J. This is a petition for a writ of prohibition to restrain the assessors or the selectmen of the town of Anson, and their successors in office, from executing the vote of the inhabitants of the town of Anson, passed at a special town meeting of the town, held on the 21st day of March, A. D. 1905, under an article in the warrant for said meeting, instructing the selectmen of the town to abate the taxes of the North Anson Lumber Company for a term of 10 years on the new mill then being erected in said town by said company, and such other mills and buildings, except dwelling houses, as the said company might erect in the fu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ture in connection with their manufacturing business. Under this vote, state and county taxes on said property were not to be abated.

The company completed the erection of a mill and certain other buildings in said Anson and placed sawmill machinery in said mill. The selectmen of said town, who were also assessors of taxes, and, as the plaintiffs claim, acted as such, abated the taxes assessed on the mill and certain other property of the said company for some years prior to 1909 in pursuance of said vote, without any written application being made to them therefor by said company or in its behalf.

At the annual town meeting of the inhabitants of said town, held on the 1st day of March, 1909, Willis C. Emery, Walter G. Hilton, and Orlando Walker were duly and legally elected selectmen and assessors of taxes of said town for the year ensuing, and entered upon the duties of the respective offices.

On the 29th day of January, 1910, James M. Norton and Elmore R. Walker, two inhabitants and taxpayers of the town of Anson, were informed by one or more of the said assessors of taxes of said town that the said assessors were about to abate the whole or some part of the taxes assessed against the property of the North Anson Lumber Company, located in said town, for 1909, and believing that the whole or some part of said tax was about to be abated in pursuance of the vote of said town passed on the 21st day of March, A. D., 1905, and for no other reason, petitioned this court for a writ of prohibition to enjoin and prohibit the said Willis C. Emery, Walker G. Hilton, and Orlando Walker, as assessors of said town, from abating the whole or any part of said taxes, except for good and legal cause and upon written application therefor, according to law.

Upon this petition notice was ordered, returnable to a term of the Supreme Judicial Court to be held at Skowhegan, in said county of Somerset, on the third Tuesday of March, 1910, and due service was made upon the respondents.

At a subsequent term of said court, by leave of court, said petition was amended by inserting in the prayer of said petition, after the word "assessors" the words "and their successors in office."

At the March term, 1910, of said court the respondents appeared and filed a motion to dismiss said petition for the following reasons:

(1) A writ of prohibition is not the proper or legal process for the cause stated in the petition.

(2) The writ of prohibition will not issue when there is another adequate remedy.

(3) Among the other adequate remedies in this case would be bill in equity for an injunction, as provided in section 6, par. 11, of chapter 79 of the Revised Statutes, and

perhaps mandamus to the tax collector to collect the tax.

(4) Assessors of taxes are not a court, nor even an inferior court, and do not possess such judicial powers as to render a writ of prohibition legally applicable to them for the cause stated in the petition.

(5) The alleged intended act does not involve an assumption or usurpation of judicial powers or functions.

(6) Said intended act would be only a ministerial or administrative act, to execute the vote of the town.

(7) The cause of complaint, as stated in the petition, is substantially an attempt to exempt property from taxation, and therefore the petition should be signed by not less than 10 taxable inhabitants of said town of Anson, as provided in section 6, par. 11, of chapter 79 of the Revised Statutes.

(8) The petition in this case is signed by only two of the taxable inhabitants thereof.

(9) The petition does not allege any process before the board of assessors upon which they may act, or that the North Anson Lumber Company has made any written application to the assessors of taxes of said Anson for the time being as required by law, for the abatement of any of its taxes assessed for the year 1909 on any of its property situated in said town.

(10) The petition does not allege that said assessors have taken any action, or done anything or attempted to do anything by vote or otherwise, or even discussed the matter in a meeting of their board, formal or informal, concerning the abatement of the whole or a part of said taxes.

This case is now before the law court on the following report as to whether a writ of prohibition shall issue as prayed for or the petition dismissed on motion of the defendants.

Counsel for defendants admit all the allegations in the plaintiff's petition, except the allegation, in the ninth paragraph of the petition, that they intended to abate the whole or a part of said tax unlawfully. But as to that allegation the defendants admit that they, as selectmen, did intend to abate a part of said tax, but not unlawfully.

Counsel for petitioners admit that they could have easily obtained the signatures of at least 10 taxable inhabitants of said Anson to an application or petition, as provided in section 6, par. 11, of chapter 79 of the Revised Statutes, and that said assessors were the selectmen.

[1] The writ of prohibition has been defined as "an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal properly and technically denominated as such, or to an inferior ministerial tribunal possessing incidental judicial powers and known as a quasi judicial tribunal, or even in extreme cases to a purely ministerial body to cease abusing or usurping judicial functions."

The writ is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming that function. It is the nature of the act which determines the propriety of the writ. The power of the Supreme Judicial Court of this state to issue the writ is expressly conferred by the Revised Statutes (chapter 79, § 5), although the court had the power by virtue of its general common-law jurisdiction; it being a common-law writ said to be as old as the common law.

The statute does not define the case in which the power is to be exercised, but it is a power, like that connected with other prerogative writs, to be used with caution and only upon proper and necessary occasion.

The decision of this case does not require a lengthy discussion of the writ of prohibition, the procedure and its purpose. All the authorities agree that the power to issue it should be used with caution, and only upon proper and necessary occasions, and that, if there is another adequate or ordinary remedy, it is the duty of the court to deny the writ, but such other remedy must be prompt, efficient, and equally adequate.

"The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity." *People v. Westbrook*, 89 N. Y. 152.

"Whilst, therefore, it thus appears that the power of the court is ample to issue writs of prohibition, upon proper and necessary occasions, yet, like other prerogative writs with which it is associated, it is to be used with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in all the tribunals, when there is no other regular and ordinary remedy." *Washburn v. Phillips et al.*, 2 Metc. (Mass.) 298.

"The writ of prohibition, like mandamus, quo warranto, or certiorari, ought not to issue when there are other remedies perfectly adequate. We have a discretion to grant or deny the writ, and it would, I apprehend, in general, be a very good reason for denying it, that the party has a complete remedy in some other and more ordinary form." *Ex parte Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

"While the court is vested with ample power to issue writs of prohibition in proper cases, it is only when there is no other adequate remedy." *Jaquith v. Fuller*, 167 Mass. 123, 45 N. E. 54.

"It may properly be added that the decision of the Supreme Court [state] indicates that in its opinion relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself. This was a ground broad enough to

maintain the judgment irrespective of the decision of any federal question." *Yesler v. Board of Harbor Com'rs*, 146 U. S. 646, 13 Sup. Ct. 190, 36 L. Ed. 1119.

"Prohibition, being an extraordinary remedy, is only granted, as has been previously stated, in cases of necessity. Therefore the existence of another adequate, ordinary remedy, or of a more proper extraordinary remedy, will make it the duty of the court to deny the writ." *Spellman, Extraordinary Remedies*, § 1727.

"The writ of prohibition agrees with both injunction and mandamus in this: That, whereas, there is an adequate remedy at law, it is not available." *State v. Braun*, 31 Wis. 606.

[2] The act which the plaintiffs seek to prohibit is an indirect attempt to execute the vote of March 21, 1905, exempting property from taxation, and chapter 79, § 6, par. 11, R. S., provides that this court shall have equity jurisdiction on petition of not less than 10 taxable inhabitants thereof to restrain the exemption of property from taxation. As said by the court in *Emery v. Sanford*, 92 Me. 525, 43 Atl. 116: "Among the adequate remedies, however, which are available to property owners and taxpayers to secure equal and legal taxation, is that prescribed in paragraph 9, § 6, c. 77, R. S., in which, on application of not less than 10 inhabitants of a town, full equity jurisdiction is conferred upon this court to hear and determine all complaints relating to any unauthorized votes of such town to raise money by taxation, or to exempt property therefrom." *Knights v. Thomas*, 93 Me. 494, 45 Atl. 499.

There being a remedy provided by statute to prevent the vote from being executed, it cannot be said that there is not an ordinary proceeding at law or in equity to restrain the defendants.

The statute, having conferred upon this court jurisdiction upon petition to 10 inhabitants of the town, has given a prompt, efficient, and an equally adequate remedy with the writ of prohibition, which remedy the plaintiffs, if they have a just grievance, should avail themselves of.

Writ denied. Petition dismissed.

McAVOY v. RENEHAN.

(Court of Appeals of Maryland. June 24, 1911.)

COURTS (§ 202*)—APPEAL FROM ORPHANS' COURT—JURISDICTION ON APPEAL.

Code Pub. Gen. Laws 1904, art. 93, § 244, provides that if, upon the answer to any petition filed in a proceeding to charge an administrator with concealment of assets, either party shall require it, the court shall cause issues to be sent to the circuit court of the county, or to the superior court of Baltimore city, etc., as the case may be, to be there tried as other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

issues from the orphans' court; and either party to such petition may appeal to the circuit court for the county, or the superior court of Baltimore city. Article 5, § 60, provides that from all orders and judgments made by the orphans' court the party aggrieved thereby may appeal to the Court of Appeals. *Held*, that the Court of Appeals had no jurisdiction of an appeal from an order of the orphans' court, refusing to receive an answer containing a demand for issues, in a proceeding by a distributee charging an administrator with concealment of assets, on the ground that defendant was not entitled to have issues framed after the trial was in progress; the circuit court having exclusive jurisdiction of the appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. § 202.*]

Appeal from Orphans' Court, Howard County.

Proceedings by Aloysius H. Renehan against Joseph McAvoy, administrator of the estate of Hugh McAvoy, deceased. From an order refusing to receive an answer demanding submission of issues, defendant appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Joseph L. Donovan and E. Allan Sauerwein, Jr., for appellant. John G. Rogers, for appellee.

URNER, J. This is a proceeding by a distributee, under section 243 of article 93 of the Code, charging an administrator with concealment of assets, and the latter has appealed from the refusal of the orphans' court to receive his answer and grant his application for issues to be sent to a court of law for trial. There is a motion to dismiss the appeal, on the ground that the exclusive right of appellate review in a case of this nature is vested by statute in the circuit court of the county in which the suit is pending. In opposition to the motion to dismiss, it is contended that the orphans' court was without jurisdiction to take the action we are asked to reverse, and that an appeal therefore lies to this court.

Upon the filing of the petition against the administrator, an order was passed, requiring him to appear on a designated date to answer the petition, to the end that the court might consider its allegations, and pass a proper decree in the premises. On the appointed day, one of the counsel for the administrator appeared and applied for a continuance, upon the ground that he and his associate had not had an opportunity to confer with their client. This application was denied, and the court thereupon proceeded to hear testimony on behalf of the petitioner. The counsel for the respondent, upon the refusal of his request for a postponement, declined to participate in the hearing and retired from the court, but later during the session he returned, and cross-examined one of the witnesses. Before the examination

was concluded, a recess was taken, and when the court reconvened an answer was filed on behalf of the administrator, denying generally the averments of the petition, and praying for issues to the circuit court. A motion that this be not received was granted. An adjournment then occurred, during which an unsuccessful application was made to the circuit court for a mandamus to compel the orphans' court to comply with the requisition for issues. When the hearing was resumed in the latter court, the administrator presented a more formal answer than the first, concluding with a renewal of his demand for issues to be tried by a jury; but an objection to its reception was made and sustained. From this and the preceding adverse action, the appeal now before us was immediately entered. The hearing then proceeded, but without participation by the appellant. An order was eventually passed, requiring the administrator to file another and true inventory of the estate, and to report under oath what disposition he had made of the assets alleged to have been concealed, and what amount he had realized from any he may have sold; or, as an alternative provision, that he bring into court a specified sum of money for distribution. There has been no appeal from this order.

The sole question, therefore, to be determined on the motion to dismiss is whether this court has jurisdiction to entertain an appeal from the refusal of an orphans' court to receive an answer containing a demand for issues in a proceeding like the present.

It is provided that: "If upon the answer to any petition or bill filed" in such a case "either party shall require it, the court shall cause an issue or issues to be made up and sent to the circuit court for the county, or the superior court of Baltimore city, the court of common pleas, or the Baltimore city court, as the case may be, to be there tried and disposed of as other issues from the orphans' court; and either party to such bill or petition may appeal to the circuit court for the county or the superior court of Baltimore city." Code, art. 93, § 244. It has been held that the appeal thus specially prescribed for this class of cases is exclusive of the general right of appeal to this court from orders of orphans' courts, under section 60 of article 5 of the Code, which provides that: "From all decrees, orders, decisions and judgments, made by the orphans' court, the party who may deem himself aggrieved by such decree, order, decision or judgment, may appeal to the Court of Appeals." *Hignutt v. Cranor*, 62 Md. 216; *Linthicum v. Polk*, 93 Md. 91, 48 Atl. 842; *Stonesifer v. Shriver*, 100 Md. 27, 59 Atl. 139; *Abbott v. Golibart*, 39 Md. 554; *Worthington v. Herron*, 39 Md. 145. In the case last cited, it was said: "If the right of appeal had not been expressly given to the circuit court by section 240 (now 244) of article 93, then the broad and unqualified lan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

guage of section 39 (now 60) of article 5 would have afforded the right of appeal to this court; but, as we have seen, the statute conferring the new jurisdiction having provided the particular mode of appeal, that mode is a negation of any other, and must be taken to be exclusive." The rule has accordingly been established by the above decisions that "in no event" can an appeal in such a proceeding as the present be taken to the Court of Appeals under the general provision mentioned.

The appeal before us, however, as we have already noted, is sought to be sustained upon the ground that the orders from which it is prayed were beyond the limits of the special jurisdiction, with reference to which the appeal to the circuit court was provided. While it is conceded that the court below acquired jurisdiction under the statute in question to entertain the charge of concealment of assets preferred against the administrator, the contention is made that the demand for issues divested its jurisdiction as to any further action in the case, except compliance with that requirement.

In the case of *Maynadier v. Armstrong*, 98 Md. 175, 58 Atl. 357, which was a plenary proceeding for the reopening of an administration account for alleged improper allowances, an application by one of the parties for issues to be sent to the circuit court was refused by the orphans' court, on the ground that it was not made until after the commencement of the hearing. The proceeding was instituted, and the demand for issues was made, under sections 253 and 254 of article 93 of the Code, in connection with which no special mode of appeal is prescribed; and the question being brought to this court for review it was held that the action of the orphans' court in refusing issues under the circumstances was proper. The statute provided that in such cases, "if either party require it, the court shall direct an issue or issues to be made up and sent to any court of law convenient for trying the same;" but it was said by this court that the provision just quoted "does not require the orphans' court to stop investigations being made before it, as these were, and send to a court of law issues for the determination of such questions as those proposed in this petition, when that investigation is being made under a plenary proceeding, and the parties had elected to try the questions before the court." This decision is conclusive to the effect that an orphans' court has a judicial function to perform when issues to a court of law are demanded. While its refusal to transmit issues would, except under special circumstances, be erroneous and subject to reversal by the appropriate appellate court, yet its action in deciding the question presented by the application is clearly within the bounds of its jurisdiction.

In this case there was a dispute as to the right of the respondent to have issues framed after the trial was in progress. A question was thus raised which it was the duty of the orphans' court to determine. If it had overruled the objection and granted the issues, its action would concededly have been reviewable only in the circuit court; and it is clear that the appeal from a contrary decision should have been directed to the same tribunal.

While it will be necessary to dismiss the appeal, it does not appear that the appellant is precluded from making a defense on the merits, as the order passed upon the petitioner's testimony only requires the administrator to file a true inventory, and to report what he has done with the assets in dispute, and does not definitely and finally adjudicate the controversy.

Appeal dismissed.

LAPP v. STANTON.

(Court of Appeals of Maryland. June 23, 1911.)

1. ACTION (§ 27*)—COMPLAINT—NATURE OF ACTION—CONTRACT OF TOBT.

Where plaintiff leased one side of a building to defendant, and in a declaration in two counts charged defendant with having run great quantities of foul and filthy water into plaintiff's adjoining cellar, and in the second count with having permitted fowls under his control to make incursions on plaintiff's premises and damage his goods, the declaration sufficiently charged causes of action in trespass, under Code, art. 75, § 3, providing that any declaration which contains a plain statement of the facts necessary to constitute a ground of action shall be sufficient, and hence was not demurrable for failure to indicate with certainty whether defendant was charged with a tort or breach of contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

2. PLEADING (§ 48*)—DEMURRER TO DECLARATION.

On a demurrer to a declaration, the question must be determined, regardless of technical common-law rules as to forms of pleading; and the demurrer must be overruled, if the allegations adequately describe the nature of plaintiff's demand, and inform defendant of the particular acts for which he is sought to be held liable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.*]

3. TRESPASS (§ 40*)—DECLARATION—DESCRIPTION OF PROPERTY.

Where trespasses were alleged to have been committed in the cellar and on land of plaintiff, adjoining the cellar and land occupied by defendant, in a building described by name in a certain city, and on the lot in possession of plaintiff, situated in the rear of the building, there was a sufficient description of the property.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

4. TRESPASS (§ 40*)—DECLARATION—ACTS OF TRESPASS—DESCRIPTION.

Where a count for trespass alleged that defendant kept a lot of game chickens, which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

continually trespassed on plaintiff's premises and roosted in his shed and stable, and damaged new wagons and plows and other stock kept by plaintiff on the lot in question, such allegation indicated with reasonable certainty the cause and nature of the injury, so that the declaration was not defective for failure to state how the chickens damaged the merchandise.

[Fd. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

Appeal from Circuit Court, Allegany County.

Action by Conrad Lapp against Lewis Stanton. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

David J. Lewis, for appellant. Charles G. Watson, for appellee.

URNER, J. In this case the only questions for review are raised by a demurrer, which denies the sufficiency of two counts in the declaration. There are preliminary averments in each count, to the effect that the defendant occupied and used for saloon purposes a room and the cellar under it in a building in Frostburg, known as Moat's Opera House, and that the plaintiff, in the year 1907, became the owner of the building, and moved into it with his hardware store, and occupied the room and cellar adjoining those in the possession of the defendant. The first of the counts then alleges: "That from the 1st day of May, 1908, to the 1st day of May, 1910, the defendant, while occupying said room and cellar and keeping a saloon in same, continued to run great quantities of filthy and foul water from his cellar into the plaintiff's cellar, damaging large quantities of merchandise, rusted a lot of pipe and other material, damaged the heating plant, and caused the plaintiff a lot of unnecessary work and trouble." In the other count, it is alleged that "there was a large lot behind the room occupied by the plaintiff, and belonging to the plaintiff, which he used to store stock upon, and in the sheds and stable upon said lot," and "that from the 1st day of May, 1909, to the 1st day of May, 1910, the defendant kept a lot of game chickens, which continually trespassed upon the plaintiff, and roosted in the said sheds and stable, and damaged new wagons, plows, and other stock kept by the plaintiff on said lot, and in said sheds and stable." There was a claim of damages connected with the counts. The demurrer was overruled, a plea of not guilty was filed, and the case was tried on the facts, resulting in a verdict and judgment in favor of the plaintiff.

It is urged, as an objection common to both the counts, that the allegations do not inform the defendant whether he is charged with a tort or with a breach of contract.

The further criticism is offered as to each that it does not sufficiently allege the right of the plaintiff in the premises, or the nature of the injury, or the fact that it was committed by the defendant. With respect to the second of the two counts quoted, it is specially objected that it fails to describe the close upon which the trespass is alleged to have occurred, or to charge a breaking and entering of the close, or to describe how the damage complained of was produced.

[1, 2] In considering questions like the present, we must be guided by the statutory provision that: "Any declaration which contains a plain statement of the facts necessary to constitute a ground of action shall be sufficient." Code, art. 75, § 3. It has been held in view of this enactment, that the substance, rather than the form, of the pleading is the controlling consideration. *Gott v. State*, Use of Barnard, 44 Md. 336; *Crichton v. Smith*, 34 Md. 47. The Code itself permits a departure from the forms of pleadings it contains, "so long as substance is expressed." Article 75, § 24. The declaration must, of course, state the cause of action "with such a reasonable degree of certainty as will give fair notice to the defendant of the character of the claim or demand made against him, so as to enable him to prepare for his defense." 1 *Poe on Pleading and Practice*, § 562; *Jeter v. Schwind Quarry Co.*, 97 Md. 698, 55 Atl. 366; *Anne Arundel County v. Carr*, 111 Md. 148, 73 Atl. 668; *Pearce v. Watkins*, 68 Md. 538, 13 Atl. 376. But the inquiry on demurrer must be made, regardless of the technical common-law rules as to forms of pleading, and the object must be simply to ascertain whether the allegations constitute a plain statement of the cause of action. If they adequately describe the nature of the plaintiff's demand, and inform the defendant of the particular acts for which he is sought to be held liable, the objection to their sufficiency must be overruled.

[3] The counts under consideration are manifestly informal, but we are unable to hold that they are not in substantial compliance with the requirements of law under our system of pleading. Each count plainly indicates that the ground of action was a continuing trespass by the defendant upon the plaintiff's use of property, of which he was then in possession. To charge the defendant with having "run great quantities of foul and filthy water" into the plaintiff's cellar, and, in effect, with having permitted fowls under his control to make incursions upon the plaintiff's premises and damage his goods, was to describe acts which constituted trespasses. 1 *Poe on Pleading and Practice* (3d Ed.) § 159; *Richardson v. Milburn*, 11 Md. 340; note to *Bulphit v. Matthews*, 22 L. R. A. 55. Upon such allega-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tions, there can be no doubt as to the real nature of the cause of action. It is obviously and exclusively ex delicto. The ownership and occupancy of the designated property by the plaintiff is alleged; the disturbance of his possession by the defendant's conduct is charged; and the injuries sustained are described with reasonable particularity. The premises upon which the trespasses were committed are in each instance sufficiently indicated for the purposes of a suit of this character. Among the Code forms, an entire count in trespass consists of the statement "that the defendant broke and entered certain land of the plaintiff, called 'The Orchard,' in _____ county, and depastured the same with cattle." Article 75, § 24, subsec. 28. It is provided by section 22 of same article that land may be described in declarations "by abuttal, course and distance, by any name it may have acquired by reputation, or by any other description certain enough to identify the same." The trespasses in this case are alleged to have been committed in the cellar of the plaintiff, adjoining the one occupied by the defendant, in the building known as Moat's Opera House, in the town of Frostburg, in Allegany county, and upon the lot in the possession of the plaintiff, situated in the rear of the building. We can have no hesitation in holding that this description is a sufficient identification of the premises to which the suit refers. As facts are alleged which in effect constitute a trespass by the defendant upon the plaintiff's property, the omission to technically charge a breaking and entering cannot be held material, in view of the statutory rule we have quoted.

[4] The point is made that the count which deals with the depredations of the defendant's chickens does not state how they damaged the plaintiff's articles of merchandise. The averment is in effect that the fowls roosted in the sheds and stables on the plaintiff's lot, and damaged his new wagons, plows, and other stock there stored. This allegation indicates with reasonable certainty the cause and nature of the injury sustained under the special conditions described.

The demurrer was properly overruled, and the judgment will be affirmed.

Judgment affirmed, with costs.

MAYOR AND CITY COUNCIL OF CITY OF
BALTIMORE et al. v. BRENGLE
et al.

(Court of Appeals of Maryland. June 24,
1911.)

1. MUNICIPAL CORPORATIONS (§ 269*)—STREETS
—CLOSING—POWER OF ANNEX COMMISSION.

Acts 1904, c. 274, § 1, authorizes the mayor and city council of Baltimore to issue stock from time to time, the proceeds of which should be used only to provide the expenses of "con-

demning, opening, grading, paving and curbing the streets, avenues, lanes and alleys of the Annex portion of Baltimore City." Section 3 provides that the commission shall have the right to condemn, lay out, open, extend, widen, straighten, "close," grade, and pave any street, etc., and "shall have all powers necessary and proper in the exercise of said powers." The Annex portion of the city was prior to 1888 in Baltimore county, and many of the streets, lanes, etc., therein were originally county roads. *Held*, that the Annex Commission had power to close any street which it deemed necessary to close in carrying out the plan adopted by it for opening, straightening, etc., streets in the Annex part of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 269.*]

2. EMINENT DOMAIN (§ 19*)—CLOSING STREETS
—PUBLIC USE.

The topographical map of the Annex portion of Baltimore city showing the streets as they were to be laid out and straightened, etc., by the Annex Commission of Baltimore City, showed the streets laid out at right angles, but M. avenue, which is not adopted as one of the streets, runs diagonally across a square formed by W. avenue on the north, P. avenue on the south, E. street, formerly Tenth street, on the east, and H. street, formerly Eleventh street, on the west, and crosses E. street, and cuts off a strip at the corner of W. avenue and E. streets. N. avenue runs parallel with and is a square beyond W. avenue. Before closing M. avenue, the Annex Commissioners purchased as a public highway that part of the bed of Eleventh street from the south side of N. avenue to the north side of M. avenue, and had Eleventh street, which is wider than M. avenue, graded and macadamized. *Held*, that the closing of M. avenue was under the circumstances for a public use, even though a few owners would be benefited thereby by having the exclusive use of the bed of such avenue after it was closed.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 19.*]

3. EMINENT DOMAIN (§ 85*)—CLOSING STREETS
—COMPENSATION TO ABUTTING OWNERS.

A street cannot be closed even for a public use without making just compensation to abutting property owners entitled thereto.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 222; Dec. Dig. § 85.*]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Appeal by the Mayor and City Council of Baltimore and others from an order of the Baltimore City Court, on motion of Bettie M. Brengle and others, quashing proceedings by the Commissioners of Opening Streets, acting as the Annex Commission of Baltimore City for the closing of a certain avenue. Order reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

German H. H. Emory and Joseph S. Goldsmith, for appellants. Daniel B. Chambers and Wm. Edgar Byrd, for appellees.

BOYD, C. J. This is an appeal from an order of the Baltimore city court quashing the proceedings of the commissioners of open-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing streets, acting as the Annex Commission of the city of Baltimore, instituted for the closing of Morris avenue between Westwood avenue and Eleventh street. Three main questions seem to have been raised in the lower court. They were: (1) Is Morris avenue a public highway subject to the laws which regulate the opening and closing of streets? (2) Has the Annex Commission power to close that avenue? (3) Is the proposed closing of the avenue for a public use? The lower court decided the first two questions in favor of the city, but quashed the proceedings on the ground that the closing of the avenue was not for a public purpose. From the order thus quashing those proceedings, this appeal was taken.

1. We do not understand it to be contended in this court by the appellees that Morris avenue is not a public highway, and, as the testimony seems to be conclusive on that question, we will not discuss it, but treat it as so established.

[1] 2. By the Act of 1904, c. 274, the mayor and city council of Baltimore were authorized to issue stock to the amount of \$2,000,000, from time to time and payable at such times and bearing such rate of interest as they should by ordinance prescribe; provided, however, that not more than \$500,000 of stock shall be issued in any one year. It was then provided that "the proceeds of the sale of said stock shall be used only for the purpose of providing the costs and expenses of condemning, opening, grading, paving and curbing the streets, avenues, lanes and alleys of the Annex portion of Baltimore City." By section 2 provision is made for a special commission to be known as the "Annex Improvement Commission," which was to continue in office until the work of the commission was completed; provision being made for filling vacancies. Section 10 enacted that, in lieu of the commission provided for by section 2, the mayor and city council could by ordinance authorize and empower the commissioners for opening streets of Baltimore city to perform the duties and functions prescribed for the said commission, and that was done.

It will be observed that in the above quotation, providing for the use of the proceeds of the sale of the stock, the word "closing" is not included, but by section 3 it is enacted "that said commission shall have the right and power to condemn, lay out, open, extend, widen, straighten, *close*, grade and pave any street, avenue, lane or alley or any part thereof, from curb to curb," and it is expressly stated "that said commission shall have all powers necessary and proper in the exercise of said powers." The definite power to *close* any street, avenue, etc., was thus vested in the commission, and although that word is not used in the section providing for the use of the proceeds of the sale of the stock, if the commission has the power

to close this avenue, we are not specially concerned as to the use of the money, as in this instance no money is required. These appellees were allowed \$10 damages and were assessed \$10 for benefits, and the total damages allowed and costs of the proceedings were \$705.89, which amount is balanced by the benefits charged. In addition to that, the Hilton Land Corporation, Max Brafman, and Oregon Milton Dennis executed a bond to the city indemnifying it against all costs, expenses, etc., connected with the closing of this avenue. Whether or not the commission could use part of the money realized from the stock for closing a street, which is to be closed in connection with the opening, grading, etc., of other streets, is therefore not a practical question in this case.

In *Baltimore City v. Flack*, 104 Md. 107, 64 Atl. 702, this act was held to be valid, and was considered at length in reference to the question then before the court. Chief Judge McSherry, in speaking for the court, quoted from section 3 so much of the language as was applicable to that case—the power to grade and pave—and said, "The powers thus given are broad and unqualified." The power to *close* any street, avenue, etc., is just as broad and unqualified as that to grade and pave, as they are all in one sentence. Indeed, in some cases the power to close would be essential to an intelligent exercise of the power to open, grade, pave, etc., and hence it may be that, in speaking of how the proceeds of the two million loan were to be applied, the word "closing," on page 123 of 104 Md., 64 Atl. 702, was purposefully used; but, even if it was inadvertently inserted in the connection in which it was used, there can be no doubt of the power of the commission to close any street, avenue, etc., which must properly be closed in carrying out a plan adopted by the commission for opening, straightening, etc., streets. A street which runs diagonally across a block, as Morris avenue does, would not only be unnecessary, but would be a serious injury to most of the lots in that square, and would result in the erection of an undesirable class of houses, as the lots would not be large enough for better buildings, and would be a useless burden upon the city in keeping it in order.

It must be remembered that these \$2,000,000 were to be expended in the Annex part of the city, which was prior to 1888 in Baltimore county, and the Legislature must have known that there would be streets, avenues, lanes, and alleys, which were originally roads of the county, and which were so laid out that some of them must either be closed, or the neighborhood injured rather than benefited by opening new streets, laid out in the way city streets usually are. So, without dwelling longer on that branch of the case, we have no doubt about the power of the commission to close a street situated as this

is, with reference to the other streets which are to be opened.

[2] 3. We are of the opinion, however, that the learned judge who decided this case was in error in quashing these proceedings for the reason given by him. The commission was required by the act, immediately after its appointment and organization, to cause to be prepared for its guidance and use a map or maps of the entire Annex, or any part or parts thereof "showing the streets, avenues, lanes and alleys and the number of houses situated in and the area of each block of ground in said Annex, and such other information as may be desired."

By the Act of 1892, c. 138, a part of the loan therein provided for was authorized to be used for the preparation of topographical maps. Then chapter 576 of the Acts of 1894 prohibited avenues, streets, and alleys in the Annex from being opened, established, or condemned, and the dedication of such from being accepted, unless they conformed to the plans, plats, and surveys defined by the topographical survey, then being prepared, unless otherwise provided by an act of Assembly. By ordinance No. 129, approved December 8, 1898, the city adopted the completed plans of streets, etc., for the Annex territory. The street plans have been further regulated by Acts of 1902, c. 453; Acts 1904, c. 433; and Acts 1908, c. 158. A copy of the part of the topographical map which includes the section of the Annex with which we are now concerned is in evidence, and shows that the streets are laid out thereon at right angles; but Morris avenue (which is not adopted as one of the streets) runs diagonally across the square formed by Westwood avenue on the north, Presbury avenue on the south, Ellamont (formerly Tenth) street on the east, and Hilton (formerly Eleventh) street on the west. It then runs across Ellamont street and cuts off a strip of ground at the corner of Westwood avenue and Ellamont street. That takes off a small strip of the appellees' lot, which is supposed to front on Morris avenue; but in point of fact they have planted a hedge and inclosed the part of that avenue between their lot and Westwood avenue.

It will thus be seen that, according to the plan proposed by the topographical survey and map, this territory was intended to be laid out in squares, and Morris avenue was not expected to be kept open, as the map very clearly indicates. In laying out the property in this way, it would be wholly unreasonable to require the city to leave Morris avenue open, for it would deprecate the value of the property, destroy all prospect of beautifying that locality, as it might be with streets and alleys properly laid out, and would impose the useless burden on the city of keeping that avenue in proper condition, lighting it, etc. The Legislature and the mayor and city council, by virtue of the authority vested in

them by the Legislature, have thus in plain terms expressed their determination to have the streets in the Annex territory laid out in a systematic way, such as is becoming a city of the size of Baltimore.

Section 5 of chapter 274 of the Acts of 1904 provided that the commission should be the agent of the mayor and city council to acquire by gift, purchase, lease, or other methods of acquisition, or by condemnation any private property whatsoever, including streets, avenues, lanes, and alleys, rights or interests, franchises or easement that may be required to open, widen, extend, straighten, close, grade, or pave any street, avenue, lane, etc. It further provides that as soon as the title to the property so acquired has been certified by the city solicitor the commission should have the same conveyed to the mayor and city council. As a part of the plan, and before they would close Morris avenue, the commissioners required the Hilton Land Corporation to convey in fee to the city, as and for a public street and highway, all that part of the bed of Eleventh street, from the south side of North avenue to the north side of Morris avenue, excepting the part of the east half thereof extending southerly from North avenue 68 feet. North avenue runs parallel with and is a square beyond Westwood avenue. They also required that company before conveying it to grade and macadamize Eleventh street, and, particularly as it is a wider street than Morris avenue, it would seem to be established that it is a much better one than that avenue, which is not graded or improved.

We think the record shows that the closing of Morris avenue can fairly be said to be a part of the plan adopted for the annexed territory under legislative sanction. The commission cannot execute any plan it may have at one time, and although Mr. New, one of the commissioners, said that but for this application the avenue would probably not have been closed at this time, he said: "It would have been closed eventually, because the Topographical Commission has provided for it. The board of public improvements has given its approval and the city engineer has requested that Morris avenue be closed." It was said of the question of paving in case of Baltimore City v. Flack, 104 Md. on page 123, 64 Atl. 708: "It is apparent that the Legislature contemplated that the commission should do only *part* of the work of paving each year; and, inasmuch as to no other department or agency of the city government was there delegated any authority to determine what *part* should be paved in any of the four years over which the work was required to extend, it must inevitably follow that to the commission, and to it alone, was committed the authority and the discretion to select, in the exercise of the broad powers intrusted to it, the streets to be paved each year." That language might well be applied

to opening and closing streets, as well as to paving them.

It cannot be said that, because some parties may receive more direct benefits than the public at large by closing this avenue, it is therefore for a private and not a public use. A street opened, graded, and paved through a piece of land may enable the owner to sell lots for many times their former value, and it sometimes results in making a few persons wealthy; but it cannot be said that because the opening of the street may have such an effect it is for a private and not a public use. It is perhaps rare for an application to be made to the county commissioners of a county to open, alter, or close a road, excepting when one or more persons are specially interested in having it done. The cases of *Jenkins v. Riggs*, 100 Md. 427, 59 Atl. 758, and *Riggs v. Winterode*, 100 Md. 439, 59 Atl. 762, are striking instances of special benefits derived by an individual by the closing of an old road and the opening of new ones. The old road had not only reverted to Mr. Riggs, but was actually conveyed to him; but in the judgment of the county commissioners the public was benefited by the changes, and Mr. Riggs was sustained by this court in what was done.

Nor does the case of *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, by any means conclude this. Jew alley ran from Marion street on the south to Lexington street on the north, and was 18 feet wide at the southern end and 12 feet at the northern end. Mrs. Gutman owned lots at the southern end fronting 73 feet 5 inches on each side of the alley. An ordinance authorized the closing of that portion of the alley on which her lots bounded. All of the other owners would have been debarred from access to their properties from Marion street, and there was no substitute for it. This court said: "This is palpably and plainly taking their private property for her private use. In other words, it is a forced sale to her of their property. The extinguishment of their interests does not appear to inure in any way to the public service, nor to tend to the relief of any public necessity, nor to promote any public interest, nor to subserve any public purpose, nor to be connected with anything used by the public, nor, in short, to have any relation to the public convenience or public welfare." That was manifestly correct, as no one but Mrs. Gutman, who could build on the part of the alley thus closed, would be benefited by closing it, and the public could have been in no way helped, and there was no occasion, so far as the public was concerned, for closing the part of the alley.

But that is a wholly different case from this, as we have already pointed out. If that portion of Baltimore is thickly built up, as of course it is expected to be, it cannot be denied that the public at large will be benefited by having the property regularly laid

out in squares, with streets such as the plans call for, rather than have a street—the successor of an old county road—running diagonally across the territory included. If a street cannot be closed under such circumstances as we have in this case, such public improvements as are contemplated by the acts referred to would be effectually obstructed, and as the commission is authorized to close streets, and it is not contended that it did not comply with the provisions required to accomplish that end, in our opinion it is abundantly shown that it is for a public use which is not affected by the fact that a few owners will be specially benefited, because they may have the exclusive use of the road-bed after it is closed. That is generally the result when any road, street, or alley is closed.

The case of *Matter of the Mayor*, 157 N. Y. 409, 52 N. E. 1126, is very analogous, although not precisely like this. It was there held that the closing of a street in furtherance of a general street improvement plan constitutes the closing of a street for a public purpose, and in the opinion of the Appellate Division, reported in 28 App. Div. 143, 52 N. Y. Supp. 588, which was approved by the Court of Appeals, it was said: "The fact that, as a consequence of closing of the street, private ownership in its bed results, and that provisions are made by the law by which the land can be utilized and rendered valuable, does not convert the main purpose of the Legislature from a public to a private one." See, also, *Henderson v. Lexington*, 132 Ky. 390, 111 S. W. 318, 22 L. R. A. (N. S.) 20; *Grafton v. St. Paul, M. & M. Ry. Co.*, 16 N. D. 813, 113 N. W. 598, 22 L. R. A. (N. S.) 1; *Lewis on Eminent Domain*, § 209.

The condemnation map filed shows that, in addition to the streets adopted by the plan, there are also alleys, one 10 feet wide, from Westwood avenue to Presbury street, and one 17 feet wide from Eleventh street to the other alley. The record is not altogether satisfactory as to the condition of Presbury street; but we assume that the commissioners will see that the interests of the public are properly protected with reference to it, and that is not a question now before us.

[3] With the use of that and Eleventh street, together with the others in that neighborhood, it is difficult to see how any one can be materially injured by closing Morris avenue between the points named; but of course a street cannot be closed even for a public purpose without just compensation to those entitled to it. No question about the regularity of these proceedings was raised before us; but it is stated in the bill of exceptions in effect that the proceedings of the commissioners were regular and in proper form, although of course the appellees did admit the power and authority of the ap-

pellants to close Morris avenue and extinguish the easement thereover.

For reasons given we will reverse the order of the lower court.

Order reversed, and cause remanded; the appellees to pay the costs.

LUERY v. STATE.

(Court of Appeals of Maryland. June 24, 1911.)

1. CRIMINAL LAW (§ 370*)—EVIDENCE OF OTHER CRIMES—GUILTY KNOWLEDGE.

On a prosecution for receiving stolen goods from the thief, defendant's receipt thereof of him on more than one occasion may be shown as showing his guilty knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 825-829; Dec. Dig. § 370.*]

2. CRIMINAL LAW (§ 370*)—EVIDENCE—KNOWLEDGE OF OTHER ACTS.

Though the state on a prosecution for receiving stolen solder failed to prove receipt of any on the date named in the indictment, yet the thief having, without objection, testified that he commenced to take solder about seven or eight months before he was arrested, and that he had taken it at different times and sold it to defendant, it was not necessary, in the absence of application by defendant therefor, for the state to select some definite time on which it relied for conviction, so that testimony of the thief that he took solder and sold it to defendant about a dozen times after the day when the police notified defendant and other junk dealers that solder was being stolen, was admissible to show knowledge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 370.*]

3. CRIMINAL LAW (§ 780*)—INSTRUCTIONS—EVIDENCE OF ACCOMPLICE.

Inasmuch as the courts do not charge juries in criminal cases, the juries being made judges of the law and of facts, the trial court might well adopt the practice of granting prayers advising juries against conviction on testimony of accomplice, without corroboration, although there is no statute in the state requiring corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

4. CRIMINAL LAW (§ 753*)—DISCHARGE—EVIDENCE OF ACCOMPLICE.

There is no practice which would authorize the court to discharge defendants on motion because the only evidence against them is the uncorroborated evidence of accomplices.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.*]

Appeal from Criminal Court of Baltimore City; John J. Dobler, Judge.

Solomon Luery was convicted of receiving stolen goods, and appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Eugene O'Dunne, for appellant. Raymond S. Williams, for the State.

BOYD, C. J. Solomon Luery, Leah Luery, and two other parties were indicted separately for receiving stolen goods, knowing them

to have been stolen. The cases were tried before the court without a jury, having been by agreement heard together. The property alleged to have been stolen was solder which belonged to the United Railways & Electric Company of Baltimore, and Samuel J. Barrett, an employé of that company, pleaded guilty to the larceny of it. The court rendered verdicts of guilty against the two Luerys, and found the other two not guilty. The two appeals taken by the Luerys were heard together, and will be disposed of in one opinion.

Leah Luery is the wife of Solomon Luery. They are junk dealers, and have a place in the rear of a saloon on the corner of Gay and Lexington streets, and also another place on Harrison street. Solomon Luery testified that the main business was on Lexington street and the other place was used for storage. The license was in the wife's name.

There are four bills of exception in the record. The first three present rulings on the admissibility of evidence, and the fourth was taken to the ruling of the court on a motion to discharge each of the defendants, which will be hereinafter set out.

After two detectives, two policemen, and an employé of the railroad company were examined, Samuel J. Barrett was called by the state. The indictments charged the defendants with having received stolen goods on the 10th day of August, 1910. Barrett was arrested in the afternoon of that day, and had a cake of solder in his pocket. After his arrest Detectives Davis and Bradley and Barrett went to the corner of Gay and Lexington streets. Detective Bradley testified that he first went into the defendant's place alone, showed Mrs. Luery the piece of solder he had taken from Barrett, and asked her if she had bought anything like that in the last two or three months. She said she had not, and then said that Officer Cooper had shown her the "lookout sheet" dated the 20th of July, 1910. They are issued by the department to the policemen and detectives, and this one read, "Stolen from Trouble Station, U. Ry. & E. Co., since 1st inst., about 75 lbs. wiping solder in ingots 5½ in. long, 2½ in. wide and 1½ in. thick, stamped 'Extra Quality Wiping Solder.' Look over junk stores, plumbers, tinnerns," etc. Detective Bradley then went to the door, and called Detective Davis and Barrett. The three went into the store, and Bradley gave this account of what then occurred: "When Mrs. Luery saw Barrett, she reached down behind the counter and produced this ingot, and said, 'Yes; I bought that.' I said, 'From whom did you buy it?' She said, 'That man there,' meaning Barrett. I said, 'What did you do with the rest you bought?' She said, 'I sold it.' I said, 'Do you know who to?' She said, 'I don't know now. I don't remember.'" He then went to Harrison street, where he saw

Solomon Luery, and showed him the piece of solder he had found on Barrett. He said he had not bought anything of that kind. The piece which Mrs. Luery got from under the counter was marked "Superior Extra Fine Wiping Solder," and on the piece found on Barrett was marked "Extra Wiping Solder." The testimony of the witness Fox was that the company used both kinds. The one has more tin in it, and is brighter than the other. Capt. Gilbert who was connected with the United Railways, said complaint was made to him on February 19, 1910, that wiping solder was being stolen from the East Baltimore trouble station. He went to the junk dealers along certain streets, and the first place he visited was Luery's on Lexington street. He saw Mrs. Luery, and asked if she bought any of that kind of material, and she said no. He told her, if any of it came in, to notify the police, that they had been losing some of it. Barrett testified that he had been employed at the East Baltimore street trouble station, and said the first tin or solder he took from the company was about seven or eight months before he was arrested, that it was the kind of material Mr. Bradley found on him, and that the company handles solder like the samples shown him. He said he sold the solder taken by him on Lexington street to Solomon Luery; that he received 40 cents a cake for it, and a cake contained five pounds; that it was worth about 16 cents a pound. He also said that Solomon Luery advised him to continue it. He was asked whether, after the first time, he sold any more solder to Solomon Luery or wife, and replied that he had, and was asked about how long it was after the first time, and replied, "On various occasions, well, averaging maybe about a week, five or six days between, and maybe two weeks between." In answer to how much he took there at that time he said, "Mostly one cake, forty cents worth." He said he carried the cake in his hip pocket, and sometimes he would get 45 cents from the Luerys, but very seldom, and never did get more than 45 cents for a five-pound cake from them. He said sometimes Mrs. Luery was there and paid him. He was then asked, "How many times, if you can estimate, between February, 1910, and the 20th of July, 1910, did you take solder and sell it down there, either to Luery or his wife, Leah?" and answered, "I should judge about half a dozen times." The first exception was taken to that question and answer. He then said he would sell it to whichever was there. If both were there, he would sell it to either—one would take it and the other pay him. He was then asked, "Did either Solomon Luery or his wife, or both, say anything to you in reference to coming back," and replied, "Yes, sir. They told me to come back, and, if they saw me on the street, they wanted to know why I didn't bring more solder." Permitting that question to be ask-

ed and answered formed the ground for the second exception.

[1] There can be no doubt that it is permissible in a case of this character to prove more than one act as reflecting upon the guilty knowledge of the accused. It might very well happen that one would innocently purchase a cake of solder or other article without having any reason to suspect it had been stolen, but a number of such sales at about one-half of the value of the article, especially if made by an employé of a company which used it, ought to suggest to any one that there was something wrong. In this state there have been many decisions authorizing admission of evidence of other crimes when guilty knowledge or a similar question is involved. In *Bloomer v. State*, 48 Md. 521, where a conspiracy was charged with reference to passes on the Chicago, Burlington & Quincy Railroad, some of the same character of passes on the Burlington & Missouri River Railroad were admitted. In *Bishop v. State*, 55 Md. 138, in which the defendants were indicted for uttering as well as forging a bond, it was held to be competent for the state to show that on or about the time of the charge in the indictment the accused held and uttered similarly forged instruments. In *Bell v. State*, 57 Md. 108, evidence of uttering a check on the day after uttering the one charged in the indictment was held admissible although the traverser had been acquitted of that. In *Lamb v. State*, 66 Md. 285, 7 Atl. 399, evidence was admitted that the traverser made a subsequent attempt to accomplish an abortion by different means, to show with what purpose and intent he made the attempt charged in the indictment, as well as to corroborate the evidence of the first attempt. The case of *Rex v. Ellis*, 6 B. & C. 145, was referred to, in which a shopman was indicted for robbing his employer's money drawer of a particular sum of money on a named day; evidence was admitted that the prisoner had robbed the drawer at other times. Bayley, J., delivering the opinion said: "Generally speaking, it is not competent for a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other." In *Carnell v. State*, 85 Md. 1,¹ traverser was indicted for obtaining goods under false pretenses on January 30, 1896. A letter found in his possession addressed to the president of a bank dated February 22, 1896, asked him to certify to the fact that he had \$100 on interest in the bank, that he wanted to give a check dated July 2, 1896. Below was written, "Hagers-town, Md., 2-27, '96. To whom it may concern: The above is all right. The money is here, payable July 2, 1896"—and purported to be signed by the president. The court said: "The representation made in the latter being,

¹ 36 Atl. 117.

according to its purport, subsequent in date to a similar statement set forth in the bill of particulars, may not prove that the latter was in fact made, yet the letter was admissible for the purpose of showing guilty knowledge. The fact that he had on his person a paper in his own handwriting which contained the same false statement he was charged with in the indictment tends to prove guilty knowledge as to both." And the court also said that the letter was admissible for the purpose of showing that the defendant had devised a scheme to obtain goods wherever he could by falsely representing that he had money on deposit in that bank. In the case of *Beuchert v. State*, 165 Ind. 523, 76 N. E. 111, as annotated in 6 Am. & Eng. Ann. Cas. 914, many cases are cited to show that in a prosecution for receiving stolen goods evidence of the defendant's possession of other stolen goods prior to or at the time of the commission of the offense is admissible as testimony to establish that the defendant received with guilty knowledge the goods specified in the indictment. Many other cases might be referred to, but we do not understand the general proposition to be questioned.

[2] It is contended, however, that inasmuch as the state failed to prove that the goods alleged to have been received were received at the time named in the indictment, to wit, August 10, 1910, it was required to select some definite time on which the state relied for conviction, and that evidence of other receipts of stolen goods in so far as admissible at all could only be admitted for the purpose of reflecting upon the guilty knowledge of the defendants at such particular time. Of course, the mere fact that the state proved the receipt at a different date from that named in the indictment could make no difference, but, as the record shows, there was a failure to prove the charge, on the date named in the indictment, as the solder stolen that day was still in the possession of Barrett when he was arrested, and hence had not been received by either defendant. If application had been made to the court, it might have determined whether it would be proper to require the state to elect some time in each case, as the one relied on for conviction for each particular traverser, if that could be done, but there was no such motion, and the four cases were tried together. It was perhaps impossible to name any particular day, and, if that be so, it would practically have furnished immunity to a receiver of stolen goods if the state had to elect some one definite time and rely on that alone. Suppose the witness had been asked to state whether or not he had sold to Luery, or his wife, any of the solder stolen by him, and if so when, and he had replied, "Yes, half a dozen times, but I do not remember the dates." The state could certainly have followed that up by endeavoring to show, as nearly as possible, when it was

done. He had already testified without objection that he had taken solder at different times, and sold it to the Luerys. The dates named in the question in the first bill of exceptions (February, 1910, and July, 1910) were apparently used by reason of the testimony already given. Capt. Gilbert had said, it will be remembered, that he was informed in February, 1910, that wiping solder was being stolen from the company, and he notified the junk dealers, including Mrs. Luery, and then the "lookout sheet" was read to her by Officer Cooper on or about July 20th—the date of that sheet. The record shows that, after the second exception was taken, the state followed the testimony up by asking if Barrett had sold any of the solder taken by him from that company between the 20th of July and the 20th of August; the 20th of August being a mistake either in the record or in the question, as the arrest was made on the 10th. That question was not objected to.

Inasmuch as it would be extremely difficult to establish any definite day, and the proof showed that the thefts covered the periods included in the question, the state had the right to take the dates between which notices were shown to have been given Mrs. Luery, and find out, if possible, how often, if at all, she or her husband or both had bought solder within those dates. The question might have been followed up in chief or on cross-examination to ascertain the dates more definitely than had yet been done, and, if they could have been fixed accurately, the traversers, if they were in danger of being injured, could have asked the court to require the state to elect some date for each one, but, as we have seen, that was not asked. If any evidence objected to related to receipts subsequent to the time elected by the state, whether or not it should have been excluded we need not do more than say that to exclude it in a case like this, where there was the same thief, same article, same owner, and same receivers would have been of very doubtful propriety, as they were practically one entire transaction. The fact that the four cases were heard together and receipts at different times might have been relied on would have made it more difficult than in ordinary cases to confine the testimony of other acts to those prior to the date relied on for conviction. So, without further discussion of the question, we are of the opinion that the evidence in the first and second exceptions was admissible. The third we do not understand to be pressed. It apparently had nothing to do with the Luerys.

[3] It only remains to consider the motion presented by the fourth bill of exceptions. It is as follows: "The testimony being concluded, each of the defendants by their counsel moved that they, and each of them, be discharged on the ground that, upon the uncorroborated evidence of accomplices connecting the defendants with a crime, the law does not permit a conviction to stand." The

case of *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058, was not reversed on the ground that he was convicted upon uncorroborated evidence of accomplices. In speaking of their evidence we said: "Both were under indictment, and upon the uncorroborated evidence of accomplices connecting Lanasa with the crime the law does not permit a conviction to stand. Wharton's Crim. Evidence (8th Ed.) §§ 441, 442." It is true that at common law a verdict of the jury would not be set aside merely because founded on the evidence of an accomplice which was not corroborated, but by legislation in many states of this country and by the practice of most of the courts, where there is no such statute, such a verdict is regarded as an exceedingly dangerous one, and is not approved by the courts. In those jurisdictions where it is not positively prohibited unless corroborated, the evidence of an accomplice is universally received with caution and weighed and scrutinized with great care. "The suspicion with which the testimony of an accomplice is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such a person, have led to the very general and proper practice of advising or cautioning juries against convicting upon the uncorroborated testimony of an accomplice." Note to *Rex v. Tate* (1908) 2 K. B. 680, annotated in 15 Am. & Eng. Ann. Cas. 698, where numerous cases are cited. In the note just referred to many cases are collected on the question whether it is reversible error not to so instruct the jury, some courts taking one, and others the other, position on that subject. But the undoubted fact is that the experience of the courts, which is certainly much greater than that of juries, is that it is unsafe, at least in the great majority of cases, to rest a conviction upon the uncorroborated evidence of an accomplice. Any one who has had experience at nisi prius trials knows how captivating is the story of one relating the circumstances connected with some mysterious crime. When such a one has as a motive the prospect of freedom, a milder sentence, or the favor of the officers who have him in charge, an innocent one may undoubtedly be made to suffer, if great caution is not used. Hence it would seem to be safer to require some corroboration, and inasmuch as under our system the courts do not charge the juries in criminal cases, and the juries are made judges of the law and of the facts, one effective way of affording relief is for the trial court not to permit a conviction to stand if based exclusively on such testimony, if a motion for a new trial is seasonably made, or the trial courts might well adopt the practice of granting prayers advising or cautioning juries against conviction without corroboration. Under our system prayers are advisory, and not binding on juries in criminal cases, and, of course, as has been distinctly decided in previous cases, when a prayer is granted,

the court must be careful to so word it that the jury will understand that it is not binding. If then such a prayer is granted, it would be along the lines adopted by most courts in states where there is no statute requiring corroboration. It is true that a court cannot be required to instruct the jury in a criminal case in this state, but, in view of the almost universally approved practice in other states of advising or cautioning them in the class of cases spoken of, we would recommend that trial courts grant such prayers if properly framed, when requested, or when they deem it desirable, even if not requested. They should not, however, require too much in the way of corroboration, and, while we are not now called upon to enter into a general discussion of what would be sufficient, we will add that it is not required to have sufficient evidence to convict, exclusive of the accomplice's testimony, for, if that be required, there is but little use in having the evidence of the accomplice. As the reason for the rule, as adopted by most courts, is that the testimony of an accomplice alone and unsupported is regarded as too doubtful to be safe, the important matter is to have him supported in at least some of the material points involved tending to show the guilt of the accused. We have felt called upon to say this much, as the meaning of the statement in the *Lanasa Case* does not seem to be wholly understood, but we have no doubt about the correctness of the action of the lower court in refusing to discharge the *Luerys* under the motion quoted above.

In *Dick v. State*, 107 Md. 11, 63 Atl. 296, 576, the traverser was charged with embezzlement. At the close of the evidence of the prosecution, which showed that the defendant had failed to account for the money collected by him for his client, the defendant moved to strike out the testimony as being insufficient to prove that he was the agent of his client within the meaning of the word agent as used in the statute. This court said: "The motion to strike out the testimony of the state was in legal effect a demurrer to the evidence, and an attempt to obtain an instruction from the court to the jury to render a verdict for the defendant, and it is well settled that this cannot be done in Maryland, where the jury in criminal cases are the judges of the law, and of the legal effect and legal sufficiency of the evidence, and the court only determines the admissibility of the evidence." The cases of *Franklin v. State*, 12 Md. 246, *Broll v. State*, 45 Md. 360, *Bloomer v. State*, 48 Md. 533, *Beard v. State*, 71 Md. 280, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536, and *Ridgely v. State*, 75 Md. 512, 23 Atl. 1099, were then cited. In *Garland v. State*, 112 Md. 83, 75 Atl. 631, the defendant objected in advance to the testimony of each witness, and then made a motion at the conclusion of the state's testimony to strike out the evidence. The court said: "We cannot hold that the ev-

idence produced by the state was not admissible because it did not tend to prove the commission of the offense charged in the indictment. The evidence of W. Wallace Elliott was corroborated by the evidence of the admissions or statements of the appellant, and was admissible for the purpose of showing the alleged conspiracy. With the sufficiency of the evidence we have nothing to do. The jury in this state are the judges of both the law and the facts, and, where there is no reversible error in the rulings of the court, their finding must stand."

[4] There is no practice in this state which would have authorized the court to discharge the defendants as requested by the motion, and it was properly overruled. We do not want to be understood as assuming that one guilty of larceny is an accomplice, within the meaning of the law, of one charged with receiving stolen goods. In this state larceny and receiving stolen goods are very distinct crimes, but it is not necessary for the purposes of this case, and hence we have expressed no opinion on that subject. It follows from what we have said the judgment in each case must be affirmed.

Judgment affirmed, the appellant to pay the costs.

LUERY v. STATE.

(Court of Appeals of Maryland. June 24, 1911.)

Appeal from Criminal Court of Baltimore City; John J. Dobler, Judge.

Leah Luery was convicted of receiving stolen goods, and appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Thomas J. Mason, for appellant. Raymond S. Williams, for the State.

BOYD, C. J. For reasons given in the opinion in case of Solomon Luery v. State, 81 Atl. 681, the judgment in this case will be affirmed.

Judgment affirmed, the appellant to pay the costs.

WILMER v. MAYOR AND CITY COUNCIL OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. June 24, 1911.)

1. APPEAL AND ERROR (§ 607*)—RECORD ON EQUITY APPEAL.

Where counsel in a suit in equity fail to agree on what shall be inserted in the record on appeal, the record must be made up as provided by Code Pub. Gen. Laws 1904, art. 5, § 34, and the trial judge may direct appellant's solicitor to submit a statement to him, and, where he fails to do so, there is a default, as the right of appellant to control the record is not without limitation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665-2672; Dec. Dig. § 607.*]

2. APPEAL AND ERROR (§ 627*)—RECORD—DELAY IN FILING.

Where appellant, for more than four months after the expiration of the time for the trans-

mission of the record to the Court of Appeals, did nothing to perfect the appeal, and the inaction was unexplained, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3126; Dec. Dig. § 627.*]

3. APPEAL AND ERROR (§ 371*)—RECORD—PAYMENT OF COSTS.

The clerk of the trial court in a suit in equity need not forward the record to the Court of Appeals until it is paid for, and the clerk need not demand payment from appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2000; Dec. Dig. § 371.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Suit between Edwin M. Wilmer, trustee, and the Mayor and City Council of Baltimore. From a decree for the latter, the former appeals. Dismissed.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

David Ash and D. Eldridge Monroe, for appellant. Joseph S. Goldsmith and Charles F. Stein, for appellee.

STOCKBRIDGE, J. The appeal in this case was dismissed upon the day following the argument upon the motion to dismiss, at which time it was announced that the reasons for such action would be given later. On June 6, 1910, a decree was entered by the circuit court of Baltimore City in this case, and on August 4th, two days before the expiration of the time limited for an appeal, the order for an appeal was filed. Under section 33 of article 4, Code Public General Laws, the record should have been transmitted to this court so as to reach here at the latest by November 3, 1910. It was in fact transmitted on March 31, 1911, reaching this court on April 1st. It is this delay and non-compliance with the statute which forms the ground for the motion to dismiss.

As is usual, affidavits and counter affidavits have been filed as to the cause of the delay. From these it appears that, no agreement having been reached between counsel, the solicitors of the appellant gave an order to the clerk to insert certain enumerated papers as constituting the record, while the clerk suggested that these would not constitute a complete record. The appellant's solicitors then brought the situation to the attention of the judge before whom the case had been heard, who informed them that if they would prepare a statement of what should, in their judgment, be included in the record and submit it to him, he would order the clerk to prepare the record in such manner as might appear proper to him. This the appellant's solicitors said they would do, but in fact never did.

In argument the appellant asserts that he has the right to control the record, and relies on the decisions in Ewell v. Taylor, 45 Md. 573, and Estep v. Tuck, 109 Md. 531, 72

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Atl. 459, to support this contention. It is true that for many purposes the appellant is entitled to control the record, for example, the time of its transmission (*Carroll v. Hut-ton*, 90 Md. 636, 45 Atl. 886); but this right is not without limitation. If it were it would be within the power of an appellant to bring here a record containing only such of the pleadings and evidence as were, in his judgment, favorable to his case, and omit the rest entirely.

[1] Undoubtedly the counsel in a case may agree as to what shall be inserted and what omitted; but, where no such agreement is reached, section 84 of article 5, Code Public General Laws, explicitly provides how the record for appeals in equity cases shall be made up. In the case of appeals in cases at law it is the long-settled practice in this state, in the event of a disagreement between counsel, for the trial judge to determine what shall constitute the record, and the judge who heard this case below was but acting in analogy to this practice when he directed the appellant's solicitors to submit a statement to him. This they should have done, and their failure to do so was a default on their part.

[2] The time for the transmission of the record expired on November 4, 1910. More than four months were then allowed to elapse during which nothing appears to have been done to give vitality to the appeal prayed in August, and during which time one of the counsel of the appellant had the matter brought directly home to him, by the non pros. of an ejectment suit connected with a portion of the same property here involved. The inaction during this interval of more than four months remains entirely unexplained, and is additional evidence of default on the part of the appellant.

[3] The order for the appeal was filed on the 4th of August, 1910, the list of the selected papers for the record was handed to the clerk on or about the 21st day of October, 1910, but the cost of the record of these was not paid for until the 31st of March, 1911, and the clerk is under no obligation to forward the record until it is paid for. *Steiner v. Harding*, 88 Md. 343, 41 Atl. 799. Nor is it his duty to look up the appellant and demand payment therefor. *Parsons v. Padgett*, 65 Md. 356, 4 Atl. 410; *M. D. & V. Ry. Co. v. Hammond*, 110 Md. 126, 72 Atl. 650. The requirement is not met by the appellant saying to the clerk, "I will pay you what I (the appellant) regard as the proper cost of the record."

It has been held, in a long line of decisions in this state, that the burden is upon an appellant of showing that the failure to forward the record within three months after the entry of the appeal was not the result of his own neglect, but was due to the default

of the clerk or appellee. *Ewell v. Taylor*, 45 Md. 573; *Parsons v. Padgett*, 65 Md. 356, 4 Atl. 410; *Estep v. Tuck*, 109 Md. 528, 72 Atl. 459; *Warburton v. Robinson*, 113 Md. 24, 77 Atl. 127; *Horpel v. Hawkins*, 80 Atl. 842, decided at January term, 1911.

The burden which the law imposes has not been met by the appellant in this case, and the appeal is, accordingly, dismissed, with costs.

Appeal dismissed, with costs.

STATE v. POTOMAC VALLEY COAL CO. OF GARRETT COUNTY.

(Court of Appeals of Maryland. June 24, 1911.)
MASTER AND SERVANT (§ 69*)—CONSTITUTIONAL LAW (§ 247*)—COAL OPERATORS—PAYMENT OF WAGES—PENALTY FOR DELAY—CONSTITUTIONALITY OF STATUTE.

Acts 1910, c. 211, amending Acts 1904, c. 37, by prescribing a penalty against corporations engaged in mining coal or fire clay in Garrett county, for failure to pay wages semi-monthly, violates Const. U. S. Amend. 14, by discriminating unreasonably against particular classes of employers.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 78-81; Dec. Dig. § 69.* *Constitutional Law*, Cent. Dig. § 703; Dec. Dig. § 247.*]

Appeal from Circuit Court, Garrett County; Robert R. Henderson, Judge.

The Potomac Valley Coal Company of Garrett County was indicted for an offense, and the State appeals from a judgment sustaining a demurrer to the indictment. Affirmed.

The following is the opinion delivered by the circuit judge, referred to in the opinion of the court:

"The indictments in these three cases are precisely similar and charge the defendants with violating chapter 211 of the Acts of 1910. This act is entitled 'An act to repeal chapter 37 of the Acts of 1904 entitled an act to require all corporations engaged in mining coal or fire clay in Garrett county to pay their employes wages due semi-monthly and to re-enact the same with amendments.' The material parts of the statute are as follows:

"Section 1. Be it enacted, etc., that chapter 37 of the Acts of 1904, entitled an act to require all corporations engaged in mining coal or fire clay in Garrett county, to pay their employes wages due semi-monthly, be and the same is hereby repealed and re-enacted with amendments to read as follows:

"Sec. 2. That all corporations or individual mine owners now or hereafter engaged in mining coal or fire clay in Garrett county, be and the same are hereby required to pay each and all their employes their wages earned in said employment semi-monthly: That is to say; all wages earned on or before the 15th day of each month shall be paid not later than the 25th day of each month, and all wages earned from 16th day to the last day of the month, both inclusive,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

shall be paid on or before the 10th day of the succeeding months, unless said 25th day or 10th day of the month shall fall on Sunday or a legal holiday, in which case the time of payment shall be extended to the next day,' etc.

"Section 3 makes violation of the above provisions a misdemeanor and imposes a fine of \$50 to \$300. The amendment is in making the act applicable to individuals as well as corporations, and to those 'now or hereafter engaged,' etc.

"The indictments are formally correct, but in each case a demurrer is interposed to test the constitutionality of the act. The defendants contend that the law violates the fourteenth amendment of the Constitution of the United States because it abridges their rights as citizens of the United States and denies to them the equal protection of the law. The state contends that the act in question is a valid exercise of the police power, or, if not, it is a constitutional exercise of the right to amend the charters of the defendants, which are its creatures.

"It may as well be admitted at once that, if the act is an exercise of police power, its validity is unquestioned. But broad and undefinable as is the police power, its scope must be confined to those matters which concern the public health, safety, or morals. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

"Within these broad general limitations the Legislature has almost absolute discretion as to the means to be adopted to accomplish its purpose. But it is for the courts to say in each case whether the power attacked is in the exercise of a reasonable discretion by the Legislature, really within the bounds laid down above, or whether the reliance upon the police power be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class."

"In respect to the subject of the regulation of the time and manner of the payment of wages, it may well be, and the courts have so decided, that this matter may bear some relation to the public welfare; but it does not necessarily do so. The line of distinction between the adjudicated cases seems to be that where this relation or connection exists reasonable regulations are unobjectionable, but where it is absent any attempt at such interference is unjustifiable and void.

"Amongst the earliest cases upon the subject of wage regulation are two decided in West Virginia in 1889. In *State v. Goodwill et al.*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, a law (Acts 1887, c. 63) providing that 'all persons, firms, corporations or associations engaged in mining coal, ore or other minerals, or mining and manufacturing them or either of them or manufacturing iron or steel, or both, or any other kind of manufacturing shall pay their employes as provided in this act,' and

then prohibiting, under a penalty, such concerns from issuing for the payment of labor any order or other paper whatever unless redeemable at its face value in lawful money of the United States, bearing interest at the legal rate and made payable to the employes or bearer and redeemable within 30 days, was held unconstitutional because 'it is not competent for the Legislature, under the Constitution, to single out owners and operators of mines and manufacturers of every kind and provide that they shall bear burdens not imposed upon other owners of property or employers of labor and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of police power.'

"This was followed by *West Virginia v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. Rep. 891, which held that an act (section 4 of chapter 63 of the Acts of 1887) which prohibited persons and corporations engaged in mining and manufacturing and interested in selling merchandise and supplies from selling any merchandise and supplies to their employes at a greater per cent. of profit than they sell to others not employed by them was unconstitutional, because it was class legislation and an unjust interference with private contracts and business.

"About the same time the Indiana Supreme Court upheld the constitutionality of an act providing that the wages of miners should be paid in money, every two weeks; but no point seems to have been made against the time feature, and the court rests its judgment upon the rather absurd reason that the Legislature had the right to pass such an act to protect and maintain the lawful money of the nation.

"In *State v. Brown & Sharpe Manufacturing Company* (Rhode Island, 1892) reported in 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856, the Legislature of that state had provided that 'every corporation, other than religious, literary or charitable corporations, and every incorporated city, but not including towns, shall pay weekly the employes' (Acts 1891, c. 918), and a penalty was imposed for failure to do so. The court there sustained the constitutionality of the act, upon the ground that it was an amendment of all charters to which it applied, and cited the case of *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74. The court held that the law could not be obnoxious to the fourteenth amendment of the Constitution of the United States because that amendment has no application to corporations, and because a corporation is neither a citizen nor a person within its purview—a contention long since sent to its final resting place. *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Luman v. Hitchens Bros. Co.*, 90 Md. 24, 44 Atl. 1051, 46 L. R. A. 393. What force

the judgment has must therefore rest upon the right of amendment of corporate charters.

"In *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789 (1893), the court held unconstitutional an act prohibiting mining or manufacturing concerns from issuing for the payment of wages any order or other evidence of indebtedness payable otherwise than in lawful money of the United States unless the same were negotiable and redeemable without discount in cash or in supplies at the option of the holder, because such a law deprived persons of liberty without due process of law. The court held that the 'liberty' guaranteed by the Constitution includes the right to freely buy and sell, make contracts and have them enforced as others may, and that the classification of mining and manufacturing enterprises for legislation regulating the mode of payment of employés was unreasonable and arbitrary and could not be upheld.

"In *Frerer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, a company store act was held unconstitutional.

"In *Re House Bill No. 1,230* (Mass. 1895) 163 Mass. 598, 40 N. E. 713, 28 L. R. A. 344, a proceeding peculiar to Massachusetts by which the opinion of the Supreme Court can be obtained by the Legislature, the court advised the lawmaking body that an act requiring manufacturers to pay the wages of their employés weekly, although applying to individuals as well as corporations, was within the power of the Legislature under the Constitution of that state, which extends such power 'to all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to the Constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof and of the subjects of the same and for the necessary support and defence of the government thereof,' etc. (Const. pt. 2, c. 1, § 1, art. 4), and does not in terms make any provisions as to freedom or liberty of contract. 'The legislation on this subject relates to a great variety of contracts, and has been passed, some of it to promote the public health or the public morals or the public convenience, and some of it for the protection of individuals from fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing.'

"In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (1898), the law of Utah limiting the hours of labor in underground mines and in smelters and ore reduction works was held constitutional. The act was attacked under the fourteenth amendment of the Constitution of the United States, because it was alleged to abridge the privileges and immunities of citizens of the United States, deprived both employer and laborer

of his property without due process of law and denied to them the equal protection of the law. The court held this statute to be a police regulation, proper for those engaged in the hazardous employments mentioned, and in the course of its opinion says: 'While this court has held, notably in the cases of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, and *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. * * * The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class.'

"The California Supreme Court, in *Slocum v. Bean Valley Irrigating Company*, 122 Cal. 555, 55 Pac. 403, 68 Am. St. Rep. 68, in 1893 decided that the act of March 31, 1891 (St. 1891, p. 195), giving liens on the property of corporations for the wages only of such mechanics and laborers as may be employed by the week or month, was repugnant to the provision of the Constitution of California prohibiting special legislation.

"The Supreme Court of Illinois, in *Braceville Mining Company v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206, construed an act which provided 'that every manufacturing, mining, quarrying, lumber, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation, and every incorporated express company and water company, shall pay weekly each and every employé engaged in its business the wages earned by such employé to within six days of the date of such payment,' etc. Acts 1891, p. 213. In holding this act unconstitutional the court says: 'The act under consideration applies not to all corporations existing within the state, or to all that have been or may be organized for pecuniary profit under the general incorporation laws of the state. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of this act will demonstrate that many corporations that may be and are organized under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employés of an electric railway that would not require a like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would

not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect to corporations engaged in making excavations and embankments.'

"In Indiana the decisions are seemingly somewhat inconsistent. In *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, decided in 1903, the act in question was one that provided as follows: 'Every person, company, corporation or association employing any person to labor or in any other service for hire, shall make weekly payments for the full amount due for such labor or service, in lawful money of the United States to within six days or less of the time of payment.' The Supreme Court held that this act was not a legitimate exercise of the police power and was unconstitutional, saying: 'When the power is used for the purpose of regulating a business, occupation, or employment which in itself is lawful and useful to the community, it becomes the duty of the court, when called on, to decide whether the particular regulation is just and reasonable and in harmony with the constitutional guaranty, or whether it is an unwarrantable invasion of the protected rights of the citizen to pursue such business or employment upon terms of his own choosing.' *Laws 1899, c. 124.*

"In the same state, in 1906, in the case of *Seelyville Coal & Mining Company v. McGlosson*, 166 Ind. 561, 77 N. E. 1044, 117 Am. St. Rep. 396, the law in controversy was as follows: 'Every corporation, association, company, firm or person engaged in this state in mining coal, ore, or other mineral, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile machinery, agricultural or mechanical implements, or any article of merchandise, shall pay each employé of such corporation, association, firm or person, if demanded, at least once every two weeks the amount due such employé for labor, and such payment shall be in lawful money of the United States and any contract to the contrary shall be void.' *Burns' Ann. St. 1901, p. 7065.* The penalty was \$1 per day and attorney's fees.

"The defendant set up the *Republic Iron Steel Co. Case*, supra, as conclusive; but the court says: 'The case at bar cannot, as insisted by counsel for appellant, be ruled by the decision in *Republic Iron, etc., Co. v. State*, supra. The statute in controversy in this latter case and the one herein involved are materially different. The distinction between the two acts is palpable. The invalidity of the statute involved in *Republic Iron, etc., Co. v. State*, supra, was by this court attributed to the fact that the act deprived both the employer and employé in all lines of labor of the right to contract for employment except upon the condition that the wages earned by the employé should be

paid weekly. The right of the Legislature to reasonably, or to a limited extent, regulate the payment of wages, as is done under the statute in the case at bar, was not in that appeal denied by the court. It will be observed that the act of 1887 does not profess to restrict or abridge the right of contract except as against its express requirement that the amount due the employé for labor shall be paid in money of the United States. This is the only express provision thereof which prohibits the right of contract. The constitutionality of this provision of the act was fully sustained by this court in *Hancock v. Yaden*, 121 Ind. 366 [23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396]. The court goes on to say that 'the classification certainly cannot be said to be narrow, unreasonable, or arbitrary.' It also holds that 'this requirement to pay at the time prescribed by the statute only becomes mandatory upon the employer on the demand of the employé to whom the wages are due and owing. His right under the law to semi-monthly demand the amount of wages then due him is a matter wholly optional with him. It is a right which he may exercise or not, as he chooses. In no manner does the statute require him to exercise this right against his own free volition.' There is no mention in this case of the Constitution of the United States.

"In *Toledo, St. L. & W. R. R. Company v. Long*, decided in 1907 by the same Indiana Court [169 Ind. 316, 82 N. E. 757, 124 Am. St. Rep. 226], the judgment is that a law providing (1) that 'every company, corporation, or association now existing or hereafter organized and doing business in this state shall, in the absence of a written contract to the contrary, be required to make full settlement with, and full payment in money to, its employés engaged in manual or mechanical labor, for such work and labor done and performed by said employés for such company, corporation, or association, at least once in every calendar month of the year,' and (2) that for a violation of this provision a penalty of \$1.00 a day might be recovered, is unconstitutional under the fourteenth amendment of the Constitution of the United States because it discriminates in favor of employés of corporations, and only those doing manual or mechanical labor.

"*Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17 (1899), involved a law giving a lien for wages on all the property of a corporation, except duly recorded mortgages, etc., in case of the failure of a corporation to pay its employés monthly, without even requiring any description of the property or notice in any manner in order to make the lien valid, and an attorney's fee, while such provisions did not apply to any other class of laborers. This was held to be an unconstitutional discrimination against corporations.

"The United States Circuit Court for the Northern District of California, construing a California statute, in *Skinner v. Garnett Gold Mining Co.* (C. C. 1899), 96 Fed. 735, holds that an act requiring all corporations doing business in the state to pay their employes at least once a month the wages earned during the preceding month, and providing that the violation of the law should entitle an employe to a lien for his wages, having precedence, does not discriminate unjustly against corporations, in violation of the state Constitution prohibiting the granting of special privileges or immunities to any citizens or class of citizens, nor does it violate the fourteenth amendment of the Constitution of the United States, nor does it interfere illegally with the freedom to make contracts. The opinion contains the usual guarded expressions as to the illegality of unjust discriminations or unreasonable classifications, one of which is as follows: 'The doctrine of the foregoing cases leads to the conclusion that a classification of corporations, imposing burdens different from those imposed upon the general public, may be made without the statute encountering the prohibition of the state or federal Constitutions, providing such classification is made upon reasonable grounds, and is not merely an arbitrary selection.'

"The Supreme Court of the United States, in *St. Louis & Iron Mt. Ry. Co. v. Chas. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746 (1899), upheld an act of Arkansas requiring railroad companies to pay their employes when discharged their unpaid wages then earned without deduction, or that such wages should continue at the same rate until paid, not to exceed 60 days. The court ruled that such an act did not deny to such companies the equal protection of the law; but the reasoning of the court was that this was so because railroad companies were organized for public purposes, and it was their duty to serve the public in the most efficient manner practicable. It further placed its ruling upon the ground that the Legislature could amend railroad charters to accomplish the result desired. Following is a part of the opinion: 'If the Legislature, in its wisdom, seeing that their employes are and will be persons dependent on their labor for a livelihood and unable to work on credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employes when the same is fully performed and at the end of their employment.' As to the fourteenth amendment of the United States Constitution, the court said: 'In view of the fact that these corporations were clothed with a public trust, and discharged duties of public con-

sequence, affecting the community at large, the Supreme Court held the regulation, as promoting the public interest in the protection of the employe to the limited extent stated, to be properly within the power to amend reserved under the state Constitution. Inasmuch as the right to contract is not absolute, but may be subjected to the restraint demanded by the safety and welfare of the state, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the fourteenth amendment.'

"In a note to *Lawrence v. Rutland Ry. Co.* (1907) 80 Vt. 370, 67 Atl. 1091, reported in 15 L. R. A. (N. S.) 350, later cases in Ohio and Pennsylvania denying the constitutionality of such legislation are given; but the reports are not at hand.

"Coming now to our own state, the law applicable to this branch of the case is laid down in *Luman v. Hitchens Bros. Co.*, 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393, as follows: 'A statute which denies to one person the protection that is accorded to others under the same conditions, and in the like situation, or which imposes on one a burden not similarly borne by others, is, because it so discriminates, in both instances, invalid under the paramount organic law. Though it was perfectly competent to the Legislature to prevent railroad and mining corporations from engaging in the business of bartering or selling goods, wares, and merchandise, either by not conferring such a power upon them in their charters, or, if it had been conferred, then by subsequently amending the charters and imposing the restriction by such an amendment, yet it was obviously not within the power of the General Assembly to deny to particular individuals, who happened to be officers of those corporations, and merely because they were such officers, the right which every other citizen of the county, whether an officer of other corporations or not, possessed to sell goods, wares, and merchandise within the county. Whilst the Legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes, these classifications must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. There is nothing in operating mines or railroads to render the individual less capable to contract, or to give him greater wisdom and adroitness therein, than he would possess were he engaged in operating and controlling a manufacturing establishment or conducting commercial pursuits or any other of the numerous branches of industry. In each and all of these callings vast numbers of both skilled and unskilled laborers are employed, and their relations to their em-

ployers would seem to be under precisely the same conditions as are those affecting the relations between mine owners and officers of railroads on the one side, and their employes on the other. The prohibition which the statute contains is not imposed for the purpose of rendering mining and railroading less perilous or laborious, nor to restrict or regulate the duties of employer and employe in respects peculiar to those industries, but for the sole purpose of imposing disabilities in contracting as to the sale of goods, wares, and merchandise—things about which all laborers must contract, and as to which officers and agents of all other corporations, and in every other branch of industry, are permitted to contract with their employes without any restriction whatever. * * *

The statute was not passed in the exercise of the police power of the state, and is repugnant to the fourteenth amendment.'

"The language of this opinion would seem to be, *mutatis mutandis*, precisely applicable to the case at bar. The classification of corporations and individuals engaged in mining coal or fire clay in Garrett county, for the purpose of imposing upon this class burdens not imposed upon other industries, seems to be unreasonable and arbitrary and founded upon no essential or apparent difference in conditions between this class and others engaged in mechanical or similar occupations. The act does not explain or even suggest any reason why mining concerns should pay their employes twice a month, when railroad, lumbering, or manufacturing concerns are not required so to do. Nor is there any reason for such classification and differentiation that occurs to the mind of the court. With every disposition to uphold solemn acts of the Legislature, the court must be mindful of the duty to protect citizens from the imposition of unequal and arbitrary and unreasonable burdens, and, after a full consideration of this act, I have reached the conclusion that it is not a proper exercise of the police power, and that it violates the fourteenth amendment of the Constitution of the United States, and must be struck down, unless it can be upheld, as far as corporations are concerned, as an act amending the charters of all mining corporations.

"The extent of the power to so amend corporate charters seems to be held to be unlimited by our Court of Appeals in *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74, and in the *Hitchens Case* last quoted. It was not necessary in either of these cases to go so far, and the *Shaffer & Munn Case* is severely criticised in *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17. In the *Shaffer & Munn Case* the court declares that a corporation has no interest or natural rights like a citizen. Certainly this is so in the sense that the Legislature may, in the creation of corporations, limit their powers and rights to

any extent it may see fit, and that it may, under the reserved power of alteration and amendment, prescribe for the government of their affairs whatever rule it could have established in the original charters.

"In *Lawrence v. Rutland Ry. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, it is expressly decided that the reserved power to amend charter of a railroad company includes the right to require it to pay its employes weekly in lawful money, and that its constitutional rights are not impaired thereby.

"Inasmuch as our Constitution has provided that corporations shall be created under general laws so far as possible, and that no special charter shall be valid where general laws exist for the formation of such corporations, as it may be desired to form, it would seem reasonable and logical that amendments must also be by general laws. It is somewhat difficult to distinguish between the legislative act in the *Shaffer & Munn Case* as a general act of amendment of charters and that in the *Hitchens Case*, and yet the Court of Appeals holds one to be an amendment and the other not. As in the *Hitchens Case* the act now at bar does not profess to amend any charters, and as its intention in this respect, as in all others, is one of construction, it would seem to me it must be construed to be an attempt to pass a police regulation, where, as we have seen, it is incompletely done. The fact that individuals are joined with corporations, and that corporations external to the state are covered by its terms, indicates that it was not passed as an amendatory act. If it is objected that the act might be allowed to stand as to corporations, while void as to individuals under the fourteenth amendment, the answer is that, when a part of a statute is held to be void, then the entire statute must be held to be inoperative, if its enforcement without the void part would effect results not within the legislative purpose. *Storck v. State*, 101 Md. 486, 61 Atl. 330. It must, I think, be apparent that the Legislature never intended by this act that corporations and individuals engaged in the same business should stand upon a different footing as to the payment of their employes, and that such a construction would effect results exactly contrary to the legislative intent. The whole statute must therefore fall.

"The demurrer in each case will be sustained."

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Isaac Lobe Straus, Atty. Gen., Julius C. Renninger, and David J. Lewis, for the State. Gilmor S. Hamill and Edward H. Sincell, for appellee.

PEARCE, J. The Potomac Valley Coal Company and the Hamill Coal & Coke Com-

pany, each being a body corporate, were separately indicted in the circuit court for Garrett county, charged with the violation of chapter 211 of the Acts of 1910, a local law for Garrett county. The charge in each case was precisely the same, viz., the failure to pay to a certain named employé of each company, semimonthly, the wages respectively earned by such employé, as required by said act, and the indictments were precisely similar; the only difference between the two cases being that the Potomac Valley Coal Company was created under the general incorporation law of Maryland, while the Hamill Coal & Coke Company was created under the general incorporation law of Virginia. But this difference in no way affects the disposition of the question involved in each case.

In each case it was conceded that the indictments are technically correct, and demurrers were interposed for the sole purpose of determining the constitutionality of the act under which the indictments were drawn. The cases were argued together below, and the circuit court held the act to be unconstitutional and void, and sustained the demurrer in each case, and judgment being entered for the defendants upon the demurrers, the state has brought these appeals, which were submitted upon single briefs filed in both cases.

The title of the act in question is as follows: "An act to repeal chapter 37 of the Acts of 1904 entitled an act to require all corporations engaged in mining coal or fire clay in Garrett county to pay their employés wages due semimonthly and to re-enact the same with amendments." And we will transcribe the act below:

"Section 1. Be it enacted by the General Assembly of Maryland, that chapter 37 of the Acts of 1904, entitled an act to require all corporations engaged in mining coal or fire clay in Garrett county to pay their employés wages, due semimonthly, be and the same is hereby repealed and re-enacted with amendments to read as follow:

"Sec. 2. That all corporations, or *individual mine owners*, now or hereafter engaged in mining coal or fire clay in Garrett county, be and the same are hereby required to pay each and all their employés their wages earned in said employment semimonthly; that is to say; all wages earned on or before the 15th day of each month shall be paid not later than the 25th day of each month, and all wages earned from sixteenth to the last day of the month, both inclusive, shall be paid on or before the tenth day of the succeeding month, unless said twenty-fifth day, or tenth day, shall fall on Sunday or a legal holiday, in which case the time of payment shall be extended to the next day; *and if payment as above is to be made before the twenty-fifth of the tenth day of any month, it shall be the duty of the mine owner, agent, superintendent, or paymaster of each mine,*

to notify their employés at least three days in advance of such intended payment, by posting notices at their respective places of employment.

"Sec. 3. That any corporation, *association or individual*, operating a coal or fire clay mine in Garrett county, that shall fail or neglect to make payment of wages at the times and in the manner hereinbefore specified in section 2 of this act, shall be deemed guilty of a misdemeanor, and upon indictment and conviction thereof shall be fined not less than fifty dollars nor more than three hundred dollars in the discretion of the court."

The only amendments made by chapter 211 of 1910 to the language of chapter 37 of 1904 are indicated by the words in the above transcript which are italicized, so that the only apparent, or rationally inferable, purpose of amending the act was to embrace in its provisions *individuals* as well as *corporations*, and those *then* as well as *thereafter* engaged in the pursuits mentioned.

The grounds of demurrer are assigned:

(1) That the act interferes with the right of personal liberty guaranteed both by the twenty-third article of the Bill of Rights of Maryland, and by the fourteenth amendment to the Constitution of the United States, in that it abridges the freedom of contract which is an essential element of personal liberty, unless some restriction is made in the legitimate exercise of the police power.

(2) That it discriminates unreasonably against particular classes of employers, and thus denies to those classes the equal protection of the laws guaranteed by the fourteenth amendment of the Constitution of the United States.

These questions have been many times, in many forms, before the highest state courts and the Supreme Court of the United States, and it is not surprising in the multitude of such cases, in view of the nice distinction of facts sometimes existing, the ingenuity and skill of able counsel, and the diverse mental habits and training of the judges who are required to decide these questions, that the decisions are not always clearly consistent, or readily reconcilable; but through them all there will be found certain basic principles established, which, kept steadily in view, afford a reasonably safe guide for their just application to any state of facts which may be presented, and we will now proceed to state some of the principles thus established.

Judge Cooley, in his work on Constitutional Limitations (5th Ed.) p. 391, says: "Every one has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free govern-

ments. * * * The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to build, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty, in matters of primary importance to 'their pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negative." Id. 393. In exception to these general principles, "the police power is universally conceded to include everything essential to the public safety, health, and morals. * * * Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27 [5 Sup. Ct. 357, 28 L. Ed. 923]; *Kidd v. Pearson*, 128 U. S. 1 [9 Sup. Ct. 6, 32 L. Ed. 346]. But to justify the state in thus interposing its authority, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.

Instances where the police power may be validly exercised are the destruction of a dilapidated house on a highway endangering passers-by, or blowing up houses in a town to stay a conflagration, the slaughter of diseased cattle, the destruction of impure milk being served to the general public of a community, the compulsory vaccination of school children, the suppression of houses of ill

fame, or of obscene publications, and even the regulation of railways and other recognized public utilities. All these have direct and obvious relation to the public safety, health, morals, or general welfare, and this relation is immediately suggested to the most ordinary intelligence and perception. The learned judge of the circuit court in his opinion forcibly observes: "The act does not explain or even suggest any reason why mining concerns should pay their employes twice a month, when railroad, lumbering, or manufacturing concerns are not required to do so. Nor is there any reason for such classification and differentiation that occurs to the mind of the court."

The Attorney General in his ingenious and very able brief lays much stress upon what he characterizes as the "socio-economic isolation of mining communities," and argues that mining corporations discharge peculiar duties, of public consequence and concern, and affecting the general public as distinguished from those of certain communities or localities; but we cannot accept this as a satisfactory distinction. That contention was made in *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869, in reliance upon *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, but was not approved; the court saying: "The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life, which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore when he chooses to mine his coal he exercises no franchise." In the same case the court said: "Why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract? Undoubtedly, if these sections (regulating the weighing of coal in so far as it nullifies all contracts for mining coal which dispense with such weighing) fall within the police power, they may be maintained on that ground; but it is quite obvious they do not." And the court also cited with approval the following passage from *Walley's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511: "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional or void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those who made the law, by another; whereas, a like general law affecting the whole community generally could not have been passed." We have been referred to no consideration of the public health,

safety, morals, or general welfare which can justify this act as the legitimate exercise of the police power of the state, and none of the cases relied on for that purpose, in our judgment, are at all analogous to the case before us. The complete, and to our minds conclusive, answer to the argument that this case is within the police power is admirably expressed in the language of the court in *Re Jacobs*, 98 N. Y. 114, 50 Am. Rep. 636: "Such legislation may invade one class of rights to-day and another to-morrow; and if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."

In *Fraser v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, the court said: "The privilege of contracting is both a *liberty* and a *property right*, and if A. is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract."

In *Re Jacobs*, supra, the New York Court of Appeals thus expressed the same principle: "One may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. 'Liberty,' in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, the act under consideration, which restricted the right of contract in respect to the method and time of payment for their labor, was made applicable to all persons or corporations engaged in mining, or manufacturing from coal or other minerals, or any other kind of manufacturing, and the court said: "While these terms include all persons engaged in any kind of *manufacturing*, such as the shoemaker, cigar maker, distiller, brick maker, jeweller, weaver, milliner, tailor, or miller, it does not include the

wholesale merchants with their hundreds of clerks and agents, nor the railroad and construction companies, with their thousands of employes. The propriety or necessity, if such exists, of applying the provisions of the statute to these latter, is equally as great, if not more so, as it is to any of the former. The rights and privileges of certain specified employers are abridged, while others of the same class are left free. * * * When the subject of contract is lawful, *not public in its character, and the exercise of it is purely private and personal to the parties*, it cannot be forbidden or limited by the Legislature." The statute in that case was an almost literal copy of a Pennsylvania statute, declared in *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, to be unconstitutional "because it prevented persons *sui juris* from making their own contracts."

The logical and convincing test of this question is whether the subject of contract is public or private in its character, as expressed in the *West Virginia* case, supra, which is in that respect typical of all the more important cases holding acts to be void which interfere with the liberty of contract. *St. Louis & Iron Mountain R. R. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, is a typical case of the converse of the proposition, where the subject of contract is of a public character. The act in that case provided that railroad companies should pay the wages of their employes, without deduction, whenever they were discharged, and, if not so paid, that then, as a penalty, such wages should continue at the same rate until paid, during a period not exceeding 60 days. That act was upheld as not an infraction of the fourteenth amendment, upon the distinct ground, however, that *railroad corporations* "were clothed with a public trust, and discharged duties of public consequence affecting the community at large."

No case has been cited from the Supreme Court of the United States which measures up to the contention of the Attorney General, and which, in such event, it would be our duty to obey.

We have, however, in Maryland, the case of *Luman v. Hitchens*, 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393, in which an act of our Legislature prohibiting railroad and mining corporations, their officers or agents, from selling or bartering goods, wares, and merchandise in Allegany county to their employes, was held not to have been passed in the exercise of the police power of the state, and to be repugnant to the fourteenth amendment because "the attempted classification was arbitrary, and was not made to rest upon some difference which bears a reasonable and just relation to the act, the thing, in respect of which the classification is proposed."

We fully concur with the circuit court that that decision is precisely applicable to the case at bar, and that, in the absence of

paramount authority from the Supreme Court of the United States, it is our duty to follow the ruling in *Luman v. Hitchens*.

Without discussing the question whether, as to corporations, this act could be sustained as amending the charters of either domestic or foreign corporations doing business in this state, while stricken down as to individuals, we do not think it conceivable that the Legislature would have passed the act at all, if they had anticipated the discrimination which would thus be worked in favor of corporations as against natural persons. *Nutwell v. Anne Arundel County*, 110 Md. 669, 73 Atl. 710.

The opinion of the learned judge of the circuit court contains so thorough and impartial a review of the leading cases relied on by counsel upon both sides that we shall direct it to be published in connection with this opinion.

Judgment affirmed.

STATE v. HAMILL COAL & COKE CO.

(Court of Appeals of Maryland. June 24, 1911.)

Appeal from Circuit Court, Garrett County; Robert R. Henderson, Judge.

The Hamill Coal & Coke Company having been indicted for an offense, the State appeals from a judgment sustaining a demurrer to the indictment. Affirmed.

Argued before *BOYD, C. J.*, and *BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER*, and *STOCKBRIDGE, JJ.*

Isaac Lobe Straus, Atty. Gen., Julius C. Renninger, and David J. Lewis, for the State. Gilmor S. Hamill and Edward H. Sincell, for appellees.

PEARCE, J. This case being in all respects similar to the case of *State v. Potomac Valley Coal Company of Garrett County*, 81 Atl. 686, and having been argued together with that case, the judgment will, for the reasons there given, be affirmed.

Judgment affirmed.

GOODMAN v. SAPERSTEIN.

(Court of Appeals of Maryland. June 22, 1911.)

1. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where evidence is subsequently admitted, without objection, which was originally excluded, such exclusion is immaterial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.*]

2. EXCEPTIONS, BILL OF (§ 56*)—PRESENTATION OF GROUNDS OF REVIEW—SUFFICIENCY OF BILL OF EXCEPTIONS.

A bill of exceptions which is not signed by the court cannot be considered on appeal.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 94-96; Dec. Dig. § 56.*]

3. APPEAL AND ERROR (§ 688*)—EXCEPTIONS—COMPETENCY OF JUDGE—REVIEW.

An exception to the competency of a judge to make any order in the case, because he fur-

nished security when the defendant laid a rule for security for costs upon the plaintiff, cannot be sustained, where neither the docket entries nor the record disclose any order made by such judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 688.*]

4. DEPOSITIONS (§ 65*)—CROSS-EXAMINATION.

Under Code Pub. Gen. Laws 1904, art. 35, § 17, providing for the taking of depositions, a party who has been served with notice that the opposite party desires to take depositions has a right to attend in person and cross-examine a witness, even though the other party submits written interrogatories.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 142-145; Dec. Dig. § 65.*]

5. DEPOSITIONS (§ 111*)—ADMISSIBILITY—WAIVER OF OBJECTIONS.

Where, upon notice of the taking of depositions, the party served appears and demands a right to cross-examine, and the court, upon a refusal, remands the depositions to permit such cross-examination, an appearance thereafter and a cross-examination of the witnesses, taken with the original appearance and demand, waives any possible objection to the admissibility of the depositions as a whole.

[Ed. Note.—For other cases, see *Depositions*, Dec. Dig. § 111.*]

6. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR.

Where a defendant, in an action for a balance due on a sale of certain goods, claimed the right to cross-examine on the taking of depositions by the plaintiff, and the court remanded the depositions taken for the purpose of allowing such cross-examination, the defendant was not prejudiced by the order of remand and an exception thereto cannot be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4062-4062; Dec. Dig. § 1033.*]

7. APPEAL AND ERROR (§ 237*)—RESERVATION OF GROUNDS—MOTION TO EXCLUDE AT CLOSE.

No error can be imputed to a trial court in overruling a motion to strike out a certain answer, where the court admitted it, subject to objection, and it was not followed up by a motion for its exclusion at the close of all the party's evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.* Trial, Cent. Dig. §§ 228-252.]

8. TRIAL (§ 53*)—EVIDENCE—EFFECT—REFERENCE TO DOCUMENT.

Where, in an action for balance due on a sale of goods, a shipping receipt, purporting to be for the goods in suit, has been properly produced and identified, reference to it may be made in the testimony of other witnesses.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 53.*]

9. PRINCIPAL AND AGENT (§ 24*)—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

In an action for a balance due on goods sold, evidence which tended to prove the authority of a son of the defendant to sign letters in relation to the business carried on by his father, under his mother's name, having been admitted to prove the signatures to certain original letters introduced, and to establish the authority of the person signing the letters to bind the defendant, the weight and sufficiency of the evidence was for the jury in the trial court.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 24.*]

10. EVIDENCE (§ 71*)—DOCUMENTARY—LETTERS—FOUNDATION.

Proof of the mailing of original letters raises the presumption of their receipt by the addressee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.*]

11. EVIDENCE (§ 174*)—BEST AND SECONDARY EVIDENCE—CARBON COPIES OF LETTERS.

Carbon copies of letters shown to have been sent by the party offering the copies in evidence are properly admitted, when their custody is properly proven, being regarded as duplicate originals.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561-569; Dec. Dig. § 174.*]

12. TRIAL (§ 417*)—WAIVER OF ERROR—REFUSAL TO DIRECT VERDICT.

Where a defendant, in an action for a balance on goods sold, offered, at the close of plaintiff's case, two prayers, designed to withdraw the case from the jury, and upon their refusal went on and introduced evidence to support his own contention, he cannot complain of such refusal as error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 980; Dec. Dig. § 417.*]

13. SALES (§ 358*)—DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action for a balance due on goods sold, evidence as to damages by reason of non-delivery thereof on a certain day is not admissible on behalf of the defendant, where time was not shown to have been of the essence of the contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

14. SALES (§ 358*)—DAMAGES—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for a balance due on goods sold, evidence as to damages to the defendant for failure to deliver at a certain time is wholly speculative and conjecturable, and is not admissible.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

15. TRIAL (§ 229*)—INSTRUCTIONS—IDENTICAL INSTRUCTIONS.

A request for two identical instructions is improper, as the giving of them would have a tendency to confuse the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 513; Dec. Dig. § 229.*]

16. TRIAL (§ 253*)—SUBMISSION OF ALL FACTS.

An instruction which segregates from all the facts in evidence a particular fact or facts, and directs the finding of a verdict upon such segregated facts, is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 612-623; Dec. Dig. § 253.*]

17. TRIAL (§ 253*)—INSTRUCTIONS—SUBMISSION OF ALL FACTS.

In an action for a balance due on goods sold, a prayer, asked by the defendant, which failed to submit to the jury the question of the acceptance of the goods shipped by the plaintiff, is improper, as omitting an essential fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 612-623; Dec. Dig. § 253.*]

18. SALES (§ 347*)—ACTION FOR PRICE—DEFENSES.

And a prayer, asking a direction to find for the defendant on a finding that the goods sued for were not delivered by a certain date, is improper, where there is no showing that time was of the essence.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 347.*]

Appeal from Circuit Court, Wicomico County; E. Stanley Toadvin, Judge.

Action by Isaac Saperstein against Annie Goodman. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

A. P. Barnes, for appellant. John W. Station and Ellegood, Freeny & Wailes, for appellee.

STOCKBRIDGE, J. Isaac Saperstein brought suit in the circuit court of Worcester county to recover from Annie Goodman the sum of \$242, as balance due him upon a sale of certain clothing made to her, through her manager and husband, William Goodman. The suit was in assumpsit upon the common counts. General issue pleas were filed, and upon the pleadings so made up the case came on to trial, after having been removed from the circuit court of Worcester county to that of Wicomico.

[1] The exceptions which bring the case before this court are 31 in number, but the points involved are within a very narrow compass, and some of them can be disposed of briefly. Thus the twenty-sixth and twenty-seventh exceptions are in terms waived by the appellant in her brief; and the twenty-eighth exception, which was taken to the refusal of the court to permit oral testimony as to the contents of certain letters, written in the Hebrew language by the husband of the defendant to the plaintiff, is immaterial, as the evidence then excluded was subsequently given without objection.

[2] The third bill of exceptions was not signed by the court below, and therefore cannot be considered by this court. Central Ry. Co. v. Coleman, 80 Md. 328, 30 Atl. 918; Schaeffer v. Insurance Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

[3] The second exception is to the competency of Judge Robley D. Jones to make any order in the case. His sole connection with the case seems to have been that when the defendant laid a rule for security for costs upon the plaintiff that security was furnished by Mr. (subsequently Judge) Jones; but neither the docket entries nor the record in this case anywhere discloses upon its face any order as made by him in the progress of the case, and therefore furnishes nothing upon which to base this exception.

[4-6] The testimony on behalf of the plaintiff was taken by way of depositions, and these depositions are the basis of a large number of the exceptions contained in the record. Under the original notice for the taking of the depositions, written interrogatories were submitted on behalf of the plaintiff, while the defendant appeared in person and claimed the right to cross-examine—a right which the notary before whom the dep-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ositions were taken refused to recognize; and it was to the admissibility of these depositions after the trial court had remanded them, for the purpose of permitting the cross-examination of plaintiff's witnesses, that the first exception was taken. While the practice in regard to the taking of depositions under section 17 of article 35, Code 1904, has not been very definitely established, it is manifest that if a party upon whom notice of the taking of depositions had been served proffers to attend in person and cross-examine the witnesses such party has an undoubted right so to do. The defendant did this, both under the original notice and under the remand, and by so doing waived all possible objection to the admissibility of the depositions as a whole. *Jackson v. Jackson*, 80 Md. 178, 30 Atl. 752. Moreover, the defendant was certainly not prejudiced by the order of remand, which gave to her the opportunity of cross-examination, which had been erroneously refused to her in the first instance by the notary taking the deposition.

The fourth, fifth, sixth, seventh, eighth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth exceptions were each and all of them exceptions taken to different portions of the evidence taken under depositions on behalf of the plaintiff, and the defendant's alleged ground of objection in each of these instances is the same as that of her first exception, and what has been said in regard to that applies equally to these.

[7] No reference is made upon the brief of the appellant to the eleventh exception, which was to the ruling of the trial court upon the motion to strike out the answer of the witness Annie Saron with regard to a certain letter and shipment. The action of the court does not appear to have been a final ruling upon the admissibility of this answer. It is not always possible for a trial court to control the order of proof (*Mills v. Bailey*, 88 Md. 320, 41 Atl. 780), and especially is that true where a portion of the evidence is in the form of depositions. In such cases all that the trial court can do is to admit, subject to objection, and hold the evidence liable to be stricken out upon motion presented at the proper time, and in the present case that is exactly what was done; and the evidence thus in, not having been followed up by any motion for its exclusion at the end of the plaintiff's evidence, no error can be imputed to the trial court in this regard.

[8] The exceptions numbered 12, 20, 22, 23, and 24 all bear, in one form or another, upon evidence in regard to the shipping receipt, offered by the plaintiff, of the goods which had been forwarded to the defendant. The story of that receipt is fully told in the evidence given by the witness Solomon, who testified to having personally fastened up the box or case in which the goods destined

for A. Goodman had been packed; and that he received the paper offered in the evidence of the plaintiff, and called the "shipping receipt," "from the railroad truckman, showing that the case of clothing was shipped to A. Goodman, Snow Hill, Md., via Penn Railroad." With this receipt produced and identified, the references to it made in the evidence of the witnesses Saron and Saperstein were clearly admissible.

[9] The exceptions 9, 10, and 13 were each of them reserved to the admission in evidence, during the examination of the witness Annie Saron, of certain letters received by the plaintiff, in due course of mail, on the letter head of, and purporting to come from, the defendant, and also to carbon or manifold copies of certain letters sent by the plaintiff to the defendant. With regard to this evidence, it is contended that the burden was upon the plaintiff (1) to prove the signatures to the letters, so far as they were originals; (2) the authority of the person signing the letters to bind the defendant; and (3) that, in so far as they purported to be copies, they were entirely inadmissible. The learned judge before whom the case was tried, upon the first and second of the propositions, held the plaintiff to the strict rule of law, and that burden the plaintiff endeavored to meet by placing upon the stand the witness Staton. His evidence, whether strong or weak, undoubtedly tended to establish the authority of Jesse Goodman to sign letters in relation to the business carried on by his father, under his mother's name; and, while the evidence of Mr. and Mrs. Goodman both flatly denied the existence of any such authority, the amount of credence to be given to the testimony of the witness Staton was a question to be passed upon by the jury. What has been said in this connection is sufficient to dispose of the twenty-first exception.

[10,11] The carbon copies of the letters from the plaintiff to the defendant were properly admitted. Proof was given by the witness Saron of the mailing of the originals, which raised the presumption of their receipt by the addressee (*Bank v. Raney*, 77 Md. 321, 26 Atl. 119); and carbon copies of such letters, when their custody is properly proven, are regarded as duplicate originals. *Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626; *Ches. & Ohio Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161.

[12] At the conclusion of the plaintiff's case, the defendant offered two prayers, designed to withdraw the case from the consideration of the jury, and the refusal of these constitutes the ground of the twenty-fifth exception. The court having refused these prayers, the defendant then proceeded to offer testimony in support of her contention. By so doing she waived any rights she may

have had to insist upon these prayers in this court, and the ruling of the court on them is not open for review here. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337; *Un. Rys. Co. v. Deane*, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453; *N. Y., etc., Ry. Co. v. Jones*, 94 Md. 24, 50 Atl. 423; *West Md. R. R. Co. v. Shirk*, 95 Md. 637, 53 Atl. 969; *Vonderhorst Br. Co. v. Amrhine*, 98 Md. 406, 56 Atl. 833; *Keyser v. Warfield*, 100 Md. 72, 59 Atl. 189; *Wells, etc., Council v. Littleton*, 100 Md. 416, 60 Atl. 22; *Bernheimer v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356; *Johnson v. Johnson*, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; *Jarrell v. Young*, 105 Md. 280, 66 Atl. 50, 23 L. R. A. (N. S.) 367; *Penn. R. Co. v. Cecil*, 111 Md. 298, 73 Atl. 820.

[13, 14] The twenty-ninth and thirtieth exceptions were taken to the refusal of the trial court to admit evidence of damages to the defendant, by reason of the nondelivery, on the 1st of September, of the goods sold. These rulings were correct, first, because no evidence had been adduced to show that time was of the essence of the agreement to purchase and, secondly, because, as has been often held by the court, the character of damage sought to be introduced was wholly speculative and conjectural.

[15, 16] The only remaining exception is that relating to the prayers granted by the court. The defendant's second and third prayers as offered were identical, and each of them was granted by the court with a modification. To ask two instructions in identical language must inevitably have a tendency to confuse the jury, and there was no error in the rejection of these prayers. The modification as added by the court submitted to the jury the effect of the promise of the defendant to pay for the goods before or after the giving of the check for \$100. This was essential to these prayers, because it is error to segregate from the evidence of a case a particular fact or facts, without regard to other facts of which there has been evidence, and then direct the jury to find a verdict upon such segregated facts. *Jackson v. Jackson*, 80 Md. 192, 30 Atl. 752.

[17, 18] The first prayer of the defendant was properly refused, because it failed to submit to the jury the question of the acceptance or not of the goods shipped by the plaintiff, and also for the reason that it directs the jury to find for the defendant, if it shall find that the goods were not delivered by a certain date; there having been no evidence before the jury that time was of the essence of the contract.

The record does not show the plaintiff's prayers as originally presented to the court, only the form in which they were granted after amendment; and, without protracting this opinion unduly, it is sufficient to say

that these prayers, taken in connection with the prayers of the defendant as granted, fairly placed the case before the jury.

Judgment affirmed, with costs.

LABRANCHE v. ST. JEAN BAPTISTE SOCIETY.

(Supreme Court of New Hampshire. Hillsborough. Nov. 7, 1911.)

1. INSURANCE (§ 756*)—MUTUAL BENEFIT SOCIETY—RIGHT TO BENEFITS.

Where the by-laws of a benefit society provided that insurance was payable to the widow and heirs only of a member in good standing, and, in addition to the payment of special assessments, each member to be in good standing was required to pay regular monthly dues, the administrator of a member who at the time of his death was in arrears for both assessments and dues could not recover the insurance benefit in the absence of proof of waiver, though no action had been taken to expel deceased or deprive him of his membership.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1917; Dec. Dig. § 756.*]

2. INSURANCE (§ 755*)—ASSESSMENTS—NON-PAYMENT—WAIVER.

A by-law providing for the suspension of a person insured for nonpayment of assessments or dues may be waived.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1907; Dec. Dig. § 755.*]

3. INSURANCE (§ 755*)—MUTUAL BENEFIT SOCIETY—SUSPENSION—WAIVER.

Where members of a mutual benefit society were suspended without action of the society for nonpayment of dues and assessments, that no action was taken by which insured after suspension for nonpayment of dues and assessments was deprived of his membership, and that the names of suspended members were carried on the books, did not constitute a waiver of the suspension.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.*]

Transferred from Superior Court, Hillsborough County; Plummer, Judge.

Action by George Labranche, as administrator of the estate of Alphonse Labranche, deceased, against the St. Jean Baptiste Society for funeral benefits and life insurance. Case transferred from superior court on agreed statement of facts. Judgment for defendant on the case agreed.

The defendant is a fraternal beneficiary association, providing by assessments for sick benefits and funeral expenses, and also having an insurance fund provided by a separate assessment of \$1.50 for each member. As to sick and funeral benefits, the by-laws provide that "a member who shall fail to pay his dues at the general meeting of each month shall forfeit his right to vote and to the benefits as long as he shall continue to be in arrears." The insurance provided by the special assessment of \$1.50 per member is payable to the widow or heirs "of a member in good standing with the society." There is also a provision for dropping from the rolls members who are 90 days in arrears

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

on their regular assessments, and one that the special assessment is "payable within 30 days under penalty of expulsion." The plaintiff's intestate was in arrears on both classes of assessments on November 21, 1907, when the society voted to notify all members that they must pay the special assessment before the next general meeting to be held December 19th. Labranche was notified, but died December 15th without having paid. At the meeting on December 19th the names of five others who failed to comply with the notice were stricken from the rolls. No action was taken as to Labranche's membership until after January, 1908. The records of the society show that the provisions of the by-laws governing the payment of dues and special assessments have not been strictly enforced, that names of members in arrears have been carried on the books, and that the procedure adopted was to report this fact to a regular meeting, when it would be voted that they be notified to pay. If they then refused to pay, the fact would be reported to the next meeting, when the delinquents would be expelled.

Henry A. Burque, for plaintiff. Hosea W. Parker, for defendant.

PEASLEE, J. [1] As to the funeral benefit, the plaintiff concedes that he cannot recover unless there has been a waiver of the provisions in the defendants' by-laws; but, as to the insurance provided by the special assessment, he contends that he is entitled to recover in any event because the only penalty provided for the nonpayment of this assessment is expulsion from the society, and no such action had been taken. The fallacy in this position lies in its failure to take into account all the conditions imposed upon one claiming to recover the insurance. If the member failed to pay this special assessment, the society might expel him, but until it did so, the nonpayment did not affect his rights. This was a part of the insurance contract, but it was not the whole agreement. The money was payable only to the representatives of "a member in good standing with the society." If for any cause his good standing was lost, the claim to the insurance was lost also. In addition to his agreement to pay the special assessments, he was under obligation to pay his regular monthly dues. If he became in arrears as to these, he was deprived of his right to vote in the society's meetings and of any claim to sick or funeral benefits. To use the language of the by-laws he was not "a member in good standing with the society." No action on the part of the society was necessary to make the provision operative. Failure to pay created the condition described and deprived the member of the benefits until he paid up his arrearages. It deprives the plaintiff of the funeral benefits by virtue of the condition which he ad-

mits applies to the situation; and it deprives him of the insurance through the proviso that a participant therein must claim through a member in good standing. On neither branch of the case can there be a recovery unless there has been a waiver.

[2] It is well settled that a by-law providing for the suspension of a person insured for nonpayment of assessments or premiums may be waived. *Lally v. Insurance Co.*, 75 N. H. 188, 72 Atl. 208; *Salvail v. Foresters*, 70 N. H. 635, 50 Atl. 100. The question of waiver is one of fact, and is not stated as a part of the agreed case.

[3] The facts that no action had ever been taken by the society to suspend a member until after notice, and that the names of members in arrears for monthly dues were carried upon the books, do not settle the controversy. No action by the society was necessary to create a suspension, and members who were in arrears for dues were suspended by virtue of that fact alone. While suspended, their names were properly kept on the books. They were still members, though not members in good standing. It does not appear how long the society had been in existence, nor whether its business had been such that occasions for action upon the cases of delinquents had been numerous. It is not stated that Labranche knew of or relied upon the practice to disregard the by-laws. The action taken by the society in November, whereby members in arrears were given until December 19 to pay their arrearages, related to expulsion for failure to pay special assessments only. It had no bearing upon the suspension of members for other delinquencies. In short, the agreed case merely states facts, from which the essential fact of waiver might be found.

As the case stands, there should be judgment for the defendant. Whether, upon an application in the nature of a petition for a new trial, the plaintiff should be relieved from his agreement and granted a trial of the fact on the question of waiver, is a matter to be determined by the superior court. *Dame v. Woods*, 73 N. H. 391, 62 Atl. 379.

Case discharged. All concurred.

ABBOTT v. ABBOTT et al.

(Supreme Court of New Hampshire. Belknap. Nov. 7, 1911.)

WILLS (§ 682*)—DEVISE—TRUST—TITLE.

A will in terms giving to the executor in trust for the benefit of E. a house, the trustee to expend the income thereof, at such times and in such amounts as may in his judgment seem best, in paying for the comforts and necessities of life of E., and authorizing the trustee, whenever it may in his judgment appear for the best interests of E., to sell the property, and pay the proceeds to E., for her sole use and disposition, and providing that, if E. dies before the sale thereof, it shall go to certain others, does not make a devise to the use of E.,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which, executed by the statute, would give her the legal title, but creates a trust in the executor, with a discretion as to expending the income and selling the property, with a gift over at the death of E., in case sale has not then been made; so that no title to the land, legal or equitable, is vested in E., and therefore sale of it on execution against her gives no title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1607-1611; Dec. Dig. § 682.*]

Transferred from Superior Court, Belknap County; Plummer, Judge.

Petition by E. G. Abbott, administrator, against Emma J. Abbott and F. W. Fowler, trustee, for partition. Transferred without ruling from the superior court on an agreed statement of facts. Petition dismissed.

The will of the mother of Emma J. Abbott, one of the defendants, which has been duly proved and allowed, contained the following clause: "Fifth. I give, bequeath, and devise to my executor hereinafter named, in trust for the benefit of my daughter, Emma J. Abbott, the one half of the dwelling-house situated at No. 17 Laurel street, at Lakeport, in Laconia, N. H., said trustee to expend the income thereof, at such times and in such amounts as may in his judgment seem best, in paying for the comforts and necessities of life for the said Emma J. Abbott's personal use, first using from said income whatever may be required to keep said property in good and sufficient repair; and I authorize said trustee, whenever it may appear in his judgment for the best interests of my said daughter, to sell said property, execute a good and sufficient deed to the purchaser thereof, and to pay the proceeds of said sale, after deducting the lawful fees and expenses therefrom, to my said daughter, for her sole use and disposition. In the case of the death of my said daughter before the sale of said property, the same to go to said Arthur D. and Edgar H. Elkins in equal shares." The defendant Fowler is trustee under the will, but has not expended any of the income for the benefit of Emma. He has not sold the property and does not intend to do so. Emma owns in fee one-half of the dwelling house above described, which has been set off to her as her homestead. The plaintiff having an unsatisfied execution against Emma, her interest in the realty devised by the fifth clause of her mother's will was duly seized and sold thereon, and was purchased by the plaintiff, who asks that his share in the real estate may be set off to him in severalty.

James A. Broderick, for plaintiff. Cox & Fowler, for defendants.

PARSONS, C. J. Considering all the language employed by the testatrix to declare her purpose, it is plain she did not intend to devise the half of the dwelling house claimed by the plaintiff under the execution sale to her executor merely for the use of her

daughter. If this conclusion might be drawn from the first part of the devise, where the property is given to the executor in trust for the benefit of the daughter, it cannot be when the language used to define the duties and powers of the trustee is considered. The trustee is to administer the income, and must have possession and control of the property to collect the rents and make repairs, and has power to sell and convey. The testatrix intended a trust in the executor, and not a devise to the use of the daughter, which, executed by the statute, would give her the legal title. The words used were legally sufficient to declare such purpose. Tappan's Appeal, 55 N. H. 317, 320, 321; Hutchins v. Heywood, 50 N. H. 491; Hayes v. Tabor, 41 N. H. 521; Upham v. Varney, 15 N. H. 462; 1 Per. Tr. § 305. She created a trust coupled with a power to administer the estate, expend the surplus income with discretion in paying for comforts and necessities for the daughter's personal use, and to sell the property upon the contingency that in the trustee's judgment such a sale should be for the best interests of the daughter, with a gift over at the death of the daughter in case no sale had been made.

The question of the validity of provisions restraining the alienation of, or attempting to exempt, an absolute legal or equitable life estate from the claims of creditors, if it could be raised in this proceeding, does not arise because no absolute estate, legal or equitable, is given the daughter. "A trust may be so created that no interest vests in the cestui que trust; consequently, such interest cannot be alienated, as, when property is given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion." 1 Per. Tr. § 386a; Barnes v. Dow, 59 Vt. 530, 542, 10 Atl. 258. No title to the land, legal or equitable, was vested in the daughter at the time of the plaintiff's purchase at the execution sale, and he has obtained none.

Whether the refusal of the trustee to pay the plaintiff's claim which may be inferred from the case is an abuse of the discretion vested in him to expend the income or sell the premises, which he has made no attempt to exercise, is a question not found or presented. Such discretion is not arbitrary, but is subject to revision by the court. Ellis v. Aldrich, 70 N. H. 219, 222, 47 Atl. 95. Whether such discretion is properly exercised is a question of fact. Cram v. Cram, 63 N. H. 35, 36. But the court will not interfere until there is evidence of abuse. Brock v. Sawyer, 39 N. H. 547, 553; Edgerly v. Barker, 67 N. H. 443, 448, 32 Atl. 766.

In accordance with the provisions of the case, the order is, petition dismissed. All concurred.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ELLIOTT v. TOWN OF MASON.

(Supreme Court of New Hampshire. Hillsborough. Nov. 7, 1911.)

1. ADJOINING LANDOWNERS (§ 8*)—MUTUAL RIGHTS.

The rights of adjoining owners of land are reciprocal and determinable by the doctrine of reasonable user, and ownership does not include the right to an unreasonable use, depriving an adjoining owner of the reasonable enjoyment of his land.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 60-66; Dec. Dig. § 8.*]

2. HIGHWAYS (§ 85*)—USER BY TOWNS.

The rule that rights of owners of adjoining land are reciprocal and determinable by the doctrine of reasonable user applies to towns in their qualified ownership of highways as well as to individuals, and a town which maintains an uncovered ditch over which an adjoining owner must pass to go to and from his land may be making an unreasonable use of the highway in view of the owner's reasonable occupation, and may be guilty of maintaining a nuisance as to him.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 296; Dec. Dig. § 85.*]

3. LICENSEES (§ 50*)—RIGHT IN REAL PROPERTY—ACCESS TO HIGHWAY—REMEDY.

Where an owner of land adjacent to a highway has a private way from his land across a ditch maintained by the town to the highway, his licensee in the use of the private way may not maintain an action against the town for maintaining a private nuisance based on the ditch rendering travel unsafe, though the owner may sue therefor, a licensee not being invested with any legal interest in the land, but the licensee merely excusing an act which would otherwise be a trespass.

[Ed. Note.—For other cases, see Licensees, Dec. Dig. § 50.*]

4. ADJOINING LANDOWNERS (§ 8*)—MUTUAL RIGHTS—LIABILITY.

Where an owner manages his real estate in such a way as to unreasonably interfere with the correlative right of an adjoining owner to a reasonable enjoyment of his land, the nuisance may not be justified by proof of the owner's exercise of due care, but the question is whether he invaded the proprietary rights of the adjacent owner.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 60-66; Dec. Dig. § 8.*]

Transferred from Superior Court, Hillsborough County; Mitchell, Judge.

Case for personal injuries by Clarence A. Elliott against the Town of Mason. There was a demurrer to the declaration, and the question raised thereby was transferred without a ruling from the superior court. Case discharged.

The declaration alleged, in substance, that the defendants maintained a private nuisance by the side of a highway adjacent to a lot of land which consisted of an uncovered ditch running parallel with the highway and along said lot; that the landowner had a private way from his premises across the ditch to the highway; that the ditch

was made without the owner's consent and rendered travel over his private way unsafe and dangerous; and that the plaintiff, with the permission of the landowner, was traveling over the private way with his team to the highway when he was injured by being thrown to the ground in consequence of the uncovered ditch.

John M. Stark and Fremont E. Shurtleff, for plaintiff. Henry A. Cutter, for defendant.

WALKER, J. The plaintiff's position, as we understand it, may be stated thus: The uncovered ditch which the defendant maintains by the side of the highway renders the approach from the highway to the adjoining landowner's premises dangerous and unreasonably inconvenient, and as to the landowner constitutes a private nuisance. The plaintiff at the time of his injury was the landowner's licensee for the purpose of traveling upon his private way. From these premises he deduces the conclusion that in the right of the owner he is entitled to maintain this action for the recovery of the damages he suffered from the alleged nuisance. He argues that, if the owner of the abutting land could recover damages caused by the uncovered ditch, he has the same right under his license from the owner. But the fallacy of the argument consists in the assumption that his license to travel over the owner's private way gave him the rights of an owner of the land with respect to nuisances maintained upon adjoining land.

[1] Under the law of this state, the ownership of land does not include the right to an unreasonable use of it which deprives an adjoining owner of the reasonable enjoyment of his land. The rights of adjoining proprietors of land are reciprocal and are determinable by the doctrine of reasonable user. "The doctrines of reasonable necessity, reasonable care, and reasonable use prevail in this state in a liberal form, on a broad basis of general principle." *Haley v. Colcord*, 59 N. H. 7, 8, 47 Am. Rep. 176; *Davis v. Whitney*, 68 N. H. 66, 44 Atl. 78; *Ladd v. Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Hamlin v. Blankenberg*, 73 N. H. 258, 60 Atl. 1010; *Moore v. Company*, 74 N. H. 305, 67 Atl. 578, 11 L. R. A. (N. S.) 284, 124 Am. St. Rep. 968.

[2] And this principle is as applicable to towns in their qualified ownership and control of highways as to individuals. *O'Brien v. Derry*, 73 N. H. 198, 204, 60 Atl. 843. If the defendant town in leaving the ditch uncovered, over which the adjoining owner must pass in order to go to and from his land, made an unreasonable use of the highway in view of the owner's reasonable occupation

and enjoyment of his land, it may be guilty of maintaining a nuisance as to him. It might be said that its use of the highway in this particular was not justifiable, and that it ought to respond in damages to the landowner for any injury he is thereby compelled to suffer in the proper use and enjoyment of his property.

[3] If it is assumed that this is a correct statement of the liability of the defendant to the one in possession of the adjoining land, it is necessary for the plaintiff to show that there is a similar liability on the part of the town to a bare licensee of the owner, who has no legal interest in the land, and who is not therefore deprived of any enjoyment of the rights of its use and occupancy, as the owner may be, or as a tenant might be. A merely temporary, transient occupation by a licensee or a visitor does not invest him with a legal interest in the land. The license "does not convey any right or estate in the land, and amounts to nothing more than an excuse for an act which would otherwise be a trespass." *Blaisdell v. Railroad*, 51 N. H. 483.

Though the question thus presented is somewhat novel, it has claimed the attention of the courts in a few cases. In *Ellis v. Railroad*, 63 Mo. 131, 21 Am. Rep. 436, it appeared that the defendant by one of its locomotives ran onto and killed a horse near the house occupied by the plaintiff's husband and his family, and left the dead animal there, which soon created a nauseating stench and made the plaintiff sick. Her action was brought to recover damages for her physical suffering caused by the nuisance. But she failed in her suit for the reason that she was not in the possession of the premises occupied by the family. The court say that the defendant "was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house. The right of action in this case was in the husband of the plaintiff, he being the occupier and in the rightful possession of the house with his family, by contract with the owner of the property. Had the husband brought this suit it could have been maintained." "We have found no case where a private action has been maintained for corruption of the air by offensive odors, except by a plaintiff who was the owner of or had some legal interest, as lessee or otherwise, in land, the enjoyment of which was affected by the nuisance." *Kavanagh v. Barber*, 131 N. Y. 211, 214, 30 N. E. 235 (15 L. R. A. 689). In that case the house was owned by the plaintiff's wife, and the family lived "in the house by sufferance of the wife"; but for the reason above suggested he was not permitted to recover for "the personal discomfort to which he was subjected in the occupation of the house." This doctrine was affirmed in *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636, where it was held that

while a city may not conduct sewage into the house or upon the premises of an individual, and, if it does, is responsible to him in damages for the trespass or nuisance, the injury is one to property for which the owner alone may demand redress, and a member of his family has as such no special remedy against the municipality for personal suffering caused by its neglect of sanitary precautions against disease.

[4] These cases are criticised in *Thompson v. Railway*, 97 Tex. 590, 80 S. W. 990, where an opposite result is reached. But the criticism is not convincing, and the decision seems to overlook the distinction between an action for negligence and one for a nuisance. The opinion cites approvingly but two cases—*Hunt v. Gaslight Co.*, 8 Allen (Mass.) 169, 85 Am. Dec. 697, and *Holly v. Gaslight Co.*, 8 Gray (Mass.) 123, 69 Am. Dec. 233—both of which were actions for negligence. When a person manages his real estate in such a way as to unreasonably interfere with the correlative right of his neighbor to a reasonable enjoyment of his land, it is no justification for the nuisance for the former to prove that he was guilty of no negligence, or that he exercised due care in what he did. The question is: Has he invaded the proprietary right of his neighbor? If the necessary result of his act is to injure the latter in the reasonable enjoyment of his property, "the law of negligence has no application and the law of nuisance applies." *Bohan v. Gaslight Co.*, 122 N. Y. 18, 26, 25 N. E. 246, 247 (9 L. R. A. 711); *Boston Ferret Co. v. Hills*, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844; *Joyce, Nuis.* § 18; *Wood, Nuis.* § 841; 29 Cyc. 1155. "But such liability does not rest upon the doctrine of negligence. It exists irrespective of that doctrine. The inquiry is not whether the town has negligently failed in its duty to the plaintiff, but whether for any reason it has deprived him of that reasonable enjoyment of his land to which under the circumstances he was entitled." *O'Brien v. Derry*, 73 N. H. 198, 205, 60 Atl. 843, 846; *Lockwood v. Dover*, 73 N. H. 209, 61 Atl. 32; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895; *Lane v. Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643.

The cases cited by the plaintiff (*Paul v. Hazelton*, 37 N. J. Law, 106; *Miller v. Grænewich*, 62 N. J. Law, 771, 42 Atl. 735; *Case v. Weber*, 2 Ind. 108) do not support the plaintiff's contention that permission of the owner to drive over his private way gave the plaintiff such an interest in the land that he could maintain an action for the nuisance. If the owner could. In those cases the plaintiffs were in the actual beneficial possession of lands under parol licenses from the owners which amounted to a parol letting. They had, in fact, the rights of a tenant at will, and not merely the temporary rights of a traveler who is permitted to pass over a pri-

vate way for his own pleasure or convenience. Moreover, the injuries complained of were to property rights claimed by the plaintiffs, and not merely personal injuries occasioned by the defendants' violation of their proprietary duty to an adjoining landowner.

If instead of being thrown from his carriage and injured, as alleged, the plaintiff in attempting to pass from the private way to the highway had observed the dangerous condition of the ditch and had been put to some inconvenience in passing over it, or had come to the conclusion that the town was maintaining a nuisance at that place with reference to the use of the private way, would it be contended that, because he was upon the way by the permission of the owner, he was entitled to maintain a suit for this invasion of the owner's right of property? The mere fact that his damages might be small or nominal would not deprive him of the right, if he had it. Nor does the fact that he suffered serious injury have the effect of giving him that right. If anybody's right has been infringed, it is the landowner's right to the reasonable enjoyment of his property; and this is a right which he could not confer upon another without investing him with the title or the right to the possession of the land or some part of it. The plaintiff's rights with reference to the nuisance were not greater after he got permission to use the private way than they were before. The existence of the private way was presumably an invitation to all persons to use it for proper purposes, but it did not invest them, when so using it, with a proprietary right in the land; one sufficient reason being that the parties did not intend it should have that effect. If the landowner had had the same experience in crossing the ditch that the plaintiff had, his action would be based upon the defendant's infringement of his right to the reasonable enjoyment of his land. After showing the fact of his lawful occupation of the land as an owner or tenant and the injury to his reasonable enjoyment of the land by the defendant in permitting the nuisance to exist, his right to redress would be established. But, in the absence of proof of such facts, he would fail in his suit, however great his injuries might be. Wood, Nuls. § 853. Whether the facts of the particular case would sustain an action for negligence is a different and immaterial question in determining the plaintiff's right to recover for a nuisance affecting the reasonable enjoyment of the possession of real estate. So far as the plaintiff's declaration is based on his right as a mere licensee of the owner, the demurrer must be sustained; and it would seem that he could not recover as a traveler on the highway for the defendant's alleged negligence in suffering the uncovered ditch to exist. *Drew v. Bow*, 74 N. H. 147, 65 Atl. 831.

Case discharged. All concurred.

In re MOORE.

(Supreme Court of New Hampshire. Merrimack. Nov. 7, 1911.)

ATTORNEY AND CLIENT (§ 38*)—SUSPENSION—CHARACTER AND CONDUCT.

An attorney should be suspended from his office as morally or mentally wanting in the elements of common honesty and fair dealing, he having violated his oath, required by Pub. St. 1901, c. 213, § 5, on admission to the bar, to do no falsehood, nor consent that any be done in the court, and, if knowing of any, to give knowledge thereof to the justices of the court, by affirming, on investigation of his conduct in respect to a note which he obtained of F. and assigned to S., that he sold it to S. for full value, and by conducting a cross-examination of S. intensifying the claim that S. paid \$500 therefor, and by himself testifying to the same effect, when, as it afterwards appeared by his cross-examination, he, having arranged a loan from S. on ample real estate security, simply transferred such note to S., in addition to the real estate security, without additional value, which transaction he testified he considered a "technical sale," and he having, when already bound to give a release of wages from trustee process, his conduct in trusteeing which was unprofessional, demanded, as a condition of release, a return of witness fees paid.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 38.*]

Walker and Bingham, JJ., dissenting.

Complaint, by the Attorney General, charging Joseph Moore with unprofessional conduct in his office as attorney. Defendant suspended from his office.

The charges are that Moore took advantage of the intoxicated condition of one Flanders to obtain from him a note for \$505 in settlement of a suit for alienation of affection brought by Ida Quimby against Annie Saltmarsh, that Moore subsequently sold the note to S. S. Sharon, and, upon payment being refused, brought suit in Sharon's name, attaching Flanders' savings bank account and also his wages due for labor in the repair shops of the Boston & Maine Railroad.

Edwin G. Eastman, Atty. Gen., and Thomas F. Clifford, County Sol., for complainant. Hugh Moore and Joseph Moore, for defendant.

PEASLEE, J. At the hearing before the whole court, it appeared that Flanders is an habitual drunkard, infirm, untruthful, and infatuated with the Saltmarsh woman. His testimony is so unreliable that it cannot be depended upon to affirmatively show what happened when the note was given, and it is found that the charge of obtaining the note by fraud is not satisfactorily established.

In his answer Moore affirmed the allegation of the complaint that he sold the note to Sharon for full value. Both parties summoned Sharon as a witness at the hearing, and he testified in detail to purchasing the note in that way. He was cross-examined by the defendant, who gave no hint that the

transaction was other than a bona fide sale. On the contrary, the whole trend of the cross-examination was to intensify the claim that Sharon paid about \$500 for the note. The defendant, upon his own direct examination, testified to the same effect. Upon his cross-examination, it appeared that the real transaction was that he had theretofore arranged for a loan from Sharon, to be secured by a note and mortgage on real estate standing in the name of Moore's wife. This note and mortgage were given, and Sharon also took the Flanders note, but gave no additional value for it. He is amply secured upon the real estate. After these facts appeared, Moore testified that he considered this a "technical sale," and that he made it to cut off the defense of want of consideration, which he feared Flanders would set up. He offered no explanation of his failure to voluntarily disclose to the court the true nature of his transaction with Sharon. Early in April Moore gave notice to take depositions in the suit of Quimby v. Saltmarsh, and summoned Flanders to go from his home in Concord to give a deposition at Tilton. Just before the day set for taking depositions, Moore gave notice that they would not be taken, and demanded of Flanders the repayment of \$3 paid him as witness fees. When, at a later date, Flanders demanded a release of his wages from the trustee process in the Sharon suit, Moore refused to give one unless Flanders would repay the \$3. This was finally done.

From these facts it appears to a majority of the court that Moore's conduct has not been of the high order the public has the right to demand from members of the legal profession. His conduct in procuring and negotiating the note, if excusable between parties dealing at arm's length, is not of a character calculated to reflect credit upon the actor. His course in failing to make a plain explanation to the court of his transaction with Sharon was highly reprehensible. It was a violation of his oath as attorney not to consent that any falsehood be done in the court, and a failure to perform his obligation in such case to give knowledge thereof to the justices of the court. P. S. 1901, c. 213, § 5. His conduct in trusteeing Flanders' wages was unprofessional, and his demand of a return of the \$3 as the price for the release he was already bound to give was extortionate.

A minority of the court are of opinion that the facts in the case are susceptible of an interpretation consonant with good character and reasonable capacity. But as the majority view is that it has been proved that the defendant is morally or mentally wanting in the elements of common honesty and fair dealing, it follows that some action must be taken for the protection of the community. De-

lano's Case, 58 N. H. 5, 42 Am. Rep. 555; Hobbs' Case, 75 N. H. 285, 73 Atl. 303; Allen's Case, 75 N. H. 301, 73 Atl. 804.

The order is that the respondent be suspended from his office as an attorney.

WALKER and BINGHAM, JJ., dissented. The others concurred.

COULOMBE v. EASTMAN.

(Supreme Court of New Hampshire. Coos.

Nov. 7, 1911.)

CORPORATIONS (§ 219*)—ORGANIZATION—PURPOSE—"PROFIT."

A corporation formed to promote social recreation issued stock to provide money to furnish rooms and to pay its debts and the debts of a partnership it succeeded. The greater part of its income was derived from monthly dues from its members. It paid its shareholders a dividend equal to legal interest. *Held*, that the corporation was not organized for "profit," within Pub. St. 1901, c. 150, § 1, making the officers and stockholders of corporations whose object is a dividend of profits individually liable for the debts of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 219.*

For other definitions, see Words and Phrases, vol. 6, pp. 5659-5666; vol. 8, p. 7766.]

Exceptions from Superior Court, Coos County; Pike, Judge.

Debt by Ovide J. Coulombe against Albert H. Eastman. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

See, also, 75 N. H. 531, 77 Atl. 936.

The plaintiff, having recovered a judgment against the Maynesboro Club in an action for breach of contract, sought to enforce it against the defendant, an officer and shareholder of the club, by virtue of sections 5, 14, and 16, c. 150, Public Statutes. Trial by the court and verdict for the defendant, to which the plaintiff excepted.

In October, 1901, the defendant and 12 others, acting in pursuance of chapter 147, Public Statutes, formed a corporation under the name of the Maynesboro Club, "for the purpose of promoting social recreation and amusement." The capital stock was fixed at \$1,000, divided into shares of \$25 each. The articles of incorporation were duly recorded in the office of the city clerk of Berlin and with the Secretary of State, but the certificate and return provided for by sections 14 and 16, c. 150, Public Statutes, were not filed. Prior to the formation of the corporation, an organization existed in Berlin under the same name and for the same objects, which became merged in the corporation "for the purpose of paying up some old bills and debts." After the incorporation one of the members of the club received a dividend upon the share of stock which he owned. The revenue of the club was derived from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

monthly dues of members and the profits accruing from dances given under its auspices. The court found that the sole object for which the corporation was established was that stated in the articles of incorporation, and not a division of profits among the members.

Libby & Coulombe, for plaintiff. Herbert I. Goss and William H. Paine, for defendant.

YOUNG, J. If the Maynesboro Club is not a corporation whose officers may incur individual liability, the plaintiff's exception must be overruled. Whether it is such a corporation depends on the proper construction of section 1, c. 150, Public Statutes, which provides: "The officers and stockholders of corporations whose object is a dividend of profits, except banks, shall be individually liable for the debts and contracts of the corporation in the cases and to the extent specified in this chapter, and not otherwise." If this language is given its ordinary meaning, the only corporations whose officers may incur individual liability are those which engage in business to make money for their shareholders. The test, therefore, to determine whether this club is such a corporation, is to inquire why it carries on the business of "promoting social recreation and amusement." Is it to make money for its shareholders, or to promote the mental or physical welfare of its members? In other words, the test to determine that question is, not to inquire under which of the subdivisions of section 1, c. 147, Public Statutes, the club was organized, but as to the purpose which induced it to engage in business.

The defendant offered evidence tending to prove that the club was a purely social organization, and that the greater part of its income was derived from monthly dues paid by its members. The plaintiff, however, contends that the presumption that the club is not a corporation whose object is a dividend of profits, which may be drawn from this evidence, is rebutted by the facts that it has paid a dividend to one of its shareholders, and has made a contract with him by the terms of which he is to manage the club for one year and pay the shareholders a dividend of 6 per cent. The weight to which this evidence is entitled depends on the purpose for which the stock was issued. If it was issued to provide the money the club needed to furnish its rooms, and to pay its debts or those of the partnership it was organized to succeed, the fact it has paid or intends to pay its shareholders a dividend equal to legal interest has no great tendency to prove that it is a corporation whose object is a dividend of profits, especially if the payment is made out of dues paid by all the members of the club—that is, by the mem-

bers who are as well as by those who are not shareholders. Such a payment is more like a payment of interest than a dividend. The fact that those who furnished the club with money took shares of stock, instead of notes, has no effect on the nature of the transaction. In other words, notwithstanding the shareholders take nothing until the other creditors are paid, the mere fact that the money they provided to pay the club's debts is represented by stock does not conclusively establish that the club is a corporation "whose object is a dividend of profits."

Plaintiff's exception overruled. All concurred.

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FRENCH et al. v. LAWRENCE et al.
(Supreme Court of New Hampshire. Hillsborough. Nov. 7, 1911.)

1. CHARITIES (§ 21*)—GIFTS—CERTAINTY—"FEEBLE CORPORATIONS."

A devise of a fourth of testator's estate remaining after the death of his wife to the feeble Congregational churches of the state designates the particular object and purpose of the gift, and the failure to name the particular churches does not render the devise invalid; but the state must see that the gift is divided among such churches as come within the class described, by reason of their inability to sustain themselves financially.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 44-50; Dec. Dig. § 21.*]

2. EXECUTORS AND ADMINISTRATORS (§ 328*)—CONSTRUCTION OF WILL—SALE OF PROPERTY.

A will declared that at the death of testator's wife the property should be divided into four parts, one of which should be given to the feeble Congregational churches of the state. Testator's estate consisted of a small tract of land. *Held*, that at the death of the wife the land must be sold, and a fourth must be distributed among the feeble Congregational churches of the state.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1843; Dec. Dig. § 328.*]

Transferred from Superior Court, Hillsborough County; Wallace, Judge.

Bill in equity by Robert A. French, as administrator de bonis non with the will annexed of Gideon Hardy, deceased, and another, against one Lawrence and others, for advice as to his duty under the will. Transferred without a ruling from the superior court. Case discharged.

See, also, 75 N. H. 609, 78 Atl. 278.

The tenth clause of the will provides: "At my said wife's decease, if any property is left after paying funeral expenses and liabilities, I desire the same to be divided into four equal parts, * * * one-fourth to the feeble Congregational churches of New Hampshire." Gideon's heirs at law contend that this bequest is invalid, because it cannot be administered without an exercise of prerogative power, because the will does not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
81 A.—45

contemplate the appointment of a trustee, and because of uncertainty as to the churches intended to be benefited. The property available for distribution under the bequest is less than \$4,800 in value. Gideon's wife, who was named as the executrix of the will, is dead. The plaintiff French has been appointed to complete the administration of the estate, and asks direction of the court upon the following points: (1) Was it the intent of the testator that the feeble Congregational churches should be regarded as a class that might vary from time to time as beneficiaries according to their needs, and that the bequest and devise should be held and administered as a trust by some trustee to be appointed by some court? (2) Was it the intent of the will that the property should vest solely in certain feeble Congregational churches after the death of said widow and thereafter be owned by them? If so, how shall those churches be ascertained and in what proportion shall they share? (3) Was it the intent of the will that the administrator should bring about a division of the real estate by proceedings for partition, or by sale and division of the proceeds?

George B. French, for plaintiffs. Sylvester P. Callinan and Niles & Upton, for defendants.

YOUNG, J. [1] The mere statement of what is intended by prerogative power will demonstrate the fallacy of the defendants' first contention. It is the custom in England, when a bequest is given to charity, without specifying the particular purpose for which it is to be used, or when the purpose for which it is given is illegal, for the chancellor to designate a purpose for which the money shall be used. The chancellor, in doing this, is said to exercise prerogative power. The will designates the particular object Gideon desired to promote, and his purpose is legal (*Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100); consequently it will not be necessary to consider whether this court has jurisdiction of such causes. This is not to be construed, however, as an intimation that this court will not do whatever is necessary to effect the testator's intention, if it can be ascertained and is legal. *Adams v. Page*, 76 N. H. 96, 97, 79 Atl. 837.

Gideon knew that the bequest was not to take effect until after the death of his wife, and that it would be necessary for some one to determine which of the Congregational churches in this state were feeble and how the bequest should be divided among them. Since this is so, it must be assumed that he intended this work should be done by whomsoever the court appointed to complete the

administration of his estate. *Hayward v. Spaulding*, 75 N. H. 92, 94, 71 Atl. 219. The fact that the testator failed to name the particular churches which are to take the fund is relevant to the issue of the character of the trust, but not to that of its validity; that is, the fact that the testator failed to name the particular churches he wished to benefit makes it the duty of the state to see that it is divided among such churches as fairly come within the class the testator desired to benefit, but does not render the bequest invalid. *Haynes v. Carr*, 70 N. H. 463, 480, 49 Atl. 638. This bequest, therefore, is valid, and is to be administered by the plaintiff French.

[2] This brings us to a consideration of the matters as to which our advice is asked. The only evidence relevant to the issue of whether the land is to be sold or divided is the language the testator used, and that tends to prove it is to be sold and the proceeds divided; for he says that whatever property is left at the death of his wife is to be divided into four equal parts, and that one of those parts is to be divided among the feeble churches. The only practicable way of dividing a small tract of land among a large number of persons is to sell it and divide the proceeds. It is probable that the testator intended to benefit the churches which are feeble when the fund is divided—not those which were feeble at the time of his death. When "feeble" is applied to a corporation, it is commonly used to designate one that is financially weak. It is probable, therefore, that the testator intended to benefit those churches that are not self-supporting.

The testator must have known that the annual income of this fund would hardly be sufficient to pay the expense of administering it, if that included the annual ascertainment of the churches to be benefited and a distribution of the income among them. Since this is so, it is probable he intended that the fund itself should be divided among the feeble churches. It is probable that the testator's object in making this bequest was to promote the work of Congregational churches in the state. Therefore the sums the different churches receive will not necessarily be equal, but the fund should be divided in the way the administrator thinks will best promote the testator's purpose.

The administrator is therefore advised that it is his duty to convert all of Gideon's property that was left at the death of his wife into money, to divide what remains on the settlement of his final account into four equal parts, and to distribute one of them among the feeble Congregational churches in New Hampshire.

Case discharged. All concurred.

ATTICKS et al. v. RIVERTON CONSOL. WATER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

WATERS AND WATER COURSES (§ 203*)—DOMESTIC WATER SUPPLY—INCREASE OF RATES—EVIDENCE—INJUNCTION.

A bill to restrain a water company from making a new scale of rates, as unreasonable and discriminating and because a violation of a contract made by the borough with the party under whom it claims, is properly dismissed, where there is no evidence to show extortion, or that there has been a violation of contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

Appeal from Court of Common Pleas, Cumberland County.

Bill by George W. Atticks and others against the Riverton Consolidated Water Company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

It appears by the record that the defendant is a corporation formed in 1904 by the merger of six companies, including the Mountain Water Company, supplying water to the inhabitants of the borough of New Cumberland under an ordinance passed in 1896, and duly accepted granting the right to H. M. Horner to introduce water into the borough, which right was subsequently assigned to the Mountain Water Company, whose successor the defendant is. Section 4 of this ordinance is as follows: "The said H. M. Horner shall not charge the inhabitants of the said borough for the use of water to be furnished any higher rates than charged in Marysville, Pa., as per rate sheet filed at the present time; and provided, that discrimination shall not be made in rates charged citizens for the use of said water; and provided, further, that said rates shall not be raised after the same have once been adopted." At the hearing defendant requested, among others, a finding of fact which, with the court's answer, was as follows: "That there has been no increase in the rates as adopted by H. M. Horner under the ordinance of January 20, 1896. Answer: Under the testimony we cannot find that the rates have been increased beyond those of the Marysville rate sheet, referred to in the ordinance of January 22, 1896."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

A. G. Miller and J. W. Wetzel, for appellants. S. B. Sadler, for appellee.

PER CURIAM. The bill was properly dismissed on the findings of fact. It was alleged that the defendant was exacting unreasonable, extortionate, and discriminatory charges for the supply of water to the inhabitants of New Cumberland, and that in

raising the rates it was violating a contract made by the borough with the person to whom the right to furnish water was originally given and under which the defendant claims. There was no testimony whatever in support of the allegations of extortion and discrimination, and the court found that the evidence was insufficient to justify the conclusion that there had been a violation of the contract set up. This finding we approve.

The decree is affirmed, at the cost of the appellants.

AFRICA et al. v. TREXLER.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. EJECTMENT (§ 90*)—EVIDENCE—DEED.

A deed in the chain of title of defendant in ejectment, containing a recital that the grantors had previously conveyed the premises to a certain company, which was not shown to be incorporated, was properly admitted in evidence, since the recited conveyance did not vest legal title in the company, because it had no such legal existence as would entitle it to be a grantee.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 90.*]

2. EJECTMENT (§ 96*)—EVIDENCE—POSSESSION BY DEFENDANT.

Acceptance of service by counsel for defendant in ejectment has, under Act July 9, 1901 (P. L. 619) § 1, cl. 14, the same effect as if the defendant had been personally served by the sheriff, and is prima facie evidence of defendant's possession of the premises.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 96.*]

3. TAXATION (§ 734*)—TAX SALES—VALIDITY.

A sale of unseated lands for taxes, after the owner has called on the county treasurer, inquired for the taxes due, and paid all the taxes demanded of him, is void, and passes no title.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 734.*]

4. WITNESSES (§ 144*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

Under Act May 23, 1887 (P. L. 159) § 5, cl. "e," providing that, where any party to a contract in action is dead, and his right has passed to a party of record, no surviving party to the contract, or other person whose interest shall be adverse to the right of the deceased party, shall be a competent witness to any matter occurring before the death of the party, unless the action be ejectment against several defendants, and one or more of them disclaims of record any title at the time suit was brought, and secures the accrued costs, in which case he shall be a fully competent witness, a codefendant in ejectment, who complies with the conditions by filing a disclaimer and securing the costs, is relieved from the disability as a witness, though he still has an interest in the controversy as a warrantor in a deed to one of the parties.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 144.*]

5. TAXATION (§ 744*)—TAX DEED—EFFECT.

Where a tax sale was wholly void, the county treasurer's deed thereunder does not give

purchasers constructive possession of the premises.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 744.*]

6. WITNESSES (§ 149*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

In ejectment, where plaintiffs claimed under a tax deed, a codefendant, who had disclaimed title and secured the accrued costs, was not incompetent to testify that he had called on the county treasurer, inquired the amount of taxes due, and paid the amount demanded, though the county treasurer was dead at the time of trial, since the treasurer was simply the agent and acting for the county, and his estate was not interested in the cause, nor represented by any party to the record.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 149.*]

7. EVIDENCE (§ 271*)—DECLARATIONS—SELF-SERVING DECLARATIONS.

In ejectment, where plaintiffs claimed under a tax deed, and a witness for defendant testified that he had called on the county treasurer, inquired the amount of taxes due, and paid the amount demanded, plaintiffs could not show declarations of the treasurer in regard to what took place between him and the witness, made to a stranger to the title, and not in the presence of the witness, at a time subsequent to the interview at which the taxes were demanded and paid; such declarations being simply ex parte and self-serving, and not admissible to contradict defendant's witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1063-1079, 1081-1104; Dec. Dig. § 271.*]

Appeal from Court of Common Pleas, Huntingdon County.

Action by J. Murray Africa and others against Jacob F. Trexler. From a judgment for defendant, plaintiffs appeal. Affirmed.

At the trial, when John L. Trexler, a witness called on behalf of defendant, was sworn, defendant made this offer: "Mr. Waite: I propose to prove now by the witness that about June 1, 1898, he received a communication from Huntingdon, to the effect that the William Smith tract and the John Patton tract, the last-named being the one involved in this issue, were advertised for sale by the treasurer of Huntingdon county; that, in pursuance of that notice, he came to Huntingdon on June 2, 1898; that he went from the station to the office of the county commissioners in Huntingdon county, and inquired about the taxes which were assessed to the two above-named tracts of land, in which he was at that time interested, and that he was directed to the office of the county treasurer, and that Peter Kean, one of the then commissioners of the county of Huntingdon, went with him to the office of the county treasurer, and that he asked the county treasurer for all the taxes that were due upon the William Smith tract in Porter township and the John Patton tract in Walker township, and that the county treasurer took down a book, and, after some little time, handed the witness the amount of taxes which were due upon these lands, and that

the witness then gave a check to the county treasurer for the amount of money which the county treasurer demanded; that the witness then left the office of the county treasurer, believing that he had paid all the taxes that were assessed against these two tracts of land, including the one involved in this issue. This for the purpose of showing that the witness made an honest effort to pay all the taxes that were assessed upon this land. Mr. Bailey: Counsel for plaintiffs object to the testimony proposed from the witness, for the following reasons: (1) That, having been a tenant in common with Jacob F. Trexler, the now defendant, the witness would be incompetent to testify in support of his former cotenant's title to the land in question, for the reason that the other party to the thing in action, J. Simpson Africa, died in 1900, and his rights upon the record have passed by his will to the plaintiffs in this action, who stand as his representatives. By the death of J. Simpson Africa, both Jacob F. Trexler and John L. Trexler were rendered incompetent to testify adversely to his estate, under the act of May 23, 1887 (P. L. 158), as to anything which occurred during the lifetime of the decedent, who died, according to the testimony in this case, in the year 1900, and the occurrence to which the recollection of the witness is directed took place in 1898. The witness is incompetent for the reason that the result of his testimony would be not only adverse to the estate of J. Simpson Africa and to these plaintiffs, but might result in injury to the title of that estate to the locus in quo. (2) The witness is incompetent, even though he conveyed his estate in these lands by deed just offered in evidence by the defendant, dated January 25, 1905, for the reason that the said deed contains a covenant of general warranty which is still in force against the witness. If he is permitted to testify to the matter contained in the defendant's offer, he will be testifying adversely to the estate of J. Simpson Africa in a matter which would directly affect the estate of J. Simpson Africa, and in a matter in which he is personally interested as against the estate of J. Simpson Africa, namely, in the support of his own covenant of warranty, and against the estate of J. Simpson Africa, on their tax title. (3) The witness would be incompetent, even if his deed contains no covenant of warranty whatever, for the reason that a release of his interest, which would result in making him competent, must be the extinguishment of that interest and a disclaimer of title. By the conveyance put in evidence by the defendant, the title of John L. Trexler, or claim of John L. Trexler, to the locus in quo was not extinguished or disclaimed, but passed, still in existence and in full force, to his cotenant, Jacob F. Trexler, the defendant. (4) The testimony is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

generally incompetent, irrelevant, immaterial, and inadmissible, and the witness incompetent, under the act of 1887. The Court: We will allow the evidence to be received for the present. (Objection overruled. Bill of exceptions sealed for plaintiffs.)"

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Jas. S. Woods, T. F. Bailey, and W. H. Woods, for appellants. H. H. Waite and C. C. Brewster, for appellee.

MESTREZAT, J. This is an action of ejectment, brought by J. Murray Africa, and B. F. Africa, Walter G. Africa, and J. Murray Africa, executors and devisees under the last will and testament of J. Simpson Africa, deceased, against John L. Trexler and Jacob F. Trexler, to recover the possession of a tract of unseated land situate in Walker township, Huntingdon county, containing about 437 acres. The præcipe was filed June 22, 1908, and on the same day counsel for the defendants appeared and waived the issuance and service of the writ upon their clients. Both parties filed abstracts of title. When the case was called for trial on February 9, 1909, John L. Trexler, one of the defendants, was permitted to withdraw his plea of not guilty, and to file a disclaimer "of all title or claim of title or of possession to the premises described in the writ, * * * and that he had neither title nor possession of said lands at the time said suit was brought." He also filed a bond to secure the payment of the accrued costs.

On the trial of the cause the plaintiffs showed title out of the commonwealth, the assessment and levy of taxes for the years 1895 and 1896 on the lands in dispute, the return for nonpayment of the taxes, the subsequent sale and delivery of the treasurer's deed to J. Simpson Africa and J. Murray Africa, and then rested.

[1] The defendant, Jacob F. Trexler, introduced the records tending to show a complete legal title from the commonwealth down through the several mesne conveyances to himself. In the chain of his title was a deed from one Levi L. Fritch and Sarah, his wife, to John L. Trexler and Jacob F. Trexler, which contained a recital disclosing the fact that the grantors had previously conveyed the premises to the American Stave & Lumber Company. The deed was admitted under objection, and an exception was noted. John L. Trexler conveyed his undivided one-half interest in the premises to Jacob F. Trexler by deed, dated January 25, 1906, and recorded March 8, 1909. The deed of Fritch and wife to the Trexlers was properly admitted in evidence. There is nothing in the record to show that the American Stave & Lumber Company was incorporated, or, aside from the recital in the deed, whether it was a partnership or an unincorporated association; and therefore no title

passed from Fritch and wife by the deed of August 4, 1894. *Burns v. McCabe*, 72 Pa. 309; *Jackson v. Sisson*, 2 Johns. Cas. (N. Y.) 321. The superior court correctly disposed of this question in the following language of its opinion, in *Trexler v. Africa*, 42 Pa. Super. Ct. 542, 547: "It does not appear in the record that the American Stave & Lumber Company was a corporation. It must therefore have been a partnership name, or a fictitious name, and under the above-quoted authority the conveyance by Fritch and wife, by the deed of August 4, 1894, to the American Stave & Lumber Company did not vest the legal title to the land therein described in that company, because it had no such legal existence as would entitle it to be a grantee in a deed of real estate. This left the legal title still in Fritch and wife, and their subsequent deed of September 13, 1899, to the plaintiffs [Jacob F. Trexler and John L. Trexler], vested the legal title in the latter."

* * * *Enterprise Transit. Co. v. Hazelwood Oil Co.*, 20 Pa. Super. Ct. 127; *Wilkinson v. Connell*, 158 Pa. 126 [27 Atl. 870]. We need not discuss the question whether the deed to the American Stave & Lumber Company vested an equitable title in that company, because there is no one in possession of the locus in quo claiming under such title, and it is not the rule of law that an equitable title authorizes the holder of it to go into possession of land without additional authority to take possession."

For the purpose of invalidating the treasurer's deed, and thereby defeating the plaintiffs' title, the defendant called John L. Trexler as a witness, and offered to prove by him that on June 2, 1898, he called at the office of the county treasurer, and asked him for the taxes due upon the William Smith tract and the John Patton tract of land (the latter being the land in dispute), which were then owned by himself and the defendant, that the treasurer furnished him the amount which he said was due for taxes on these lands, and that the witness then gave the treasurer a check for the money he demanded. The plaintiffs objected to the testimony, on the ground that the witness was incompetent to testify by reason of the death of J. Simpson Africa, whose right or interest in the property had passed to his devisees, who were on the record as plaintiffs. The court overruled the objection and permitted the witness to testify. This raises the important question in the case.

[2, 3] The acceptance of service by the defendant's counsel was in effect the same as if the defendant had been personally served by the sheriff (Act July 9, 1901, § 1, cl. 14 [P. L. 619; 1 Purdon's Dig., 13th Ed., p. 242]), and was therefore prima facie evidence of the defendant's possession of the premises in dispute. *Kirkland v. Thompson*, 51 Pa. 216. The defendant had the right to attack the validity of the treasurer's deed. *Miller v. McCullough*,

104 Pa. 624. If, as alleged by him and offered to be shown by the witness John L. Trexler, the latter called upon the treasurer, inquired for the taxes due on the land in dispute, and paid all the taxes demanded of him by the treasurer, he did all that was necessary to discharge the land from liability to sale, and the subsequent sale to the plaintiffs for taxes omitted to be demanded passed no title. *Dietrick and Wilson v. Mason*, 57 Pa. 40; *Breisch v. Cox*, 81 Pa. 336; *Pottsville Lumber Co. v. Wells*, 157 Pa. 5, 27 Atl. 408. This is undoubtedly the settled law of the state, and we do not know that the appellants controvert it. If, therefore, John L. Trexler was a competent witness, and his testimony was believed by the jury, the treasurer's sale was invalid, and the deed did not vest the title to the premises in the plaintiffs.

[4] By section 4 of the act of May 23, 1887 (P. L. 159; 4 Purdon's Dig. [13th Ed.] p. 5157), it is provided that no interest or policy of law shall make any person incompetent as a witness, except as provided in section 5 of the act. Clause "e" of section 5 is the only one having any relevancy to the question in hand, and it provides as follows: "Nor where any party to a thing or contract in action is dead, * * * and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased * * * party, be a competent witness to any matter occurring before the death of said party, * * * unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought, and also pays into court the costs accrued at the time of his disclaimer, or gives security therefor, as the court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness."

The plaintiffs contend that John L. Trexler is interested in the result of the case, and that his interest is adverse to the estate of J. Simpson Africa, deceased. This interest, it is claimed, arises from the fact that, in the event of a recovery by the plaintiffs against Jacob F. Trexler, John L. Trexler will be liable to his brother upon the clause of general warranty in the deed conveying his undivided interest in the land to his brother. It is therefore contended that John L. Trexler is interested adversely to the estate of the decedent, whose representatives are plaintiffs, and that the witness is incompetent under clause "e" of section 5 of the act above referred to. We think it manifest that this contention is not sup-

ported by the clause of the act in question. If it be conceded that John L. Trexler would be liable on his warranty, if the plaintiffs recovered a judgment against the defendant, and that therefore he is interested adversely to the right of the deceased party represented on the record by the plaintiffs, it would not necessarily follow that he was disqualified to testify under clause "e" of section 5. The right of the witness to testify does not depend upon his interest in the question at issue. As we have seen, the act makes all persons competent witnesses with the exceptions noted in section 5. One of those exceptions denies the right of a surviving party to testify to any matter occurring before the death of the other party, where the latter's interest in the subject in controversy has passed to a party on the record, who represents his interest. That part of the exception might exclude John L. Trexler as a witness, by reason of his liability on his warranty, which might be construed as an interest adverse to the right of the deceased in the premises in dispute. We need not, however, determine whether such interest would disqualify the witness, as it becomes unnecessary under the other part of clause "e," which is quoted above. That part of the clause furnishes, as it were, an exception to the exception contained in the earlier part of the clause, disqualifying a witness on the ground of an interest adverse to that of the deceased party. It relieves the witness from disqualification in actions of ejectment, where he files a disclaimer, and secures the payment of the accrued costs. In other words, when a codefendant in an action of ejectment is called as a witness, and complies with the conditions imposed by this clause by filing a disclaimer and securing the cost, he is relieved from the disability imposed upon a surviving party having an interest adverse to that of the deceased party. Such witness in an ejectment suit occupies the same position as if the clause had no existence, and becomes a competent witness under section 4 of the statute. The competency of such a witness does not depend upon his interest in the subject in controversy, but whether he has filed a disclaimer, and has paid or secured the payment of the costs which have accrued in the action. The wisdom of this provision we may not question; that was solely for the Legislature, and its command must be obeyed. It follows that John L. Trexler, having filed his disclaimer and secured the costs, was a competent witness to testify to what occurred between the witness and the county treasurer in regard to his effort to pay the taxes assessed against the land in dispute.

[8] The finding of the jury invalidated the tax title, and therefore the plaintiffs could not recover. The defendant having made the proper effort to pay the taxes charged against

the land in dispute, and having failed by reason of the improper act of the treasurer, and by no fault of his own, the effect as to the legality of the purchasers' title was the same as though the taxes had been actually paid. The sale was void, and passed no title to the purchasers. The treasurer's deed did not give them constructive possession of the premises, and the defendant could question its validity. *Miller v. McCullough*, 104 Pa. 624. The plaintiffs, having no title to the premises, are not in position to oust the defendant from his possession. The deed upon which they rely was absolutely void, and conveyed no title or right to the possession.

[6] The death of the county treasurer did not make John L. Trexler an incompetent witness. The treasurer was simply the agent and acting for the county, and his estate was not interested in the cause, nor was it represented by any party on the record.

[7] It is equally apparent that the plaintiffs could not show the declarations of the treasurer in regard to what took place between him and John L. Trexler, and which were made at a time subsequent to the interview with the treasurer at which the taxes were demanded and paid. *Young v. Commonwealth*, 28 Pa. 501; *McGregor v. Sibley*, 69 Pa. 388; *Romig v. Romig*, 2 Rawle, 241; *McPeake v. Hutchinson*, 5 Serg. & R. 295. Such declarations were no part of the res gestæ, but simply ex parte or self-serving, and were not admissible to contradict Trexler's testimony as to what had previously occurred between him and the treasurer. They were made to a stranger to the title, and not by an agent of the defendant, nor in the latter's presence, and hence are not competent evidence to affect the defendant's title to the premises in dispute.

The judgment is affirmed.

KITCHEN v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. July 6, 1911.)

RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.

In an action for injuries at an obstructed railroad crossing, where the evidence showed invitation of brakeman to cross the track, the question of plaintiff's negligence was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Appeal from Court of Common Pleas, Warren County.

Action by William Kitchen against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

U. P. Rossiter, for appellant. D. U. Arird, for appellee.

PER CURIAM. The testimony in support of the plaintiff's case clearly required its submission to the jury. The plaintiff approached the crossing of the defendant's road, where there were three tracks. The first was an unoccupied switch. On the second track there stood a long freight train, composed of 35 or 40 cars, which blocked his way. He waited near the first track between five and ten minutes, in a temperature several degrees below zero, when a brakeman walked back from the engine, uncoupled the cars, and signaled the engineer, who drew a part of the train off of the crossing. This left an opening 15 or 20 feet wide, through which the brakeman walked to the third track, turned, and beckoned to the plaintiff to come on. Before starting his horses the plaintiff stood up on the seat of his sled and looked and listened for a train, and continued to look and listen, leaning forward, as he drove on the crossing. His sled was struck on the third track by a shifting engine running rapidly backward, and of the approach of which no signal was given.

The plaintiff stopped at a proper place, waited until the train was parted and a way opened for him to cross, and went on at the invitation of defendant's employé, who was in charge of the situation and in a position to observe any threatened danger. He did not then blindly rely upon notice from the brakeman, but was vigilant to observe for himself. If, under the circumstances, he should have taken any further precaution, was not a matter that could be properly determined by the court. *Guthrie v. Railroad*, 222 Pa. 366, 71 Atl. 542.

The judgment is affirmed.

COMMONWEALTH v. CUNNINGHAM.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CRIMINAL LAW (§ 656*)—REMARKS OF JUDGE—WEIGHT OF EVIDENCE.

A judge has the right, and often it is his duty, to express to the jury his opinion of the weight of the evidence; the only limitation being that there must be reasonable ground for his statement, and that it leave the jury free to act.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

2. CRIMINAL LAW (§ 656*)—REMARKS OF JUDGE—WEIGHT OF EVIDENCE.

Where, on a trial for murder, the opinion of the judge, as stated to the jury, that there was nothing in the evidence showing that the killing was in self-defense, being warranted by the defendant's own account of the occurrence, and where the judge also stated that he did not bind the jury by his opinion, and that, if they believed the evidence justified a killing in self-

defense, they had a right to do so, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

Appeal from Court of Oyer and Terminer, Philadelphia County.

William Cunningham was convicted of murder in the first degree, and appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Lotis A. K. Mellon and C. Stuart Patterson, Jr., for appellant. Joseph H. Taulane, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

FELL, C. J. The appellant was convicted of murder of the first degree in killing James McDevitt by cutting his throat with a razor. A statement of the occurrence favorable to the appellant is that, after an altercation with McDevitt on the street in relation to a dog, he went home and returned to the street, where half an hour later the altercation was renewed. McDevitt seized the appellant by the arm, and made a threatening remark and gesture. The appellant drew a razor from his pocket and inflicted the wound that caused death. The different degrees of murder, manslaughter, and the right of self-defense were defined with exceptional clearness and accuracy in the charge, and the defendant's points, which covered every feature of the case favorable to him, were affirmed without qualification.

The assignments of error are to the following excerpts from the charge: "I do not believe there is anything in the case that would justify you in saying that the evidence warranted the defendant in killing McDevitt in self-defense. There was no weapon in sight, and I do not think the evidence would justify you in saying that he should be acquitted on the ground that he killed in self-defense. The same thing applies to manslaughter. But you are not bound by my opinion. I do not think the evidence warrants a verdict of manslaughter." In immediate connection with these statements it was said: "I do not bind you by my opinion. If you believe the evidence justified a killing in self-defense, you have a right to say so. You are not bound by my opinion on that point, or upon any other point in the case. * * * If you believe the evidence does justify it, in accordance with the law as I have given it to you, you are warranted in finding him guilty of manslaughter, notwithstanding my opinion."

[1, 2] It is the undoubted right of a judge, and often it is his duty, to express to the jury his opinion of the weight and the effect of the evidence. The only limitation of the right is that there must be reasonable ground for his statement, and that it is not made as

a binding direction, but leaves the jury free to act. McClain v. Com., 110 Pa. 263, 1 Atl. 45; Com. v. Orr, 138 Pa. 276, 20 Atl. 866; Com. v. McGowan, 189 Pa. 641, 42 Atl. 365, 69 Am. St. Rep. 836. The opinion expressed by the judge was warranted by the defendant's own account of the occurrence, and because of the abundant caution repeated in the charge the jurors must have understood that they were entirely free to form their own judgment.

The judgment is affirmed, and it is directed that the record be remitted for the purpose of execution.

BOLLINGER v. CRYSTAL SAND CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—BURDEN OF PROOF.

In an action for personal injuries, the burden is on plaintiff to show that defendant was negligent and that his negligence caused the injury, but he is not required to disprove contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-907; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—EVIDENCE.

In an action to recover for the death of an employe, where plaintiff showed that defendant had failed to properly guard a shaft, and that her husband was killed by coming in contact with it while engaged in his usual work, she established a prima facie case of negligence on the part of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.*]

Appeal from Court of Common Pleas, Mifflin County.

Action by Elizabeth V. Bollinger against the Crystal Sand Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZISKER, JJ.

W. W. Uttley and Rufus C. Elder, for appellant. J. Howard Neely and J. C. Houser, for appellee.

PER CURIAM. The plaintiff's husband was employed in a building in which sand rock was crushed and sand was washed and dried and prepared for shipment. His work was to oil the machinery and watch the conveyors and bins, and it took him to all parts of the building. While alone in an upper room, his clothing was caught on the line shaft at a point where the rough edge of a key was projected an eighth of an inch, and his body was wound around the shaft and he was killed. No one witnessed the accident.

At the trial different theories were advanced as to what the deceased was doing when his clothing was caught. It is contended by the defendant that the accident must have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

happened in one of three ways: By the clothing of the deceased coming into contact with the shaft when he was oiling the machinery while it was in motion, in violation of his instructions; by his attempting for his own convenience to pass through a narrow space under the shaft in going from one platform to another, instead of using a ladder furnished for the purpose; or by his falling against the shaft while walking near it on a way provided—and that, as the first two of these suppositions would make him chargeable with contributory negligence, the jury was permitted to select from probable causes one that would impose liability on the defendant.

[1, 2] This argument overlooks the burden of proof. A plaintiff cannot make out a case by proof that an injury was caused by one or more of a number of equally probable causes, some of which show negligence on the part of the defendant and others do not. He is required to prove that the defendant was negligent, and that his negligence caused the injury; but he is not required to disprove contributory negligence, but only to make out a case clear of it. The jury in this case was not left to conjecture as to anything the plaintiff was required to prove. She established a *prima facie* case by proof that the defendant had failed to properly guard the shaft, and that her husband was killed by coming into contact with it while engaged at his usual work. The failure to guard the shaft was the neglect of a statutory duty, against the consequence of which nothing but the contributory negligence of an employé would relieve the defendant. *Jones v. American Caramel Co.*, 225 Pa. 644, 74 Atl. 613. The presumption of care was in her favor, and the burden of proof of contributory negligence was on the defendant.

It follows that there was no error in refusing to enter judgment *non obstante veredicto*.

The judgment is affirmed.

GRIFFITHS v. MONONGAHELA R. CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WATERS AND WATER COURSES (§ 85*)—ILLEGAL DIVERSION—INJUNCTION.

Equity will enjoin the continued wrongful diversion of a water course, though complainant has suffered no material damage thereby, as otherwise the diversion might ripen into a prescriptive right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 84-90; Dec. Dig. § 85.*]

2. APPEAL AND ERROR (§ 66*)—APPEAL IN EQUITY—ABSENCE OF FINAL DECREE.

An appeal in an equity case will be quashed, in the absence of a final decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 329-343; Dec. Dig. § 66.*]

Appeal from Court of Common Pleas, Fayette County.

Bill by John S. Griffiths against the Monongahela Railroad Company and others. From a decree granting a permanent injunction, defendants appeal. Appeal quashed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZIS-KER, JJ.

W. J. Sturgis, E. H. Reppert, and S. J. Morrow, for appellants. D. W. McDonald, Frank P. Cottom, Harry A. Cottom, and James R. Cray, for appellee.

POTTER, J. The record in this case shows that no final decree has ever been entered. The findings of the trial judge were filed June 15, 1910, with a decree annexed awarding a permanent injunction. On June 23, 1910, exceptions were filed to the finding and decree. On January 10, 1911, an order was made by which the exceptions were "overruled and dismissed." The former decree, which under the equity rule must be regarded as a decree nisi, was not confirmed, and no other decree was entered. When an appeal is taken without a final decree having been entered, the rule is to quash the appeal. See *Watkins v. Hughes*, 206 Pa. 526, 56 Atl. 22; *Kenworthy v. Trust Co.*, 218 Pa. 286, 67 Atl. 469. The proper practice is for the trial judge to report a form of decree with his findings, which will be entered nisi under the rule. Then, if exceptions are filed, a final decree should be formally entered, when the exceptions are disposed of, whether they are sustained or overruled. It would have been better if in this case the trial judge had followed the approved practice of setting forth his findings of fact and his conclusions of law in separate and numbered paragraphs. See *Pittsburg Stove & Range Co. v. Penna. Stove Co.*, 208 Pa. 37, 57 Atl. 77; *Gaynor v. Quinn*, 212 Pa. 362, 61 Atl. 944.

[1, 2] This appeal will have to be quashed, because there is no final decree. But, upon the facts as found by the court below, we have no doubt as to the case being a proper one for the exercise of equitable relief. "The diversion or obstruction of a water course has been the subject of frequent equitable interference by way of injunction." Gould on Waters, § 534. "A court of equity will generally grant relief by way of injunction to prevent the continued wrongful diversion of a water course, and such relief may be granted though the complainant has suffered no material damage by reason of the diversion, as otherwise the continued diversion might ripen into a prescriptive right, or require a multiplicity of suits." 30 Am. & Eng. Ency. of Law (2d Ed.) 369. Where water has been wrongfully diverted from its proper channel, a mandatory injunction may be granted to restore it. *Bispham's Equity*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

§ 400; 1 High on Injunctions, § 804; Gould on Waters, § 553.

For the reason above noted, the absence of a final decree, the appeal is quashed.

KING et al. v. AMBROSE.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. APPEAL AND ERROR (§ 362*)—STATEMENT OF ERRORS—EFFECT OF FAILURE TO FILE.

Where appellant failed to file in the trial court the statement of errors required by equity rule 92, the filing of such a statement nunc pro tunc will be allowed, where such filing will impose no hardship on the other party; the failure to file not being necessarily fatal to the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961; Dec. Dig. § 362.*]

2. PARTITION (§ 43*)—LOCATION OF PROPERTY—EVIDENCE.

Under Act Feb. 20, 1854 (P. L. 89), providing that, when a partition embraces lands in more than one county, it shall be brought only in the county where the larger part of the estate in value shall be situated, the court of one county acquires no jurisdiction of a decree for partition of real estate situated partly in the county, where a finding that at the time the petition was filed the larger part of the lands, both in equity and value, was situated within the county, was not supported by the evidence; the proof being that 2,018 acres, valued at \$8,050, were situated in another county, and only 1,417 acres, valued at \$7,050, were within the county in which the petition was presented.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 107-110; Dec. Dig. § 43.*]

Appeal from Court of Common Pleas, Somerset County.

Bill in equity by E. Lawrence King and another against Ida Reamer Ambrose, for herself and as committee of Mary Kerns Reamer, for partition. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHIS-KER, JJ.

J. H. Longenecker and F. W. Biesecker, for appellant. Alexander King, for appellees.

BROWN, J. [1] Counsel for appellant frankly admit that the failure to file in the court below the statement of errors required by equity rule 92 was due to their oversight, and, as the filing of such statement nunc pro tunc will impose no hardship on the appellees, the motion to so file it, made May 8, 1911, is now allowed as of that date, and the motion to quash the appeal is dismissed. The failure to file the statement was not necessarily fatal to the appeal. *Barlott v. Forney*, 187 Pa. 301, 41 Atl. 47.

[2] This bill was for the partition of lands belonging to the estate of Abraham Kerns, situated in Bedford and Somerset counties. He died many years ago, and at the time of his death his domicile was in Bedford coun-

ty, where the larger part of his estate in value was situated. The bill was filed in the county of Somerset on May 9, 1907, under an averment in it that at that time the larger part of the estate of the deceased in value was situated in that county. This averment in the bill was specifically denied in the answer, and the defendants affirmatively averred that at that time by far the greater part of the estate, in quantity and value, was situated in Bedford county. This responsive answer to the jurisdictional averment in the bill was not overcome by the measure of proof required in equity practice; but the court below nevertheless found that of the lands of the decedent remaining unsold and described in the bill, the larger part, both in quantity and value, was situated in Somerset county.

The requirement of the act of February 20, 1854 (P. L. 89), relating to proceedings in partition, is that, when such a proceeding is intended to embrace lands in more than one county, it shall be brought only in the county where the decedent whose land is to be divided had his domicile, or where the homestead or larger part of his estate in value shall be situated. Whether the court below would have had jurisdiction if, as a matter of fact, the larger part of the estate of the decedent in value was situated in Somerset county at the time the bill was filed without regard to where the larger part of it in value was situated at the time of his death, is a question that we need not now determine, for the finding of the court below that at the time the bill was filed the larger part of the lands, both in quantity and value, was situated in Somerset county, was not only not supported by the necessary proof, but was clearly erroneous, in view of the documentary evidence in the case. To the report of the master making partition there is attached a draft, the accuracy of which was not questioned before us by the appellees. According to it only one tract—the John Check tract, containing 400¼ acres—is situated wholly in Somerset county. Of the remaining nine, two, containing 800¼ acres, are almost entirely in Somerset county. These three tracts were valued by the master at \$8,700. Five of the tracts (including the Snake Spring township tract, which is not on the draft), containing 1,801½ acres, and valued by the master at \$7,300, are situated in Bedford county. The remaining tract, known as the "George Smith tract," and containing 433 acres, is located in both counties, about half of the tract being in each. Its total value as fixed by the master was \$1,500. It thus appears that 2,018 acres, valued at \$8,050, were situated in Bedford county at the time the bill was filed, and only 1,417 acres, valued at \$7,450, in Somerset county. Neither at the time of the death of the decedent nor when the bill was filed was the larger part of his

estate, in value, situated in Somerset county, and its court of common pleas had, therefore, no jurisdiction of the bill filed.

The first assignment of error is sustained, the decree is reversed, and the bill dismissed, at appellees' cost.

W. H. SHEPHERD & SONS v. FIRST NAT. BANK OF WILKES-BARRE.

(Supreme Court of Pennsylvania. July 6, 1911.)

CONTRACTS (§ 199*)—BUILDING CONTRACT—CONSTRUCTION.

Where a specification of a building contract does not clearly show whether the roof is to be of slag or of copper, and contractor incorporates in his bid the words "Main roof estimate slag," and the owner fails to eject those words and accepts the bid without objection, he cannot thereafter object to the right of the contractor to construct the roof of slag, and not of copper.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 884-889; Dec. Dig. § 199.*]

Appeal from Court of Common Pleas, Luzerne County.

Action by W. H. Shepherd & Sons against the First National Bank of Wilkes-Barre. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendants presented the following points:

"The contract, plans, and specifications being in writing, and there being no ambiguity in the language used in the same, which is open to explanation by parol evidence, the construction of the same is exclusively for the court. Answer: This point, in the form in which it is drawn, is denied. We are of opinion that the actions of the parties in connection with this proceeding, as represented, shows a certain ambiguity; and that, at any rate, whether there be ambiguity or not, the contract is between the parties, and that the bid and acceptance in the form in which one made and the other accepted are read into the contract.

"The plaintiffs' bid so far as the same refers to slag estimate, under the terms of the contract, is no part of the contract, and was not made a part of the same. Answer: That is denied.

"The contract taken in connection with the plan and specification calls for a copper roof over the 'main roof,' and was not an extra, but a portion of the work to be paid for and out of the cost of the construction of the building, namely, \$112,983, and the plaintiffs are not entitled to recover. Answer: That is denied.

"Under all the evidence in the case the verdict should be for the plaintiffs for \$207.54, the amount of the tender, without interest or costs. Answer: That is negatived."

Verdict and judgment for plaintiff for \$2,400.06. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZIS-KER, JJ.

William S. McLean and William S. McLean, Jr., for appellant. S. J. Strauss and John McGahren, for appellee.

MESTREZAT, J. This is an action of assumpsit brought to recover the difference between the cost of covering the main roof of the defendant's bank building with a slag and a copper roof.

At the request of the defendant's architect, the plaintiffs tendered a bid or proposal for the erection of a bank building for the First National Bank of Wilkes-Barre, Pa. The proposal was in writing, and contained several paragraphs, each making a different and conditional bid for the work to be done and the materials to be furnished. By paragraph 4 the plaintiffs offered to construct the building for \$112,983. In paragraph 6 the plaintiffs bid \$663 on the clock frame, and stated that they included cornice of granite in place of concrete for alley in No. 4 estimate. This paragraph concluded with the words: "Main roof estimate slag." A few days after the bid the secretary of the building committee of the defendant bank advised the plaintiffs that the committee had accepted their bid "as set forth in paragraphs four and six of same." The parties entered into a contract for the construction of the building in pursuance of the bid and its acceptance, by the ninth article of which the owner was to pay the contractor \$112,983, "as stipulated in proposition or paragraph 4 and \$663 as stipulated in proposition or paragraph 6 of the bid of contractors, a copy of which is hereto attached." Among the specifications was the following: "The roofs (excepting the front portion and main roof which is copper), shall be covered with a five-ply slag covering of the Warren-Ehret, or Owen D. Jones, manufacture." The contract provided for three roofs on the building of different altitudes, the front roof, the main roof, and a third roof over the directors' room. During the construction of the building a dispute arose between the contractor and the owner in regard to the covering for the main roof. The contractor claimed that the main roof was to be covered with slag; the owner, that it was to be covered with copper. It was agreed that the contractor should furnish a copper covering, and that the dispute should be adjusted by an action of law. This suit was brought to recover the difference between the cost of the slag and copper covering of the main roof. The learned court below instructed the jury to find a verdict for the plaintiffs, and the defendant has taken this appeal.

The defendant bank contends that the contract required the plaintiffs to erect the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

building according to the plans and specifications of the architect, and that the specification above quoted required the main roof to be covered with copper. Its contention is that the front and main roofs were to be covered with copper, and only the roof over the directors' room was to be covered with slag. It is further claimed by the defendant that the words, "main roof estimate slag," added to paragraph 6 of the plaintiffs' bid, are without effect, and do not change the specification providing for the roofing.

We do not agree with the defendant's contention. The specification in question was ambiguous, and was so regarded by bidders and architects, even by Mr. Kipp, defendant's architect, who prepared the plans and specifications for the building. Mr. Shepherd, observing the ambiguity in the specification, attempted to communicate with the architect before he submitted the plaintiffs' bid, but was unable to do so by reason of Mr. Kipp's illness. He then submitted to the architect through the latter's wife certain questions as to the proper construction of the specification but received no definite answer; the architect replying, "You better figure on copper roof." This occurred on the morning the bids were to be submitted, and Shepherd testifies that he could not estimate the cost of a copper covering without a specification, and the time was too short for him to get a bid on a copper roof basis. Another bidder communicated with the architect on the subject in the same way. The first reply he received was that the main roof was to be of slag, but, on his suggestion that the roof was too steep for slag, the architect replied again through his wife: "You better figure copper." Another architect was called, and he testified that there was nothing on the drawings to show the character of the roof, and that, as there were three roofs, he would interpret the specifications to cover the portion over the main bank room with slag.

The specification being ambiguous and open to different interpretations, it was proper for the plaintiffs in submitting a bid to specify the character of covering of the main roof on which they made their estimate. This relieved the bid of any uncertainty, and distinctly notified the defendant and its architect of the construction placed upon the specification by the plaintiffs. This bid, as will be observed, was accepted by the building committee. The resolution adopted by the committee and communicated to the plaintiffs, accepted the bid as set forth in paragraphs four and six, the latter of which contains the notice to the owner that the plaintiffs made their bid on the basis of a slag covering for the main roof. The contract provides that the owner should pay the sums stipulated in the two paragraphs and copies of those paragraphs were attached to

the contract. The bid was, therefore, made and accepted upon the distinct notice by the contractor to the owner that it was upon the basis of a slag covering for the main roof. The proposal distinctly notifies the owner that the roof is to be slag, the building committee accepts the proposal including this notice, and the contract specifically provides that the sums named in the two paragraphs, one of which contains this notice, will be paid by the owner to the contractor for the construction of the building. This is a construction of the specification providing for the material for the roofing by both parties, and neither is at liberty to reject it now. When the building committee accepted the proposal, including the plaintiffs' construction of the specification, and subsequently wrote it into the contract, both parties were bound by it, irrespective of the true interpretation of the specification. If the defendant intended the main roof to have a copper covering, it should have at once rejected that part of the proposal which disclosed the fact that the plaintiffs' bid was made on a basis of a slag covering. The bank not only did not reject this part of the proposal, but in terms accepted the sixth paragraph of the proposal which included the slag estimate. The sixth paragraph in its entirety became a part of the contract for the construction of the building. The bid of \$112,983 was on the basis of a slag covering for the main roof, and it is manifest that, if it had been made on the basis of a copper covering for the roof, it would have been increased by the difference between the cost of a slag and a copper covering. It was, therefore, the duty of the defendant bank when it received the proposal notifying it that the contractor had made his estimate on a slag roof to reject that part of the proposal and give notice that the roof was to have a copper covering. In the absence of such action by the bank, it cannot now assert that the bid for the work was made on the basis of a copper covering for the main roof.

The learned court below was right in directing a verdict for the plaintiffs, and the judgment entered thereon is affirmed.

IRELAND v. IRELAND ADVERTISING AGENCY et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. TRUSTS (§ 31*) — CREATION — TRANSFER OF TITLE.

Where there is evidence to sustain the findings of a court of equity that plaintiff, on account of ill health, was indisposed to give personal attention to the business he had established, that, contemplating rest in travel, he executed a bill of sale of the business to his wife, to enable her in his absence to transfer it to a corporation to be created, that the corporation was formed with a capital stock of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2,000 shares, which represented nothing of value, except the property included in the bill of sale, of which shares she received 1,840, that later she became president and treasurer, and, asserting her individual ownership of the stock, contracted with the other defendant, in pursuance of a scheme to exclude plaintiff from all control over the property, and there was no evidence of an intention on the part of plaintiff to make a gift to the wife, a decree, declaring a trust in his favor as to the shares of stock held in her name, and annulling the contract between her and the other defendant, will be sustained.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 42; Dec. Dig. § 31.*]

2. TRUSTS (§ 375*)—ESTABLISHMENT—DECREE.

On a bill in equity to declare a trust in shares of stock held in the name of plaintiff's wife, and to annul a contract between her and another defendant, a clause of the decree, authorizing plaintiff to call a meeting of the stockholders to elect officers and transact other corporate business, is improper, and will be stricken out.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 375.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Howard I. Ireland against the Ireland Advertising Agency and others, to declare a trust *ex maleficio*, to annul a contract, and for an injunction and account. From a decree for plaintiff, defendants appeal. Modified and affirmed.

Argued before FELL, C. J., and ELKIN, STEWART, and MOSCHZISKER, JJ.

E. Cooper Shapley and Frank B. Stockley, for appellants. Morton Z. Paul, for appellee.

STEWART, J. [1] The finding by the chancellor to the effect that no gift to the wife or other person was intended by the bill of sale which the appellee executed, covering all the assets of the advertising agency of which he was the sole owner, is conclusive of this case, except as it can be shown that such finding is without support in the evidence. The numerous assignments of error do not call for separate consideration. The one question in the case is, What was the real purpose and object of the bill of sale? The chancellor finds that the appellee, broken in health, from whatever cause, was for the time at least indisposed, if not unable, to give personal attention to the business he had established; that he contemplated a period of rest in travel, and that the bill of sale to the wife was simply to invest her with the legal title to enable her, in his absence from the country, to transfer it to a corporation thereafter to be created. In due time the corporation was formed, with a capital stock which represented nothing of value but the property included in the bill of sale, and which the appellant Mrs. Ireland turned over. The capital was divided into 2,000 shares of the par value of \$5 per share, appellant receiving 1,840 of these: the remainder being gratuitously bestowed upon several who

became directors. Later on the wife became the president, displacing her husband from that position, and treasurer of the corporation as well. The bill was to declare a trust in favor of the husband with respect to the 1,840 shares of stock held in the wife's name, and to cancel and annul a contract, entered into between the wife and Donovan, the other appellant, by which the latter was to receive a certain amount of the capital stock in addition to salary for services to be rendered as general manager of the corporation.

It is vain to argue that the findings of the chancellor with respect to the purpose of the bill of sale and the joint participation of appellants in a scheme to deprive the husband of the ownership of his property are without warrant in the evidence. It is made abundantly clear by the testimony of witnesses called by the appellants, who were present when the bill of sale was suggested, and when it was executed as well, that all that was intended to be accomplished through it was the incorporation of the business. The incorporation was suggested as a means, whereby the appellee could get respite from business cares and responsibilities. Not a witness testifies to anything from which an intention to make a gift to the wife could be derived. Even the wife herself asserts nothing that gives support to her contention of ownership. On her cross-examination, she was asked whether her husband had ever suggested giving his business entirely over to her. Her answer was, "I do not remember." She nowhere in her testimony asserts that her husband at any time before the execution of the bill of sale expressed an intention to make a gift of his property to her. Nor did any witness. The whole transaction shows conclusively that no gift was intended, and that the wife's course during the absence of the husband abroad in the management of the corporation, and in the assertion of her individual ownership of the stock, was in clear violation of the husband's rights.

Donovan, the other appellant, had been for years in appellee's employ, and was perfectly familiar with actual conditions, both as to the ownership of the property and the contemplated change of the business into a corporation. Immediately following upon the organization of the corporation and the appellee's departure from the country, and without the knowledge of the latter, he entered into a written contract with Mrs. Ireland, the wife, wherein Mrs. Ireland, asserting her individual ownership of 1,840 shares, agrees that Donovan shall become general manager of the corporation for a period of five years at a fixed salary, and in addition a certain amount of the capital stock held by her. This was not only an unwarranted assumption of power on the part

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Mrs. Ireland, but such fact must have been known to Donovan. He knew of the bill of sale; he fully understood its purpose; he knew of Ireland's absence from the country; and he must have known that what Mrs. Ireland was attempting to accomplish by the contract was the exclusion of her husband from all control over his own property. In this scheme the chancellor finds that Donovan was an active participant. It is enough to say that the evidence fully warrants the finding. The assignments of error are overruled.

[2] By paragraph 9 of the decree, the plaintiff, Howard I. Ireland, is authorized upon notice to call a meeting of the stockholders of the Ireland Advertising Agency, for the purpose of electing officers of the corporation, and the transaction of other corporate business. The decree without this feature provided full relief to the plaintiff. Its inclusion was not only not required for plaintiff's protection, but the authority of the court to make such order, as the case stood, may well be doubted. The decree calls for amendment in this particular, and the ninth paragraph of the decree is accordingly stricken therefrom. As so amended, the decree is affirmed, and appeal dismissed.

HIGINBOTHAM v. PAUCH.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. ESTOPPEL (§ 120*)—INSTRUCTIONS.

In ejectment, where plaintiff claims under a deed purporting to have been signed by defendant, which she denies, and where the evidence shows that if a fraud was committed the only parties thereto were defendant's brother, since deceased, with whom defendant had left her deed, to enable him to collect rents for her, and a woman who represented herself as defendant, a charge that when one of two equally innocent parties must suffer by the fraud of another the loss should fall on the one whose negligent act or omission enabled the wrongdoer to commit the fraud is improper; there being no evidence of any agency, nor of any act or omission on defendant's part, enabling her brother to deceive plaintiff.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 310; Dec. Dig. § 120.*]

2. PRINCIPAL AND AGENT (§ 103*)—AUTHORITY OF AGENT—IMPLIED AUTHORITY.

That a sister left with her brother her deed, to enable him to collect rents, did not raise an implied agency in him to make sale of her real estate.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.*]

Appeal from court of Common Pleas, Fayette County.

Action by J. C. Higinbotham against Anna Pauch. From a judgment for plaintiff, defendant appeals. Reversed, with new venire.

The court charged the jury in part as follows:

"In this case, as in other cases occasion-

ally, it is possible that somebody may have to suffer and lose some money. It sometimes happens that two persons who are innocent have to suffer, or one or the other of those two. The rule of law is that, if two innocent persons must suffer, the one who is least to blame is the one that must suffer least. In this case, if you should find that there has been imposition and fraud practiced by some one, and that neither the plaintiff, Mr. Higinbotham, nor the defendant, Mrs. Pauch, was to blame, the burden is on you to determine which of them is the least to blame, and you should find your verdict accordingly; that is, if they are both innocent, and one or the other of them has to suffer. If this comes to be a consideration with you, it is your duty to take into account their respective positions, places of residence, and opportunities for acquainting themselves with the facts, and what was being actually done, and by whom. If the contention of Mrs. Pauch is correct that she was in or near Chicago, and knew absolutely nothing of what was going on in South Brownsville, she could not be held responsible for anything that might have happened in South Brownsville, and, having no opportunity to protect her interests, no blame could be imputed to her. If, however, you should find that Mr. Frank Pauch was acting as the agent of Mrs. Anna Pauch, and was looking after and attending to her affairs, and betrayed the trust that she had reposed in him to the extent of presuming to act for her, and imposed on Mr. Higinbotham, then there would be no blame attached to Mr. Higinbotham, if he used such care and caution as a reasonably prudent man would have used under the circumstances; if that comes to be a consideration with you, it will be your duty to determine which is the least to blame, and the one who is the least to blame would be the one who should suffer least.

"In this case, as in a great many other cases, there are conflicts in the testimony, and where there are conflicts in the testimony it is the duty of the jury to reconcile them, if they will admit of reconciliation; if they cannot be reconciled, and there are some conflicts in this testimony that cannot be reconciled, then the burden is cast upon the jury of determining who is testifying correctly or incorrectly, of who is mistaken, and who is not mistaken. In this case, either Mr. Brashear or Mr. Smith is mistaken; they cannot both be correct in their testimony as to the identification of this defendant; and where this condition prevails it is the duty of the jury to determine which of them is correct, and which of them is mistaken, or which of them is testifying correctly, and which is testifying incorrectly or falsely; or, if you should be satisfied that one or the other of them is testifying falsely, it is your

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duty to determine which you think it is; and it is not only your right and your privilege, but your duty, to take into account the manner of the witnesses on the stand, any prejudice, malice, bias, or ill will that they or any of them may manifest in the giving of their testimony, any interest that they or any of them may have in the result of your verdict; also any corroboration that there may be of either of the witnesses whose testimony is being considered by other evidence, with the truth of which you are satisfied. In short, it is the duty of the jury to take into consideration any and everything that will aid or assist you in determining which is testifying correctly, and which incorrectly. * * *

"Where there is such a conflict in the testimony as there is in this case, another consideration is the preponderance of credible testimony. Credible testimony, or the preponderance of credible testimony, is not always established by numbers. There might be a dozen people who testified to a condition on one side, and, if the jury were satisfied that none of them was worthy of belief, or that they were not credible witnesses, their testimony might be overcome by one man, whom you might be absolutely satisfied was credible, on the other side. This being a civil action, where there are questions of fact to be determined, and, as we have indicated, there is one important and prime question of fact for determination in this case; that is, whether or not Mrs. Anna Pauch signed this deed on December 18, 1905. If you find the preponderance of credible testimony to the effect that she did not sign it, you will return a verdict generally for the defendant; and if, on the other hand, you find the preponderance of credible testimony is on the side of the plaintiff, and you find that the defendant did sign and acknowledge this deed on December 18, 1905, you should return a verdict for the plaintiff for the premises described in the writ, together with $6\frac{1}{4}$ cents damages."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHISKER, JJ.

W. J. Sturgis, E. H. Reppert, and S. J. Morrow, for appellant. D. W. McDonald, Frank P. Cottom, Harry A. Cottom, and James R. Cray, for appellee.

FELL, C. J. [1] This was an action of ejectment, in which the plaintiff claimed title by virtue of a deed, alleged to have been signed by the defendant. The defendant denied that she had signed the deed, and the clearly defined issue was whether it was a forgery. She was a single woman, whose residence was in Chicago. She purchased the property in question in 1903, and her deed for the same was duly recorded and left with her brother in Pennsylvania, and

he acted as her agent in collecting the rents and in looking after the property. In 1907 the plaintiff negotiated with the defendant's brother for the purchase of the property, and at the settlement a deed was signed and acknowledged by a woman, who was represented to be the defendant. At the same time, the woman executed a writing, directing the payment of the purchase money to the defendant's brother. At the signing and acknowledgment of the deed, four persons were present: The defendant's brother, who died before the trial, the woman who executed the deed, and the two subscribing witnesses, one of whom was the notary who took the acknowledgment. One of the subscribing witnesses testified at the trial that the defendant was the woman who signed; the other testified with equal positiveness that she was not. Corroborating circumstances were shown on both sides, and it was evident that if a fraud had been committed, at the execution of the deed the only parties to it were the defendant's brother and the woman who signed the deed. It was said in the charge that, if one of two innocent parties must suffer loss, the loss must be borne by the one least to blame, and that it was for the jury to determine which of the parties to the action was least to blame and to find a verdict accordingly. This was an inaccurate statement of the rule that, where one of two equally innocent parties must suffer loss, by reason of the fraud of another, the loss should fall upon him whose negligent act or omission has enabled the wrongdoer to commit the fraud, and it was a misapplication of the rule to the facts of the case.

[2] This was not a case of agency. There was not a pretense even that the defendant had authorized her brother to sell the property, and none could be implied from the fact that he held the deed and collected the rents. No act or omission on her part enabled him to deceive the plaintiff.

The first assignment of error is sustained, and the judgment is reversed, with a new venire.

BOVAIRD v. CITY OF BRADFORD.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MUNICIPAL CORPORATIONS (§ 165*) — OFFICERS—COMPENSATION—ACTIONS TO RECOVER.

In assumpsit by the treasurer of a city of the third class against the city for the salary of a clerk under a city ordinance giving the clerk to the city treasurer an annual salary of \$720, which ordinance was repealed after the treasurer's election, the claim being based on Act May 23, 1889 (P. L. 277), providing that no ordinance shall be passed increasing or diminishing the salary of any officer after his election or appointment, a verdict is properly directed for defendant where no attempt was

made to show that any clerk was appointed by the treasurer or city council; testimony that a certain person had acted as clerk being entirely insufficient to raise an issue of fact.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. MUNICIPAL CORPORATIONS (§ 162*)—OFFICERS—COMPENSATION—ACTIONS TO RECOVER.

The fact that a city treasurer's failure to appoint a clerk, as authorized by ordinance, cast upon the treasurer heavier burdens, did not authorize him to recover the salary of the clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 373, 374; Dec. Dig. § 162.*]

Appeal from Court of Common Pleas, McKean County.

Action in assumpsit by William Bovaird, Jr., against the City of Bradford for a clerk's salary. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Rufus B. Stone and James George, for appellant. F. P. Schoonmaker, for appellee.

STEWART, J. [1] The city of Bradford is a city of the third class. The act of assembly governing cities of this class creates the office of city treasurer, and provides that such officer "shall receive a fixed annual salary to be provided by ordinance." Act of May 23, 1889, art. 8, § 1 (P. L. 277), as amended by Act of May 16, 1901, § 23 (P. L. 224). The act makes no provision for the election, appointment, or employment of a clerk to the treasurer; but the city council, by ordinance approved March 19, 1902, directed "that the clerk to the city treasurer from and after the first Monday in April, 1902, shall receive an annual salary of \$720, to be paid in monthly installments in the same manner that the salaries of other city officials are now paid." At a municipal election in 1905 appellant was elected to the office of city treasurer, for the term of three years beginning the first Monday in April, 1905. He duly qualified and served out his term. Immediately preceding his entry into office, the city councils by ordinance approved March 10, 1905, repealed the ordinance of March 19, 1902, providing a salary for the clerk to the treasurer. Appellant brought this action to recover from the city the sum of \$2,349, which he claimed as clerical hire accruing under the ordinance of March 19, 1902, which was in force at the time of his election, basing his claim on the prohibition contained in the Act of May 23, 1889 (P. L. 277) par. 13, § 3, art. 5, which directs that "no ordinance shall be passed increasing or diminishing the salary or compensation of any officer after his election or appointment"; his contention being that the effect of the repealing ordinance was to diminish the salary or compensation of city

treasurer, and that having been passed after his election to the office, if not entirely nugatory, it could become effective only after the completion of his term of office. As this record stands, we are not called upon to decide the several questions raised on the argument. A demurrer must have proved fatal to plaintiff's action. In the statement of claim filed it is averred that on February 27, 1905, plaintiff, by virtue of the provisions of said ordinance, appointed one Clinton J. Boyd as clerk to the city treasurer to serve during his said term of three years from April 1, 1905, and on the same day notified the mayor and city controller of the city of Bradford in writing of such appointment; that on April 3, 1905, the said Clinton J. Boyd entered upon his duties as said clerk to the city treasurer, which position he held and which duties he performed until April 6, 1908, the end of plaintiff's term of office as said city treasurer, and of said Boyd's appointment. Under this state of facts, what possible right of action was in the plaintiff? The suit was for salary; but the salary was payable to the clerk, and to him alone. The plea of nonassumpsit put the plaintiff to his proofs. And here he wholly failed. He did not attempt to prove that any clerk had been appointed by himself or by the city councils. His effort to prove that Boyd had acted as clerk was too feeble to raise an issue of fact. It was confined to the testimony of a single witness, whose testimony was as follows: "I did understand that there was a man in the city treasurer's office, but just what position he occupied relative to the city treasurer I don't know. He was performing duties, he and the treasurer together were performing the duties of the office. His name was C. J. Boyd." Not a particle of testimony beyond this was offered to show that a clerk had served at any time or for any period. Its insufficiency for the purpose is too obvious to call for discussion. If no clerk was appointed, and none served, no salary accrued.

[2] If by reason of failure to appoint heavier duties were cast upon the treasurer which he performed, such fact, under no conditions, would give the treasurer any right to the salary of the clerk. The increased labor would not be in diminution of his own salary. It is universally recognized that a change in the duties of an office during the term of the incumbent does not affect the compensation. See the authorities cited in 29 Cyc. 1424. "It is well it should be distinctly understood," said Paxson, C. J., in *Pierle v. Phila.*, 139 Pa. 573, 21 Atl. 90, "that county officers whose salaries have been fixed by the Act of March 31, 1876 (P. L. 13), have no right to extra charges for services pertaining to their offices and which have been cast upon them by law." Verdict was properly directed for the defendant.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

THORPE v. FALES.

(Supreme Court of Rhode Island. Dec. 7, 1911.)

1. ELECTIONS (§ 180*)—BALLOTS—STATUTORY PROVISIONS—MARKS.

Under Gen. Laws 1909, c. 11, § 43, providing that when a voter has placed a cross in any one circle upon a ballot, "and has not made any mark in any other circle, such cross shall be counted as a vote for each of the candidates in the column above which it is placed," a cross in one circle in the ballot is nullified by a cross in another circle on the same ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157; Dec. Dig. § 180.*]

2. ELECTIONS (§§ 180, 194*) — BALLOTS — MARKS.

A ballot which contains, in addition to a cross in the circle under the party emblem, another cross below and to the right of the circle, and another which is in addition to such cross in the party circle, crosses to the right of every name under the emblem, and also crosses to the left of the name of every candidate on the same ticket except three, not only render the elector's intention uncertain, but afford a means of subsequent identification, and such ballots are properly disallowed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-157, 166, 167; Dec. Dig. §§ 180, 194.*]

3. ELECTIONS (§ 194*)—MARKS ON BALLOTS.

Under Gen. Laws 1909, c. 11, § 44, which provides for the procuring of another ballot by a voter who has spoiled the first one given him, a ballot marked with individual crosses to the right and to the left of each candidate in a party column, some of those to the left appearing to have been attempted to be erased, and which contains no cross in the circle at the head of the column, is still possible of identification subsequently, and should not be counted for any candidate thereon.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

4. QUO WARRANTO (§ 61*) — DECREE — STATUTORY PROVISIONS.

Where a proceeding in the nature of quo warranto to determine the title to a certain office is commenced under Gen. Laws 1909, c. 328, § 3, which provides that "in all such proceedings the court shall enforce its judgment by proper process, and whenever it shall find that no election was made it may order a new election," etc., a new election is properly ordered upon a finding that the result of the vote was a tie.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 72; Dec. Dig. § 61.*]

Petition in the nature of quo warranto by Allston E. Thorpe against Warren R. Fales to determine title to the office of member of the town council. New election ordered.

Terence M. O'Reilly, for petitioner. Charles A. Wilson, Percy W. Gardner, and Harmon S. Babcock, for respondent.

BLODGETT, J. This is a petition in equity in the nature of proceedings in quo warranto, under the provisions of chapter 328, Gen. Laws 1909, to determine the title to the office of third member of the town council of the town of East Providence.

At the annual election of town officers in said town, held on November 7, 1911, the petitioner, Allston E. Thorpe, was the regular Democratic candidate for said office, and was also a candidate therefor under the heading on the ballot "Progressive Citizens' Nomination Papers," and the respondent, Warren R. Fales, was the regular Republican candidate for the same office, and there were no other candidates therefor. By the official count made by the town council it was declared that Thorpe had received 1,213 votes therefor and that Fales had received 1,214 votes, and was declared elected by a plurality of 1 vote. Thorpe now questions in this proceeding the legality of the action of the council in respect of 7 ballots only, of which 5 were rejected entirely by the council and not counted for either candidate, and of which 2 were counted in favor of Fales which Thorpe claims should not have been so counted.

[1] Three of these rejected ballots were marked with a cross in the circle under the star, the Democratic emblem, and in addition had a cross in the circle over the designation "Progressive Citizens' Nomination Papers." We are of the opinion that the ballots were properly rejected and disallowed by the town council. Section 43, c. 11, Gen. Laws 1909, provides *inter alia* as follows: "When a voter has placed a cross (X) in any one circle, *and has not made any mark in any other circle*, such cross (X) shall be counted as a vote for each of the candidates in the column above which it is placed except for those candidates whose names have been cancelled." The inference is plain that a cross in a given circle on the ballot is nullified by a cross in another circle on the same ballot, and the ballot must be rejected. *Gainer v. Dunn*, 29 R. I. 239, 242, 69 Atl. 336, 851, and cases cited. This is true, even if the nominees were identical in the two columns; but in the case at bar, while the nominees on the "Democratic" and "Progressive Citizens' Nomination Papers" columns were identical so far as certain nominations for the different offices to be filled at that election were concerned, yet on the latter column there were no nominations for certain other offices to be filled.

[2] Two others of the rejected ballots were marked as follows: One with a cross in the circle under the star (the Democratic emblem), and in addition having a second cross below the circle and to the right of it, and the other having a cross in the circle under the star, and having also crosses both to the right of the name of every candidate on the Democratic ticket, and also crosses to the left of the name of every candidate on the same ticket except three. We are of the opinion that these ballots were properly disallowed. In *Re Ballot Marks*, 18 R. I. 822, 27 Atl. 608, this court said: "Section 18 [Pub. Laws

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1889, c. 731] provides that the elector 'shall prepare his ballot by marking in the appropriate margin a cross opposite the name of the candidate of his choice for each office to be filled.' This requirement is both explicit and easy of observance. If complied with, there can be no uncertainty in regard to the elector's intention. Moreover, a cross so placed affords no means of subsequently identifying the ballot, as it might if placed in a different position from that directed. The placing of any mark by a voter on a ballot, by which it may be identified as the one voted by him, is prohibited by said section 18. We are still of the opinion, as stated in *Re Vote Marks*, 17 R. I. 812 [21 Atl. 962], that to give validity to a ballot the cross must be inscribed on it to the right of a name printed or written on it and opposite to the name."

The objection raised by the petitioner to one of the two ballots counted for the respondent is that the marking in the circle was so indistinct that it was difficult to determine that it was a cross. An inspection of the ballot in question satisfies us that it is properly marked with a cross in the circle under the eagle (the Republican emblem), and not otherwise, and was properly counted for the respondent, Fales.

[3] The last ballot to be considered is one which was counted for the respondent, but was marked with individual crosses to the right and to the left of each candidate on the Republican column. It differs in form from one of those previously described and held to be properly rejected in this: That there is no cross in the circle at the head of the column, and that there appears to have been some attempt made to erase some of the crosses at the left of some of the names. But we are of the opinion that the legal effect of the crosses to the left of the names in each case is the same, and section 44 of said chapter 11 provides *inter alia*: "If any voter inadvertently spoils a ballot, he may obtain another upon returning the spoiled one and satisfying the officer of the fact of the inadvertence." We are therefore of the opinion that this ballot was improperly counted for the respondent, Fales, and should not have been counted for either candidate.

Inasmuch as the plurality for Fales was a plurality of but one vote, it follows that the result of the rejection of this ballot is to give to each candidate 1,213 votes, and that there was no choice of said councilman at said election.

[4] Section 3 of chapter 328, Gen. Laws 1909, under which this proceeding is instituted, is as follows: "In all such proceedings the court shall enforce its judgment by appropriate process; and whenever it shall find that no election was made, it may order a new election in all cases where new elec-

tions are required by law to be held upon failure to elect in the first instance."

It follows, accordingly, that an order for a new election must be made, and the same is hereby ordered to be holden for said office in said town on the 9th day of January, 1912, in accordance with law.

INLAID CO. v. AL. FRIEDMAN & CO.

(Supreme Court of Rhode Island. Dec. 7, 1911.)

Action by the Inlaid Company against Al. Friedman & Co. There was a default judgment against defendants, and the superior court refused to vacate the default, and defendants filed a petition for trial, under Gen. Laws 1909, c. 297, § 1. Denied.

O. M. Van Slyck and Frederick A. Jones, for plaintiff. Barney & Lee, for defendants.

PER CURIAM. The petition for a trial is denied.

PERRIER v. DUNN WORSTED MILLS.

(Supreme Court of Rhode Island. Dec. 6, 1911.)

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Alphonse Perrier against the Dunn Worsted Mills. Judgment for defendant, and plaintiff excepts. Case remitted to the superior court, with direction to enter judgment for the defendant upon the verdict.

See, also, 75 Atl. 1103.

Thomas P. Corcoran, Lewis A. Waterman, and Ernest P. B. Atwood, for plaintiff. Gardner, Pirce & Thornley (William W. Moss, of counsel), for defendant.

PER CURIAM. We are convinced that a verdict for the plaintiff could not have been supported upon any view of the evidence. The direction of a verdict for the defendant was proper.

Case remitted to the superior court, with direction to enter judgment for the defendant upon the verdict.

MAYOR AND COMMON COUNCIL OF CITY OF NEWARK v. TUNIS et al.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

(Syllabus by the Court.)

TAXATION (§ 384*)—NATIONAL BANK SHARES —"TRUE VALUE."

The rule adopted by the Supreme Court in this case, that the true value of national bank shares for taxation is, under ordinary and normal conditions, their exchangeable value in the market, is a working rule, and not an invariable test of true value under any and all circumstances.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 635; Dec. Dig. § 384.*

For other definitions, see *Words and Phrases*, vol. 8, p. 7115.]

Error to Supreme Court.

Action by the Mayor and Common Council of the City of Newark against Carrie E.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Tunis and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John R. Hardin, for plaintiffs in error.
Herbert Boggs, for defendants in error.

PARKER, J. But for what appears, on a perusal of the briefs filed for plaintiff in error, to be a misapprehension on the part of counsel of the purport and effect of the very careful and comprehensive opinion delivered in the Supreme Court, we should be content to rest our affirmance of the judgment below on that opinion without further comment. This apparent misapprehension related to the language of the Supreme Court as to what constitutes true value of national bank shares, and the opinion is challenged as though it had been held that such true value is market value for the time being, without regard to other considerations. Quoting from the brief: "The Supreme Court held that the measure of true value of bank shares was their exchangeable value in the market; i. e., market value."

As we read the opinion, the Supreme Court was very far from deciding that the market value, or selling price of such shares in the market for the time being, was the absolute measure under any and all circumstances of their true value. The question presented for decision was whether the valuation fixed by the state board was correct. That valuation was based purely upon what in the discussion is called "book value"; i. e., value based on tangible assets and liabilities. The Supreme Court held that this was erroneous, as disregarding the elements of good will, dividend-earning power, ability in management, public confidence, and other intangible features that ordinarily tend to give the stock a selling value in excess of pure book value; and as it was conceded that the valuation fixed by the county board properly reflected all these elements, the judgment of the state board was set aside, and the valuation made by the county board adopted. There was nothing in the judgment, therefore, to indicate that the rule of market value for the time being was a rigid test of true value; and the opinion itself is careful to guard against any such inference. It is pointed out that true value is not always to be ascertained by reference to selling price; that special circumstances may increase or depress market value, without affecting true value, or vice versa; and that the tax act still empowers the assessor, and makes it his duty, to use his power to ascertain by independent investigation other facts bearing on true value, and to make use of all these facts in determining what that true value is; but that as a general working rule, under ordinary and normal conditions, true value is expressed by the exchange value in the market. That such exchange value may be sometimes considered higher

than true value is illustrated by the case of *Stratton v. Collins*, 43 N. J. Law, 562, 566, in which the stock was selling at considerably above the valuation fixed by the assessor, although the book value was somewhat lower.

It thus appears that in neither the judgment nor the opinion is market value made a rigid test of true value, but it is nothing more than a convenient index and evidence of true value "under ordinary and normal conditions." With this view we are fully in accord, as well as with the reasoning and conclusions of the opinion on the other branches of the case; and for the reasons given in that opinion the judgment will be affirmed.

MAYOR AND COMMON COUNCIL OF
CITY OF NEWARK et al. v. CLARK.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

Error to Supreme Court.

Action by the Mayor and Common Council of the City of Newark and others against W. Campbell Clark. Judgment for plaintiffs, and defendant brings error. Affirmed.

John R. Hardin, for plaintiff in error.
Herbert Boggs, for defendants in error.

PER CURIAM. This case was argued with the case of *Mayor, etc., of Newark v. Tunis, Executrix*, 81 Atl. 722, decided at the present term, is similar in its essential facts, and is controlled by the decision in the *Tunis Case*.

For the reasons given in the opinion filed in that case, the judgment of the Supreme Court will be affirmed.

MAYOR AND COMMON COUNCIL OF
CITY OF NEWARK et al. v.
CONKLIN.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

Error to Supreme Court.

Action by the Mayor and Common Council of the City of Newark and others against Archibald W. Conklin. Judgment for plaintiffs, and defendant brings error. Affirmed.

John R. Hardin, for plaintiff in error.
Herbert Boggs, for defendants in error.

PER CURIAM. This case was argued with the case of *Mayor, etc., of Newark v. Tunis, Executrix*, 81 Atl. 722, decided at the present term, is similar in its essential facts, and is controlled by the decision in the *Tunis Case*.

For the reasons given in the opinion filed in that case, the judgment of the Supreme Court will be affirmed.

**MAYOR AND COMMON COUNCIL OF
CITY OF NEWARK et al. v. PLUME.**

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

Error to Supreme Court.

Action by the Mayor and Common Council of the City of Newark and others against Joseph W. Plume. Judgment for plaintiffs, and defendant brings error. Affirmed.

John R. Hardin and Robert H. McCarter, for plaintiff in error. Herbert Boggs, for defendants in error.

PER CURIAM. This case was argued with the case of Mayor, etc., of Newark v. Tunis, Executrix, 81 Atl. 722, decided at the present term, is similar in its essential facts, and is controlled by the decision in the Tunis Case.

For the reasons given in the opinion filed in that case, the judgment of the Supreme Court will be affirmed.

GILSON et al. v. APPLEBY.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

CORPORATIONS (§ 232*)—INSOLVENCY AND RECEIVERS—RIGHT TO COLLECT UNPAID SUBSCRIPTIONS.

Where a corporation issues a certificate of stock for property purchased, for an amount known to be in excess of the value of such property, which contains a provision that the stock is fully paid and unassessable, the receiver of such corporation may maintain a proceeding against such stockholder to enforce his liability for the unpaid part of his subscription, without first procuring an annulment of the subscription contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879-884; Dec. Dig. § 232.*]

Error to Supreme Court.

Action by Herbert C. Gilson and others against J. Charles Appleby. Plaintiffs' writ of attachment was quashed by the circuit court, and on certiorari such order was affirmed by the Supreme Court (80 N. J. Law, 542, 77 Atl. 1084), and plaintiffs bring error. Affirmed.

See, also, 78 Atl. 668.

J. Merritt Lane, for plaintiffs in error. Hartshorne, Insley & Leake, for defendant in error.

GUMMERE, C. J. This suit was begun by a writ of attachment sued out of the circuit court of Hudson county. That court quashed the writ, upon the ground that the alleged debt sworn to in the affidavit on which the writ issued was in the nature of a claim for unliquidated damages; it being a liability imposed by the corporation act upon the defendant as a stockholder of the J. C. Appleby Sand & Clay Company to respond to the plaintiffs, as receivers of that corporation,

for the unpaid amount of his stock subscriptions, for the purpose of paying debts of the corporation. Upon certiorari sued out to review the validity of this order of the circuit court there was an affirmance (80 N. J. Law, 542, 77 Atl. 1084), and this writ of error challenges the soundness of the conclusion reached by the Supreme Court.

We concur in that conclusion, and for the reasons set out in the opinion delivered by that court, with which we are entirely satisfied, except in one particular, which we now point out. The opinion, after reciting that where a corporation issues a certificate of stock for property purchased, and such certificate contains a provision that the stock is fully paid and unassessable, it constitutes a contract between the corporation and the shareholder, then intimates (as we understand it) that, in case the corporation afterwards becomes insolvent, such shareholder, even though the stock issued to him was known by both parties to be in excess of the value of the property purchased, cannot be called upon by the receiver to make contribution for the purpose of paying the debts of the corporation until that officer has, by proper proceedings, procured an annulment of the contract. In the case of Easton National Bank v. American Brick & Tile Co., 70 N. J. Eq. 722, 728, 64 Atl. 1095, this court pointed out that such a contract contravened the prohibition of the corporation act, and was not merely voidable, but void. We accordingly held that such a contract could not be laid hold of by either party as a ground of action or a ground of defense, that no bill or other original proceeding was necessary to procure an adjudication of its nullity, and that, in a proceeding by a receiver to enforce the liability of stockholders for the unpaid portion of their subscriptions, the court was at liberty, upon ascertaining the facts that rendered the contract void, to treat it as affording no obstacle to the granting of the relief sought by the receiver. The view there expressed was reached after full consideration, and we see no reason for departing from it.

The judgment under review will be affirmed.

BALL et ux. v. BALL et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

DEEDS (§ 71*)—VALIDITY—THREAT OF PROSECUTION.

Parents, who make a conveyance to a creditor of their son under pressure of a threat to have the son criminally prosecuted, made in the honest belief that the son had subjected himself to such a prosecution, although the contrary was the fact, are entitled to have the conveyance set aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 183-189; Dec. Dig. § 71.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Appeal from Court of Chancery.

Bill by John B. Ball and wife against Nellie W. Ball and others. From a decree for plaintiffs, defendants appeal. Decree affirmed.

Pitney, Hardin & Skinner, for appellants.
Riker & Riker, for respondents.

GUMMERE, C. J. The bill in this case was filed to set aside two deeds of conveyance made by the complainants to Sidney S. Ward, the defendants' decedent, upon the ground that they were executed under duress exercised upon the grantors by Mr. Ward; the duress complained of consisting of threats of the immediate arrest and imprisonment of their son, Arthur D. Ball, for obtaining money from Mr. Ward under false representations.

We concur in the conclusion reached by the learned Vice Chancellor that the complainants established by a fair preponderance of proof the validity of their claim that these conveyances were made as a result of the threat to have their son arrested, and for the purpose of preventing that threat from being carried into effect. The analysis of the testimony made by the Vice Chancellor, and set out in his opinion, is complete and accurate, and leaves nothing to be added by us. The Vice Chancellor further concluded from the proofs submitted that the money advanced by Ward to the son of the complainants was not, in fact, obtained under false pretenses, although Mr. Ward probably believed that this was the case when he made the accusation to the complainants. We concur in this conclusion of the Vice Chancellor, and for the reasons which he states in his opinion.

Having reached these conclusions upon the facts, the Vice Chancellor in his opinion then takes up the consideration of the question whether a conveyance made by parents to a creditor of their son, under the pressure of a threat to have the son criminally prosecuted, is valid, when it appears that the creditor honestly believed that the son had subjected himself to such a prosecution, although the contrary was the fact. He reaches the conclusion that the grantors of a conveyance made under such conditions are entitled to have it set aside. We concur with him in this view. In discussing this latter question, however, the learned Vice Chancellor goes outside of the lines of the question, and the conclusion declared by him is broader than the decision of the case required. He thus states it: "In my judgment, the equitable rule to be applied in this case is that it is against equity and good conscience for the creditor to extort from the parent payment or security for the debt of the son, for which the parent is not

responsible, by threats of criminal prosecution of the son, even if imprisonment be lawful." The question whether a conveyance made by a parent to prevent the imprisonment of a child who has, in fact, been guilty of a criminal offense, may afterward be set aside at the option of the parent, is one upon which judicial views are not in harmony. It is not presented under the facts found by the Vice Chancellor, and concurred in by us, and any expression of view upon the question by this court would, consequently, be obiter. For this reason we neither assent to, nor dissent from, what was said by the learned Vice Chancellor upon this point.

The decree under review will be affirmed.

NEW JERSEY IMPERIAL ROAD CO. v. FREEHOLDERS OF GLOUCESTER COUNTY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 66*)—REVIEW—REFUSAL OF CHANGE OF VENUE.

Alleged error in refusing application for a change of venue (assuming the change asked for was a matter of right) held not reviewable by writ of error prior to final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 66.*]

Error to Supreme Court.

Action by the New Jersey Imperial Road Company against the Freeholders of Gloucester County. Judgment for plaintiff (80 N. J. Law, 640, 77 Atl. 1022), and defendant brings error. Dismissed.

John Boyd Avis and David O. Watkins, for plaintiff in error. Carrow & Kraft, for defendant in error.

PER CURIAM. The plaintiff in error seeks to bring under review an order made by the Supreme Court refusing defendant's application for a change of venue. It is contended that the action is local in its nature, and that the change of venue asked for by the defendant was a matter of right. We are not called upon to pass upon this question, because it is manifest from the state of the case that the action has not been brought to trial and that no final judgment has been rendered therein. In *Defiance Fruit Co. v. Fox*, 76 N. J. Law, 482, 70 Atl. 460, the cause had proceeded to final judgment. Our review by writ of error is confined to final judgments. 2 Gen. St. p. 1391, § 1; *Chambers v. Philadelphia Pickling Co.*, 79 Atl. 273; *State v. Kelsey*, 82 Atl. 18, decided by this court during the present term.

The writ of error should be dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

DAYTON v. BOETTNER et al.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 488*)—CONFLICTING JURISDICTION—STRIKING OUT PLEADINGS.

The power to strike out a pleading in an action in the Supreme Court is lodged solely in that court or in a justice thereof, and is not possessed by a circuit court judge to whom the cause has been referred for trial pursuant to chapter 118 of P. L. 1906, p. 209.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1816-1823; Dec. Dig. § 488.*]

2. ACTION (§ 41*)—JOINDER OF CAUSES—FORMS OF ACTION.

Under rule 16 of the Supreme Court counts in debt and in assumpsit may be joined in the same suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 328-359; Dec. Dig. § 41.*]

3. APPEAL AND ERROR (§ 108*)—DECISIONS REVIEWABLE—REFUSAL TO STRIKE PLEADINGS.

A refusal to strike out a pleading cannot be made a part of the record so as to be reviewable on a writ of error. It is only when the motion to strike out has prevailed that section 110 of the practice act (P. L. 1903, p. 569) permits error to be assigned thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 699-710; Dec. Dig. § 108.*]

4. EVIDENCE (§ 373*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.

Where there is no subscribing witness to a bond in suit, the testimony of a witness at the trial that he saw the defendant sign it justifies its admission in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1581-1586; Dec. Dig. § 373.*]

5. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

An objection that a question of cross-examination was overruled will not be considered where substantially the same question was afterwards put to the same witness and answered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

6. TRIAL (§ 139*)—TAKING QUESTION FROM JURY—NONSUIT.

Where the evidence will support a verdict for the plaintiff, a motion to nonsuit must be denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

Error to Supreme Court.

Action by John M. Dayton against Frank A. Boettner and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Harry V. Osborne, for plaintiffs in error.
Rene P. Von Minden and Isaac P. Runyon, for defendant in error.

TRENCHARD, J. On July 17, 1902, Frank A. Boettner and Henry Pomerehne executed a bond to John M. Dayton for \$1,880 payable in one year from the date thereof. Certain payments were made on account, and in 1910 Dayton brought this suit in the Supreme Court to recover the remainder due. The

declaration contained a special count on the bond in debt and the common counts in assumpsit. The defendants pleaded payment to the special count, and nonassumpsit to the common counts. Upon trial at the Middlesex circuit, before the circuit court judge to whom the cause had been referred for trial by the justice of the Supreme Court holding the circuit, the plaintiff recovered a verdict, and the judgment entered thereon is here for review.

The first assignment of error challenges the refusal of the trial judge to strike out the common counts.

[1] We are of opinion that such refusal was proper. The power to strike out a pleading in an action in the Supreme Court is lodged solely in that court or in a justice thereof, and is not possessed by a circuit court judge to whom the cause had been referred for trial pursuant to chapter 118 of P. L. 1906, p. 209. See section 110 of the practice act (P. L. 1903, p. 569); *Hubbard v. Montross Metal Shingle Co.*, 79 N. J. Law, 208, 74 Atl. 254; *McConnell v. Alpha Portland Cement Co.*, 74 N. J. Law, 730, 67 Atl. 348.

[2] Moreover, the contention of the defendants that counts in assumpsit could not be lawfully joined with one in debt was not well founded. Under rule 16 of the Supreme Court, counts in debt and in assumpsit may be joined in the same suit.

[3] But there is a reason of a fundamental character why the assignment of error under consideration cannot avail the defendants, and it is this: a refusal to strike out a pleading cannot be made a part of the record so as to be reviewable on a writ of error. It is only when the motion to strike out has prevailed that section 110 of the practice act (P. L. 1903, p. 569) permits error to be assigned thereon. *Cooper v. Vanderveer*, 47 N. J. Law, 178.

[4] The second assignment of error, namely, that the trial judge erroneously admitted in evidence the bond on which the plaintiff founded his suit, is without merit. There was no subscribing witness to the bond, and a witness at the trial testified that he saw the defendants sign it. Since that proof justified the admission of the bond in evidence, it is unnecessary to determine whether it was admissible under the pleadings without such proof.

[5] The third assignment alleges that the trial judge erroneously overruled a question propounded to the plaintiff on cross-examination. But this will not be considered for the reason that substantially the same question was afterwards put to the same witness and answered. *Redding v. Central R. Co.*, 68 N. J. Law, 641, 54 Atl. 431; *Chesebrough v. Tirrill*, 61 N. J. Law, 629, 41 Atl. 215; *O'Brien v. Traynor*, 69 N. J. Law, 239, 55 Atl. 307.

[6] The fourth assignment of error questions the propriety of the refusal of the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

judge to nonsuit the plaintiff. It is plainly without merit. The evidence was sufficient to support a verdict for the plaintiff, and the motion to nonsuit was properly denied.

All other assignments of error argued have been considered, but none have been found requiring reversal.

The judgment of the court below will be affirmed.

GANNON v. BRADY BRASS CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTIONS FOR JURY.

Where a contract has not been reduced to formal language, either written or oral, the intention of the parties to make a contract and its terms, if made, are to be gathered from what the parties did and said, and this is normally a question of fact for the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770; Dec. Dig. § 176.*]

2. APPEAL AND ERROR (§ 273*)—REVIEW—EXCEPTIONS—SUFFICIENCY.

An exception that is too broad, in that it includes the whole charge, and too narrow, in that it gives no notice of the alleged error, will not support an assignment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1620-1630; Dec. Dig. § 273.*]

Error to Circuit Court, Hudson County.

Action by John W. Gannon against the Brady Brass Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The writ in this cause reviews a judgment, on verdict, in favor of the plaintiff, recovered in an action for damages, because of discharge from employment under an alleged contract of October 4, 1909, for one year. The errors assigned are on exceptions to rulings on evidence, to refusal to nonsuit the plaintiff or direct a verdict in favor of the defendant, and to the charge.

Plaintiff entered the employ of the defendant as salesman, under contract, made September 1, 1908, at a salary of \$200 per month, payable semimonthly; the contract being subject to cancellation on 30 days' notice from either party. On October 4, 1909, Mr. Brady, the president of the defendant, Harry Onslow, one of its directors, and the plaintiff had luncheon together, and the plaintiff's relations with the defendant were discussed. As to the conversation at this luncheon, the version of the plaintiff must be taken as true. He testified that the relative merits of compensating a salesman by commission or salary were talked over, and, without attempting to state the rest of the conversation at the luncheon, he testified that, as the party rose from the table, Mr. Brady turned to Mr. Onslow, and said, "Well, Harry, it is understood that we will

take John [meaning plaintiff] on for another year at the same price;" and that Mr. Onslow said, "All right." On cross-examination, when asked to state exactly what Mr. Brady had said, he testified as follows: "We all rose at the same time, and Mr. Brady said: 'Well, Harry, it is understood, then, that we take John on again at the same money for another year.'"

On March 25, 1910, plaintiff was discharged by Mr. Brady, who informed plaintiff that he would be paid a month's salary from that date, thus giving him the 30 days notice required by the contract of September 1, 1908. Suit was begun in August, 1910, and at the trial plaintiff claimed that he had been unable to secure employment. The verdict was for \$1,033.33, being a sum equivalent to \$200 a month from April 25, to October 1, 1910.

The case of the plaintiff was not rested on any defect in the 30 days notice. His counsel distinctly repudiated any such contention, and the case was therefore put to the jury by the judge, on the theory that the plaintiff could recover only on their finding a new contract, made October 4, 1909, in substitution of the old contract. The jury were distinctly told that the plaintiff could not recover on the old contract.

The foregoing condensed statement of the case is taken from the brief of counsel for the plaintiff in error.

Gilbert Collins, for plaintiff in error. Tenant & Haight, for defendant in error.

GARRISON, J. (after stating the facts as above). When the motion to nonsuit the plaintiff was made, the testimony that had been given warranted a finding that on October 4, 1909, the plaintiff had been for over 14 months in the employ of the Brady Brass Company at \$200 a month, subject to discharge on 30 days notice; that on the day in question he was called into the office of Mr. Brady, the president of the company, to discuss some change in the terms of his employment; that while this subject was under discussion Mr. Onslow, one of the directors of the company, came in, to whom Mr. Brady stated the subject under discussion, and proposed that it be continued at luncheon, which was done. During this conversation, Brady, in answer to Onslow's inquiry as to what the plaintiff "was getting," replied, "Twenty-four hundred," and at the conclusion of the luncheon the remarks quoted in the statement that precedes this opinion were made, respecting the result of the conference. On the evening of the same day, Mr. Brady wrote to the plaintiff, confirming what had happened at the luncheon as "our understanding of even date," and saying, "Our company understands that for the year beginning this month you will concentrate your best efforts," etc.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon this testimony and other proofs, showing that the company were not dissatisfied with the plaintiff, and had no thought of discharging him, it was open to the jury to find that, as some change in the terms of plaintiff's employment was the express subject of the conference and of the discussion that preceded it, and as the nature of his work and his annual compensation remained unchanged, the only term in which any change was made was that the monthly employment, with its incident as to discharge, was changed into a straight employment for one year. If there had been previously no relations between the parties, a jury could hardly avoid finding a yearly contract of this nature. Such previous relation was, however, only one of many circumstances to be considered in determining what conclusion the parties came to. If the subject under discussion was whether the plaintiff should be discharged, or should be continued in the company's employment, Mr. Brady's declaration would be strongly indicative of a mere continuance of the old relation; but if the continuance of the plaintiff's employment was assumed, and the subject of the conference was a change in its terms, Mr. Brady's declaration was entirely consistent with the notion that some change had been made, and, if so, was somewhat persuasive that an annual employment had been agreed upon, since otherwise there was no change. The question was submitted to the jury, over the defendant's motion for a direction, and an exception that raised the same question as that presented by the motion for a nonsuit, and for the direction of a verdict.

For reasons sufficiently indicated, we think it was not error to deny these motions.

[1] The cases holding that, where no attempt has been made to reduce the terms of a contract to formal language, the intention of the parties, as gathered from what they said and did, is a question of fact for the jury are very numerous. *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, may stand for the class.

In the present case, however, a preliminary question was whether or not any contract was made on October 4, 1909. This, under the testimony, was clearly a question for the jury.

It may be that, if the making of a new contract on that date was admitted, and the sole question was, what were its terms, as evidenced by a single unequivocal declaration? a court question was thereby presented.

We need not consider this question, however, since no such point was made at the trial. Counsel, it is true, objected to a part of the charge, on the ground that there was no question for the jury, just as he moved for the direction of a verdict on the same ground; but he nowhere suggested as an ad-

ditional ground that the testimony was such that the court should have determined the terms of the contract. Indeed, he could not consistently have laid such a ground, because his contention throughout was that there was a lack of proof as to the making of a new contract and its terms—a contention that, if true as to the jury, must be equally true as to the court. The trial judge could not know, and was not obliged to divine, any such point from the mere exception to a part of the language in which he submitted the question to the jury.

Counsel also lays hold of the expression "implied contract," used by the court in its charge, and argues that it was not technically apt, as applied to an executory contract to be gathered inferentially from the words and conduct of the parties. The judge, however, was talking to a jury, not dictating a legal thesis, and he told the jury that by an implied contract he meant "one to be gathered by implication, presumption, or inference from the course of dealing of the parties, and from the circumstances of the case."

This accords with one of the definitions given by Webster, and was sufficiently accurate in the context in which it was used.

[2] Moreover, counsel did not direct the attention of the trial court to the verbal criticism that he now advances. His exception was "to what your honor said with regard to the right of the jury to find an implied contract from the language used by Mr. Brady to Mr. Onslow." This was in effect an exception to the whole charge, all of which was concerned in one way or another with the contract so described; but the point now made, viz., that the word "implied" was improperly employed, was in no way brought to the judge's notice.

We find no error in the charge or in rulings upon evidence that should lead to a reversal.

The judgment of the Hudson circuit is affirmed.

PHELPS v. FUCHS & LANG MFG. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 29*)—RELATION—ABANDONMENT BY SERVANT—ACTION FOR DISCHARGE.

The plaintiff brought his action to recover damages for an unlawful discharge. It appeared that he was employed as chief clerk in defendant's factory, subject to the supervision and direction of defendant's superintendent; that he had an altercation with another clerk who disputed his authority, and the superintendent, having heard the explanation of plaintiff, informed him that he had exceeded his authority, whereupon the plaintiff said, "Well, I will quit," and followed this by turning over to another clerk the key to the cash drawer and leaving

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the factory, taking with him certain of his personal effects, and did not return to work. Held, that plaintiff's subsequent disclaimer of any intent to quit defendant's service was not sufficient to overcome his declared intention to quit and his subsequent acts in execution of such purpose, and that a nonsuit allowed upon this state of facts was not error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 28, 29; Dec. Dig. § 29.*]

2. APPEAL AND ERROR (§ 232*)—PRESENTATION OF QUESTION IN TRIAL COURT—ADMISSIBILITY OF EVIDENCE.

An appellate court will not hear reasons in favor of the competency of testimony overruled at the trial which were not disclosed to the trial court, and are first suggested on the argument of the writ of error issued to review such action of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

(Additional Syllabus by Editorial Staff.)

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE AND EXTENT.

In an action for wrongful discharge from employment, the issue being whether plaintiff was discharged or quit voluntarily, where plaintiff testified that he carried away his notarial seal because he wanted to use it at home, a question on cross-examination whether he had anything that he intended to use it for that evening was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

Error to Circuit Court, Bergen County.

Action by Austin H. Phelps against the Fuchs & Lang Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mackay & Mackay, for plaintiff in error.
Collins & Corbin, for defendant in error.

BERGEN, J. [1] The plaintiff's case, as set up in his declaration, is based upon his alleged unlawful discharge from service by the defendant, in violation of a written agreement of employment existing between the plaintiff and defendant. By the terms of the contract the defendant agreed to employ plaintiff for a period of five years beginning July 1, 1908, at the rate of \$30 per week, and plaintiff agreed to devote his entire time during that period to the business of the defendant, as chief clerk in its factory at Rutherford, N. J., under the supervision and direction of Mr. Ford, the defendant's superintendent, or of any of defendant's officers. The trial court ordered that a judgment of nonsuit be entered at the close of plaintiff's case, to which direction the plaintiff excepted, and a bill of exceptions being sealed, assigned error thereon. The case made by the plaintiff was as follows: On April 11, 1910, he had an altercation with defendant's shipping clerk, and being asked by Mr. Ford, by telephone from the New York office, about the matter, he gave his version of the situation, after which, the plaintiff testifies, "he told me I was exceeding my authority; and I asked him if he was coming out that day; he said

he didn't know. I then said, 'Well, I will quit.'" After waiting until the arrival of the next train from New York and some time between 10 and 11 o'clock, he left the factory, taking with him the certificate of his appointment as notary public and his notarial seal, and turned over to another employé the key to the cash drawer. On the afternoon of the same day he went to the New York office and saw the treasurer of the defendant company, and told him "I could not carry on the business of the office to their satisfaction or mine if I didn't have the authority over the clerks, and if they were going to do as they pleased, why, I could not maintain any discipline there at all." The treasurer advised him to see Mr. Ford, which he did on the 13th of April, and explained what he had told the shipping clerk to do and what the clerk had refused to do, and then, without any previous reference to his relation to the company, said to Mr. Ford that he had not quit, but on the contrary had been discharged, and to this Mr. Ford replied that he had not been discharged, but had voluntarily quit the service of the defendant. From the time plaintiff left the factory just after he told Mr. Ford he would quit, until this conversation, nearly three days later, he had not returned to the factory nor attempted to serve the defendant. There is no evidence to support the averment in the plaintiff's declaration that he had been discharged unless such an inference can be drawn from Mr. Ford's denial of a discharge, and his claim that plaintiff had voluntarily quit defendant's service. Such an inference cannot be properly drawn from anything said or done by Mr. Ford, taken in connection with the previous conduct of the plaintiff, who had attempted to exercise an authority over another employé, which Mr. Ford, under whose directions and supervision he had agreed to serve, denied he possessed, and he then informed Mr. Ford that he would quit the service of the company, apparently for the reason that he was denied authority to direct the services of the shipping clerk. He followed his statement that he would quit, by turning over to another clerk his key to the cash drawer and leaving the factory, taking with him his notarial seal and certificate. He then went to the treasurer of the company for the avowed purpose of having the direction of Mr. Ford overruled, saying, in effect, that he could not successfully serve the company unless he was given an authority which Mr. Ford refused, and having failed in this purpose, he did not accept the situation and return, or attempt to return, to his work, but remained away. All that Ford did was to insist that the plaintiff had quit, and if such insistence was justified by plaintiff's words and conduct, and we conclude it was, no illegal discharge

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

could be implied from facts which conclusively demonstrated that the plaintiff had abandoned the service.

Our conclusion is that the case proved by the plaintiff failed to show a discharge; on the contrary it conclusively shows that the plaintiff quit the service of the defendant of his own motion because he was denied authority over the shipping clerk without which he was unwilling to remain in defendant's service. His subsequent repentance, if he did repent, would not destroy the effect of his previous notice to the defendant that he would quit its service, following it by acts indicating the execution of such purpose, in which the defendant apparently acquiesced. The nonsuit was properly allowed, and we find no error in the action of the trial judge in that regard.

[2] The next assignment of error argued relates to the following question which the trial court overruled: "Q. As head clerk, what were your duties in this place?" It is urged in support of the competency of this question that its purpose "was to show that the defendant in error had required the plaintiff in error to perform other duties than those mentioned in the contract, and to show what control he exercised over the employes of the defendant in error." No such purpose was disclosed to the trial court, the question was there urged upon the ground that the contract "did not say what the particular duties are, in detail." The trial court refused the question upon the ground that the contract did define plaintiff's duties, and a reference to the contract will support the conclusion of the court. The plaintiff's claim is rested upon an alleged illegal discharge, and he testified that he performed all his duties under the contract, so it was quite immaterial what those duties were in that aspect of the case, but the trial court having considered the reasons offered in support of the legality of the question, and determined its propriety in view of the reason given, it is now too late, for the first time in an appellate court, to offer other reasons not suggested to the trial judge.

[3] The only remaining assignment argued challenges the action of the trial court in permitting defendant's counsel to ask the plaintiff, on cross-examination, the question: "Q. You didn't have anything that you expected to use it for that evening that you knew of, did you?" The only objection interposed was that the question was not relevant. We are of opinion that this cross-examination was proper and competent, for plaintiff had testified that he carried his notarial seal, to the using of which the question was directed, away from the factory because he wanted to use it at home, and that he did not intend by such act to indicate that he had quit the service of the de-

fendant. It was quite relevant to show that the purpose, which he subsequently declared, for removing the seal from the factory was not in fact true and this, the evidence admitted, had a tendency to show.

The judgment will be affirmed, with costs.

ASHBY v. YETTER.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. DEEDS (§ 70*)—VALIDITY—FRAUD.

Complainant, while suffering from nervous prostration and incompetent to manage his business affairs, was induced by misrepresentations of defendant to convey real estate and personal property to him for a grossly inadequate consideration. *Held*, that such conveyance was procured by fraud and was properly set aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

2. CANCELLATION OF INSTRUMENTS (§ 34*)—LACHES.

Under the circumstances of this case, complainant's right to a reconveyance and accounting *held* not barred by laches.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

Appeal from Court of Chancery.

Bill by Winfield S. Ashby, by next friend, against Frederick P. Yetter. Decree for complainant, and defendant appeals. Affirmed.

See, also, 78 Atl. 799.

On appeal from a decree advised by Vice Chancellor Walker, who filed the following opinion:

"The bill was filed by Winfield S. Ashby, who alleged that during January, 1902, he was the owner of certain real estate and personal property at Atlantic City, N. J.; that during that month he became broken in health and a sufferer from nervous prostration and melancholia and became mentally infirm and unable to grasp business situations, and was thereafter for a long space of time mentally and physically incapacitated and totally unfit to look after his property and business; that in this situation the defendant, Yetter, requested the complainant to convey to him his real and personal property in Atlantic City, representing that he would take charge of the same and conduct and manage it for the complainant and account to him for the proceeds of the property. The bill was filed March 6, 1907. Thereafter Ashby became insane, and on September 30, 1907, an order was made appointing Jesse B. Ashby, the complainant's wife, as his next friend, to prosecute the suit. Ashby himself, being insane, was not a witness.

"Mrs. Ashby testified that Yetter came to the house several times to see her husband, and she was present at one conversation in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which Yetter told her that he realized that her husband was a sick man and not able to take care of his affairs, and he (Yetter) was trying to persuade him to turn them over to him so that he could look out for them until such time as he (Mr. Ashby) would be able to take them up again.

"The result of negotiations between Ashby and Yetter were that Ashby conveyed all his Atlantic City property to Yetter by three deeds for the real estate and a bill of sale for the personal property, March 18, 1902. It is significant that each deed recites a consideration of \$1, and the bill of sale \$1 and other valuable consideration. On the same day Yetter conveyed to Ashby three certain building lots on the outskirts of Philadelphia; the consideration being expressed to be \$1 and other good and valuable consideration. The equities in the real estate conveyed by Ashby to Yetter amounted approximately to \$10,000, and the personal property to approximately \$2,400, making in all approximately \$12,400, which Yetter took over into his possession and control. The lots conveyed by Yetter were worth something between \$500 and \$900, the latter figures at the very outside. Ashby became decidedly aberrated after the transaction, and Yetter knew it, and this, to my mind, explains how it was that Yetter wrote Mrs. Ashby on July 8, 1902, nearly four months after he had taken title, for permission to ship certain of the personal property he had become possessed of from Mr. Ashby, to a Mr. McCarroll. This to my mind is inconsistent with Yetter's present claim of ownership in himself of the property acquired through the Ashby conveyances, and his (Yetter's) attempted explanation only confirms that belief.

"The defendant lays stress upon a memorandum written and signed by Mr. Ashby on March 8, 1902, 20 days before the deeds passed, in which Mr. Ashby says he that day sold to Mr. Yetter all his interests in Atlantic City. The explanation is that the note was an authority to Yetter to go to Atlantic City and take charge of Ashby's business in advance of the conveyances and is entirely consistent with the complainant's claim that the transfer of property was in trust. Besides the probabilities of the case being entirely with the complainant, Yetter's appearance on the witness stand and manner of testifying was decidedly against him.

"The conveyances, being entirely regular and valid on their face, import legality, and the burden is upon the complainant to overcome that presumption. To my mind the complainant has discharged the burden of proof. I hold in this case that the testimony does not warrant a finding that the complainant was non compos mentis at the time he made and consummated the transaction, but it shows that he was suffering from a severe mental disorder, and that his unfortunate condition and the mental weakness

resulting from it was the moving cause of his putting his property in the hands of Yetter to manage for him. I am persuaded that the conveyance by Yetter to Ashby was by way of security for the faithful performance of the trust he assumed and was not a consideration for the conveyance to him by Ashby of his property.

"A decree for a reconveyance and accounting will be made in accordance with the prayer of the complainant's bill."

Wescott & Wescott, for appellant. Garrison & Voorhees, for respondent.

PARKER, J. (after stating the facts as above). We reach the same result as that to which the learned vice chancellor was led by his consideration of the evidence, but for reasons not wholly identical with those expressed by him. There is some difficulty in resting the decree for reconveyance on the terms of an express trust, because that trust was not evidenced by any writing as required by the third section of the statute of frauds. *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Newkirk v. Place*, 47 N. J. Eq. 477, 21 Atl. 124; *Aller v. Crouter*, 64 N. J. Eq. 381, 391, 54 Atl. 426; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520. The theory of a resulting trust arising from nonpayment of consideration was not relied on, and would have been untenable. *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644; *Coffey v. Sullivan*, supra. It may be that as there was no objection to the parol evidence tending to show an express trust, and that evidence, if properly to be considered, was adequate to support such a finding, the decree may be upheld on this ground, though in *Coffey v. Sullivan* this court intimated that the trust itself would be invalidated and not merely the parol evidence to establish it. 63 N. J. Eq. 304, 49 Atl. 520.

[1] We need not go further into this branch of the cause, because we are satisfied on a reading of the evidence that the conveyances from Ashby to Yetter were procured by fraud, and that procurement facilitated by Ashby's mental condition at the time. He was a nervous wreck with his mentality impaired. He had been in the insane asylum some years before, and shortly after the bill was filed went there again. Defendant, a shrewd and apparently a somewhat unprincipled real estate speculator, seeing Ashby's condition, took advantage of it, and to increase his anxiety and worry, and thus induce him to get rid of his property, told him that there were judgments against him, that he could not show himself in Atlantic City, that the mortgages were being foreclosed or about to be foreclosed.

The grossly inadequate consideration is of itself evidence of fraud. *Worth v. Watts*, 76 N. J. Eq. 299, 305, 74 Atl. 434. Superadding the misrepresentations of fact, we have no difficulty in finding that the deeds

and bill of sale were fraudulently procured, and should be set aside.

The effect of the fraudulent procurement was to create a trust *ex maleficio* in favor of complainant. Pom. Eq. Jur. § 1053 et seq. Reconveyance and accounting are of course incidental to such a trust, and hence were properly decreed.

[2] The defense of laches is made, but is without merit. It is true that five years elapsed before the filing of the bill. But during all that time Ashby's mental incapacity persisted, finally culminating in insanity; and for a great part of it Yetter's behavior was such as to justify complainant's wife in the belief that Yetter was dealing with the property as a trustee. With the husband mentally incompetent and the wife deceived as to the defendant's position in the matter, laches may well be excused, especially as Yetter's position has not yet been changed in any respect that cannot be fully compensated for on the accounting and by a reconveyance of the Philadelphia lots.

The decree of the Court of Chancery will be affirmed.

CAMPBELL v. WEBER et al.

(Court of Chancery of New Jersey. Dec. 12, 1911.)

(Syllabus by the Court.)

DOWER (§ 53*)—How Lost.

When a husband conveys land to his wife through an intermediary and the wife joins in the deed to the intermediary and thus releases her inchoate right of dower, if the conveyances be set aside as fraudulent in favor of a creditor, the subsequent sale of the premises to make the creditor's claim will be free from the estates granted and conveyed, including the inchoate right of dower. Belford v. Crane, 16 N. J. Eq. 265, 273, 84 Am. Dec. 155, distinguished.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 53.*]

Bill by William Campbell against Charles O. Weber and others. Decree for complainant.

John A. Coan, for complainant. Edwin C. McKeag, for defendants.

WALKER, V. C. This was a suit in aid of a judgment creditor to set aside fraudulent conveyances, which issue was determined in favor of the creditor, and the question reserved upon the hearing as to whether the wife of the defendant Weber was entitled to have an inchoate right of dower saved and protected to her.

From the cases of Den v. Johnson, 18 N. J. Law, 87, 97; Frey v. Boylan, 23 N. J. Eq. 90; Boorum v. Tucker, 51 N. J. Eq. 135, 147, 26 Atl. 456; Goodheart v. Goodheart, 63 N. J. Eq. 746, 53 Atl. 135; and Dowes' Case, 68 N. J. Eq. 11, 16, 64 Atl. 803—it appears that the wife's right of dower was extinguished

when she joined her husband in the conveyance to the intermediary who conveyed to her, and, being once extinguished, cannot be revived. Her present estate in the lands in question is one of fee arising under the conveyance to her by the person who became the conduit of title, and this estate must be swept away from her because it rests upon the conveyances made to defraud the complainant, a creditor. So much, at least, as is necessary, must be swept away; but the balance, if any, will be hers, as the conveyances are good inter partes, and she will be entitled to any surplus that may arise upon the sale.

Belford v. Crane, 16 N. J. Eq. 265, 273, 84 Am. Dec. 155, is not in conflict with the cases above cited, as I view it. In Belford v. Crane, Chancellor Green remarked that the land there in question had been purchased with the money of the husband, and that there was a resulting trust in his favor. The title was in the wife, and he further observed that, as no actual fraud was imputed to her, her interest in the property, as against the husband's creditors, would be secured to her to the extent of the value of her dower, the same as though title had been vested in the husband. Thus it appears that in Belford v. Crane the wife had never extinguished her inchoate right of dower by deed of release, but that, on the contrary, she had taken the legal title to the premises in trust for her husband, and, upon its being held that the property was his in equity, the wife's inchoate right of dower was also held to exist. However, if there be any conflict between Belford v. Crane and the other cases referred to, as all of them except Den v. Johnson are later cases in this court, they must govern my decision.

A decree will be advised for the sale of the defendants' lands free from the estates granted and conveyed by Weber and wife to the latter through the intervention of the intermediary, including the inchoate right of dower claimed by the wife.

In re ALEXANDER et al.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

1. COURTS (§ 198*)—INFERIOR COURTS—ORPHANS' COURT—JURISDICTION.

The orphans' court cannot assume jurisdiction unless conferred by statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 471; Dec. Dig. § 198.*]

2. GUARDIAN AND WARD (§ 58*)—EXPENDITURES—DIRECTION BY ORPHANS' COURT—JURISDICTION.

The orphans' court has no power, in the absence of statutory authority, to direct in advance a guardian to expend the income of his ward's estate, or how he shall expend it; but the guardian must expend the same to his best

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment and rely on the court to allow his account.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 58.*]

3. GUARDIAN AND WARD (§ 58*)—EXPENDITURES—DIRECTION OF ORPHANS' COURT—JURISDICTION.

P. L. 1901, p. 825, allowing the orphans' court in specified instances to order the use of the principal of the personal estate, or a part thereof, as it may deem for the best interests of infants, does not authorize the orphans' court to direct the expenditure of the income of an infant's estate.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 58.*]

4. GUARDIAN AND WARD (§ 30*)—APPLICATION OF INCOME FOR EDUCATION OF INFANTS.

The guardian of infant children of parents having an income of less than \$1,200 a year may use the income of the estate of the children for their education along lines for which they show a special aptitude.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 116-135; Dec. Dig. § 30.*]

Appeal from Prerogative Court.

Petition by the parents of Jeremiah N. Alexander, Jr., and another, infants, to direct their guardian to pay for the education and maintenance of the infants the income produced from funds held by the guardian. From an order of the Prerogative Court affirming an order of the Orphans' Court denying the petition, the petitioners appeal. Affirmed.

Joshua E. Borton, for appellants.

PER CURIAM. The parents of Jeremiah N. Alexander, Jr., and Mary B. Alexander, infants, residents of the county of Camden, filed their petition in the orphans' court of that county praying that the guardian of their two children might be directed to pay to them, for the education and maintenance of their children, the income produced from funds held by the guardian in trust for the children. Upon the hearing of the application the prayer of the petition was denied. Thereupon the parents appealed to the Prerogative Court, and that court affirmed the order of the orphans' court. Appeal was thereupon taken to this court.

For the reasons set out in the opinion of Joline, J., filed in the orphans' court, we conclude that the order of the Prerogative Court, affirming that made by the orphans' court, should, in its turn, be affirmed. The opinion of the orphans' court, which is here to annexed, is adopted by us as expressing the view which we entertain:

"Joline, J. The petition in this case sets out that Jeremiah N. Alexander and Anna B. Alexander are the father and mother of Jeremiah N. Alexander, Jr., an infant aged 16 years, and Mary B. Alexander, an infant aged 13 years; that the mother is possessed of certain property worth about \$6,000, upon which there is a mortgage of \$500; that she

has no other outside funds or income and business or means of making any money; and that the father has an annual salary of \$1,200.

"It further sets out that upon the death of a relative their son, named above, received a legacy of \$1,000, and their daughter received a legacy of \$4,000; that on the 14th day of January, 1910, letters of guardianship were granted by the surrogate of the county of Camden to the Security Trust Company of Camden; that on the 26th day of January, 1910, said company received the money due said infants and on the said last-named day invested the same in mortgages.

"It further sets out that the said Jeremiah N. Alexander, Jr., is attending the Penn Charter School in Philadelphia; that the said Mary B. Alexander is attending the public school in Haddonfield; that she has special taste and aptitude for music; that their parents are anxious to give her a musical education, and anxious to educate as best they can their son; that they are unable, financially, to give said children the education they think and believe they should have, and believe it would be for the best interest of said infants to have the income of said moneys used during their minority for the purpose of properly educating and properly clothing them.

"The prayer of the petitioners is that the Security Trust Company pay the income from said moneys to them, said parents, for the purposes aforesaid.

"Upon the hearing it was developed that the son lived in Haddonfield, N. J.; that he was being sent to the Drexel Institute, Philadelphia, at a cost of \$100 a year, besides the cost of the trip from Haddonfield to Philadelphia; and that the mortgages drew 5 per cent. interest. In all else the material allegations of the petition were fully sustained.

[1] "From the time of its creation it has been held that the orphans' court was the creature of statute, and that it cannot assume jurisdiction of any matter unless it is given by statute. In the case of *Gray v. Fox*, 1 N. J. Eq. 259, 272, 22 Am. Dec. 508, it was held that 'the decree of the orphans' court on a matter over which it has jurisdiction, if fairly obtained, is certainly not to be questioned in a collateral way, even in this court.' (Chancery.) 'But that court is one of limited power and jurisdiction; if it transcends its jurisdiction its acts will pass for nothing.' *Sherman v. Lanier*, 39 N. J. Eq. 249-258. In *Dunham v. Marsh*, 52 N. J. Eq. 256-261, 30 Atl. 473, it was held that, once having obtained jurisdiction, it follows 'as an incident in the exercise of that power that it has power to solve any question which must necessarily be decided in reaching that end.' *Mullaney v. Mullaney*, 65 N.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. Eq. 384-386, 54 Atl. 1086; Baker's Case, 61 N. J. Eq. 592, 47 Atl. 1046; 2 N. J. Digest, 2907, § 72a; Godfrey's Case, 72 N. J. Eq. 354, 65 Atl. 202; Woolsey v. Woolsey, 72 N. J. Eq. 900, 67 Atl. 1047; McSpirit Estate, 73 N. J. Eq. 616, 68 Atl. 755; Lippincott's Case, 68 N. J. Eq. 581, 59 Atl. 884.

[2] "The question then naturally occurs: Has any statute conferred upon the orphans' court power to direct in advance a guardian to expend the income of his ward or how to expend it? I have failed to find any statute of this character, and none has been presented to me by counsel. I conclude, therefore, that in so far as the orphans' court is concerned it must be expended as the best judgment of the guardian dictates, and that he must rely upon the court to allow it in his account.

"The power to do that which is asked of this court is inherent in the Court of Chancery, if anywhere. Ailing v. Ailing, 52 N. J. Eq. 92, 27 Atl. 655. In Re Hannah Barry, 61 N. J. Eq. 140, 47 Atl. 1052, the court holds that: 'The general policy of the statute and decisions in this state upon the question now presented has been to leave the question of the necessity of the expenditure of the personal estate, both income and principal, to the judgment of the guardian, in the first instance, subject to affirmation of the orphans' court on the settlement of his accounts, and in all ordinary cases this course (which has been followed for over a century) affords protection both to the guardian and the infant.'

[3] "This case was decided in 1900, and the Legislature, in 1901, passed an act allowing the orphans' court in certain instances to make an order authorizing the use of the principal of the personal estate, or a part thereof, as it may deem for the best interest of said minors. P. L. 1901, p. 325. Said act did not authorize the court to direct the expenditure of the income.

"I have been unable to find that this court has the power or authority to make an order directing a guardian how he shall expend the income of his ward, or to direct him to expend at all.

"My conclusion, therefore, is that the prayer of the petition be denied. It may not be amiss at this junction to make a few observations.

[4] "In so far as the boy is concerned, the prayer is that the income may be used for his education; and, as to the girl, that it may be used for her musical education, for which she has shown a singular aptitude. The mother owns a property worth \$6,000, upon which there is a mortgage of \$500, and has no income. The father has an income of \$1,200 a year. Taking therefrom \$30, the interest on the mortgage, there is left \$1,170 with which to feed and clothe his family and educate his children, plainly an inadequate sum.

"In *Streitvolf v. Streitvolf*, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. Rep. 630, the court, in speaking of the duty of a parent, says: 'The necessity that is the criterion of validity is not mere physical necessity, but rather social and moral propriety, having regard to the situation of the parties and the fitness of things. Food, shelter, and clothing are physical necessities. In an enlightened community, the common education of a child is a moral and social necessity. Professional training is not a general necessity, but is a special advantage.'

"These remarks are as applicable to guardians as to parents, and the guardian in this case, I think, can safely pay out the income due the young man on account of his education, and just as safely pay the income due the young girl, or a part of it, upon her musical education. If she does not in the future exhibit this special aptitude for music, the expenditure can cease. It is within the power of the guardian to see the income is applied to such education, and, I may add, to her clothing. No doubt her parents feel that the development of her latent powers will fit her to earn a livelihood in the future, and surely a court, in the light of the above decision, would not surcharge a guardian with money expended for such a laudable purpose."

The order of the Prerogative Court is affirmed.

SMITH v. BARNARD.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

HIGHWAYS (§ 176*)—LAW OF THE ROAD—CONSTRUCTION.

The law of the road relating to the passing by one vehicle of another one ahead and moving in the same direction does not relieve the driver of the former from the duty resting on him of using reasonable care to observe and avoid other vehicles including those going in the opposite direction.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 465; Dec. Dig. § 176.*]

Error to Circuit Court, Bergen County.

Action by Charles H. Smith against Arthur W. Barnard. Judgment for defendant, and plaintiff brings error. Reversed.

Mackay & Mackay, for plaintiff in error.
Doremus & Lecour, for defendant in error.

PARKER, J. The suit arose out of a collision between a carriage driven by plaintiff and an automobile driven by defendant, upon a public highway called Ridgewood avenue, at Ridgewood in the county of Bergen. The declaration contains two counts. The first count charges for negligence that defendant did so carelessly run and operate the auto-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

mobile along the highway named, and on the wrong side thereof, as to collide with the wagon in question. The second count ascribes the collision to defendant's alleged careless and negligent failure to keep a proper lookout and to have his automobile under proper control. The trial judge directed a nonsuit, and the principal assignment of error is based upon an exception to that ruling.

The circumstances of the accident, as the jury might have found them, are substantially these: The plaintiff was driving a runabout and had just met a friend named Lamb who had arrived on a train at the railroad station at Ridgewood. His sister Bridget arrived on the same train, and all three got into the runabout, sitting on one seat; plaintiff being in the middle. They started to drive from the railroad station, first southward, parallel with the track, to Ridgewood avenue; then southeasterly across Ridgewood avenue, which is about 45 feet wide, to the southerly side of the same; then easterly along Ridgewood avenue to Smith's home. The speed of the runabout was about a mile in 10 minutes. As the runabout was straightening out toward the eastward, on the southerly side of Ridgewood avenue, it was stopped temporarily by another wagon standing at the curb ahead. All this time a covered wagon had been approaching from the eastward at a moderate rate of speed, and, as Smith's wagon was held up, the peddler's wagon passed on Smith's left, and the defendant, who had been coming up behind the peddler's wagon in a westerly direction in his automobile, cut out behind the peddler's wagon to his own left, apparently without seeing the Smith runabout, and collided with the left fore wheel of the said runabout, throwing Miss Smith out on her head, and inflicting injuries from which she died, and injuring the plaintiff, besides damaging his wagon.

The trial judge was asked to nonsuit on the ground that no negligence of the defendant had been shown, and also on the ground of contributory negligence. He declined to nonsuit on the second ground, but did nonsuit on the first, holding that "it had not been shown that the defendant failed to do anything that a reasonable and prudent man should do by means of which the accident resulted."

The declaration is a little vague. It charges, in the first count, that the defendant did so carelessly and negligently run and operate said automobile along the said highway, and on the wrong side thereof, that as a direct and proximate cause of such carelessness and negligence the accident resulted. This may be read as charging general carelessness in operation, or carelessness in running on the wrong side, or both. But whatever may be intended, the second count charges distinctly a failure to keep a proper lookout and to have the machine under proper control; and we are clearly of opinion that a case for the jury was made out under this count. It is

strenuously argued, and this argument seems to have carried great weight in the mind of the trial judge, that the rule of the road absolutely required defendant, in passing the covered wagon ahead of him, to do so on the left, irrespective of the position of that wagon in the road. Such a rule is intimated in the opinion in *State v. Unwin*, 75 N. J. Law, 500, 501, 68 Atl. 110, as resulting from the language of Road Act, § 91 (3 G. S. p. 2823), re-enacted as to automobiles in P. L. 1906, p. 187, § 22, although this rule of the road was in no way involved in the decision of that case. Taking this view of the statute, the trial judge ruled out testimony that the peddler's wagon was to the left, or south, of the middle of the road, and that there was a clear space, to the right or north of it, of some 25 feet. This ruling was excepted to and is assigned for error, and is worthy of discussion at this point. Assuming the rule as stated in the *Unwin Case*, still the testimony was relevant and competent, because, if the defendant was under a legal duty of passing the peddler's wagon on the left, he was under a similar duty of passing vehicles going in the opposite direction to the right, and a jury may well have found that he ought to have waited until the peddler's wagon had drawn over to the right and given him space to pass or a chance to see what was ahead of that wagon, instead of taking the left side of the road before he could see whether anything was approaching it from the opposite direction and with increased chance of collision on account of the restricted space.

Returning to the nonsuit, the situation was this: Plaintiff's wagon on the right of the road going east, compelled to turn out slightly to the left by a wagon standing at the south curb, and in the act of passing the peddler's wagon, which was going west and about in the middle of the road; defendant's automobile directly behind the peddler's wagon, which obstructed defendant's view. From this and from the fact, as the jury might have found, that the automobile turned rather sharply to the left, struck the left fore wheel of plaintiff's wagon at an angle, as testified, and with enough force to throw all three occupants out of it and kill one of them, it was entirely open to the jury to infer that defendant had "failed to keep a proper lookout and have his automobile under proper control;" and that, if he had done either, the accident would not have resulted. As has been said, if the defendant's duty was to pass the peddler's wagon on the left, he was not entitled to do so entirely at the risk of other vehicles with rights equal to his own, and which, coming from the opposite direction, had primarily at least as much right as he to utilize the space to the south of the peddler's wagon. As to such vehicles a duty of reasonable care rested upon him to discover and avoid them; and whether he exercised

such care, under the circumstances, was a question for the jury.

The defendant in error argues that the nonsuit was justifiable on the ground of plaintiff's contributory negligence. The alleged negligence on which the motion was rested was in "permitting to be placed, or placing the occupants of the seat of the wagon he was riding upon, so that his vision was obscured or his movements impeded." We fail to see anything in the situation that either obscured his vision or impeded his movements. All three were on one seat, plaintiff in the middle. If there was any question of negligence involved in this, it was pre-eminently for the jury. Nor do we find anything else in the case that would have justified the judge in dealing with contributory negligence as a court question.

Another error in the exclusion of evidence should be noted. A witness for plaintiff testified to having had a conversation with the defendant the day after the accident, but after objection was not allowed to state what defendant said about the accident. Of course, anything that defendant said was competent for plaintiff to bring out as an admission on his part, and it was clear error to exclude it.

The judgment will be reversed to the end that a venire de novo issue.

SMITH v. BARNARD

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

DEATH (§ 64*)—ACTION FOR WRONGFUL DEATH—EVIDENCE OF DAMAGE.

In an action for death by wrongful act, under the statute of 1848 (1 G. S. 1895, p. 1188) it is competent to show the family relations existing between deceased and the next of kin, and that they benefited in a pecuniary way by her earnings, as a basis of pecuniary injury resulting to them from her death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 83; Dec. Dig. § 64.*]

Error to Circuit Court, Bergen County.

Action by Thomas J. Smith, administrator, against Arthur W. Barnard. Judgment for defendant, and plaintiff brings error. Reversed.

Mackay & Mackay, for plaintiff in error.
Doremus & Lecour, for defendant in error.

PARKER, J. This case arose out of the same accident as the suit of Charles H. Smith against the same defendant (81 Atl. 734), and the two cases were tried together. The circumstances as inferable from the evidence will be found in the opinion in the other case. Bridget L. Smith died as a result of the accident. When plaintiff's counsel rested his case, a nonsuit was moved first in the case of the administrator, and granted on the ground that no pecuniary injury to

the next of kin had been shown. Hence the question of defendant's negligence, which was the question dealt with in the other nonsuit, was not raised. Of course it is no more available here than in that case; and, as Bridget was only a passenger in her brother's wagon, the question of his contributory negligence does not affect this case at all (N. Y., L. E. & W. R. R. v. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep. 126), and there is no intimation that she was herself negligent. Consequently, unless the nonsuit was justified on the ground on which it was put, it cannot be supported at all.

If there was an absence of evidence to show pecuniary injury resulting to the next of kin, such lack of evidence was due to error of the trial court in overruling questions directly tending to bring out the facts required to supply this element of the case. It appeared in the testimony of Anna Smith that Bridget Smith was 35 years old, unmarried, and worked in New York; that she lived in the same house as her brothers Charles and Thomas, and her sister Anna; that she earned \$10 a week. Then followed these questions, all of which were overruled and exceptions taken, and the rulings assigned for error: "Q. What did she do with her money? Q. Do you know what she did with her earnings? Q. Will you explain how you lived in this house together, how you ran this house? Q. To whom did Bridget L. Smith, the deceased, pay her earnings?"

These questions were all unobjectionable (except perhaps the last as involving an assumption of fact). They tended directly to show the relations of Bridget to the family and the financial system under which the household was run and the possible dependence of some upon others. It may well be, for example, that Anna was dependent in part upon Bridget for her support; or that Bridget contributed her earnings to a joint fund, and that the brothers as well as the sister benefited thereby. Any relations as a result of which the next of kin have a reasonable expectation of pecuniary benefit from a continuance of the life of the deceased are included in the purview of the statute. Paulmier v. Erie Railway Co., 34 N. J. Law, 151. Other relevant decisions are Batton v. Public Service Corporation, 75 N. J. Law, 857, 860, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855; Polo v. Palisade Construction Co., 75 N. J. Law, 873, 877, 70 Atl. 161; Carter v. West Jersey, etc., R. R. Co., 76 N. J. Law, 602, 71 Atl. 253, 19 L. R. A. (N. S.) 128. Consequently it was error to exclude these questions and thereby deprive plaintiff of the ability to show the pecuniary injury to the next of kin.

For these reasons, and those contained in the other opinion that are applicable to this case, the judgment of nonsuit will be reversed to the end that a venire de novo issue.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

STOUT v. EDISON PORTLAND CEMENT CO.

(Supreme Court of New Jersey. Dec. 8, 1911.)

(Syllabus by the Court.)

EVIDENCE (§ 163*)—BEST AND SECONDARY.

Where a witness testified from memory to the contents of the reports of the New Jersey state geological survey, and such reports were not produced or offered in evidence, held that the striking out of the witness' testimony in that regard was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 536-545; Dec. Dig. § 163.*]

Error to Circuit Court, Warren County.

Action by Mattie Stout against the Edison Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 76 N. J. Eq. 518, 74 Atl. 986.

Argued June term, 1911, before GUM-MERE, C. J., and PARKER and VOORHEES, JJ.

William H. Morrow and Robert H. McCarter, for plaintiff in error. William C. Gebhardt, for defendant in error.

VOORHEES, J. This writ of error to the Warren circuit, removes for review a judgment, entered on the verdict of a jury for the plaintiff, originally for \$2,000.23, and subsequently on rule to show cause, reserving exceptions, reduced to \$1,550.

The suit was brought by the owner of a gristmill and the land whereon it is situate. The declaration alleges that on April 2, 1903, the plaintiff was the owner of the tract of land, therein particularly described, and in the possession thereof, which lands contained a certain gristmill, and ought to have enjoyed the benefit and advantage of a stream of water, running through the land to the mill, for a supply of water to work the mill; that the defendant diverted the supply by turning unnecessary and unreasonable quantities of water from the stream, so that a sufficient supply for the mill did not run or flow to the same, whereby she could not follow up and exercise her trade and business in so large and beneficial a manner as she otherwise would have done, but was deprived of the use and enjoyment of the mill, and of the benefits, profits, gains, and advantages. Subsequently this declaration was amended by adding a second count, substantially in the same form, except as to her damages, which are therein alleged as follows: "Nor could not, during that time, rent the premises, but was deprived of the use, rents, issues, and profits of the mill and premises, and of all the benefits, gains, etc., which she otherwise might have made."

The contention is that the defendant had built a cement plant in 1902, upon the stream above the mill, and pumped the water from

the creek by a large pump into a reservoir, located on a hill, some 70 feet above the creek, and thus abstracted so much water, beginning with the summer of 1902, that it became impossible to run the mill on a paying basis. Up to the time of abstraction of the water, the mill is claimed to have been a successful and money-making business. It is alleged that the diverting of the water was conclusively proven and admitted by the defendant, but that the defendant claimed to have returned nearly all the waters to the creek, after making use of it above the plaintiff's mill. All the facts seem to be in dispute. At the time of the taking of the water, the mill was rented for \$360 a year.

The first assignment of error is to the refusal to charge the defendant's first request that the damages, if any, to which the plaintiff may be entitled are such as have been shown to accrue between April 1, 1905, and September 2, 1909, the date of the commencement of the suit. It appears that up to April 1, 1903, one Grover was tenant of the mill property, and that on the last date the plaintiff rented the mill to Harden for a term of two years to April 1, 1905; that Harden remained in possession only to July 1, 1904, and then left. The insistence of the defendant is that the tenant was still under obligation to pay rent, because there was no surrender of the lease by the plaintiff, and, Harden being financially able to pay the rent, the damages, if any, recoverable against the defendant accrued only from the termination of the lease. The court left it to the jury, under the evidence, to say when the damage commenced. This was proper, for it may be that there was a surrender of the lease in fact, by operation of law, by the acceptance of the possession of the premises by the plaintiff.

The property, as above stated, had been abandoned by the tenant in July, 1904, when the plaintiff's husband, John Stout, took charge, and in March, 1905, hired Painter as miller. The plaintiff's husband circulated letter heads, billheads, and other advertisements, which were evidential that he individually was conducting the business until this suit was commenced; and there is other evidence from which it might be concluded that the plaintiff was not connected with the business. She, however, says that her husband, during this period, was her agent. Although to the outward world he may have been personally conducting the mill, still that is not contrary to, or at variance with, the management of the business in his own name, but actually for the benefit of his wife, and as her representative. Hence it was for the jury to say how the business was conducted from the abandonment of Harden, in 1904. There may have been a surrender by operation of law; the possession being taken by the plaintiff through her husband as her

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

agent. The request, therefore, was properly refused.

The next assignment of error likewise rests upon a refusal to charge. At the conclusion of the case, the defendant requested the court to instruct the jury that "nominal damages only could be awarded, because the plaintiff by his evidence is bound to show to the jury some satisfactory basis" for the ascertainment of substantial damages. The defendant in his argument of this request admitted that if there was any evidence of substantial damages the request must go for nothing.

There was testimony that there had been several applicants for the mill, who were not inclined to rent on account of the loss of water, from which the jury might conclude that rentals at least had been lost. It also appeared that merely by grinding grist five or six dollars a day could be earned; and that from October 1st to the holidays the full capacity of the mill for grinding buckwheat alone would amount to \$12 per day. In the fall of 1905, eight hours every day were lost for the want of water. There was evidence that before the diversion the capacity of plaintiff's mill was 25 pounds of flour daily, but that after the diversion there was not sufficient power to make it profitable.

But it is argued that this was not proof of loss, because evidence was lacking, showing what volume of business could have been done. The court, in the charge, dealt with the question quite properly, by instructing the jury that damages must be compensation for what the plaintiff has lost in money value, and nothing more; that it was not sufficient to sustain a verdict for more than nominal damages to prove that the defendant had at times withheld the flow; if that proof stood alone, nothing but nominal damages could be given; that to obtain actual damages the plaintiff must prove, not only that the water was withheld, and that the power could not be used, but that at these periods her business required it.

On error, we cannot say that there was no proof of some substantial damage. A further assignment of error concerns the striking out of testimony, based upon the New Jersey state geological survey. One of the defendant's witnesses, Herman Kefler, was recalled for the purpose of making a correction in his testimony, given the day before. He stated that in estimating the number of mills which could be run by the creek he had stated 350, and that such estimate was based upon the flow of the creek as 24,300,000 gallons, according to the New Jersey geological survey. There was then a motion to strike out the testimony because of its basis. The court thereupon struck out the evidence, because admittedly

founded upon facts stated in the reports of the survey, with a reservation of decision as to any future offer that might arise.

The precise point urged for consideration here is that the court erred in striking out the testimony of the witness, although he admittedly founded it upon facts said to have been gained alone from the state geological reports; and hence by inference he was not possessed independently of those reports of any knowledge of the facts. In other words, the witness had failed to qualify as to knowledge of the flow of the stream. Now, the reports were not offered, nor were they in court. Their contents only were testified to by the witness, without their production; and therefore the argument made for the relevancy and admissibility of these documents is not pertinent, for that is not the exact question under consideration.

The rule making for the admissibility of such reports, without further proof, is thus laid down in 1 Greenleaf's Evidence, 162 M. (16th Ed. Wigmore's Revision): "An exception which in practice is by far the commonest in its employment is the exception admitting statements, made by officials in pursuance of official duty, * * * avoiding the inconvenience of summoning public officers from their posts to prove the documents and records in litigation. The guaranty of trustworthiness justifying the exception is usually said to be the official oath of duty; but a further and additional reason is the publicity of the document, which insures the probability of the correctness of possible errors by the public, who have access to it."

It is also said that there must be an official duty to make the record or entry, which may be provided for by statute or ordinance, or implied from the nature and functions of the office, and the statements must be made on the personal knowledge of the officer, or his subordinate; and this further involves the exemption from the production in court of the original, and the presumption of authenticity of official signatures and seals. But it will be perceived that none of the cases referred to by the defendant does away with the production in court of the report, or the copy of the document as published, and its offer in evidence. In all these cases apparently, the record was offered and admitted. It has not been offered in this case. There was no error in striking out the testimony.

The other assignments of error have been examined, but have been found to be without merit, or disposed of in the consideration herein given to those specially dealt with.

The judgment will be affirmed.

AUSTIN v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

1. NEGLIGENCE (§ 134*)—PROOF—WEIGHT OF EVIDENCE.

Where the evidence is circumstantial, plaintiff must show the existence of circumstances rendering the inference of negligence by defendant at least probable, and excluding an inference that the damage was due to other causes, though such inference need not be excluded beyond doubt.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-273; Dec. Dig. § 134.*]

2. RAILROADS (§ 481*)—FIRES—ADMISSION OF EVIDENCE.

In an action against a railroad company for damage by fire from a locomotive, evidence as to another fire set by the same locomotive within a few minutes of the time the fire in question was set was admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.*]

Error to Circuit Court, Ocean County.

Action by Nathan Austin against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilfred B. Wolcott (I. W. Carmichael, on the brief), for defendant in error. Alan H. Strong, for plaintiff in error.

SWAYZE, J. [1] The facts of this case warranted an inference by the jury that the fire that caused the damages for which the plaintiff sues was caused by sparks from a locomotive engine of defendant. They are quite as strong as in *Goodman v. Lehigh Valley R. R. Co.*, 78 N. J. Law, 317, 74 Atl. 519, a case which after a retrial we this term reaffirm. The defendant appeals to the well-established rule that it is not enough for the plaintiff to prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude the inference that the damage was due to a cause for which the defendant was not responsible. That is the rule, and the plaintiff must prove circumstances which render it probable, and not merely possible, that the defendant is at fault. But, when it is said that the circumstances must exclude the inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases, and to force the plaintiff to exclude such inference beyond doubt. All that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability, rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial, and where probability may be all that is attainable. A striking illustration is *Suburban Electric Co.*

v. Nugent, 58 N. J. Law, 653, 34 Atl. 1069, 32 L. R. A. 700.

The evidence as to the condition of the screen also presented a jury question. The screen itself was in evidence, and was produced at the argument before us. An inspection justified an inference adverse to the defendant.

[2] The evidence as to another fire set by the same locomotive within a few minutes of the same time was admissible under the rule in the *Goodman Case*.

The complaint of the comment by the learned trial judge upon the possible interest of one of the witnesses is not warranted. As we read it, the effort of the judge was to show the jury that the charge of bias or interest preferred by the plaintiff was without foundation, and that his relations with the railroad company would not be likely to lead him to color his testimony in the company's favor. It was a well-meant effort in favor of the defendant, and, although it is possible that a different impression may have been conveyed to the jury by the tone or manner of the judge, we are unable to see that it was likely to harm the defendant.

The judgment is affirmed with costs.

WALLACE v. COWARD et al.

(Court of Chancery of New Jersey. Nov. 17, 1911.)

1. LIMITATION OF ACTIONS (§ 180*)—BILL—DEMURRER—LIMITATIONS.

Where it appears on the face of a bill that complainant's right to action is barred by limitations, a demurrer for that reason will lie.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

2. PAYMENT (§ 66*)—FORECLOSURE—LIMITATIONS—DEMURRER.

On general demurrer to a bill to foreclose a mortgage, the presumption of payment arising from lapse of 20 years, will be sustained, in the absence of allegations explaining or excusing the delay.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 66.*]

3. LIMITATION OF ACTIONS (§ 19*)—FORECLOSURE.

The statutes of limitations applies to a suit in equity to foreclose a mortgage, under the rule that the right to foreclose ceases when the legal right of entry is barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

4. LIMITATION OF ACTIONS (§ 157*)—FORECLOSURE—PAYMENT OF INTEREST.

Payment of interest on a mortgage by the mortgagor or his grantee within 20 years prior to the filing of a bill to foreclose will toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 631-636; Dec. Dig. § 157.*]

5. LIMITATION OF ACTIONS (§ 44*)—FORECLOSURE—ACCRUAL.

A bond, secured by mortgage, provided for payment to mortgagee of a specified sum one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

year from April 1, 1861, and the legal interest thereon, which interest was to be paid to E. C. during the term of her natural life, in lieu of dower, but from her death the interest to be paid to mortgagee, his heirs and assigns. A bill to foreclose, filed in 1911, contained no allegation of payment of interest at any time to E. C. during her lifetime or to complainant since her death, nor was the date of her death alleged. *Held* that, since the payment of the principal to the mortgagee was not postponed until the death of E. C., but the mortgagee was entitled to sue therefor on April 1, 1862, the bill on its face, in the absence of any allegation showing payment, either of principal or interest, within 20 years, or any explanation or excuse for delay in bringing suit, showed that the suit was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220-232; Dec. Dig. § 44.*]

Bill by Charles C. Wallace against Charles E. Coward and others. On demurrer to bill. Sustained.

Davis & Davis, for complainant. A. V. Dawes, for demurrants.

EMERY, V. C. This is a bill to foreclose a mortgage securing a bond, dated March 30, 1861, given by Forman Coward, obligor, to Charles E. Wallace, the complainant, in the penal sum of \$1,066, payable to the obligee, his executors, administrators, or assigns, with the following condition underwritten, viz.: "That if the said Forman Coward should pay unto the said Charles E. Wallace, his certain attorney, executor, administrator or assigns, the just sum of \$533.00 in one year from the first day of April, A. D. 1861, and the legal interest thereon, which interest is to be paid to Elizabeth Coward, widow of Samuel Coward, deceased, for and during the term of her natural life, in lieu of dower, but at and from her death said interest to be paid to the said Charles E. Wallace, his heirs and assigns, then this bond shall be void." The amended bill was filed June 16, 1911, and seeks to recover interest and principal alleged to be due thereon to the obligee. The only additional allegation of the bill showing the obligee's right to recover interest is the following: "That the said Elizabeth Coward mentioned in the deed mortgage from Forman Coward to your orator is dead, and your orator thereupon became entitled to the payment of the interest reserved in said mortgage, and that there are large sums of money due to your orator as interest on said mortgage, which said sum, as well as the principal sum thereby secured, are due and unpaid." It appears by the bill that after the mortgage the mortgaged premises were conveyed by the mortgagors (Forman Coward and his wife), and the grantees, as well as the holders of subsequent mortgages on the property, are defendants to the bill, as well as the original mortgagors, against whom decree for payment of deficiency is prayed.

[1, 2] The defendants file a joint demurrer, setting up the statute of limitations, and that none of the supposed causes of action accrued within 20 years before filing the bill. Where it appears on the face of the bill that complainant's right of action is barred by the statute of limitations, a demurrer for that reason will lie. *Bird's Adm'r v. Inslee's Ex'rs*, 23 N. J. Eq. 363 (Zabriskie, Ch., 1873); *Myers v. Fridenberg*, 70 N. J. Eq. 3, 62 Atl. 532 (Magie, Ch., 1905). And on general demurrer the presumption of payment of a bond and mortgage arising from lapse of time (20 years) will be sustained, in the absence of allegations explaining or excusing the delay. *Olden v. Hubbard*, 34 N. J. Eq. 85 (1881) *Runyon, Ch.*, and cases examined by me, cited in *Blue v. Everett*, 55 N. J. Eq. 329, 36 Atl. 960 (1897). On the appeal in this case, the decree was affirmed on other grounds, and the grounds upon which the decision was rested were not considered (58 N. J. Eq. 455, 39 Atl. 765 [1897]); but they were considered and approved in the subsequent case (*Colton v. Depew*, 60 N. J. Eq. 454, 462, 46 Atl. 728, 83 Am. St. Rep. 650 [Err. & App. 1900]).

[3, 4] These decisions of the Court of Errors and Appeals (*Blue v. Everett* and *Colton v. Depew*) settle the rule that the statute of limitations applies to a foreclosure suit in equity, and that the right to foreclosure ceases when the legal right of entry is barred; and also that payment of the interest on the mortgage by the mortgagor or his grantee within 20 years of the filing of the bill will prevent the running of the statute. *Colton v. Depew*, supra, 60 N. J. Eq. 464, 46 Atl. 728, 83 Am. St. Rep. 650.

[5] Under these settled rules, the question in this case, on this joint demurrer of the obligor and grantees, is whether complainant's bill shows that the right of recovery in himself, for either principal or interest, is barred by the statute of limitations, or by the presumption of payment. The demurrer, being general and to the whole bill, cannot be sustained, if either principal or interest be recoverable. The bill was filed in 1911, 39 years after the bond for the payment of the principal became due, and there is no allegation of payment of interest, either on the bond or mortgage, at any time, to Elizabeth Coward during her lifetime, or to complainant since her death. The date of the death of Elizabeth Coward is not given, and, for the purpose of the demurrer, may be taken to have occurred just previous to filing the bill, upon the principle that the pleading is to be continued contra proferendum. This construction limits, so far as possible, the amount of complainant's right of recovery. Complainant contends that, inasmuch as his right to the interest did not accrue until Elizabeth Coward's death, the statute did not run against his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

right to recover interest until after her death, which must on the demurrer be taken to have been within 20 years. This contention might be well founded if by the bond the payment of the principal to complainant had been postponed to the death of Elizabeth Coward, or if, by the proper construction of the bond, it should be considered that complainant had a right to recover interest, for his own benefit, as a claim separate from his right to recover the principal, and without regard to the principal being due. But, as I read this bond, it was conditioned for the payment of a certain sum absolutely to complainant one year from April 1, 1861, followed by a further provision as to the payment of the "interest thereon"; that is, the interest on the said sum remaining unpaid, and so long as it was unpaid. As to the "interest thereon," it was (so long as the principal was not paid to complainant) to be paid to Elizabeth Coward during her life, and from her death the "interest thereon"—that is, the interest on the principal sum unpaid—was to be paid to complainant. If the sum of \$533 had been paid to complainant on April 1, 1862, according to the tenor of the bond, "interest thereon" would no longer be payable by the obligor, either to Elizabeth Coward or to complainant after her death. And after the death of Elizabeth Coward complainant's right to recover interest is not a right independent of his right to recover the principal, but is an incident of his right to recover the principal sum due. Complainant, at any time after April 1, 1862, might have brought a foreclosure to recover the principal due to himself and the interest due on the bond, either to Elizabeth Coward or himself; but, in the absence of any allegations showing payments within 20 years, either of principal or interest on account of the mortgage, and in the absence, also, of any explanation or excuse for complainant's delay in bringing on the suit, the right of foreclosure is barred, as well because of the statute of limitations as upon the presumption of payment.

I will advise order allowing the demurrer, but complainant may apply to amend the bill.

DE FESTETICS v. DE FESTETICS et al.
(Court of Chancery of New Jersey. Nov. 29, 1911.)

DEAD BODIES (§ 3*)—BURIAL—JURISDICTION OF EQUITY.

A child of parents who had separated died in New Jersey. The mother, a nonresident, had been awarded the custody of the child by the court of a sister state and the father had surreptitiously taken the child into New Jersey. The parents had assumed a position of intense hostility to each other. *Held*, that equity had jurisdiction to control the burial of the child within the state in a plot to be provided by the father approved by a master of the court, ap-

pointed to supervise the burial, at the expense of the father, subject to the rights of the parents of equal access to the grave.

[Ed. Note.—For other cases, see *Dead Bodies*, Dec. Dig. § 3.*]

Suit by Elsie H. De Festetics against Gyula De Festetics and others. Heard on bill, answer, replication, and proofs. Decree rendered.

Frank W. Hastings, Jr., for complainant.
Charles C. Hommann and Robert N. Craue, for defendants.

HOWELL, V. C. This is a controversy between husband and wife over the dead body of their son who died on June 14, 1910, aged about 12 years. At the time of his death he was with his father, the defendant, who was residing at Plainfield in Union county; the mother, the complainant, was then a resident of the state of New York. They had separated many years before. After their separation the child was awarded to the mother by the New York courts. He was surreptitiously taken by the father and brought from the state of New York into the state of New Jersey several years ago. The pleadings disclose irreconcilable differences between the parents, which exist to the present time. At the time of the death of the child its body was placed in a receiving vault in a cemetery at Plainfield where it has remained ever since. No arrangements for its burial or other final disposition have ever been made by the parties. The mother now brings this suit for the purpose of obtaining the custody of the body and committing it to sepulture in a family burial plot in which she has an interest in a cemetery either at Rye, N. Y., or at Mt. Auburn, Mass. She states, however, in her bill that she would be willing to have the child interred in the Plainfield cemetery, in whose receiving vault it now lies.

The questions raised were these: (1) Whether this court had any jurisdiction in the premises; (2) whether this court could, or, if it could, whether it would direct the burial of this child to be had in a foreign state; and (3) whether it was not the right and duty of the father, without supervision or advice, to bury the child wheresoever he might choose.

These questions all relate to the original burial of the dead body, and not to its exhumation or removal to another place of sepulture. We got little light on the subject from the cases in our own state, which seem to settle three propositions: (1) That there is no property right in a dead body; (2) that after the body shall have been buried it is in the custody of the law; (3) that the removal of a body once buried is subject to the jurisdiction of this court. *Peters v. Peters*, 43 N. J. Eq. 140, 10 Atl. 742; *Smith v. Shep-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

herd, 64 N. J. Eq. 401, 54 Atl. 806; Toppin v. Moriarty, 59 N. J. Eq. 115, 44 Atl. 469.

An examination of the adjudged cases generally leads to the conclusion that there is a substantial agreement of judicial thought on the following propositions, touching the original burial of the dead body, namely: (1) The duty is cast in the first instance upon the person in whose house a man dies to carry the body to the grave, covered, and to bury it decently at his own expense, unless some one having a more urgent duty or a greater right shall intervene. *Patterson v. Patterson*, 59 N. Y. 583, 17 Am. Rep. 384; *Rex v. Stewart*, 12 Ad. & El. 773. (2) The person upon whom this right and duty next falls is *prima facie* the personal representative; a duty is cast by law upon the executor or administrator to see to it that the body shall have a decent burial, and for the purpose of performing his duty he is entitled to its custody. By our statute he is allowed his reasonable expenses in that behalf as a preferred claim against the estate. *Toppin v. Moriarty*, 59 N. J. Eq. 115, 44 Atl. 469; 2 Wms. on Ex'r 165; *Williams v. Williams*, 20 C. D. 659, 51 L. J. Ch. 385. In Indiana and South Carolina, however, the next of kin are given the paramount right. (3) In case there shall be no personal representative, or he should see fit not to employ himself in the matter, the duty and right then devolves upon the next of kin to the deceased in the order of their kinship; that is to say, of the whole body comprising the next of kin those nearest of kin shall have the strongest right. *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795. (4) This, however, is not an invariable rule, because a more distant relative or even a friend not connected by ties of blood may have a superior right under exceptional circumstances to one nearer of kin, as was held in *Scott v. Riley*, 16 Phila. (Pa.) 106. And generally speaking the surviving husband or wife has the right to control the burial of the deceased spouse, as against the next of kin. *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. (5) All the foregoing rules must, however, be subject in their application to the jurisdiction of this court whenever the same shall be properly invoked by the parties in interest. Perhaps it is stating their effect too broadly to call them rules; but they are guides to be considered and applied as the case may require when the occasion arises. It would be embarrassing in many cases to find that they were hard and fast rules and binding strictly on the conscience of the court because the court might find its duty to lie entirely beyond their scope. Each case must be dealt with separately, and in accordance with its own circumstances. The whole situation is admirably summed up in the opinion in *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. It is there said: "Although, as we have said, the body is not

property, in the usual recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever. He holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed. So in the case of custody of children, certain persons are *prima facie* entitled to their custody, yet the court will interfere and regulate it. We think these analogies furnish a rule for such a case, and one which will probably do most complete justice, as the court could always interfere in the case if improper conduct, e. g., preventing other relatives from visiting the place for the purpose of indulgence of feeling or testifying their respect or affection for the deceased." One other consideration needs to be mentioned, and that is the interest of the public. It is to the interest of the public that dead bodies should be interred decently and in order, and as soon as the circumstances of the case will permit; the public morals, the public health, the instincts of our common humanity, the customs of our people all demand that burial shall be so conducted.

Under ordinary circumstances it would be the duty of the father, as next of kin and as the natural guardian of a deceased infant, to bury it and to meet all the expenses appertaining thereto, and he would have the corresponding right of possession for that purpose. It was so held in *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273. It is quite likely that such a disposition of the matter would generally be practicable and satisfactory. But the circumstances here are of such a character as to preclude any such disposition. The parents have assumed a position of intense hostility to each other; and there is little or no prospect of any agreement between them which will observe the proprieties or be considered more than temporarily binding on them.

These considerations lead me to the conclusion that the burial of this child should be accomplished under the direction of this court with a view to compliance with the customs with which we are familiar, and the observance of the decencies and proprieties of civilized life. The burial must be in the cemetery at Plainfield, in the receiving vault of which the body now lies. I am constrained to deny the application of the mother to permit the burial to take place in a foreign state, for two reasons: The first is that she has by her bill signified her consent that the burial shall take place in New Jersey; the other is that this court would have no means of enforcing its decree touching the

matters in dispute after the body was once beyond the boundary line of the state. It might be taken to New York or Massachusetts, or it might be concealed and so placed beyond the jurisdiction of this court. The burial must be in a plot of land to be provided by the father, but subject as to location and suitableness to the approval of a master of this court, who will be appointed for the purpose by the decree. His duty will be to see that the provisions of this decree touching the interment shall be carried out, and that no indecorous proceeding shall be had at the burial. In case a religious service should be desired at the grave the same must be conducted under the supervision of the master who will see to it that no unseemly or unbecoming acts are committed by the parties. The expense of opening and closing the grave, and such other expenses as are incident to the occasion must be borne by the father, and if he shall fail to make provision therefor within 15 days after the service of a copy of the decree on him further application may be made on behalf of the mother for such relief as she may be thereupon entitled to. The decree will provide that after the burial shall have taken place the body of no other person shall be interred in the plot, without the allowance of this court, and that no monument, mausoleum, or other erection shall be made upon the plot, without the like allowance. These matters and any other matters that pertain to the burial plot will have to be made the subject of an independent application to the court.

The decree will provide that the parents shall have equal rights of access to the grave; disputes concerning the same will be settled upon application to the court.

DORDONI v. SMITH.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

MALICIOUS PROSECUTION (§ 6*)—CRIMINAL PROSECUTION—LIABILITY.

One is liable for procuring the arrest of another on a false complaint, charging disorderly conduct and that accused is of unsound mind.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 6; Dec. Dig. § 6.*]

Swayze, Voorhees, Bogert, and Vroom, JJ., dissenting.

Error to Circuit Court, Passaic County.

Action by Constant Dordoni against Archibald H. Smith. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

Isadore Klenert, for plaintiff in error. Edward F. Merrey, for defendant in error.

PER OURIAM. This is an action for malicious prosecution. The defendant sought the arrest of plaintiff, and made complaint

to a magistrate that the plaintiff was disorderly, to the annoyance of citizens and the disturbance of the peace, "being of unsound mind and in the opinion of deponent a lunatic." Thereupon the magistrate issued a warrant against the plaintiff as one "too furiously mad and dangerous to be permitted to go at large." The defendant was arrested, and subsequently discharged by order of the county physician. We think a jury might find that the complaint made by the defendant stated the facts untruly, and that the warrant issued by the magistrate was the natural result of the defendant's acts, and hence that the case is within the rule established in *Navarino v. Dudrap*, 66 N. J. Law, 620, 50 Atl. 353.

It follows that it was error to direct a verdict for the defendant, and the judgment must be reversed, and a venire de novo awarded.

SWAYZE, VOORHEES, BOGERT, and VROOM, JJ., dissent.

LOWENTRAUT et al. v. JACKSON.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 416*)—INSOLVENT ESTATES—PAYMENT OF DEBTS—LIABILITY FOR INTEREST.

An executor of an insolvent estate must pay to the creditors such a percentage of their claims, principal and interest, as the funds will permit, and payments made by him from time to time go in reduction of the principal and interest then due, and where such payments exceed the interest due at the date of payment the excess must be applied on the principal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1652-1654; Dec. Dig. § 416.*]

Error to Circuit Court, Essex County.

Action by Peter Lowentraut, prosecuted after his death by Anna Lowentraut and another, executors, against Thomas W. Jackson. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Lafferty & Pilgrim, for plaintiffs in error. W. Bradford Smith, for defendant in error.

GUMMERE, C. J. The defendant was the holder of four promissory notes made by one Schaller, which fell due between October 15, 1901, and November 26th of that year. The aggregate of the notes was \$7,289.34. Upon two of these notes, amounting together to \$4,350.80, the plaintiff's testator, Peter Lowentraut, was indorser, and was responsible to the defendant for their payment, and before their maturity gave the defendant a bond and mortgage for \$10,000, bearing interest at 5 per cent., to secure their payment, as well as the payment of a \$5,000 note held by the defendant, upon which he was also an indorser. (This latter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

note was subsequently paid by a prior indorser, and cuts no figure in the present litigation.) About the time of the maturity of the notes, Schaller, their maker, died without having paid them, and left an estate of doubtful solvency. The defendant proved his claim on the four notes with the executor of Schaller, and from time to time received payments on account thereof as follows: November 18, 1903, \$2,573.08; May 4, 1904, \$1,866.77; August 24, 1904, \$508.06; March 18, 1905, \$1,289.69; and on June 28, 1905, \$729.23. No further payments were made to the defendant by the executor of Schaller up to January 15, 1907. On that day the plaintiff's testator called upon the defendant for the purpose of discharging his liability upon the two notes which he had indorsed, and obtaining the surrender and cancellation of the mortgage which he had given as collateral security. He prepared a statement showing that the amount for which he was then liable by reason of his indorsements, after crediting the payments which had been made by the Schaller estate to the defendant, was the sum of \$1,076.83. The defendant testified that he did not dispute the accuracy of this statement, and agreed to accept that sum in satisfaction of Lowentraut's liability as indorser, and to deliver up the mortgage to him, upon condition that, if anything more was paid to the defendant by the Schaller estate, it should belong to him.

Lowentraut, by whom this suit was originally instituted and prosecuted to judgment, did not deny that the settlement was made upon the terms testified to by the defendant, and those terms must, therefore, be accepted as the agreement between the parties. A little more than two years after the date of this settlement, and on January 15, 1907, the Schaller estate made a final payment of \$875.08 to the defendant, and received from him a release from all further liability upon the notes. The theory upon which the present suit was rested by Lowentraut is that the Schaller estate was insolvent to such an extent as to be able to pay only the principal sum of the several notes held by the defendant against it, and that, consequently, neither Lowentraut nor the defendant had any right to look to it for interest upon the notes. Assuming the correctness of this theory, Lowentraut then contended that at the time of the settlement between himself and the defendant the whole of the latter's claim against the Schaller estate had been satisfied by the payments hereinbefore recited, except the sum of \$875; that the money paid by him at the settlement was an overpayment to the extent of \$201, which he was entitled to recover back upon the ground of mistake; and that the mon-

ey's afterward paid by the Schaller estate to the defendant were, in law, paid to him for the use of Lowentraut. The trial was had before the court without a jury, and resulted in a judgment for the defendant. Subsequent to the entry of that judgment Lowentraut died, and, his death being suggested on the record, an order was thereupon entered authorizing all further proceedings in the cause to be conducted in the names of his executors, the present plaintiffs in error, who now seek to have the judgment reversed.

We concur in the finding of the trial court. The trouble with the plaintiff's case is that it is based upon a theory which is untenable. In the first place, there was no proof that the estate of Schaller was insolvent. It was not settled as such, under the statute, so far as the proofs show, and the assets received by the executor were slightly in excess of the amount of the claims as proved against the estate. For all that appears to the contrary, the decedent may have left real estate which, if sold, would have produced a sum sufficient, when added to the funds distributed by the executor, to have satisfied all creditors in full. In the second place, even if the estate had been insolvent, that fact would not have relieved the executor from the obligation to pay interest upon the claim of creditors. He was bound to pay them such a percentage of their claims, both principal and interest, as the funds in his hands would permit. The payments made by him to the defendant from time to time went in reduction of the latter's claim as it existed at the time when they were made; that is, in reduction of the total principal and interest then due. In determining the amount due from a debtor to his creditor, the rule applicable to the calculation of interest, where payments have been made from time to time by the debtor in excess of the interest which has accrued up to the date when they are respectively made, is that the excess shall be deducted from the principal. *Holcombe v. Holcombe*, 74 N. J. Law, 257, 65 Atl. 855. A rough calculation, made upon this basis, will show that, at the time when Lowentraut made the \$1,076.83 payment in exoneration of his liability upon the two notes on which he was indorser, the amount then due from the Schaller estate was in excess of \$1,900. The Lowentraut payment, therefore, instead of more than satisfying the debt then due to the defendant from the Schaller estate, left that estate still in debt to him in the neighborhood of \$900; and the final payment of \$875.08 was not equal to the amount then due.

The judgment under review will be affirmed.

SEE v. PUBLIC SERVICE RY. CO.
(Supreme Court of New Jersey. Dec. 9, 1911.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 117*)—OPERATION—ACTIONS FOR INJURIES—QUESTION FOR JURY.

The driver of a truck heavily laden with fruit, approaching a trolley track, his horse being on a walk and about nine feet from the track, saw a car coming very fast about 200 feet away, continued his course, at the same gait, across the track, and before the rear end of the truck had entirely cleared the track it was struck by the car and upset, injuring and damaging the horse, truck, and fruit. *Held*, that the court committed no error in submitting the question whether the driver exercised due care in crossing the track to the jury for determination.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 207*)—PRESENTATION OF QUESTIONS IN LOWER COURT—REMARKS OF COUNSEL.

Although the remarks of counsel for plaintiff in summing up were improper, they were discontinued, upon objection being made thereto by defendant's counsel, and the court was not asked to admonish counsel; nor was there any request made to the court to charge the jury to disregard them; nor was there any refusal on part of the court to interpose; and therefore no basis was laid for a valid assignment of error, requiring a reversal of the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1500; Dec. Dig. § 207.*]

(Additional Syllabus by Editorial Staff.)

3. EVIDENCE (§ 317*)—HEARSAY—WHAT CONSTITUTES.

In an action against a street railway company, in which plaintiff sought damages for injuries to his horse, testimony of a witness to whom plaintiff turned over the horse to be sold, as to whether he could sell him, was not objectionable as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Appeal from District Court of Hoboken.

Action by J. Albert See against the Public Service Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Argued June term, 1911, before GARRISON, TRENCHARD, and KALISCH, JJ.

Edwards & Smith, for appellant. Weller & Lichtenstein, for appellee.

KALISCH, J. The plaintiff brought his action against the defendant to recover damages which the plaintiff sustained to his property as a result of a collision which took place on Henderson street, in Jersey City, between a car of the defendant company and a heavily loaded, one-horse truck, which was being driven across the trolley track on said street. Henderson street, where the collision occurred, runs north and south. On the east side of Henderson street, between Second and Third streets, is the freightyard of the Pennsylvania Railroad Company. This yard is inclosed by a high board fence, and the conceded fact is that it is impossible for

any one walking or driving out of said yard to see any vehicle going or coming on Henderson street, in either direction, until the fence line of said yard is passed. The defendant maintained two trolley tracks on Henderson street, upon which its cars were operated. The distance from the fence line to the most easterly rail of the north-bound track was 23 feet. The entire length of horse and truck was conceded at the trial to be 25 feet. The collision took place shortly after midnight, and at a place which was lighted up by electric lights.

[1] According to the driver's story, he was driving slowly through the gateway of the yard, his truck being heavily loaded with fruit, and when he attained a position about 2 feet beyond the fence line he then perceived a trolley car about 200 feet or more distant, approaching "pretty fast" on the north-bound track. At this juncture, the horse must have been within 9 feet of the easterly rail of the north-bound track. The driver continued on his course at the same gait, and bearing to the north across the track, and had nearly succeeded in clearing the track of the truck when "the car just struck the tail end of it," as the driver puts it, thereby upsetting it and the horse, and causing considerable loss and damage.

The undisputed facts make it manifest that the case was one peculiarly within the province of the jury to decide. The entire length of the horse and truck was 25 feet. The distance from the fence line to the most easterly rail of the north-bound track was 23 feet. The situation was such that the horse, as soon as he emerged from behind the fence, would become visible to the motorman, if in the performance of his duties he was on the alert to observe the condition of the street, before the driver of the truck would be in a position to see the approach of the car. The horse and truck, going slowly, traveled a distance, therefore, of 23 feet, and in addition thereto almost the distance of their entire length of 25 feet, in full view of the motorman, before the impact came. A reasonable inference to be drawn from such a state of facts would be that the motorman must have disregarded his duty to keep his car under control or in check to avoid colliding with the truck. The driver of the truck was entitled to believe that the motorman would respect his right to cross the track, if he were in a position where he might reasonably believe he could do so with reasonable safety, if both he and the motorman were in the exercise of reasonable care; and the fact that he had nearly cleared the track of the truck before the impact came, although he was driving slowly, strongly emphasizes his reliance on that belief. There is nothing in the testimony which in the slightest indicates that the driver of the truck had any reason to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

believe that his right to cross the track in safety would not be recognized by the motorman. Nor was the driver of the truck to be charged with notice, because the car was approaching rapidly, that it could not be controlled or brought in check in time to avoid colliding with the truck. *Peterpolo v. Public Service Ry. Co.* (Court of Errors and Appeals) 79 Atl. 307, reversing the Supreme Court in 79 N. J. Law, 290, 75 Atl. 889.

[3] Another reason advanced by the appellant for a reversal of the judgment is that the court erred in permitting one Mr. Callison, on page 113 of the case, to answer this question, "Could you sell him?" upon the ground that it was hearsay testimony. This question related to the effort, made by the witness, to sell the horse who had been turned over to him by the plaintiff for the purpose. It is obvious that the question was directed to the personal knowledge of the witness as to his own acts, and was therefore unobjectionable on the ground taken by counsel.

[2] It is strenuously insisted by appellant that the judgment should be reversed, because the court allowed the plaintiff's counsel, in summing up, to make improper remarks to the jury. The remarks of plaintiff's counsel in summing up, although apparently provoked by remarks made by appellant's counsel, were, nevertheless, in some instances improper, but upon objection made they were discontinued. There was no request made by appellant's counsel to the court, either to admonish plaintiff's counsel, or to charge the jury to disregard such objectionable remarks. There was no refusal of the court to interpose. "Where counsel in summing up proceeds to dilate upon facts not in evidence, or to press upon the jury considerations which the jury would have no right to regard, it is the plain duty of the court, upon objection made, to interpose; and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error." *Blackman v. West Jersey & Seashore R. R. Co.*, 68 N. J. Law, 5, 52 Atl. 371.

An examination of the other alleged errors relied on by the appellant for reversal discloses them to be without substance.

Judgment will be affirmed.

SCULL et al. v. IDLER et al.

(Court of Chancery of New Jersey. Nov. 29, 1911.)

1. USURY (§ 82*)—FORECLOSURE OF MORTGAGE—DEFENSE—AVAILABILITY.

A purchaser of a mere equity of redemption in premises covered by a usurious mortgage, who purchased subject to the lien of the mortgage, cannot set up usury as a defense to the mortgage.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 162; Dec. Dig. § 82.*]

2. USURY (§ 82*)—FORECLOSURE—DEFENSE—AVAILABILITY.

A mortgagor in a usurious mortgage, who is made a party to a foreclosure suit against a purchaser, subject to the lien of the mortgage, may assert the defense of usury as against a liability for any deficiency..

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 162; Dec. Dig. § 82.*]

3. USURY (§ 82*)—FORECLOSURE—DEFENSE—AVAILABILITY.

A bill to foreclose, which alleges that the mortgagor, after the execution of the mortgage, conveyed to a third person, that whatever interests the third person acquired were subject to the interests of complainant, who is without knowledge whether the conveyance was an absolute one, or whether an interest was reserved in the mortgagor, does not directly aver that the purchaser purchased the equity of redemption subject to the mortgage; and the defense that the mortgage is usurious is available.

[Ed. Note.—For other cases, see *Usury*, Dec. Dig. § 82.*]

Suit by Abigail D. Scull and another, executrices, against Howard P. Idler and others, to foreclose a mortgage. Decree entered on bill and answer.

The bill is filed to foreclose a mortgage made to complainants' testator by defendants, Lucretia P. Idler and Charles A. Idler. By an averment of the bill, hereinafter quoted, it appears that, subsequent to the date of the record of complainants' mortgage, the mortgaged premises were conveyed by the mortgagors to defendant Howard P. Idler. The mortgagors are made defendants under an averment of the bill to the effect that, notwithstanding the conveyance to their son, defendant Charles A. Idler, they may have retained an interest in the mortgaged premises.

The three defendants above named have answered. Their answer specifically and sufficiently discloses that the mortgage in question is usurious, and denies no averments of the bill, except the averments touching the amount of the original indebtedness.

Hearing has been had on the bill and answer.

William M. Clevenger, for complainants.
H. Starr Giddings, for defendants.

LEAMING, V. C. (after stating the facts as above). [1] It has been repeatedly held by the courts of this state that the purchaser of a mere equity of redemption in premises covered by a usurious mortgage, who buys subject to the lien of such mortgage, cannot set up usury as a defense to the incumbrance; the repudiation of the mortgage by such purchaser would inure to his benefit against the terms of his purchase, and would not inure to the benefit of the original borrower. In *Warwick v. Dawes*, 26 N. J. Eq. 548, 556, this principle was applied where the purchase was made at a sale under a decree of foreclosure of a second mortgage; the purchaser in that case having made his purchase with reference to the ex-

istence of the prior mortgage, which he assumed to be a valid prior incumbrance according to its terms, but which was, in fact, usurious.

[2] This inability of one who purchases the mere equity of redemption to set up the defense of usury against the foreclosure of a mortgage, subject to which the purchase was made, is not based upon the idea that the taint of usury has been purged by a conveyance, in which the mortgagor has recognized the usurious mortgage as valid; the defense of usury may still be available to the mortgagor. It would seem that as between the original parties the taint of usury can only be removed by the borrower receiving the full amount called for by the security. *Taylor v. Morris*, 22 N. J. Eq. 606; *Warwick v. Dawes*, supra; *Trusdell v. Dowden*, 47 N. J. Eq. 396, 20 Atl. 972. It necessarily follows that the original mortgagor, notwithstanding his conveyance subject to the mortgage, is still entitled to be protected against liability on his bond in the event of a deficiency at sale; and if such mortgagor is made a party to a foreclosure suit against his vendee the decree will be operative as a bar to such defense on the bond, unless the defense is asserted by him in the foreclosure suit in which he is made a party. This is expressly held in *Andrews v. Stelle*, 22 N. J. Eq. 478.

From the principles above defined, it seems to clearly follow that defendant Howard P. Idler, who now holds the legal title under a conveyance from the mortgagors, is not entitled to the benefit of the defense of usury, if his purchase was in fact a purchase of the mere equity of redemption, subject to the lien of the mortgage now held by complainants; and that defendants Charles A. Idler and Lucretia P. Idler, who were the mortgagors, and who executed the bond secured by the mortgage now sought to be foreclosed, are entitled to urge in this suit the defense of usury to the end that the decree may not be operative to bar them such defense on their bond.

[3] The bill asserts that these mortgagors, subsequent to the execution of the mortgage now sought to be foreclosed, "made, executed, and delivered unto Howard P. Idler a deed, wherein they granted, bargained, and sold unto the said Howard P. Idler all the premises heretofore described, but your oratrices charge that whatever interest the said Howard P. Idler acquired by virtue of the said conveyance was under and subservient to the interests of your oratrices." The present hearing is upon bill and answer, and the answer makes no denial of the above averment. This averment is not, however, in my judgment, the equivalent of a positive and direct averment that a mere equity of redemption was in fact purchased by Howard P. Idler, expressly subject to a lien for the amount appearing to be due on

the mortgage now held by complainants, or in a manner in which the purchaser necessarily deducted from the purchase price the amount appearing to be due on that mortgage. That element is the one which must exist to deny to the purchaser the defense of usury; under the averments of the bill, that element may not have been present in the transaction. This is made clear in the case of *Hackensack Water Company v. De Kay*, 36 N. J. Eq. 548, in which Mr. Justice Depue, speaking for the Court of Errors and Appeals, said: "There is a class of cases in which a purchaser taking title subject to an incumbrance prior in point of time, is precluded from disputing its validity. *De Wolf v. Johnson*, 10 Wheat. 367 [6 L. Ed. 343], *Dolman v. Cook*, 14 N. J. Eq. 56, and *Conover v. Hobart*, 24 N. J. Eq. 120, are cases of this class. In those cases the lands conveyed were subject to mortgages claimed to be void for usury. In *De Wolf v. Johnson*, the mortgagor had conveyed the premises expressly subject to the mortgage of *De Wolf*; and in *Dolman v. Cook*, and *Conover v. Hobart*, the mortgagor's conveyances of the mortgaged premises were expressly subject to the mortgages, and it so appeared in the deeds of conveyance. In each of these cases, the grantee, having accepted a conveyance under the mortgagor, subject in express terms to the payment of the usurious mortgage, was held to be estopped from contesting its validity. The theory on which cases of this class are founded is that, the mortgagor having elected to affirm the usurious mortgage, by selling the mortgaged premises subject to the mortgage, the purchaser, by his contract as expressed in his deed, took an equity of redemption only, and therefore could not dispute the validity of the mortgage, and thus obtain an interest in the land which the mortgagor never intended to transfer to him. *Shufelt v. Shufelt*, 9 Paige [N. Y.] 137 [37 Am. Dec. 381]; *Post v. Dart*, 8 Paige [N. Y.] 639; *Green v. Kemp*, 13 Mass. 515 [7 Am. Dec. 169]; *Morris v. Floyd*, 5 Barb. [N. Y.] 130. But this principle does not apply to sales by officers under judicial process. A purchaser at a sheriff's sale, either under an execution at law against the mortgagor, or at the foreclosure sale of a second mortgage, may defend against a prior mortgage on the premises, on the ground of usury, although in fact by his purchase he acquired the property subject to whatever prior incumbrances there might be upon it. *Brolasky v. Miller*, 8 N. J. Eq. 789; *Id.*, 9 N. J. Eq. 807; *Pinnell v. Noyd*, 33 N. J. Eq. 600." The averments of the bill cannot, I think, be properly regarded as more than a general averment that the rights of complainants under the mortgage are superior to the rights of defendant Howard P. Idler, as purchaser, in that the purchase by the latter was subsequent to the date of the registration of the mortgage now held by complainants.

This becomes even more apparent by a consideration of the paragraph of the bill above quoted in connection with a subsequent paragraph of the bill, in which an averment is made to the effect that complainants are without knowledge whether the conveyance to Howard P. Idler was an absolute conveyance, or whether that conveyance was made through some secret understanding, whereby an interest was reserved in the vendors.

As the mortgagors were made defendants, and the answer filed in behalf of the mortgagors and the purchaser sets forth that only the sum of \$1,800 was actually loaned, I think no decree in excess of that amount can be properly entered on the bill and answer.

THOMAS v. THOMAS et al.

(Court of Chancery of New Jersey. Nov. 23, 1911.)

1. WITNESSES (§ 129*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED—“REPRESENTATIVE CAPACITY.”

In a suit to establish title to real estate claimed under a sheriff's sale, where complainant paid the consideration for his own benefit, but took title in the name of his three sons, testimony as to conversations with one of the sons, since deceased, is not inadmissible, the suit being one in rem and not in personam, so that the representative of the deceased son defending the suit does not appear in a representative capacity within the meaning of the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 556-560; Dec. Dig. § 129.*]

For other definitions, see Words and Phrases, vol. 7, p. 6115.]

2. TRUSTS (§ 86*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

Where one pays the consideration for a conveyance of land to a stranger, the presumption is that he supplied the money for his own benefit, and the law creates a resulting trust in his favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

3. TRUSTS (§ 88*)—RESULTING TRUSTS—PAROL EVIDENCE.

Where a father pays the consideration for a conveyance to his sons, parol evidence of circumstances preceding the transaction or contemporaneous therewith, or so nearly contemporaneous as to form a part of the *res gestæ*, is admissible to rebut the presumption of gift, settlement, or advancement so as to prove the existence of a resulting trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

Bill in equity by John Thomas against Amlee E. Thomas and another. Final hearing on bill, answer, replication, and proofs. Decree for complainant.

Bleakly & Stockwell, for complainant. Cyrus D. Marter, for defendants.

LEAMING, V. C. My views in this case are entirely defined. The arguments which

have been made, and the references to authorities during the progress of the case, have sufficiently refreshed my memory of adjudications in cases of this class, to enable me, I think, to correctly dispose of the matter at this time without taking it under advisement.

There is no doubt touching the facts of the case. Under the evidence which has been received the facts are clearly and indubitably established. The only possible ground of opposition that can be made to the decree sought is necessarily based upon the claim that some of the evidence which has been received is not competent by reason of our statutes.

The evidence which has been offered, and received under my rulings, establishes beyond all doubt the fact that Mr. Thomas, Sr., purchased the land in question for his own benefit at sheriff's sale, paying \$21,400 for it with his own money. He took the title, however, in the name of his three sons, causing the sheriff to make a deed to them instead of to himself. By prior arrangements with his sons, he had procured from them their assent that he should do so, and their promise that at such time as he desired the property conveyed by them to him, they would execute the deeds. He accepted their assurance to that effect without any writing being executed, and trusted them with the legal title to the property, which, as already stated, he purchased for himself, and for his own use and benefit and paid for with his own funds. The evidence clearly discloses that no money was contributed by either of these sons, and that neither understood that the purchase was for their benefit, but that all three understood that the purchase was for the sole benefit of the father. The fact is that a reason existed, which Mr. Thomas, Sr., thought was a good reason, for putting the title in the names of his sons. He was living separate from his wife at the time, under an agreement of separation, and was expecting at the time that he would soon have occasion to sell a portion of the property to an anticipated purchaser, and thought that by putting the title in the names of his sons, he would avoid any possibility of difficulty in getting his wife to sign the deed. Unfortunately one of the sons has since died, leaving the legal title in his name, which legal title has descended to the son of that son, who is now a minor and a defendant in this suit. These facts, I say, are clearly established if the evidence which has been introduced is entitled to be considered. Under this testimony but one conclusion can result, and that is that the complainant is entitled to a decree establishing his title in this land. He is entitled to such decree as may be necessary to fully confirm his title, as he is undoubtedly the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

equitable owner, and is entitled to be restored to the status of a legal owner.

The objections to the admissibility of the testimony to which I have already referred, have been considered during the progress of the trial, and need not be here restated at any length.

[1] The first objection is that the testimony of complainant touching conversations with his deceased son is incompetent because of the fact that there is before the court a defendant in a representative capacity. As stated, during the hearing, the case of *Cowdrey v. Cowdrey*, reported in 71 N. J. Eq. at page 353, 64 Atl. at page 98, fully meets that objection. There is no defendant before this court in a representative capacity within the meaning of the statute. The present suit is essentially a suit in rem, a suit purely for the restoration of legal title, and seeks no relief in personam. If it were true, however, that the complainant should be excluded from testifying to conversations between himself and his deceased son, the evidence would yet be ample to establish the facts which I have stated to exist, because the two remaining sons who are still alive have both testified to substantially the same conversations to which the father testified and have fully established the fact, and no objection can arise, so far as their testimony is concerned, based on the ground of a suit against a defendant in a representative capacity.

[2] The other objection on which defendant relies is that the effect of the decree sought is to establish a trust in the deceased defendant, and that the statute of frauds prohibits the establishment of a trust in lands by parol testimony.

An examination of the statute of frauds will disclose that it is not so broad as the statement which I have just made. The statute of frauds will not permit an express trust to be established by parol testimony, but by its very terms it excepts resulting trusts. The language of the statute, is, as I recall it, that there is excepted from its operation trusts which arise from implications or construction of law. That may not be the language of the statute, but it is substantially the language. Such trusts are not within the statute, and the courts have uniformly held that parol testimony is competent to aid in their ascertainment. Therefore, if this case were a case in which Mr. Thomas, Sr., had caused a deed to be made to a stranger, the consideration having been supplied by Mr. Thomas, the presumption of law would be that the person who supplied the money had supplied it for his own benefit, and not for the benefit of the stranger, that the title follows the consideration, and in such a case the law creates and determines the existence of a resulting trust. That is what the statute refers to as a trust which results from implication or construction of the law, and is therefore one of the

trusts which is excepted by the terms of statute. It follows in consequence that where money is supplied by one person to pay for property the title to which is taken in the name of another, the law permits the person who supplies the money to testify that he supplied the money, and the trust results as a matter of law.

[3] An additional element arises, however, when the conveyance, the consideration for which is paid by a father, is made to a son, daughter, wife, or other near relative or dependent; the mere fact of supplying the consideration, in such a case, does not create a presumption of ownership in the person who supplies the consideration. On the contrary, the presumption is the reverse. The presumption in such a case is that the father supplies the consideration not for his own benefit, but for the benefit of the relative, therefore, standing alone, the mere testimony on the part of the father or any other witness that the father supplied the money will not be sufficient to create a resulting trust, but, on the contrary, such testimony will create a presumptive gift, settlement, or advancement. That presumption, however, is a rebuttable presumption; if the presumption of gift, settlement, or advancement can be dispelled or overcome by competent evidence, then the conveyance to the son stands exactly on the same plane as a conveyance to a stranger. So the only real question here now is, whether or not the presumption of gift has been dispelled or overcome by competent evidence. The courts have uniformly held that this presumption of gift, advancement, or settlement is not only rebuttable, but it may be rebutted by any circumstance precedent to the transaction, or contemporaneous with the transaction, or so nearly contemporaneous with the transaction as to form part of the *res gestæ*, but that it cannot be rebutted by circumstances, other than admission of the parties, subsequent thereto.

When conversations between the party who supplies the consideration, the father, and the party who receives the conveyance, the son, are sought to be introduced into evidence for the purpose of repelling the presumption of gift, the thought necessarily suggests itself that the effect of such testimony is to establish a trust. As such it would be incompetent, but it is competent to establish that it was not a gift, settlement, or advancement. In other words, it is competent to repel or rebut the presumption of gift which the law has created, and it will be received for that purpose and for that purpose alone, and if, when received, it is adequate to fully dispel the presumption of settlement or advancement or gift then the case stands exactly as it would stand in the case already suggested of a conveyance made to a stranger. In other words, the testimony in this case is competent for the purpose of establishing, and is ample in

quality to establish, the fact that this conveyance was not by the father ordered made to these children as a gift, and the presumption of gift which arose from the relationship is dispelled by that evidence. That brings the case upon the same plane as a conveyance made to a stranger, by money supplied by the complainant, and in such case the law creates or presumes the trust.

It follows that in this case, under the circumstances named, there is no course that can be properly adopted, but to reach the conclusion, and make that conclusion effective through whatever decree is found necessary to answer the needs of the complainant, that this legal title, now in the name of the heirs of John Thomas, Jr., is held under a trust to reconvey, upon request, to John Thomas, Sr., and that the entire equitable title to the property is in John Thomas, Sr., and that he is entitled to have the legal title fully restored to him. I will advise a decree of that nature.

CLENDENNIN v. CLANCY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

1. WITNESSES (§ 143*)—TRANSACTION WITH PERSONS SINCE DECEASED—ACTION AGAINST EXECUTOR.

Where one who had nursed decedent bona fide assigned his claim to plaintiff for a valuable consideration, and was not a party to the record in a suit brought by the assignee against the administrator, the assignor was not disqualified by interest to testify as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 619-624; Dec. Dig. § 143.*]

2. WITNESSES (§ 183*)—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED—QUESTIONS OF LAW OR FACT.

Where, in an action on an assigned claim against an administrator, he pleaded that the assignment was not in good faith, and that the assignor was the real owner, such plea having been intended to raise only the question of the assignor's competency as a witness, an oral traverse thereto, though improper, presented a preliminary question for the court and not for the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 731; Dec. Dig. § 183.*]

Error to Circuit Court, Bergen County.

Action by Thomas R. Clendennin against Thomas J. Clancy as executor of the estate of one O'Grady, deceased. Judgment for defendant, and plaintiff brings error. Reversed.

Mackay & Mackay, for plaintiff in error.
Peter W. Stagg, for defendant in error.

SWAYZE, J. The plaintiff sues as assignee of a claim against the estate of O'Grady for services rendered to the deceased by Thomas O'Rourke, the assignor, as nurse. It was proved by the testimony of both O'Rourke and Clendennin that the assignment was bona fide for a valuable con-

sideration, consisting of the cancellation of a debt due from O'Rourke to Clendennin and the giving to O'Rourke of Clendennin's note for \$700. The amount of the consideration was less than the face of O'Rourke's claim, and it was suggested that perhaps the note was to be paid out of the claim now sought to be recovered. The undisputed evidence was however that Clendennin was bound to pay the note at all events and that in taking the assignment he took his chances of recovering a questioned claim against the estate. [1] In this state of the proofs the learned trial judge conceived that O'Rourke had an interest in the claim now in suit and excluded his evidence as to the services rendered the deceased; the necessary result was that he directed a verdict for the defendant. In this course he fell into error. Our statute has removed the common-law disability arising out of a witness' interest and permits that interest to be shown for the sole purpose of affecting his credit; his credit as a witness, however, is a question for the jury and not for the court. The ruling cannot be justified on the ground that the defendant was sued in a representative capacity for the plaintiff is not a party to the record. The case is within the rule of Cullen v. Wolverton, 65 N. J. Law, 279, 47 Atl. 626. The only difference between the two cases is that in Cullen v. Wolverton the consideration expressed in the assignment was equal to the amount of the claim, and in this case it is less. That difference does not affect the principle involved. What we decided in Cullen v. Wolverton was that the assignor was a competent witness when he had in fact parted with the claim to the assignee in good faith. The present case differs from Platner v. Ryan, Ex'r, 76 N. J. Law, 239, 69 Atl. 1007. There the court rejected evidence convincing if true, that the assignment was made, not in good faith, but solely for the purpose of qualifying the assignor as a witness, and the Supreme Court said that, when such a condition was shown to exist, the court should stay proceedings until the declaration is amended by an averment in accordance with the fact that the suit was brought for the use and benefit of the assignor. Here the evidence when the questioned ruling was made was uncontradicted that O'Rourke had in good faith parted with all interest in the claim. He may as a prudent man have been very willing to pay his debt and obtain Clendennin's note for an amount less than his claim, and to leave the risk and expense of the necessary litigation to Clendennin. The fact that he may be interested in Clendennin's success in the litigation because it makes more probable the ultimate payment of the note is of no moment. The interest that under proper practice might disqualify him as a witness is not the indirect interest of a cred-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

itor of the plaintiff in the action, but a direct property interest in the recovery itself, so that the suit may be said to be in a legal sense for the use and benefit of the assignor.

The judgment must be reversed, and a venire de novo awarded.

[2] Since this necessitates a new trial, we ought, in order to avoid possible misapprehension, add a word as to the second plea. This plea avers that the assignment was not made in good faith and for a valuable consideration, and that the real owner and real plaintiff is O'Rourke. At the trial the plaintiff seems to have been allowed to traverse this plea orally. Without approving this practice, we think it enough to say that an issue thus joined if meant as it must have been only to raise the question of the competency of the assignor as a witness was not an issue for the jury. It was one of those preliminary questions of fact that are necessarily decided by the court, resembling the question of the admissibility of confessions in criminal cases (*State v. Young*, 67 N. J. Law, 223, 51 Atl. 939) and of dying declarations (*State v. Monich*, 74 N. J. Law, 522, 64 Atl. 1016; *Wigmore on Evidence*, §§ 487, 861, 1451, 2550).

KRAUT v. PUBLIC SERVICE RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 85*)—OPERATION—RIGHTS IN STREETS.

The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highway must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

2. STREET RAILROADS (§ 93*)—OPERATION—CONTROL OF CAR.

It is the duty of the motorman of a street railway car, when approaching a crosswalk, to have his car so far under control that he will not endanger the safety of pedestrians engaged in the lawful and customary use of such crosswalk.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 117*)—OPERATION—ACTIONS FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE OF DEFENDANT.

Where the plaintiff, who was walking upon a crosswalk of a public highway, was struck by a street railway car, running at a "pretty fair rate of speed," as he was passing over the last rail of the track, and the evidence tended to show that the motorman, when 50 feet away, ought to have seen the plaintiff when he was 5 feet from the track, it was open to the jury to find either that the motorman did not make proper effort to prevent the collision, or that the inability to stop the car was due to its excessive and unlawful rate of speed, and the question of the negligence of the defendant

company was, therefore, properly submitted to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 98*)—OPERATION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

A pedestrian upon a crosswalk, where he might reasonably assume that the motorman of a street railway car would expect pedestrians to cross and would have the car under proper control accordingly, had a right to expect that the motorman would respect his right to cross the street if he was in position to justify such crossing, under a reasonable belief that he could safely do so if both he and the motorman exercised reasonable care.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

5. STREET RAILROADS (§ 117*)—OPERATION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, from the testimony, the jury could legitimately find that when the plaintiff, after looking when five feet away from the defendant's trolley track laid in a public highway, started to cross the track, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a "pretty fair rate of speed" and sufficiently distant to be checked, or, if need be, stopped, before it reached him, the question of the plaintiff's contributory negligence was for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Error to Supreme Court.

Action by Fred Kraut against the Public Service Railway Company. From a judgment of the Supreme Court (79 N. J. Law, 408, 75 Atl. 165), reversing a judgment for plaintiff, he brings error. Judgment of Supreme Court reversed, and judgment of the district court affirmed.

Ralph E. Lum (Lum, Tambllyn & Colyer, on the brief), for plaintiff in error. Leonard J. Tynan and Duane E. Minard, for defendant in error.

TRENCHARD, J. This action was brought in the Second district court of the city of Newark. The jury found a verdict for the plaintiff. On appeal to the Supreme Court the judgment entered upon the verdict was reversed. 79 N. J. Law, 408, 75 Atl. 165. This writ of error brings up for review such judgment of the Supreme Court. The suit was brought to recover damages resulting to the plaintiff below by reason of his having been struck by a trolley car of the defendant company while he was crossing Broad street in the city of Newark. At the trial, the only testimony as to the happening of the accident was that of the plaintiff himself. On his direct examination he testified that he was crossing Broad street at a crosswalk near the corner of Broad and Market streets; that when he was 5 or 6 feet distant from the north-bound track he looked and saw a car 45 or 50 feet away coming at a "pretty

fair rate of speed" towards him on that track; that he proceeded to cross, and, as he was stepping over the last rail, his foot was struck by the car and he was injured. On cross-examination, at one point he testified that he was just starting from the sidewalk, and at another, that he was about "5, 10, or 11 feet" from the sidewalk, when he saw the car 45 or 50 feet away. While it thus appears that his testimony upon direct examination and cross-examination is not in entire harmony, due probably to his imperfect understanding of the English language, yet it was clearly open to the jury to infer that the facts of the case were exhibited by his direct examination. We are unable to agree with the Supreme Court that a verdict should have been directed for the defendant upon the ground of the contributory negligence of the plaintiff. On the contrary, we are of opinion that the case was properly submitted to the jury.

[1] The general principle governing the relation of the street railway to the traveling public is that their respective rights in the public highway must be exercised by each of them, with due regard to the rights of the other, in a reasonable and duly careful manner. *Glasco v. Jersey City H. & P. St. Ry. Co.*, 79 Atl. 368; *Migans v. Jersey City H. & P. St. Ry. Co.*, 76 N. J. Law, 535, 70 Atl. 168.

[2] It was the duty of the motorman, when approaching the crosswalk, to have his car so far under control that he would not endanger the safety of pedestrians engaged in the lawful and customary use of such crosswalk. *Consolidated Traction Co. v. Glynn*, 59 N. J. Law, 432, 37 Atl. 66; *Searles v. Elizabeth, etc., Ry. Co.*, 70 N. J. Law, 388, 57 Atl. 134.

[3] Whether, in the present case, there was negligence in the operation of the car which collided with the plaintiff using the crosswalk depends largely upon the speed of the car and the distance which the car had to go at the time the motorman saw, or ought to have seen, the plaintiff in the act of crossing the track. *Zolpher v. Camden Sub. Ry. Co.*, 69 N. J. Law, 417, 55 Atl. 249. From the testimony of the plaintiff, the jury was justified in concluding that the motorman, when 50 feet away, ought to have seen the plaintiff within 5 feet of the track, crossing upon the crosswalk. It was undisputed that the motorman was then driving the car at a "pretty fair rate of speed." It traveled 50 feet while the plaintiff was traveling about 10 feet. It was, therefore, open to the jury to find either that the motorman did not make proper effort to prevent the collision, or that the inability to stop the car was due to its excessive and unlawful rate of speed. The question of the negligence of the defendant was, therefore, properly submitted to the jury. We are also of the opinion it could not

be said as a matter of law that the plaintiff was guilty of contributory negligence.

[4] The plaintiff was upon a crosswalk, where he might reasonably assume that the motorman would expect pedestrians to cross, and would have the car under proper control accordingly; and the plaintiff had a right to expect that the motorman would respect his right to cross the street if he was in position to justify such crossing under a reasonable belief that he could safely do so if both he and the motorman exercised reasonable care. *Bauer v. North Jersey St. Ry. Co.*, 74 N. J. Law, 624, 65 Atl. 1037.

[5] From the testimony the jury could legitimately find that when the plaintiff, after looking when 5 feet from the track, started to cross, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a "pretty fair rate of speed" and sufficiently distant to be checked, or, if need be, stopped before it should reach him. The question of the plaintiff's contributory negligence was, therefore, properly submitted to the jury in the district court. *Migans v. Jersey City, H. & P. Ry. Co.*, 76 N. J. Law, 535, 70 Atl. 168; *Bauer v. North Jersey St. Ry. Co.*, 74 N. J. Law, 624, 65 Atl. 1037.

The judgment of the Supreme Court will be reversed, and the judgment of the district court affirmed.

ALLGAIR v. HICKMAN et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 66*)—REVIEW—JURISDICTION—FINAL JUDGMENTS.

Review by writ of error is limited to judgments that are in their nature final; the correction of mistaken decisions in interlocutory matters being postponed until the event of the litigation appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 329-343; Dec. Dig. § 66.*]

Error to Supreme Court.

Action by Joseph Allgair against S. K. Hickman and Jonathan M. Blew. Judgment for defendants, and plaintiff brings error. Dismissed.

See, also, 81 Atl. 563.

George S. Silzer and John A. Coan, for plaintiff in error. John Boyd Avis, for defendants in error.

PITNEY, C. It appears from the state of the case that on September 23, 1910, Hickman and Blew (now defendants in error) presented a petition to the court of common pleas of Middlesex county, under section 10 of the "act to regulate the sale of spirituous vinous, malt and brewed liquors," etc., commonly known as the "Werts Act" (P. L. 1889, p. 77; Gen. Stat. p. 1810), as amended by sec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion 3 of chapter 117 of the Laws of 1906, commonly known as the "Bishops' Act" (P. L. 1906, p. 199), praying that the license of Joseph Allgair (now plaintiff in error) to keep an inn and tavern might be revoked and annulled because of certain alleged violations of law specifically set forth in the petition. Upon the filing of this petition the court of common pleas made an order requiring Allgair to show cause before that court on October 11, 1910, why his license should not be revoked and annulled. On October 10th a writ of certiorari was allowed by one of the justices of the Supreme Court at the instance of Allgair as prosecutor, and was issued out of that court, returnable October 28th, for reviewing the order to show cause, together with the petition of Hickman and Blew, "and all matters touching the same." This writ of certiorari was presented to Judge Lyon of the Middlesex Common Pleas on October 11th while he was engaged in taking the testimony of the parties pursuant to the order to show cause. Counsel for the prosecutor, upon presenting the writ, insisted that it had the effect of staying all further proceedings in the common pleas. To this insistence Judge Lyon acceded, so that after hearing some testimony introduced by the petitioners he proceeded no further with the matter. The return to the writ of certiorari brought before the Supreme Court only the petition of September 23d, with the affidavits accompanying it and the order to show cause. The Supreme Court gave leave to the parties to take depositions to be used upon the argument of the certiorari, and under this leave certain evidence was taken, and among other things the occurrences in the court of common pleas on October 11th, the return day of the order to show cause, including the presentation of the writ of certiorari to Judge Lyon, were thus put in evidence. The Supreme Court also made an order calling upon the court of common pleas to certify certain facts respecting the procedure had before that court, and a certification was made accordingly.

The principal ground upon which the prosecutor asked the Supreme Court to reverse and set aside the order to show cause was that the court of common pleas had no jurisdiction to determine the controversy, because the petition of Hickman and Blew was not verified in the manner required by the statute; among other reasons, because the petitioners, who had in affidavits annexed to the petition sworn that the matters and things therein set forth were true, had in fact no personal knowledge whatever upon the subject-matter of the petition; the insistence being that the affidavits did not constitute a sufficient verification of the petition within the intentment of section 10 of the Werts act as amended by the Bishops' act. Certain other questions were raised as the basis of the contention of the prosecutor that

the court of common pleas was without jurisdiction over the controversy.

The matter was brought on for argument by consent of parties before Justice Bergen, sitting alone for the Supreme Court, with the result that he overruled the objections of the prosecutor, and an order was made dismissing the writ of certiorari and remitting the record to the court of common pleas, to be there proceeded with according to law and the practice of that court. It is this order or judgment of the Supreme Court that is brought before us for review under the present writ of error, and the question arises, in limine, whether the proceedings have reached such a stage as to admit of review by this court.

It will be observed at once that neither the court of common pleas nor the Supreme Court has rendered any judgment that is dispositive of the matters in litigation. The court of first instance made only an order to show cause as the necessary preliminary of a hearing before that court of the merits of the controversy. Such hearing was interrupted in its course by the issuance and service of a writ of certiorari. The Supreme Court dismissed that writ, but rendered thereon no judgment that was finally dispositive of the rights of the parties; on the contrary, it remitted the record to the court of common pleas, to be there proceeded with according to law.

Counsel for the plaintiff in error cites *Mowery v. Camden*, 49 N. J. Law, 106, 6 Atl. 438, and other cases, to support the contention that when a special tribunal is proceeding summarily in a matter over which it has not legally acquired jurisdiction it is within the discretion of the Supreme Court to allow a certiorari to review its action before the final determination of the matter. This may be conceded, at least with respect to cases where the writ of certiorari is issued pursuant to the general supervisory power of the Supreme Court over inferior tribunals, as distinguished from the use of the certiorari as a substitute for the writ of error. See *Hinchman v. Cook*, 20 N. J. Law, 271, 272; *Mowery v. Camden*, 49 N. J. Law, 106, 109, 6 Atl. 438; *State, Hoxsey, Pros., v. City of Paterson*, 39 N. J. Law, 489, 493.

But that does not dispose of the very different question now presented, which is whether the order or judgment of the Supreme Court made in the certiorari matter is reviewable by this court. Our review by writ of error is limited to judgments that are in their nature final, the correction of mistaken decisions in interlocutory matters being postponed until the event of the litigation appears. *Gen. Stat. p. 1391, § 1*; *Eames v. Stiles*, 31 N. J. Law, 490, 494; *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Defiance Fruit Co. v. Fox*, 76 N. J. Law, 482, 70 Atl. 460, and cases cited.

Upon consideration, it is deemed clear that the judgment we are asked to review is not at all dispositive of the controversy between the parties. Should we affirm the decision of the Supreme Court, it would still be necessary for the court of common pleas to proceed with the hearing and render judgment thereon, and that judgment would then be the subject-matter of review by the Supreme Court either on certiorari or on writ of error (we do not need to decide which), and the judgment of the Supreme Court thereon would be subject to review by writ of error out of this court. On the other hand, should we reverse the decision of the Supreme Court, we are still left without the materials for the rendition of a final judgment, for the matters of fact which are alleged as the basis of the legal contentions of the plaintiff in error remain unsettled.

It seems clear, therefore, that the present writ of error is premature and should be dismissed.

**UNITED ELECTRIC CO. OF NEW JERSEY
et al. v. MUTUAL BENEFIT ELECTRIC
LIGHT & POWER CO. et al.**

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS (§§ 680, 681*)—
CONTROL OF STREETS—STATUTORY PROVISIONS.**

By the act of March 28, 1891, establishing boards of street and water commissioners in cities of the first class (P. L. 1891, p. 249; 1 Gen. Stat. 1895, p. 465), control over streets, for the purpose of passing an ordinance authorizing the construction and maintenance therein of conduits and wires for the supply and distribution of electricity, was taken from the common council and lodged in the board of street and water commissioners; and the act of April 21, 1896, relating to electric light, heat, and power companies (P. L. 1896, p. 322), did not have the effect of restoring such control to the common council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §§ 680, 681.*]

2. FORMER DECISION FOLLOWED.

Oliver v. Jersey City, 63 N. J. Law, 634, 635, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, affirming 63 N. J. Law, 96, 101, 42 Atl. 782, followed.

Error to Supreme Court.

Action by the United Electric Company of New Jersey and others against the Mutual Benefit Electric Light & Power Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John Milton, for plaintiffs in error. William D. Edwards and Frank Bergen, for defendants in error.

PITNEY, C. [1] This writ of error brings under review a judgment of the Supreme Court, setting aside as ultra vires an ordi-

nance of the mayor and aldermen of Jersey City granting consent to the Mutual Benefit Electric Light & Power Company to open the streets of Jersey City and lay therein conduits and wires for the supply and distribution of electricity for light, heat, and power purposes. The Supreme Court held that the power to adopt such an ordinance was lodged solely in the board of street and water commissioners of the city, to the exclusion of the common council or board of aldermen, following the decision of the same court in the similar case of *United Electric Co. v. Newark*, 77 N. J. Law, 104, 71 Atl. 237. That decision was based upon two grounds, viz.:

First, that by the act of March 28, 1891, establishing in cities of the first class boards of street and water commissioners (P. L. 1891, p. 249; 1 Gen. Stat. 1895, p. 465), control over streets, for the purpose of passing such an ordinance as the one in question, was taken from the common council and lodged in the board of street and water commissioners; and that the act of April 21, 1896, entitled "An act relating to electric light, heat and power companies" (P. L. 1896, p. 322), which contains in its second section a proviso that "no public street shall be opened for the purpose of laying any such pipes, conduits or wires, without the consent of the board of aldermen or common council of such city," did not have the effect of restoring such control to the common council, because, as held by this court in *Oliver v. Jersey City*, 63 N. J. Law, 634, 635, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228, affirming 63 N. J. Law, 96, 101, 42 Atl. 782, 783, the phrase "board of aldermen or common council" in such an act is used in the general sense of "governing body," and points to the board of street and water commissioners as such governing body, so far as the act of 1896 refers to cities of the first class having such boards.

[2] The Supreme Court properly deemed the decision of this court in the *Oliver* Case to be in point and controlling upon this question. We adhere to the view expressed in that case. Applying the reasoning to the case before us, it is not improper to point out that if we should attribute to the phrase "board of aldermen or common council," as used in the act (P. L. 1896, p. 322), a literal signification, it would result in giving to that act the force of an amendment to the act of 1891, although the title of the act of 1896 discloses no purpose to alter the law respecting municipal corporations.

Secondly, the Supreme Court, in *United Electric Co. v. Newark*, 77 N. J. Law, 107, 71 Atl. 237, expressed the opinion that the power to pass the ordinance there in question, if lodged in the common council by the act of 1896 referred to, was retransferred to the board of street and water commissioners by a supplement to the act of 1891, passed in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1897 (P. L. 1897, p. 248). Upon this question we prefer to express no opinion.

The judgment under review should be affirmed.

HARRISON v. BOROUGH OF MADISON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

MUNICIPAL CORPORATIONS (§ 147*)—DE FACTO OFFICERS—AUTHORITY.

A de facto mayor of a borough who acts under color of authority may approve an ordinance, and his approval gives it validity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 324, 325; Dec. Dig. § 147.*]

Error to Supreme Court.

Certiorari by Carrie L. Harrison to review an ordinance of the Borough of Madison. There was a judgment of the Supreme Court (78 Atl. 665) affirming the ordinance, and plaintiff brings error. Affirmed.

Frank H. Sommer, for plaintiff in error.
Charles A. Rathbun, for defendants in error.

PER CURIAM. We agree with the view expressed by the Supreme Court that at the time of the adoption of the ordinance under review Mr. Downs was de facto mayor of the borough of Madison, acting under color of authority, and that his approval of the ordinance was therefore sufficient to give it validity. We find it unnecessary to express an opinion upon the question whether he was de jure mayor.

The judgment under review should be affirmed.

MELLON v. VICTOR TALKING MACH. CO. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

When a press upon which a servant is working becomes out of order, and the servant complains of such defective condition to the representative of the master, who promises to repair it, and orders the servant to go back to work, and the servant resumes work, relying upon such promise, and, three days afterward, is injured by reason of such defective condition of the press, the question of the master's negligence is for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—ASSUMED RISKS.

While the servant assumes not only the ordinary risks incident to the employment, but as well all risks arising and becoming known to him during his service, yet the master, by promising to amend a defect complained of, as an inducement to the servant to continue, forthwith takes from the servant the risk, and thereafter, until the time fixed for repair, assumes

it, unless the danger from it is so great or so imminent that a person of ordinary prudence would not continue in the employment after the discovery of the condition. Where the promise is general and indefinite the master's undertaking runs for a reasonable time.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK.

Whether the danger from a defective machine is so great or so imminent that a reasonably prudent person would not continue in the employment after the discovery of the condition, even though the master had promised to repair it, is a question for the jury, when, from the evidence, opposite conclusions may be reasonably drawn.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK.

Whether the lapse of three days is a reasonable time for the servant to incur the risk in the expectation that the master will perform his promise to repair, is a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Error to Supreme Court.

Action by Alice Mellon against the Victor Talking Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 77 N. J. Law, 670, 73 Atl. 494.

Gaskill & Gaskill, for plaintiff in error.
John F. Harned and Wescott & Wescott, for defendant in error.

TRENCHARD, J. The plaintiff below sued to recover damages for personal injuries. She obtained a verdict at the Camden circuit, and the judgment entered thereon is here for review.

At the trial the jury was justified in finding from the evidence, if they believed it, the following matters of fact: The plaintiff, a young woman, was employed by the defendant company to work at a press in the defendant's factory. Her work consisted of placing a disk between the upper and lower plates of the press and removing it after it had been impressed by the upper plate descending by power applied through a belt. When the upper plate began to ascend she loosened the disk with a knife held in one hand and removed it with the other. She had nothing to do with keeping the press in order, nor with starting or stopping it, nor with applying the power. When the press was in normal condition and operation the upper plate raised and lowered through a space of four inches, with uniform and continuous speed and power. When descending, a safety gate automatically covered, for the protection of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

workman, the space between the upper and lower plates. It required about 32 seconds for the upper plate to rise four inches and the same time to descend. The weight of the die was 250 pounds. It operated under a pressure of 60 tons. Three days before the accident, the press became out of order as was manifest by the belt being loose and the safety gate "sticking on the top die." Thereupon the plaintiff called the attention of the superintendent of the factory to these defects, and he told her to go back to work and he would fix it. On the day of the accident, and while the plaintiff was performing her customary work of removing a disk as the upper plate was ascending, the belt slipped or "jerked" backward, and the upper part of the die "dropped like lightning" and fractured the bones of her hand.

Error is assigned upon the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendant. Both motions were grounded mainly upon the contention that (1) no negligence on the part of the defendant was shown, and (2) that the risk was obvious and was assumed by the plaintiff. Every question raised and argued may be disposed of by a consideration of the legal propriety of the denial of these motions.

We pause to remark that the testimony at the trial now under review differs from that considered when the case was here before and reported in 77 N. J. Law, 670, 73 Atl. 494. At that trial, as was pointed out by Mr. Justice Garrison in his opinion, the plaintiff testified that she had been told, when instructed how to operate the press, "not to operate the press if the gauge or gate was out of order." At the trial now under review there was no such testimony. On the contrary the plaintiff testified that no such thing had ever been said to her, and her explanation of such inconsistency was such as to justify the jury in believing the testimony which she gave upon the trial under review if they saw fit so to do. It is therefore not contended that the rule laid down in *Card v. Wilkins*, 61 N. J. Law, 296, 39 Atl. 676, is involved in the review of the present case.

[1] We are of opinion that the trial judge properly denied the motions to nonsuit and to direct a verdict. The plaintiff's evidence tended to show that the press upon which she was working became out of order. It is true that the defendant's evidence, on the contrary, tended to show that it was in perfect order, and hence their contention seems to be that the plaintiff's injury was due solely to a delayed attempt upon her part to remove the disk, or delay in removing her hand, or both. But upon that question the plaintiff was entitled to go to the jury. There was not only her testimony that the belt slipped or "jerked" backward and that the upper part of the die "came down like lightning," but there were other circum-

stances which tended to show that the press was out of order and was not working perfectly and normally. When working properly the upper plate descended slowly under a pressure of 60 tons. If it had descended under that pressure it would have completely destroyed the plaintiff's hand. The fact that only the bones were fractured seems to indicate that the die fell of its own weight, which was 250 pounds only. Again, the lower plate was so hot as to burn the hand if it was allowed to rest upon it. It therefore seems unlikely that the plaintiff thoughtlessly allowed her hand to rest there until the slowly descending plate fractured her fingers. If it had been slowly descending, it seems more likely that either the pressure from above or the heat from beneath would have apprised her of the danger in ample time to have enabled her to withdraw her hand before it was thus injured. Moreover, if the press had been in order, the safety gate would have covered the space between the upper and lower plates as soon as the upper part of the die began to descend, either warning the plaintiff of its downward course or rendering it impossible or inconvenient for her to have introduced her hand. There are other circumstances which need not be detailed, some of which make for the plaintiff, and some which, it is conceded, make against her, but enough has been said to clearly demonstrate that the question whether the press was in order was for the jury.

The plaintiff's evidence also tended to show that she complained of such defective condition of the press to the representative of the defendant; that the latter promised to repair it, and directed her to go back to work; that the plaintiff, relying upon such promise, resumed work upon the defective press, and three days later was injured by reason of its defective condition.

[2] The rule of law is that, while the servant assumes not only the ordinary risks incident to the employment, but as well all risks arising and becoming known to him during his service, yet the master, by promising to amend a defect complained of, as an inducement to the servant to continue, forthwith takes from the servant the risk, and thereafter, until the time fixed for repair, assumes it, unless the danger from it is so great or so imminent that a person of ordinary prudence would not continue in the employment after the discovery of the condition. Where the promise is general and indefinite, the master's undertaking runs for a reasonable time. *Paven v. Worthen & Aldrich Co.*, 80 N. J. Law, 567, 78 Atl. 653; *Comer v. Meyer*, 78 N. J. Law, 464, 74 Atl. 497, 29 L. R. A. (N. S.) 597; *Andrecsik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913.

[3] In the present case the question whether the danger from the defective press was so great or so imminent that a person of

ordinary prudence would not continue in the employment after the discovery of its condition, was for the jury, for the reason that, from the evidence, opposite conclusions might be reasonably drawn. *Comer v. Meyer*, 78 N. J. Law, 464, 74 Atl. 497, 29 L. R. A. (N. S.) 597. Evidently both the plaintiff and the superintendent of the defendant company thought the danger not so great nor so imminent that the use of the press should be discontinued.

[4] So, too, whether the lapse of three days was a reasonable time for the plaintiff to incur the risk in the expectation that the defendant would perform its promise to repair, was a question for the jury. *Dowd v. Erie R. R. Co.*, 70 N. J. Law, 452, 57 Atl. 248.

Since the case was properly submitted to the jury, the judgment of the court below will be affirmed.

PROUT et al. v. PROUT et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

1. EVIDENCE (§ 471*) — MARRIAGE — CONCLUSION.

On an issue of marriage between certain persons, a question asked of a witness who knew them whether they were living as man and wife was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 471.*]

2. APPEAL AND ERROR (§ 237*)—OBJECTIONS BELOW — SUFFICIENCY—ADMISSION OF EVIDENCE.

An objection to a question is unavailable on appeal where it was not made until after the question was answered, in the absence of a motion to strike out the answer, or instruct the jury to disregard it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.*]

3. MARRIAGE (§ 51*)—EVIDENCE—CORROBORATION—NONSUIT.

Where evidence of cohabitation, etc., was offered on an issue of marriage only in corroboration of the proof of a ceremonial marriage, defendant was not entitled to a nonsuit unless plaintiffs elect to "claim or show on what they stand" as between a ceremonial and a common-law marriage.

[Ed. Note.—For other cases, see *Marriage*, Dec. Dig. § 51.*]

4. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—REQUEST TO CHARGE.

Appellants could not object to an instruction where a request to charge submitted by them contained the same defect.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. § 882.*]

5. APPEAL AND ERROR (§ 231*)—OBJECTION BELOW—SUFFICIENCY—ADMISSION OF EVIDENCE—OBJECTIONS.

An objection to evidence stating no ground raises no legal question for review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1290; Dec. Dig. § 231.* Trial, Cent. Dig. §§ 194-210.]

Error to Supreme Court.

Ejectment by John Prout and others against Lewis D. Prout and others. Judgment for plaintiffs, and defendants bring error. Affirmed on opinion of Supreme Court.

The per curiam opinion of the Supreme Court was expressed in the following memorandum:

"Samuel Prout and Sarah Martin lived together from about 1850 to about 1870, as plaintiffs claim, in lawful wedlock. The plaintiffs are some of the issue of that alleged marriage.

"About 1870 Samuel and Sarah separated, and in 1882 Samuel married Isabelle Henry, one of the defendants, and the other defendant, Lewis D. Prout, is the issue of that marriage. In 1908 Samuel died leaving real estate, and plaintiffs now bring this action in ejectment to recover possession of their alleged undivided interest in such lands.

"The controversy at the trial was narrowed to this question: Were Samuel and Sarah lawfully married? The plaintiffs recovered a verdict, and this writ of error brings up for review the judgment entered thereon. The assignments of error will be considered in the order argued.

[1] "1. It is first argued that the judgment must be reversed because of the testimony of a witness in response to the question, 'Were they (Samuel and Sarah) living there as man and wife?' The witness answered, 'They were.' That was 'objected to as a conclusion,' and it is here insisted that for that reason the testimony was illegal. We think not.

[2] "But, if so, it does not lead to a reversal, since it appears that the objection was not made until after the answer was given, and there was no motion made to strike out the answer, nor to instruct the jury to disregard it. *Fath v. Thompson*, 58 N. J. Law, 180, 33 Atl. 391; *Ryan v. State*, 60 N. J. Law, 33, 36 Atl. 706.

"2. There was no error in the admission of evidence of the Bible. It was at least corroborative proof of the alleged ceremonial marriage between Samuel and Sarah and of the birth of the children, with respect to both of which matters there was some independent proof.

[3] "3. There was no error in the refusal of the trial judge to nonsuit the plaintiffs 'unless they elect to claim or show on what they stand.' This motion was apparently made because the defendants conceived that some of the testimony was offered to show a common-law marriage, but such does not appear to have been the plaintiff's purpose in submitting such proof. Rather it appears to have been offered very properly in corroboration of the proof of an actual ceremonial marriage.

"4. The trial judge properly refused to direct a verdict for the defendants. As we have pointed out, there was evidence tending to show an actual ceremonial marriage between Samuel and Sarah, which, if believed by the jury, justified a verdict for the plaintiffs.

"5. The request to charge, which is made the subject-matter of an assignment of error, was properly refused for the same reason that the motion to direct a verdict was rightfully denied.

[4] "6. There was no error in the charge of the court. That part of it complained of was not only proper, but the defendants actually requested the judge to so charge in their eighth request.

"The judgment of the court below will be affirmed."

John J. Crandall, for plaintiffs in error.
V. Claude Palmer, for defendants in error.

PER CURIAM. Upon all points, except the second, we agree with the opinion of the Supreme Court.

[5] As to the second, we prefer to express no opinion, because the record discloses that no ground of objection was stated at the trial to the introduction of the Bible in evidence, and therefore, on familiar principles, no legal question was raised by the objection.

The judgment under review should be affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. MAYOR AND COMMON COUNCIL OF CITY OF NEWARK et al.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

MUNICIPAL CORPORATIONS (§ 373*)—BUILDING CONTRACTS—ASSIGNMENT OF SUMS DUE—VALIDITY AS AGAINST CLAIMS FOR LABOR AND MATERIALS.

A stipulation in a contract for work for a city that 10 per cent. of the final estimate should be retained for one year from the acceptance of the work as a guaranty that the contractor had executed his contract, and at the end of the year the amount remaining after making necessary repairs should be paid to the contractor after satisfactory evidence that laborers and materialmen have been paid, does not provide for the retention of the money for the protection of laborers and materialmen, and an assignment by the contractor of the moneys due under the contract prior to the filing of any lien for labor or material passes the amount so retained free from any lien.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 373.*]

Appeal from Court of Chancery; Howell, Vice Chancellor.

Suit by the United States Fidelity & Guaranty Company against the Mayor and Common Council of the City of Newark and others. From a decree of the Court of

Chancery (76 N. J. Eq. 230, 74 Atl. 192) for defendants, complainant appeals. Affirmed.

See, also, 74 N. J. Eq. 454, 77 Atl. 1088.

McCarter & English, for appellant. Sher-rerd Depue and George Gordon Battle, for respondents.

GUMMERE, C. J. The complainant, the United States Fidelity & Guaranty Company, filed its bill under the provisions of the municipal lien law to enforce a lien on moneys in the hands of the city of Newark under a contract between the city and John L. Stewart and Frederick W. Abbot, partners, for the construction of the Cedar Grove Reservoir. Stewart and Abbot subcontracted the embankment and borrow pit work to one James Seme who entered into a bond with the complainant, the United States Fidelity & Guaranty Company, as the surety thereon to indemnify and save harmless Stewart and Abbot from any pecuniary loss resulting to them from a breach of any of the terms of the contract between them and Seme. This bond also provided that in case of default by Seme in the work the complainant could at its option assume and complete his contract. Seme did default in his work, and the complainant exercised its option to complete his contract, and did in fact perform the work and furnish the materials called for therein to an amount exceeding \$35,000. Not being paid by the principal contractor the money due them for such work and materials, they, on December 12, 1904, filed their lien with the city in compliance with the statute. On the 18th of November, 1904, Stewart and Abbot made a written assignment to Alexander M. Stewart and James C. Stewart of all moneys due and to become due to them from the city of Newark under their contract with the municipality. The question at issue between the parties was whether this assignment took precedence over the lien subsequently filed by the complainant. The learned Vice Chancellor held that it did, and for this reason advised a dismissal of the complainant's bill.

We concur in the conclusion reached by the Vice Chancellor and have nothing to add to his discussion of the matters treated by him in his opinion. There is, however, one ground upon which the complainant rested its right to relief, and which was relied upon in the argument before us which is not referred to by the Vice Chancellor in his opinion, viz., an alleged right conferred upon laborers and materialmen by the eighth section of the contract between the city and Stewart and Abbot. That section, after providing for the payment of 90 per cent. of the final estimate, upon the completion of the work in accordance with the provisions of the contract and its acceptance by the city

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

provides as follows: "The remaining 10 per centum of said final estimate shall be retained by said city for one year from date of said acceptance of the work as a guarantee that the contractor has faithfully executed his contract, and shall be used by said city in making good any defects or making any repairs to the work executed under this contract which may be necessary. At the end of said one year the said 10 per centum, or such portion of it as may remain after making said repairs or remedying any defects, shall be paid to the contractor after the party of the second part shall furnish the said board of street and water commissioners with satisfactory evidence that all persons who have done work or furnished materials under this agreement and who may have theretofore given written notice to said board of any balance unpaid for work or materials furnished or done on said work have been fully paid or satisfactorily secured, and in case such evidence is not furnished as aforesaid such amounts as may be necessary to meet the claims of the persons aforesaid may be retained from the money due the party of the second part under this agreement and until the liabilities aforesaid shall be fully discharged or such notice withdrawn." The contention of the complainant is that by virtue of this clause in the contract the 10 per cent. was retained for the protection of laborers and materialmen, including the complainant, and so, consequently, subject to lien by them notwithstanding the assignment made by Stewart and Abbot.

Although the contention is plausible no authority is cited in support of it, and it is opposed to earlier decisions both of the Court of Chancery and of this court. In the case of *Grassmann v. Bonn*, 30 N. J. Eq. 490, the litigation arose out of the work of improving a public road in Hudson county under a contract by which it was provided that so much of the money due to the contractors under the contract as might be considered necessary by the public authorities should be retained by them until any suits or claims against them for damages or for errors in payment to workmen, or for material furnished, should have been settled, and evidence to that effect furnished to them. The contention was that this provision of the contract operated as an equitable assignment in favor of unpaid laborers and materialmen. It was held that the provision was probably intended for the indemnity of the public authorities against suits or claims for wages or the price of materials which, though unobtainable, might nevertheless be brought against them; that it did not create a lien in favor of laborers and materialmen but was intended as a means of coercion to compel the contractors to pay their debts contracted in connection with and for the work; that the public authorities were charged with no duty

toward these classes of persons, and whether they would retain the fund or not was entirely at their option; and, finally, that the provision was not an equitable assignment on the part of the contractors of so much of the fund as might be necessary to pay such debts.

In the case of *Shannon v. Hoboken*, 37 N. J. Eq. 123, the litigation was over a contract for the repaving of a part of one of the streets of the city of Hoboken. It contained this provision: "And the said party of the second part (the contractor) covenants and agrees to promptly pay for all labor done and material furnished on said work, and in case he fails so to do * * * any money due or to grow due to said party of the second part may be used to pay for such labor and material, and the mayor and common council may order warrants drawn to the order of parties doing work or furnishing material, or may issue certificates to them for the amounts due them. And the receipts of said parties shall be a full discharge for the mayor and common council of the city of Hoboken in settlement with the party of the second part or his sureties." The contractor assigned moneys due him under the contract, and, after the assignment, claims for labor done and material furnished in the performance of the contract were presented to the municipality and payment therefor demanded. These laborers and materialmen claimed that they were entitled to be paid out of the funds in the hands of the city notwithstanding the assignment upon the ground that the covenant recited deprived the contractor of the power of transferring his claim. Vice Chancellor Van Fleet before whom the case was heard held the claim to be without substance saying, "The covenant on which it rests merely authorized the municipality to withhold and appropriate the moneys earned under the contract. No beneficial interest is transferred, nor is the municipality made subject to any duty or liability. Such a covenant does not render the municipality liable either at law or in equity to the creditor of the contractor, nor does it operate as an equitable assignment of the fund to such creditors." This case subsequently came to this court on appeal, and the decree of the Court of Chancery was affirmed upon the opinion delivered by the Vice Chancellor. 37 N. J. Eq. 318.

In *Freeholders of Essex v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391, the litigation arose over a contract for the doing of the mason work of the new lunatic asylum which was being built by the county. The contract provided that "should any person or persons that have furnished materials for or done any labor or work on the building herein contracted for, present to the parties of the first part (the board of freeholders) any claim or claims for such materials, work or labor, then the said parties of the first part shall have the right to withhold any and

every one of the above payments until such claim or claims so presented are settled and a receipt for the same delivered to the parties of the first part." The contractor assigned the money due to him under the contract to Lindsley. Subsequently claims were presented to the board of freeholders by laborers and materialmen for work done upon and materials furnished to the building. It was claimed that this provision of the contract operated as an assignment of all moneys earned by the contractor under the contract for the benefit of such persons as should become the contractor's creditors in consequence of having furnished him with any of the means which he used in performing the contract, and that thereby the board became obligated to hold such funds for the benefit of such creditors until their debts were paid. Vice Chancellor Van Fleet who also heard this cause thus disposed of the claim: "I can find, in the language used by the parties, no glimpse of a purpose like that attributed to them by this construction. It is certain that no assignment is made by express words, nor am I able to find, in the language of this provision, the slightest indication that either of the parties supposed that it was possible for anything to occur which, without a further act on the part of the contractor, would operate to transfer his rights under the contract. His dominion over the money earned under the contract is left just as complete and as absolute as it would have been if this stipulation had formed no part of the contract, except in one event, namely, on the presentation of a claim for material or labor, the board of chosen freeholders shall have the right to withhold any moneys due until such claim shall be paid. They are not authorized to pay, but merely to withhold. The contractor, however, exercised his right to do with his own as he pleased while his dominion was complete, and before any attempt had been made to impound the moneys in the hands of the board of chosen freeholders. His act in that regard is not in violation of his contract. He has not even promised that he would not collect or assign the moneys earned under the contract. All that he has stipulated is that on the presentation of a claim for material or labor, the board should, as against him, have a right to withhold, but, until a claim is presented, his power and dominion over the fund remain free and unfettered." Upon this reasoning he concluded that it must be held that the assignment was effectual to pass to Lindsley whatever rights the contractor had under the contract.

These decisions, we have already stated, are opposed to the contention made by the complainant, and that in the case of *Shannon v. Hoboken* is controlling. The reasoning of these decisions leads to the conclusion

that the 10 per centum of the final estimate which is retained under the eighth section of the contract now under consideration passed under the assignment free from any liability to be subjected to a lien which might thereafter be filed with the municipality by a laborer or materialman.

The question whether the municipality may, notwithstanding the assignment to Stewart and Stewart, retain the 10 per centum until satisfactory evidence has been furnished to the board of street and water commissioners that all claims of laborers or materialmen of which notice was given to the municipality have been fully discharged or until such notices have been withdrawn, is not involved in the present litigation and we therefore express no opinion upon it.

The decree under review will be affirmed.

WILLIAMS v. LOWE et ux.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 74*)—AUTHORITY OF COURT—INCIDENTAL RELIEF.

The general rule that a court of equity will not specifically enforce a construction contract, while it justifies the court in its refusal to do what it cannot be required to do, does not prevent it from so doing as incidental to other relief in exceptional cases.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 209; Dec. Dig. § 74.*]

2. EQUITY (§ 430*)—APPEAL AND ERROR (§ 982*)—VACATING DECREE—DISCRETION OF TRIAL COURT.

Whether or not a final decree shall be opened is discretionary in the Court of Chancery, and where an order refusing to open a decree was neither an abuse of such discretion nor the result of mistake or of any imposition practiced on that court, this court will not review such order for the mere purpose of substituting its discretion for that of the Court of Chancery.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1034-1047; Dec. Dig. § 430.* *Appeal and Error*, Cent. Dig. §§ 3877-3878; Dec. Dig. § 982.*]

3. APPEAL AND ERROR (§ 882*)—REVIEW—INVITED ERROR.

A defendant cannot have a decree molded into a form suggested by him and then have it reversed because of the form so imparted to it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Court of Chancery.

Bill in equity by Samuel Williams, Jr., against Samuel Lowe and wife. From a decree for plaintiff, defendants appeal. Affirmed.

Scott Scammell, for appellants. William M. Jamieson, for respondent.

GARRISON, J. This appeal attacks a final decree of the Court of Chancery; also an order refusing to open such decree, and also an order amending such decree. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

bill was filed by Williams against Lowe, who is the appellant, for the specific performance of a contract to convey a house, and the case made by the complainant was as follows: In 1907 Lowe leased to Williams a house and lot on Morgan avenue in Hamilton township for four years, with an option of purchase and a covenant to convey free of incumbrance. Williams entered into possession, exercised the option, and was making payments of the purchase price in monthly installments, when the foreclosure of a mortgage covering the premises brought the transaction to a halt. It was then agreed between Williams and Lowe that the former should purchase in lieu of the Morgan avenue house an unfinished house belonging to the latter on Oregon avenue to be paid for in weekly installments; Williams to be credited with the payments made on the Morgan avenue house, Lowe to finish the Oregon avenue house, and convey it to Williams free of incumbrance when \$800 was paid.

Williams moved into this unfinished house and had made payments amounting with the credits to \$615 when he discovered that Lowe had put a \$700 mortgage on the house which was still unfinished. Williams then stopped his payments and filed the present bill setting out these facts, tendering the balance of the purchase price for the house when completed, and praying that Lowe complete the house and convey it to him free of the said mortgage. There was also a prayer for general relief. Lowe not having answered this bill a decree pro confesso was entered with an order for taking proofs under which was shown what it would cost to complete the house, and such sum being in excess of the unpaid purchase money, the latter was credited to Lowe and a decree made that he pay the balance, viz., \$118.48, and convey the unfinished house free from the mortgage.

This decree was made on August 23, 1910. On September 21, 1910, Lowe petitioned the Court of Chancery to open this decree and let him in to answer which after a hearing on an order to show cause was denied. Lowe then applied to the court to amend the final decree against him by striking out the requirement for the payment of the balance of the cost of completing the Oregon avenue house on the ground that it was not within the specific prayer of the bill and was oppressive because the house could be completed by him for less than the unpaid purchase price.

This application of Lowe was granted, and the decree ordered to be amended according to the specific prayer of the bill.

From the original final decree and from each of these decretal orders the defendant has appealed, but not from the final decree as ordered to be amended.

Passing over this technical difficulty we think that the final decree was justified by the facts before the court and that it was as originally framed in effect a decree for specific performance of a contract to convey with an abatement of the price. The objection that there was no such specific prayer, if well founded, which we do not need to admit, cannot now avail the appellant since that part of the decree was stricken out on his own application. [1] The objection that the decree as amended is one to enforce a construction contract cannot avail the appellant, first, because the agreement is not a construction contract, but a contract to convey a house the completion of which was an incident and not the object of such contract; second, because the rule invoked while it justifies the court in refusing to do what it cannot be required to do does not prevent it from so doing as incidental to other relief in exceptional cases; and, third, because the appellant cannot lay as a ground for reversal a feature of the decree made at his own suggestion.

[2] The order refusing to open the decree was neither an abuse of discretion by the court below nor the result of mistake or of any imposition practiced upon it. Assuming that this court will review a discretionary order in these respects as was done in *Day v. Allaire*, 31 N. J. Eq. 303, it will not do so for the mere purpose of substituting its discretion for that of the Court of Chancery.

[3] The order amending the final decree will not be reversed at the instance of the appellant since it was the product of his own suggestion. A defendant cannot have a decree molded into a form suggested by him and then have it reversed because of the form so imparted to it.

The sole merit of the defendant's application was that the house could be finished by him at an expense less than the unpaid balance of the purchase price. He got the amended decree in order to enable him to do what he said he could do and wanted to do and in equity should be permitted to do, and then instead of doing it he prolongs the litigation at an expense which, if he is paying his lawyer at all in proportion to his services, is greatly in excess of what, on his own showing, it would cost him to complete his contract with the complainant.

The decree and both of the decretal orders are affirmed with costs.

HORTON v. BAMFORD et al.

(Court of Chancery of New Jersey. Nov. 10, 1911.)

1. BANKRUPTCY (§ 303*)—TRANSFER—BONA FIDE PURCHASER—EVIDENCE.

Evidence in an action by a trustee in bankruptcy to avoid a sale of property previously owned by a voluntary bankrupt held sufficient

to show that a brother of the bankrupt, associated with him in business and who, in the six months preceding the bankruptcy, purchased property of the bankrupt on an execution sale, and, on a sale of collateral by his creditors, knew the bankrupt's financial condition, and that any of his property sold for less than its full value, to the extent of such deficiency, was being withdrawn from his creditors, and either by express or tacit understanding with the bankrupt undertook to pay creditors holding collateral their full amounts, and secure to himself whatever equity there was above the amount due to the secured creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 159*)—PREFERENCES—"CREDITOR."

A brother of a voluntary bankrupt who during the six months preceding the bankruptcy proceeding, by express tacit understanding, set out to pay the creditors who held collateral their full amounts and secure to himself whatever equity there was in such collateral above the amounts due the secured creditors, but to whom the bankrupt himself owed no money, and whose rights with respect to the bankrupt and his property were in aid of securing himself because he was an indorser upon a secured note of the bankrupt, was not a "creditor."

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

3. BANKRUPTCY (§ 279*)—TRANSFERS—RIGHT OF TRUSTEE TO SUE.

A trustee in bankruptcy is a proper person to bring a suit against the purchaser at an execution sale, and, at a sale of collateral previously owned by the bankrupt, to avoid such transfers declared void, since the debts represented by him are so fastened to the property of the debtor that conveyances which would be held void or voidable at the instance of lien creditors are properly held voidable at the instance of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

4. BANKRUPTCY (§ 182*)—FRAUDULENT TRANSFERS—FRAUDULENT PARTICIPATION OF TRANSFERREE.

To sustain a holding that transactions between a bankrupt and one who has purchased his property from his creditors upon a sale of collateral made with his consent were actually fraudulent, it must be found that there was a covinous agreement between the bankrupt and such purchaser to transfer the bankrupt's property with the intent to defraud creditors, and it is not sufficient to a determination of actual fraud to find that the debtor alone transferred his property with the intent to defraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255-258; Dec. Dig. § 182.*]

5. FRAUDULENT CONVEYANCES (§ 31*)—TRANSFERS—NATURE AND FORM OF TRANSFER.

In the pursuit of fraud against creditors or in investigating with respect to it, the substance of the transaction is viewed, and not its form, and it is immaterial whether such fraud was perpetrated by means of judicial or other public sales, or whether it was by private agreement and transfer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 79-82; Dec. Dig. § 31.*]

6. FRAUDULENT CONVEYANCES (§ 158*)—BONA FIDE PURCHASER—INQUIRY.

Circumstances such as would put a reasonable person upon inquiry with respect to the

financial condition of a transferor will charge creditors or others dealing with a failing debtor with such facts as they would have learned had they properly investigated.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 500-503; Dec. Dig. § 158.*]

7. FRAUDULENT CONVEYANCES (§ 158*)—BONA FIDE PURCHASER—SUITS AGAINST DEBTOR.

Transfers by a debtor while suits are pending against him are always suspicious circumstances such as would lead a reasonable man to investigate concerning the financial condition of his transferor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 500-503; Dec. Dig. § 158.*]

8. FRAUDULENT CONVEYANCES (§ 101*)—CONFIDENTIAL RELATIONS—SETTLEMENT ON DEPENDENT—RELATIVES.

While a settlement upon one dependent upon the settler may not be considered as a badge of fraud, the dealings between near relatives, one of whom is largely indebted and the other of whom obtains his property, are viewed with suspicion.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 329; Dec. Dig. § 101.*]

9. FRAUDULENT CONVEYANCES (§ 74*)—TRANSFER BY DEBTOR—INADEQUACY OF CONSIDERATION—LIABILITY OF TRANSFERREE.

Where one, either a creditor or a purchaser, takes property from a debtor whom he knows to be indebted or under circumstances that put him on inquiry as to the financial condition of his transferor, he must, even in the absence of proof of a participation with the debtor in an intention to defraud creditors, either pay approximately the value of the property taken, or take the risk of being held responsible for any inadequacy, if it is of such an amount as to show that the transfer was not a fair and proper one under the circumstances, upon the theory that with respect to all of the property transferred in excess of consideration the conveyance is voluntary, and therefore fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. § 74.*]

10. FRAUDULENT CONVEYANCES (§ 74*)—ACTION—EVIDENCE—PRESUMPTION OF FRAUD.

As to a voluntary conveyance made by one who is indebted, there is an irrebuttable presumption of fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186-190; Dec. Dig. § 74.*]

11. FRAUDULENT CONVEYANCES (§ 162*)—KNOWLEDGE AND INTENT OF GRANTEE—PARTICIPATION IN FRAUDULENT INTENT.

2 Gen. St. p. 1604, § 12, which provides that every conveyance of lands or goods, and every judgment and execution contrived in fraud or collusion with intent to defraud creditors and others shall be void, applies only where there is an actual participation in the fraud by the grantee or transferee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 504; Dec. Dig. § 162.*]

12. FRAUDULENT CONVEYANCES (§ 237*)—REMEDIES OF CREDITORS—JURISDICTION.

Jurisdiction concerning fraudulent conveyances is exercised by courts of equity in this state upon the theory of inherent equitable powers, irrespective of any statute.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 237.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't indexes

13. FRAUDULENT CONVEYANCES (§ 183*) — TRANSFER BY DEBTOR—INADEQUATE CONSIDERATION—TRANSFER VOID BEYOND ACTUAL CONSIDERATION.

In the absence of satisfactory proof of actual fraud, a transfer by a debtor will be sustained to the extent of the consideration actually given, and declared void as to the residue, the amplified principle being that where a court of equity is asked to set aside a deed as voluntary and fraudulent as against creditors, and the evidence is not sufficient to induce the court to avoid the deed absolutely, but merely excites a well-grounded suspicion as to the adequacy of the consideration and the fairness of the transaction, the court will permit the conveyance to stand as security for the consideration actually given.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 578-582, 695; Dec. Dig. § 183.*]

14. FRAUDULENT CONVEYANCES (§ 181*) — RIGHTS OF GRANTEE—PROCEEDS OF PROPERTY.

Where the consideration paid by a purchaser on a transfer of property by a debtor went to satisfy legitimate debts of the debtor, the purchaser will be protected to that extent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 181.*]

15. BANKRUPTCY (§ 303*)—ACTION BY TRUSTEE—PROPERTY OF BANKRUPT—BURDEN OF PROOF.

In an action by a bankrupt's trustee to avoid purchases at execution sale against a bankrupt, and also at a sale of collateral securing the bankrupt's notes, where the purchaser had knowledge of the bankrupt's financial condition, or where the circumstances were such as to put him upon inquiry respecting it, the purchaser has the burden of proving, in view of the purchase of 2,000 shares of stock owned by the bankrupt of the par value of \$200,000 for a consideration of \$5,000, what the actual value of the stock was, so that the court could determine whether his conduct was fair and equitable, and whether his holding of it was fraudulent as to the excess of the value of the stock over the price paid.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 303.*]

16. BANKRUPTCY (§ 303*)—ACTION BY TRUSTEE—PROPERTY OF BANKRUPT—BURDEN OF PROOF.

In a suit by a bankrupt's trustee against a purchaser of stock formerly owned by the bankrupt at a sale of collateral, consented to by the bankrupt, evidence by the purchaser held insufficient to show that the consideration was adequate to sustain the transaction.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 303.*]

17. BANKRUPTCY (§ 305*)—ACTION BY TRUSTEE—PROPERTY OF BANKRUPT—JUDGMENT—BONDS.

Where the proof in a suit by a bankrupt's trustee against a purchaser of stock formerly owned by the bankrupt to have the transfer declared void as in fraud of creditors is not sufficient to require the transfer to be held absolutely void, and it is held void only to the extent of any excess over the consideration actually paid and its value, the court, on rendering judgment for the complainant, will require him to give bonds to secure the purchaser for the amount that is found to be due him on the transaction.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 305.*]

Bill by Rayton E. Horton, trustee in bankruptcy of Joseph Bamford, Jr., against Walter Bamford and wife and others. Heard on pleadings and proofs in open court. Decree for complainant.

This is a bill filed by the trustee in bankruptcy of Joseph Bamford, Jr., against the said Joseph Bamford, Jr., his brother, Walter Bamford, and the wife of the latter. (The wife is made a defendant solely because of a claim of inchoate right of dower in certain of the property which formerly belonged to Joseph, and which was purchased by Walter.) The purpose of the bill is to obtain a decree declaring null and void, as against the creditors of Joseph Bamford, Jr., represented by the trustee in bankruptcy, the sale of certain property, both real and personal, previously owned by Joseph Bamford, Jr., and purchased by Walter Bamford. The charge of the bill is that these transfers were effected in fraud, to hinder, delay, and defraud the creditors of Joseph Bamford, Jr., and that some of them were within four months of the filing of the petition in bankruptcy, and therefore preferences forbidden by the bankruptcy law. The defendants Walter and Joseph Bamford, Jr., have each filed answers denying that the purchases made by Walter Bamford of Joseph Bamford, Jr.'s, property were fraudulent, or were to hinder, delay, and defraud the creditors of Joseph, and affirming and asserting the validity and legality of each of said purchases. Heard on bill, answers, replications, and proofs in open court.

Clifford L. Newman (Alexander Simpson, Francis C. Lowthorp, and Alexander Thain, of the New York Bar), for complainant. Harry V. Osborne and William B. Gourley, for defendant Walter Bamford. Wayne Dumont, for defendant Joseph Bamford, Jr.

GARRISON, V. C. (after stating the facts as above). I find the facts as follows: About 1891, Joseph Bamford, his eldest son, Joseph, Jr., and his youngest son, Walter, incorporated the Bamford Bros. Silk Manufacturing Company. Its plant was at Paterson, N. J. Eventually this company issued 6,000 shares of capital stock, of the par value of \$100 each, and of these each of the parties above named had 2,000 shares. The elder son, Joseph, the defendant herein, was the superintendent or manager and also the secretary of this company. Walter was the treasurer, and, at first, the father was the president, and subsequently, Walter. The father died in April of 1909. About 1906 Joseph Bamford, Jr., became connected with a corporation named Baxter & Co., which was engaged in railroad construction, and had its headquarters in New York City; and in 1907, by reason of his connection

with this business, he was very largely indebted. There were at least \$80,000 of notes of his which were unsecured, and there were between \$38,000 and \$40,000 more of notes for which he had given security. In the summer of 1907 he was in dire financial difficulties, and, as Walter phrased it in his testimony in the bankruptcy proceedings, it was "public property" that Joseph was in poor condition, that he had been losing money through what Walter termed "robbers," and had financially ruined himself. At this time, in addition to the \$200,000 par value of stock which Joseph owned in the Bamford Bros. Silk Manufacturing Company, he is shown to have been the owner of the following: 26 shares of the capital stock of the Hamilton Trust Company of Paterson, N. J., of the par value of \$100 each; 30 shares of the capital stock of the Silk City Safe Deposit & Trust Company of Paterson, N. J., of the par value of \$100 each; 142 shares of the common stock of the United Shoe Machinery Company, of the par value of \$25 each; 75 shares of the preferred stock of the United Shoe Machinery Company, of the par value of \$25 each; 10 shares of the capital stock of the Bank of Charleroi, Pa., of the par value of \$100 each; 17 shares of the capital stock of the German-American Trust Company of Paterson, N. J., of the par value of \$100 each; 3 bonds of the Paterson & Passaic Gas & Electric Light Company, of the par value of \$1,000 each. 1 bond of the United States Steel Corporation, of the par value of \$1,000 each; a residence in the city of Paterson, on Arlington street; 3 automobiles; 17 different parcels of land in the city of Paterson, which he owned as tenant in common with his brother Walter. At the time of which I am now speaking (which is in the spring and summer of 1907) the 26 shares of Hamilton Trust Company stock and the 30 shares of Silk City Trust Company stock were pledged at the German-American Trust Company for a loan of \$12,000. There had also been obtained from this last-named company, by Joseph Bamford, Jr., either \$15,000 or \$16,000 in addition, for which there had been pledged the 142 shares of common and 75 shares of preferred stock of the United Shoe Machinery Company, the 10 shares of the stock of the bank of Charleroi, the 17 shares of stock of the German-American Trust Company, the 3 \$1,000 bonds of the Paterson & Passaic Gas & Electric Light Company, and the \$1,000 bond of the United States Steel Corporation. A concern in Pittsburgh, named Ivory, Cascadden & Moore, had taken over this loan and the securities just mentioned as collateral.

Both Walter and Joseph Bamford, Jr., were stockholders in the German-American Trust Company and in the Hamilton Trust Company, and Walter was a director in the Hamilton Trust Company. Before the 2d of March, 1907, according to the testimony of

Mr. Parmelee, the treasurer of the Hamilton Trust Company, Joseph was not indebted to that company. Walter, in his testimony before the referee in bankruptcy, stated that it was his understanding that Joseph was indebted in the sum of \$10,000 to that company before that time. However this may be, it appears that on the 2d day of March, 1907, Joseph Bamford, Jr., desired to negotiate a note for \$10,000 with the Hamilton Trust Company, and it is, of course, immaterial whether this was to renew an existing indebtedness or for a fresh one. Mr. Parmelee states that he was unwilling to loan this money to Joseph unless Walter should approve; and, upon having a conversation with Walter, he was requested by Walter to make the loan, and, because Walter informed him that he wanted him to loan the money to Joseph, he did so, and subsequently Walter indorsed this note. The note was for \$10,000, at four months, and became due on the 1st of July, 1907. Pledged with it, as collateral, were the 2,000 shares of Bamford Bros. Silk Manufacturing Company owned by Joseph. When this note came due, on the 1st of July, 1907, Walter testifies that he is in doubt whether he indorsed it, that he believes that he only indorsed once—that would be the note of March 2, 1907. Parmelee, however, testifies that Walter did indorse the note of July 1, 1907, given in renewal of the note of March 2, 1907. It further appears that before this time the \$15,000 or \$16,000 note held by Ivory, Cascadden & Moore, with the collaterals attached to it as above set forth, was sent to a Paterson bank for collection; and on the 1st day of July, 1907, Joseph, according to the testimony of Parmelee, applied to the Hamilton Trust Company to advance him, in addition to the \$10,000 which he already owed them, \$16,000 more to take over the note and securities that had been with Ivory, Cascadden & Moore. Walter in his answer says that Parmelee consulted him respecting this, and wanted to know if he would guarantee this \$16,000 loan, and that Walter replied that he would if these securities were to be applied toward the liquidation of the note, and that by reason of this "verbal guarantee" he felt himself bound to pay any deficiency. Parmelee says that at the time that they loaned the additional \$16,000 it was distinctly understood that the purpose was to get these securities liquidated as quickly as possible so as to pay Joseph's debts. Therefore the situation, so far as the Hamilton Trust Company and Joseph and Walter Bamford are concerned, on the 1st day of July, 1907, was that the trust company held a note of Joseph Bamford's for \$10,000 due November 1, 1907, with which was pledged 2,000 shares of Bamford Bros. Silk Manufacturing Company stock owned by Joseph Bamford, Jr. They also held the note of Joseph Bamford, Jr., for \$16,000, which was made payable on de-

mand, and on which Walter Bamford was what he terms "a verbal guarantor."

Joseph Bamford, Jr., was not only obligated on these two notes, but on another one of \$12,000 at the German-American Trust Company, and owed more than \$80,000 of other indebtedness for which he had given no security. There was a judgment against him, recovered on the 1st day of March, 1907, by the First National Bank of Guttenberg, for something over \$5,000, under which his house in Arlington street, Paterson, and his three automobiles had been levied upon. On the 12th day of July, 1907, a summons and declaration were served on Joseph Bamford, Jr., at the suit of Chauncy Ives. The suit was in the Passaic circuit court, and was upon two notes, one of March 27, 1907, and the other of April 2d, 1907, at three months, aggregating \$3,500. Although there is no proof of any demand having been made on Joseph Bamford, Jr., to pay the \$16,000 demand note held by the Hamilton Trust Company, as above set forth, it is proven that on the 12th day of July, 1907 (the same day upon which the summons and declaration above mentioned were served upon Joseph Bamford, Jr.), the Hamilton Trust Company sold at private sale to Walter Bamford for \$965 the \$1,000 United States Steel Corporation bond.

Thereafter suits against Joseph Bamford, Jr., were brought as follows: In the United States Circuit Court for the District of New Jersey, by Robert B. Ivory et al., on a note of \$2,500, dated July 8, 1907, at 10 days; the summons and declaration being served August 2, 1907. In the Passaic circuit court the following suits: By Elmer Conant, summons and declaration served August 16, 1907, on a note for \$500, dated May 2, 1907, at three months. By the Tradesmen's Oil Company, summons and declaration served October 31, 1907, on a note dated May 15, 1907, for \$1,000, at three months. By the Battery Park National Bank, summons and declaration served November 14, 1907, on two notes, one dated March 27, 1907, for \$1,000, at three months, and one dated April 8, 1907, for \$500, at three months. By Rudolph Cohen, summons and declaration served November 8, 1907, on a note of \$5,000, dated April 3, 1907, at three months. By the Crown Petroleum Company, summons and declaration served on December 2, 1907, on a note of \$1,000, dated July 30, 1907, at three months. In each of these suits, beginning as early as July 20, 1907, and extending to as late as the 9th of December, 1907, affidavits of merits were at various times filed by Joseph Bamford, Jr., and subsequently pleas were filed, and most of these cases were postponed upon the request of the counsel of the defendant, so that no judgments were entered until after the voluntary petition in bankruptcy was filed on the 27th of January, 1908.

The proofs show that the collateral de-

posited with the \$16,000 demand note made by Joseph Bamford, Jr., "verbally" guaranteed by Walter Bamford, and held by the Hamilton Trust Company, was sold by the Hamilton Trust Company as follows: The \$1,000 United States Steel Corporation bond, July 12, 1907, to Walter Bamford, for \$965. The 75 shares of United Shoe Machinery Company, preferred, part on July 15 and part on July 20, 1907, for \$2,024.37. The 3 Paterson & Passaic Gas & Electric Light Company bonds, August 29, 1907, for \$3,010.63. The 10 shares of the Bank of Charleroi, Pa., stock, September 25, 1907, to Walter Bamford, for \$4,000. The 142 shares of United Shoe Machinery Company, common, September 25, 1907, to Walter Bamford, for \$5,680. The total received from these securities was therefore \$20,270, which paid the \$16,000 note and left a balance of \$4,270.

The trust company claims that, by virtue of the provisions of the collateral notes taken by it, it was authorized and empowered, whenever any note came due to it, and was unpaid, to shorten the due day of all other notes of the same person and sell all collateral in its possession to pay the total of all notes of the same person held by it, and that, exercising this power, it proceeded, not only to sell sufficient collateral to reimburse it for the \$16,000 note which was payable on demand, but also the note for \$10,000, of July 1, 1907, which was not due until the 1st of November, 1907, and therefore, in addition to the sales of the collateral specifically deposited with the \$16,000 note, the sale of which as above stated produced an excess of \$4,270, it sold the 2,000 shares of Bamford Bros. Silk Manufacturing Company's stock (which was deposited as collateral with the \$10,000 note) on the 25th day of September, 1907, for \$5,000, to Walter Bamford. Before October 7, 1907, the German-American Trust Company notified Joseph Bamford, Jr., that unless he paid the \$12,000 which he owed it, and for which it held as collateral the 26 shares of Hamilton Trust Company stock and the 30 shares of Silk City Safe Deposit & Trust Company stock, it would on the morning of that day, at its banking house, sell the said securities, and on that day a representative of Walter Bamford appeared and bid the exact amount of Joseph's indebtedness, and paid for the same with Walter's check, and that stock passed into the possession of Walter.

On the judgment obtained on the 1st of March, 1907, by the First National Bank of Guttenberg against Joseph Bamford, Jr., as before stated, a levy was made upon his dwelling house in Arlington street, Paterson, and upon three automobiles owned by him, and on the 3d of January, 1908, the above property was sold by the sheriff and purchased by Walter Bamford for \$5,000, and since that time Joseph Bamford, Jr., has continued to reside in the said premises and has not paid any rent, although Walter and

he swore that Walter charges him with rent at the rate of \$40 a month; but they both agreed that he has not paid any, and what is called a "charge" seems to have been entirely in the minds of the parties, since they both agree that no account was made of it. After the sale of all the securities which were pledged to the Hamilton Trust Company by Joseph, Jr., there was still due the Hamilton Trust Company a sum slightly in excess of \$1,000, and on the 26th of October, 1907, Walter Bamford paid this amount. On the 4th of January, 1908, a partition suit was begun in this court by Walter Bamford against Joseph Bamford, Jr., respecting the parcels of land which they owned in common. This bill was filed by Wayne Dumont as solicitor for Walter Bamford, he being the solicitor of Joseph Bamford, Jr., before that time and after that time in all the suits brought against Joseph Bamford, Jr., and his solicitor in the case at bar as well as his attorney in the bankruptcy proceedings. Mr. Dumont on the witness stand explained that he represented Walter in that suit because there were judgments against Joseph, or at least one, and that there was a levy upon his property, and that he thought it would be better not to sell Joseph's undivided interest in that property, but to have it parted; that he was not able to get any information out of Joseph (although it is difficult to see what information he needed for this bill), and that he therefore applied to Walter and secured a consent from Walter to have the bill filed in Walter's name against Joseph. No one appeared for Joseph, and a partition sale was had at which Walter bought the property for \$5,000. This was for the whole property. Later the creditors of Joseph Bamford, Jr., applied to the chancellor, and had this sale set aside and a physical partition made, and the trustee in bankruptcy subsequently sold that portion of the land set off to Joseph for \$9,000. As before stated, on the 27th day of January, 1908, a voluntary petition in bankruptcy, the affidavit to which was made on the 24th day of January, 1908, was filed by Joseph Bamford, Jr., Wayne Dumont acting as his attorney. His schedule showed unsecured debts of \$81,702.42, and practically no assets whatever, excepting his interest in this undivided real estate, and some wearing apparel valued at \$200.

From the above recital of facts it therefore appears that, after the various transactions above recited, Walter Bamford became and was possessed of property theretofore owned by Joseph Bamford, Jr., as follows: 1 \$1,000 bond of the United States Steel Corporation; 10 shares of the Bank of Charleroi, Pa.; 142 shares of United Shoe Machinery Company, common; 26 shares of Hamilton Trust Company; 30 shares of Silk City Safe Deposit & Trust Company; 2,000 shares of Bamford Bros. Silk Manufacturing Company; dwelling house and lots on Arlington street, Paterson, N. J.; 3

automobiles. Since, for the purposes of this case, the complainant concedes that the prices paid for the other securities or properties were so near their value that no charge of inadequacy of price could properly be made, and the money paid therefor went to creditors of Joseph Bamford, Jr., no relief was asked for at the trial with respect to any of the above transactions excepting those concerning the 2,000 shares of Bamford Bros. Silk Manufacturing stock and the dwelling house on Arlington street, Paterson. The other transactions, therefore, will only be referred to in so far as they are useful in casting light upon the relevant facts and upon the transactions that are attacked, which are those just mentioned.

Leaving the real estate for separate consideration, the following relevant facts were proven respecting the sale of the 2,000 shares of Bamford Bros. Silk Manufacturing Company stock: As before stated, there were 6,000 shares of this stock, the par value was \$100, and they were owned equally, one-third each, by the father and the two sons. The father was president, Walter was treasurer, and Joseph was secretary and general manager or superintendent of the company. A dividend was paid in 1906. The only evidence of the value or worth of these shares was the following: On or about the 30th day of November, 1907, Walter Bamford, as treasurer of the company, caused to be sent to the Dun Commercial Agency a statement of the financial condition of the company, made by public accountants, and certified by them to correctly show such financial standing. By this statement it appears that the excess of assets over liabilities was \$943,794.62, which would make the book value of 2,000 shares on that day \$314,598.21. The complainant offered no evidence whatever, except this statement as to its value; and neither Walter nor Joseph Bamford, Jr., the defendants, offered any testimony or evidence whatever as to its value, nor did the defendant Walter Bamford make any explanation whatever respecting this financial statement. When examined before the referee in bankruptcy, he refused to testify as to how the profits of the business were divided among the three persons who owned it further than to say that there had been a dividend in 1906. Concerning other questions of value, he testified that he did not think about such things; and he refused, although ordered to do so, to answer whether he would consider that he suffered any loss if he gave up the stock upon being repaid what he paid for it, with interest and expenses in connection with the purchase.

Both he and Joseph seek to create the impression, by positive statement and suggestion, that from some period in 1906 through 1907 Joseph (who they say was drinking heavily at that time) and Walter were virtually strangers. Joseph testified before the referee in bankruptcy that, after he made

the note to the Hamilton Trust Company, he ceased drinking; and, also, that before that time he worked in his position as manager of the mills, with occasional absences due to his habits, and that during such times he saw his brother daily. And the case is filled with acts of Joseph during this period which show that he was attending to business, making notes and signing affidavits, and otherwise being as accessible as any other business man for business purposes. Walter himself testifies that, as early as the summer of 1907, it was "public property" that Joseph was in financial difficulties, was being "robbed" or had been "robbed," and either was about to be or was financially ruined. Notwithstanding the implication which these witnesses would convey that these brothers were strangers (although living side by side, and working side by side, and engaged in a mutual enterprise), it is undisputed that the Hamilton Trust Company, of which Walter was a stockholder and a director, and Joseph a stockholder, made the loan of \$10,000 to Joseph on the 2d day of March, 1907, solely at the request of Walter, and because he stated to Mr. Parmelee that he wished the company to do so. And it is also proven without contradiction that, after one suit had resulted in a judgment and other suits had been begun against Joseph, the Hamilton Trust Company, after consultation with Walter and upon what he calls his "verbal guarantee" therefor, loaned \$16,000 on a demand note made by Joseph Bamford, Jr., and took over the collateral which the former loaner had for that amount, and that this was done with the distinct understanding between Walter and the bank and Joseph that the purpose was to liquidate the securities and pay the banks, and they began immediately (although there is no evidence that up to this time they had made any demand on Joseph to pay this note) to sell these securities, and continued to sell them until they had not only paid the \$16,000 note, but had within \$1,000 of enough to pay that and the \$10,000 note on which Walter was the indorser, and for which the 2,000 shares of Bamford Bros. Silk Manufacturing Company stock was collateral.

It appears that on the 20th day of September, 1907, the Hamilton Trust Company made their first written demand upon Joseph Bamford, Jr., with respect to the \$16,000 note, and it appears from the language of this demand itself that they had already and before that time sold of the securities deposited therewith enough to realize \$6,000. That demand was as follows: "September 20, 1907. We desire to notify you that we wish to call for payment your demand loan dated July 1st, 1907, for \$16,000 on which there has been \$6,000 paid, leaving a balance due on same of \$10,000. We expect this note paid to-morrow before twelve o'clock, otherwise the collateral thereto will be sold, together with the collateral of your note for \$10,000, dated July 1st, 1907." It further appears that on the

23d day of September, 1907, Mr. Parmelee and Joseph Bamford, Jr., had an interview, as a result of which Mr. Parmelee framed the following letter for Joseph Bamford, Jr., to sign, and Joseph Bamford, Jr., did sign it: "September 23, 1907. Hamilton Trust Company—Gentlemen: I beg to acknowledge receipt from you of letter requesting the payment of my demand loan with you amounting to \$10,000, and to say that I am unable to comply with your request. As you hold as collateral security for the payment of my loans of \$20,000 the following: 142 shares common stock, United Shoe Machinery Corporation; 10 shares capital stock Bank of Charleroi, Pa.; 2000 shares Bamford Brothers Silk Mfg. Co., I hereby consent that the same be sold at public auction in the city of New York, and out of the proceeds I direct you to pay the amount due the Hamilton Trust Company and retain the balance for the benefit of my other creditors." Three days before this, and on the 20th of September, 1907, the trust company had already instructed Adrian Muller & Sons, auctioneers of the city of New York, to advertise the securities just mentioned for sale at their place in New York on the 25th of September, 1907. Before this it had been agreed between Walter Bamford and Mr. Parmelee that these securities should be sold, and Mr. Parmelee had undertaken to look after Walter Bamford's interests, as the latter was going away for a vacation. On the 25th of September, 1907, these securities were sold at Muller's, and brought the prices which have been before mentioned, namely, the Charleroi stock, \$4,000, the Shoe Machinery common, \$5,680, and the Bamford Company stock \$5,000, or a total of \$14,680. Subsequently, as has been before stated, and on October 26, 1907, the remaining security in the hands of the Hamilton Trust Company, to wit, the German-American Trust Company stock, was sold for \$4,590, and on the same day Walter Bamford paid the difference, which was something over \$1,000, to the Hamilton Trust Company, and received the notes of Joseph. Joseph testifies that he never received these notes, and knows nothing about them, and Walter testifies that he does not know what has become of them. Joseph, in fact, throughout his testimony, both before the court in this trial and before the referee in bankruptcy, sought to give the impression that he was practically oblivious to what had happened, and had no knowledge, and was not told anything by anybody. He says that he never knew what had become of his notes or of the large amounts of collateral that were deposited with them; that no one had ever told him. And yet he says that a few days after this Bamford Bros. Silk Manufacturing Company stock was sold he was told that he was no longer a stockholder of the company. So here, as elsewhere, it is evident that neither he nor Walter Bamford can be relied upon as giving a truthful version of what took

place, or as revealing the transactions between them and the knowledge which each had of the circumstances. Joseph testified before this court that he did speak to his brother about his financial affairs, and that his brother refused to aid him; and Walter testified that Joseph never spoke to him about his financial affairs. Walter also seeks to give the impression that he remembers very little about these important matters, and cannot now tell how in so many instances he knew exactly when his brother's properties were to be sold, and how he came to be present at the proper time to acquire them, excepting with respect to the Bamford Company's stock, which he says that he acquired by reason of an arrangement he made with Mr. Parmelee to protect him. It further appears that this sale was held at Walter's specific request. Mr. Parmelee testifies that he asked Walter to pay the \$10,000 note (although it was not due), and take over the stock, but Walter replied that he preferred to have it go to a sale. The reason for this preference is too obvious to require exposition. After the sale of this stock, Joseph continued performing exactly the same duties in the operation of the company's business as he had always theretofore, since its incorporation, performed, namely, he was the active silk maker, superintendent, or manager, or whatever title they gave him.

It will have been observed that most of the collateral securities pledged by Joseph and sold by the banks were those which have a recognized value in the market; and it is a significant fact that no such precaution was taken with respect to any other thing as with respect to the Bamford Company stock; and that as to that, and when it was determined to sell that, the two written papers were prepared, one the demand of September 20, 1907, for payment of the demand note of \$16,000 and the notice that the collateral held under it, and also under the note not yet due, would be sold; and, secondly, the letter prepared by Mr. Parmelee, and signed by Joseph Bamford, Jr., authorizing the sale in New York of this stock. It is also significant in my judgment that Walter Bamford abstained from aiding his brother in any of his other enterprises excepting when the stock of the Bamford Bros. Silk Manufacturing Company was pledged as collateral. This was pledged, as will be recalled, on the 2d of March, 1907, to the Hamilton Trust Company of which Joseph was a stockholder and Walter was a stockholder and director. Joseph at that time did not owe that company any money whatever according to his statement and that of Parmelee. Walter says that he thinks this \$10,000 had been theretofore loaned to Joseph. However this may be, it is undisputed that on the 2d of March, 1907, Joseph gave a note with this stock as collateral, and that Walter was not on that note. That loan was made at

Walter's request, and would not have been made without his request, and he subsequently indorsed the note. When this note came due, he induced the trust company also by what he calls a "verbal guaranty" to loan \$16,000 more to Joseph, taking over a former loan with the attendant collateral. Both he and Parmelee agree that this was done at Walter's request, and with the distinct understanding among them all (that is, Joseph, Parmelee, and Walter) that the securities should all of them be liquidated; that is to say, as I understand their testimony, that they should be sold as speedily as possible.

[1] It is impossible, after an impartial consideration of the testimony, to reach the conclusion that Walter, who is the brother of Joseph, who lived next door to him and worked side by side with him in the silk business, and had learned, as he himself says, by common repute that Joseph was financially embarrassed, if not ruined, did not know in July, August, and September of 1907 that any property of Joseph's which was sold for less than its full value was to the extent of such excess was being withdrawn from creditors of Joseph. After a most careful consideration of this testimony, I cannot escape the conviction that Walter did know of Joseph's financial condition, knew that he was tremendously involved, probably knew that a judgment had been obtained against him and that other suits were pending, and either by direct agreement with Joseph, or by some tacit understanding, set out to pay the creditors who had the collaterals in hand their full amounts, and secure to himself whatever of equity there was in such collaterals over and above the amounts due the secured creditors. There is, of course, no direct testimony of any agreement between Joseph and Walter to this effect, as there rarely is in any case of a fraudulent conveyance. But there is sufficient evidence to require any trier of fact to reach the conclusion that Walter knew that Joseph was largely indebted, was in a condition of financial embarrassment of a very high degree, and that the creditors of Joseph had already begun to pursue him and to attempt to reach his assets, and would undoubtedly continue to do so until they had secured their debts, or, at least, disposed of all his available assets in an endeavor to do so.

The question, therefore, to be considered, is, What is the legal effect of these findings, and what remedy is available to the complainant under the law as administered in this court?

First, it will be well to dispose of the charge in the bill that the transactions by which Walter secured Joseph's property constituted a preference within the meaning of the bankruptcy law. This matter was not subsequently referred to by counsel, and is

not mentioned in their briefs, and I assume that they have abandoned such charge.

[2] At the time that Walter purchased any of this property I do not think it would be proper to term him a creditor of Joseph's. At no time did Joseph owe him any money. Whatever rights he might have with respect to Joseph and Joseph's property were with respect to securing himself because he was an indorser upon a \$10,000 note of Joseph's. Even if this circumstance constituted him a creditor, the sale of the Bamford stock to Walter took place on the 25th of September, 1907, and, although Joseph swore to the voluntary petition in bankruptcy on the 24th of January, 1907, he did not file the same until the 27th of January, 1907, which, as will be observed, was two days more than four months, and the bankruptcy act only condemns preferences to creditors made within four months of the filing of the petition, and by withholding the petition from the 24th to the 27th a margin of two days is gained in favor of the transfer to Walter. Since, at the time of the purchase of the real estate, the only other transaction here sought to be impugned, there is no pretense that Walter was a creditor of Joseph's, the bankruptcy act would not apply to that transaction. With respect to the real estate, there was proof offered by the defendants from which I conclude that, if this transaction stood alone, there would be no occasion to disturb it because of the existence of any such inadequacy of consideration as to suggest fraud or other grounds for attacking or interfering with it.

[3] There is no question that a trustee in bankruptcy is a proper person to bring such a suit as this, and that the debts represented by him are so fastened on the property of the debtor that conveyances which would be held void or voidable at the instance of lien creditors are properly held voidable at the instance of the trustee in bankruptcy. *Levy v. Levy*, 57 Atl. 1011 (Reed, V. C., 1904); *Crane v. Brewer*, 73 N. J. Eq. 558; 68 Atl. 78 (Howell, V. C., 1907).

[4] The complainant contends that there is sufficient proof to lead the court to find that the transactions attacked were actually fraudulent, with the result that they should be wholly set aside in favor of the creditors of Joseph, Jr. To render this result a just one, the court must find that there was a covinous agreement between Walter and Joseph, Jr., to transfer the property belonging to Joseph with the intent to hinder, delay, and defraud the creditors of Joseph, Jr. It is not sufficient to a determination of actual fraud to find that the debtor disposed of or made away with his property with the intent to hinder, delay, and defraud his creditors. There must be found, in addition thereto, proof of a participation by the transferee or grantee in such intent. *Muirhead v. Smith*, 35 N. J. Eq. 308, 311 (Ct. of Er., 1882); *N. Y. Fire Ins.*

Co. v. Tooker, 35 N. J. Eq. 408, 412 (Van Fleet, V. C., 1882); *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244, 249, 24 Atl. 928 (Pitney, V. C., 1892); affirmed 50 N. J. Eq. 486, 27 Atl. 636; *Clafin Co. v. Freudenthal*, 58 N. J. Eq. 298, 302, 43 Atl. 529 (Emery, V. C., 1899); *Perrine v. Perrine*, 50 Atl. 694 (Pitney, V. C., 1901), and innumerable cases cited in the notes in 32 L. R. A. 33, and 36 L. R. A. 335. Each case, of course, must be judged by its own facts, and if, in the case at bar, moneys paid by Walter had gone to Joseph so that he might have used them as he saw fit, I would be strongly inclined to find that under the circumstances above detailed the transactions should be wholly set aside at the instance of Joseph's creditors, and Walter deprived of the property, with the consequent loss of what he had paid. But it is the fact that in the two instances in which the transactions are now under review, to wit, the Bamford stock and the real estate, the transfers were made at sales held at the instance of creditors of Joseph, Jr.—one a judgment creditor with an execution, and the other the holder of a collateral note.

[5] It is true, and has been firmly established, that in the pursuit of fraud, or in investigating with respect to it, the substance of the transaction is viewed, and not its form; and that, therefore, it is immaterial whether such fraud was perpetrated by means of judicial or other public sales, or whether it was by private agreement and transfer. *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35 (Ch. Zabriskie, 1871), affirmed 24 N. J. Eq. 556 (Ct. of Er., 1873); *Lund v. Eq. Life Ins. Co.*, 31 N. J. Eq. 355 (Ct. of Er., 1879); *Mech. Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486, 489 (Van Fleet, V. C., 1881), affirmed 35 N. J. Eq. 344 (Ct. of Er., 1882); *Sands v. Codwise*, 4 Johns. (N. Y.) 536, 565, 4 Am. Dec. 305; *Farr v. Simms*, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 306 (1832). But the fact that the transactions attacked are in each case sales held at the instance of creditors of Joseph Bamford, Jr., and that the money realized went to pay the legitimate debts of such vending creditors, is important, not only with respect to the question of whether there was actual fraud or not, but also upon the question of the relief to be accorded as against the purchaser, namely, Walter Bamford. In any event, it seems to me that his payment at these sales of money which went to satisfy the legitimate creditors at whose instance these sales were held entitles him to protection to the extent of such payments. And, as bearing upon the question of actual fraud, the nature and circumstances of these sales make it more difficult to find a justifiable basis for determining that there was the kind of actual fraud which the court must find to hold void in toto the transfer of the property.

[6] It is true that a man cannot shut his

eyes to avoid the responsibility occasioned by seeing what he would otherwise see, and that such circumstances as put one upon inquiry charge him with the responsibility of what he would learn if he properly pursued such inquiry. And with respect to this particular subject it has been held that creditors or others dealing with a failing debtor are chargeable with such facts as they would have learned had they properly investigated, provided facts were brought to their attention which would lead a reasonable man in like circumstances to investigate. *Atwood v. Impson*, 20 N. J. Eq. 150 (Ch. Zabriskie, 1869); *Tantum v. Green*, 21 N. J. Eq. 364, 369 (Ct. of Er., 1869); *De Witt v. Van Sickle*, 29 N. J. 209, 216 (Van Fleet, V. C., 1878); *Holt v. Creamer*, 34 N. J. Eq. 181, 189 (Van Fleet, V. C., 1881); *N. Y. Fire Ins. Co. v. Tooker*, 35 N. J. Eq. 408, 412 (Van Fleet, V. C., 1882); *Moore v. Williamson*, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336 (Ch. McGill, 1888); *Kilmouth v. White*, 47 Atl. 1 (Pitney, V. C., 1900); *Russell & Erwin Co. v. Faltoute Co.*, 62 Atl. 421, 423 (Emery, V. C., 1906).

[7] Undoubtedly in this suit there were circumstances which would have led a reasonable man, circumstanced as Walter Bamford was, to investigate concerning the financial condition of Joseph Bamford, Jr. These transfers were made while suits were pending against the debtor, which is always a suspicious circumstance. *Morris Canal & Bkg. Co. v. Sterns*, 23 N. J. Eq. 414 (Ch. Zabriskie, 1873); *Randall v. Vroom*, 30 N. J. Eq. 353 (Ch. Runyon, 1879); *Hoboken Bank v. Beckman*, 36 N. J. Eq. 83, 86 (Ch. Runyon, 1882); *Christie v. Bridgman*, 51 N. J. Eq. 331, 334, 25 Atl. 939, 30 Atl. 429 (Green, V. C., 1893). The haste to liquidate the securities, the sale of the Bamford stock before the note to which it was attached as collateral was due, the selling of it in New York City without any special notice being given to the public at Paterson, the home of the debtor, the scene of the company's activities, and the natural place for creditors to look for information, are all circumstances casting grave suspicion upon the transaction. The active, willing co-operation of the debtor in having his property sold, contrasted with his supineness and neglect to take any steps to protect himself, are additional factors of importance, and cast light upon the transaction.

[8] And, while a settlement upon one dependent upon the settler may not be considered as a badge of fraud, dealings between near relatives, one of whom is largely indebted and the other of whom obtains his property, are viewed with suspicion. *Demarest v. Terhune*, 18 N. J. Eq. 532 (Ct. of Er., 1867); *Gnichtel, Rec., v. Jewell*, 59 N. J. Eq. 651, 44 Atl. 1099 (Ct. of Er., 1899). Walter himself testifies in the bankruptcy proceeding that in the summer of 1907, long before the transactions complained of, it

was "public property" in Paterson that his brother was in the hands of "robbers," was in a poor financial condition, and either was or shortly would be financially ruined. The very fact that the Hamilton Trust Company (of which both Joseph and Walter were stockholders, and from its inception had been directly or indirectly depositors) would not loan money to Joseph, although he did not at that time owe them anything, was sufficient to put Walter upon inquiry as to why this was so; and the fact that subsequently it was only at his request and insistence that it made the second loan to Joseph likewise must be held in law to have advised him that Joseph's position was very precarious, and that the presence of other debts was the occasion of his being brought into the matter. In fact, the conclusion is inevitable that Walter either knew, or must in law be charged with knowing, that Joseph was heavily indebted, and, unless some one came to his rescue, would lose a large part if not all of his property, which, as has been above shown, was considerable.

[9] As I understand the law, if one is affected with such knowledge, and purchases the property of the debtor, even in the absence of proof of a participation with the debtor in an intention to hinder, delay, and defraud the creditors of the debtor, he must either pay approximately the value of the property that he takes of the debtor, or take the risk of being held responsible for any inadequacy if it is of such an amount as to show that the sale to him was not a fair and proper one under the circumstances. This rule has been held, not only with respect to creditors of the debtor who take property from the debtor and who are held liable for the excess over the amount of their debt, but also as to purchasers not creditors. This doctrine is based upon the theory that with respect to all of the property transferred in excess of consideration the conveyance is voluntary and therefore fraudulent. See Chief Justice Beasley's statement in *Demarest v. Terhune*, 18 N. J. Eq. 532, 539 (Ct. of Er., 1867).

[10] The same learned justice in *Haston v. Castner*, 31 N. J. Eq. 697 (Ct. of Er., 1879), held that, as to a voluntary conveyance made by one who is indebted, there was an irrebuttable presumption of fraud; and this has since been followed in this state, the citations being too numerous for inclusion. This doctrine with respect to voluntary conveyances was first laid down in its extreme vigor in the case on which Chief Justice Beasley relies, decided by Chancellor Kent in 1818—*Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520. Prof. Pomeroy (2 Pomeroy's Eq. Jurisp. [3d Ed.] § 972, p. 1799 et seq., notes), in commenting upon this doctrine and the cases, says that Chancellor Kent misinterpreted the English cases, and that the later English cases have repudiated the doctrine, as have the later New

York cases, and that it has either been repudiated or never adopted in various other jurisdictions. He says that the true doctrine is to consider a voluntary conveyance made by one who is indebted as a badge of fraud, and to take into consideration all of the other elements in reaching a decision as to whether it is or is not fraudulent under the statute.

[11] Since the rule which makes a voluntary conveyance absolutely void as against creditors is applied in cases where the grantee or transferee is admittedly free from any actual fraud or participation, and since the statute has been construed to require a finding of actual participation by the grantee or transferee before it is operative, it may be that the doctrine of irrebuttable presumption of fraud is not a satisfactory basis for these decisions, and that they are more properly justifiable under the general jurisdiction of the court of equity irrespective of the statute than by grounding them upon the statute by using the presumption as a means of doing so. Our statute (2 G. S. p. 1804, § 12) is a modern rendering of the English statute of 13 Eliz. c. 5; and the latter has, in cases too numerous for citation, been held to be merely declaratory of the common law respecting this subject-matter, Lord Mansfield remarking, in *Cadogan v. Kennett*, Cowp. 434: "The principles and rules of the common law as now universally known and understood are so strong against fraud in every shape that the common law would have attained every object proposed by the Statutes 13 and 15 Eliz." In the following textbooks and cases and the notes referred to will be found many statements of this doctrine: May on Fraud. Conv. p. 3; Story, Eq. Jurisp. (13th Ed.) § 352; *Hamilton v. Russell*, 1 Cranch, 309, 2 L. Ed. 118 (1803), and citations in *Rose Notes to the U. S. Reports*; *Clements v. Nicholson*, 78 U. S. 299, 18 L. Ed. 786 (1867), and *Rose's notes* thereto; *Hudnall v. Wilder*, 4 McCord (S. C.) 294, 17 Am. Dec. 744, notes and extra annotation in the new edition; *Farr v. Simms*, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396, notes and extra annotation in the new edition.

[12] In our own courts of equity there will be found to have been exercised a jurisdiction concerning this subject-matter which I can only justify upon the theory that inherent equitable powers were being exercised irrespective of any statute. *Disborough v. Outcalt*, 1 N. J. Eq. 298, 307 (Vroom, Ch., 1831); *Crane v. Conklin*, 1 N. J. Eq. 346, 353, 22 Am. Dec. 519 (Vroom, Ch., 1831); *Cook v. Johnson*, 12 N. J. Eq. 51, 53, 72 Am. Dec. 381 (Williamson, Ch., 1858); *Robert v. Hedges*, 16 N. J. Eq. 299, 302 et seq. (Green, Ch., 1863); *Demarest v. Terhune*, 18 N. J. Eq. 532, 539 et seq. (Ct. of Er., 1867); *Tantum v. Green*, 21 N. J. Eq. 364 (Ct. of Er., 1869); *Walsh v. Rosso*, 41 Atl. 669 (Pitney, V. C., 1896), same case on final hearing, 59 N. J. Eq. 123, 44 Atl. 708 (Stevens, V. C., 1899). See,

also, *Sands v. Codwise*, 4 Johns. (N. Y.) 596, 360, 596, 4 Am. Dec. 805; *Story, Eq. Jurisp.* § 373.

[13] And with respect to the specific application of this doctrine to the facts in the case at bar it will be found that it is thoroughly settled that, in the absence of satisfactory proof of actual fraud, the alienation will be sustained to the extent of the consideration actually given, and declared voluntary and void as to the residue. *Coley v. Coley*, 14 N. J. Eq. 350 (Green, Ch., 1862); *Demarest v. Terhune*, 18 N. J. Eq. 532 (Ct. of Er., 1867); *Morris Canal & Bkg. Co. v. Stearns*, 23 N. J. Eq. 414 (Zabriskie, Ch., 1873); *Muirheid v. Smith*, 35 N. J. Eq. 309 (Ct. of Er., 1882); *Withrow v. Warner*, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501 (Ct. of Er., 1898); *Moore v. Williamson*, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; *Wheeler & Wilson v. Lithwin*, 57 N. J. Eq. 660, 43 Atl. 1098 (Ct. of Er., 1898); *Gnichtel, Rec., v. Jewell*, 59 N. J. Eq. 651, 44 Atl. 1099 (Ct. of Er., 1899); *Merchants' B. & L. Ass'n v. Barber*, 30 Atl. 865 (Bird, V. C., 1894); *Kinmonth v. White*, 47 Atl. 1 (Pitney, V. C., 1900); *Perrine v. Perrine*, 50 Atl. 694 (Pitney, V. C., 1901); *O'Connor v. Williams*, 53 Atl. 550 (Pitney, V. C., 1902). And see cases collected in note to 21 L. R. A. (N. S.) 222.

There is no question that under the statute there must be found to have been an actual intent on the part of both parties to hinder, delay, and defraud creditors, and that as a necessary ingredient there must be proof satisfactory to the court of the participation of the grantee or transferee in such fraudulent intention. See cases previously cited. Whereas, in the case of a voluntary conveyance, or one which, as above stated, is found to be voluntary as to the excess over proper consideration, and in many of the cases above cited, the relief accorded to the creditors as against transfers of the debtor is admittedly not based upon a finding of participation by the grantee or transferee in any fraudulent intent. Justice Swayne, speaking for the Supreme Court of the United States in *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786, said, respecting the jurisdiction exercisable in equity in this respect: "It remains to consider the law applicable to this state of facts. The statute of 13th Elizabeth has been substantially enacted in Texas. The same legal principles apply there in this class of cases as in the other states where similar statutory provisions exist. As was remarked by Lord Mansfield in *Cadogan v. Kennett*, 2 Cowp. 432, the common law, without the statute, would have worked out the same results. A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where the purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge.

When the act of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors by means of the fraud."

It therefore seems that if these conveyances thus condemned were so condemned upon the ground that equity "requires a man to be just before he is generous," and that, when he is indebted, his property is held by him for his creditors, and must not be diverted from them, unless its equivalent is put in its place for them, there is a broader and more reasonable theory to use in favor of creditors than by resorting to presumptions which do violence to the proven facts of the case; and such theory seems to square itself with each of the cases in which this relief is accorded, as has been suggested by the note writer annotating *Lawyers' Reports Annotated* (5 L. R. A. [N. S.] 395), note. Trusts and frauds have always been peculiarly within the jurisdiction of equity, and it is eminently proper that that court should hold that since a man must be just before he is generous, and since, when he is indebted, he holds his property so to say in trust for his creditors, he will not be permitted, as against his creditors, to give away his property, and, when he attempts to do so, the court will nullify that attempt, holding that it is fraudulent for the grantee or transferee to accept and hold the same as against the creditors, and that it is impressed with a trust in their favor. It need hardly be remarked that courts have been always zealous of the rights of creditors; and Story points out that from the earliest period in civilized nations attempts of the debtor to obstruct the creditor have been disapproved and circumvented as occasion required. Story, Eq. Ju-

risp. (13th Ed.) § 350 et seq. However, whether the theory just suggested or the earlier one of an irrebuttable presumption of fraud is a correct one, the result, of course, is the same, and there can be no doubt that as to so much of the conveyance as is voluntary it is the right of the creditor in this court to have it set aside in his behalf, the cases to establish which have been above cited.

The doctrine with respect to conveyances upon some consideration, and therefore unattackable at law, but subject to attack in equity, was first clearly laid down by Chancellor Kent in *Boyd v. Dunlap*, 1 Johns. Ch. (N. Y.) 478 (1815); and this was adopted in New Jersey by Chancellor Green in *Beeckman v. Montgomery*, 14 N. J. Eq. 106, 113, 80 Am. Dec. 229 (1861); and has since been followed in *Coley v. Coley*, 14 N. J. Eq. 350, 354 (Green, Ch., 1862), and *Demarest v. Terhune*, 18 N. J. Eq. 532, 539 (Ct. of Er., 1867); and cited with approval in *Robinson v. Urquhart*, 12 N. J. Eq. 515, 537 (Williamson, Ch. 1858); *Lashley v. Souder*, 24 Atl. 919, 921 (Pitney, V. C., 1892); and the principle has been applied in all of the numerous cases above cited holding that a court of equity will decree a conveyance voluntary for any excess of such an amount as to shock its conscience over the actual value of the consideration given for the property conveyed or transferred. As formulated by the Court of Errors and Appeals in the case of *Withrow v. Warner*, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501, it is as follows: "Where in a court of equity a deed is sought to be set aside as voluntary and fraudulent as against creditors, and the evidence is not sufficient to induce the court to avoid the deed absolutely, but is sufficient to excite a well-grounded suspicion as to the adequacy of the consideration and the fairness of the transaction, the court will permit the conveyance to stand as security for the consideration actually given." And in the case at bar all of these elements surely exist. There is apparently a great inadequacy of consideration with respect to the Bamford stock. The value of the 2,000 shares, as shown by its books, according to a statement approved of by Walter Bamford, at a time very shortly after this stock was acquired by him, exceeded \$314,000, for which he paid \$5,000. The circumstances, which have been stated in considerable detail, certainly were such as to arouse suspicion. Walter Bamford was undoubtedly chargeable in law with the responsibility of investigating if he wished to hold what he was about to acquire in its entirety; and, if he had investigated, he would have found that Joseph, Jr., was not in such position that the law would permit him to give away, as against his creditors, any property.

[14] Whether this doctrine, as applied in this state, would have protected Walter Bamford under the circumstances if he had

paid what he did pay directly to Joseph, Jr., I do not consider nor attempt to pass upon, because I find that it has been settled in this state that, where the consideration paid went to satisfy legitimate debts of the debtor, the purchaser will be protected to that extent; and, as that is the case in the suit at bar, it is proper to apply the principle thereto. *Smith Co. v. O'Brien*, 57 N. J. Eq. 385, 41 Atl. 492 (Pitney, V. C., 1898); *Gray v. Folwell*, 57 N. J. Eq. 446, 455, 41 Atl. 869 (Pitney, V. C., 1898).

It is contended by the complainant that he has affirmatively shown that the consideration paid by Walter for Joseph's stock was inadequate. He bases this contention upon the following: That, where there is no evidence as to the value of stock, the par value is presumed to be its value; and for this he cites *Harris' Appeal* (Pa.) 12 Atl. 748; *Moffitt v. Hereford*, 132 Mo. 513, 34 S. W. 252; *Brinkerhoff v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Cook on Corporations* (5th Ed.) § 581. And he contends that he has further shown this by proving the statement approved by Walter Bamford showing the book value of the stock; and cites authorities which he says show that, where there is no known market value, the value may be proven by showing the value of the property and the business of the corporation, less the amount of its liabilities, citing therefor *Cook on Corporations* (5th Ed.) § 581, and the numerous cases there cited, and also *Sedgwick on Damages* (8th Ed.) § 257, *Morawetz on Corporations* (2d Ed.) § 268, *Industrial, etc., Co. v. Tod*, 180 N. Y. 215-232, 73 N. E. 7; and, with respect to the fixing of the value of bonds, *O'Brien v. Home Benefit Society*, 117 N. Y. 310, 22 N. E. 954. But in my view of the facts in this case and the law applicable thereto the complainant should succeed, even though it be not found that he has established by affirmative proof the value of the stock as a basis of charging that the amount paid for it was inadequate.

[15] In my view (in which I find myself supported by the authorities) the proven facts with respect to Walter's conduct and Joseph's financial condition cast the burden upon Walter of proving, in view of the apparent inadequacy, what the actual value of the thing purchased was, so that the court could determine that his conduct with respect thereto was fair and equitable, and that in holding it he is not fraudulent with respect to any excess of the value of the thing bought over the price paid. *Demarest v. Terhune*, 18 N. J. Eq. 532 (Ct. of Er., 1867); *Muirhead v. Smith*, 35 N. J. Eq. 309, 312 (Ct. of Er., 1882); *Hoboken Bank v. Beckman*, 36 N. J. Eq. 83, 86 (Runyon, Ch., 1882); *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55 (Ct. of Er., 1888); *Withrow v. Warner*, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501 (Ct. of Er., 1898); *Gnitchel, Rec., v. Jewell*, 59 N. J. Eq. 651, 44 Atl. 1099

(Ct. of Er., 1899); *Adoue v. Spencer*, 62 N. J. Eq. 782, 785, 49 Atl. 10, 56 L. R. A. 817, 90 Am. St. Rep. 484 (Ct. of Er., 1900); *Perrine v. Perrine*, 50 Atl. 694 (Pitney, V. C., 1901).

[16] It will be recalled that this defendant, Walter Bamford, is shown to have himself approved of a statement which, if true, would make the book value of these 2,000 shares over \$314,000, and that he paid \$5,000 for them; and there is therefore indubitably an apparent inadequacy of consideration of so great an amount as to fulfill all the cases which deal with inadequacy which will move the court, and which place him, as I have before said, in a position where I find the burden was upon him to justify the transaction. He has not only failed to sustain this burden, but does not even attempt to do so; and, in fact, when questioned in the bankruptcy court, refused to answer the questions which would cast any light upon this subject. I do not find from the facts that there is any such apparent disparity of value between the thing bought and the price paid with respect to the real estate; and therefore, in view of the fact that what was paid for it went directly to a judgment creditor with the result that I have above stated, I do not purpose administering any relief to the complainant with respect thereto. With respect to the 2,000 shares of Bamford Bros.' stock, I do find that they were acquired by Walter Bamford under such circumstances that he can only be protected with respect thereto to the extent of the money which he actually paid and which went to the creditors at whose instance the sale was had. This amount, it will be recalled, was \$5,000.

[17] The remaining question is with respect to the remedy. Finding, as I do, that Walter Bamford has a first right or lien to be repaid the amount of money which he paid to the legitimate creditor of Joseph in this behalf, and finding that any excess of value of the stock over the amount necessary to repay Walter is available for the creditors, equity would be done by requiring a sale of the stock after the lien of Walter has been protected. It would not do to order a sale with a proviso that out of the moneys received Walter should be first paid, because, if the stock did not bring sufficient to repay Walter, then an inequity would be done him. Therefore the complainant must give bond, satisfactory to the court, to indemnify Walter for the amount that is found to be due him on the transaction. And then, after such indemnity has been given, the stock shall be sold, and, if it brings sufficient to pay Walter and a surplus, the fund shall be thus distributed. If it does not bring sufficient, then, of course, to the extent that it goes the money should be paid to Walter on account of his claim, and the balance would be paid him out of the indemnity bond given herein. This relief I find in accordance with the practice

and principles enunciated and illustrated by the following cases: *Beeckman v. Montgomery*, 14 N. J. Eq. 106, 80 Am. Dec. 229 (Green, Ch., 1861); *Demarest v. Terhune*, 18 N. J. Eq. 532, 540 (Ct. of Er., 1867); *Roe v. Moore*, 35 N. J. Eq. 526 (Ct. of Er., 1882); *Cole v. Lee*, 45 N. J. Eq. 779, 18 Atl. 854 (Ct. of Er., 1889); *Withrow v. Warner*, 56 N. J. Eq. 795, 35 Atl. 1057, 40 Atl. 721, 67 Am. St. Rep. 501 (Ct. of Er., 1898); *Moore v. Williams*, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336.

The decree will be settled upon notice.

EBERHARDT et al. v. CHRISTIANA WINDOW GLASS CO. et al.

(Court of Chancery of Delaware. Nov. 23, 1911.)

1. CORPORATIONS (§ 610*)—APPOINTMENT OF DIRECTORS AS LIQUIDATING TRUSTEES—EVIDENCE.

Evidence held to show that three directors of a failing corporation were appointed by all the stockholders as liquidating trustees to wind up the corporation, and they became trustees, with duties, powers, and limitations applicable to all trustees.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

2. CORPORATIONS (§ 610*)—LIQUIDATION—TRANSACTIONS BY TRUSTEES—VALIDITY.

Where one of three liquidating trustees of a failing corporation acquired title to corporate property, the stockholders could avoid the transfer and participate in the profits on a resale, on their asserting their rights promptly after knowledge of the transaction.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

3. TRUSTS (§ 198*)—TRANSACTIONS BY TRUSTEES—VALIDITY.

Where a trustee remains in possession of land of the trust estate which he has purchased, the sale will be adjudged void at the suit of the cestui que trust; but where the trustee has parted with the land at an advanced price, he must account for the difference in the value.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 258-265; Dec. Dig. § 198.*]

4. CORPORATIONS (§ 610*)—LIQUIDATION—TRANSACTIONS BY TRUSTEES—VALIDITY.

One of three liquidating trustees of a failing corporation obtained from the two an option to purchase the corporate plant, to convey it to a new corporation formed by the trustee and his wife and son. The property was conveyed to the new corporation, and it assumed the debts of the former corporation, and the new corporation, after a sale of the property at a profit, paid such debts. The purchaser from the new corporation had no notice of the facts, and a bank in good faith took as collateral security a mortgage executed by the purchaser for the price. Held, that equity, at the suit of stockholders of the failing corporation, would compel an accounting of the profits of the transaction, but could not interfere with the title of the purchaser of the new corporation or the pledgee of the mortgage.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 610.*]

Suit by Frederick A. Eberhardt and others against the Christiana Window Glass Company and others for an accounting. Heard

on bill, answer, proofs, and exhibits. Decree for complainants.

See, also, 74 Atl. 33.

John P. Nields and Christopher L. Ward, for complainants. L. Irving Handy, for defendants Christiana Window Glass Co., John L. Byrne, Michael J. Byrne, Byrne Glass Co., Mary E. Byrne, Edward J. Byrne, and John E. Fox.

The solicitors for the other defendants did not participate in the argument.

THE CHANCELLOR. The seven complainants were formerly stockholders of the Christiana Window Glass Company, and assert that, though nominally they had assigned their shares to the company, they were still equitably entitled to the rights of stockholders to participate in a distribution of the assets of the company in liquidation. In 1886 the company was formed by 17 practical glass workers, including the complainants, each having subscribed and paid for an equal amount of the capital stock, and the company carried on the business of making and selling window glass until 1908, in effect on the co-operative plan, practically all the stockholders being engaged in making or selling the glass. From time to time, in addition to regular wages, sums were paid to the several stockholders as advances, at irregular times and in different amounts, without undertaking to equalize them among the stockholders. These amounts were charged against the individual stockholders. For several years the enterprise prospered. The company first leased and then bought for \$25,000 a plant, and paid for and improved it, until they had so expended about \$37,000 from earnings. Some of the original stockholders dropped out until 13 of them remained in 1908. For several years before 1908 the company had been losing money, owing to a change in the cost of production of glass making elsewhere. Finally, being without money to buy supplies, the end was reached on January 10, 1908, when the plant was shut down and operations were never resumed. This threw out of employment the stockholders, who were still carrying on the business on the co-operative plan, but who were evidently surprised by the sudden termination of the activities of the company and financially unprepared therefor. At this time Patrick J. Byrne was president and general manager, John L. Byrne secretary, and there were five directors, but none of them received salaries beyond their wages like the other stockholders, employees in the several employments in the common business.

At the cessation of business the assets of the company consisted of the glass factory and about five acres of land in the city of Wilmington, which at a conservative estimate was then worth about \$10,000, manu-

factured stock valued at about \$6,000, and bills receivable of face value of about \$2,500, aggregating, according to John L. Byrne's estimate, \$18,500. The debts consisted of a note of \$4,100, made by the company to Central National Bank of Wilmington, indorsed by Michael J. Byrne, and a bond made by the company to Michael J. Byrne for \$4,000, the aggregate being \$8,100. At this time the amounts charged against the several stockholders varied in amounts from \$54.38, charged against William H. Myers, to \$2,679.92, charged against John L. Byrne, \$2,974.11 against Patrick J. Byrne, \$3,009.92 against E. H. Byrne, and \$4,772.42 against A. P. Byrne; but none of these sums were collectible, the debtors being without property available, so that these debts due the company were not of consequence as realizable assets.

It being clear that a further continuance of the business was unwise, and that liquidation was inevitable, the advice of counsel was sought as to the best methods of winding up the company. A receivership was advised, and Patrick J. Byrne and John L. Byrne also considered together the plan of having the affairs put in their hands to be settled. On Saturday, January 11, 1908, a meeting of the stockholders was held, at which all were present except Michael J. Byrne and Edward H. Byrne, and another meeting was held on Tuesday, January 14, 1908. There is so much dispute as to what in fact took place at these meetings that it is difficult to reconcile all the evidence, including the testimony of witnesses as to what took place, the minutes of the meetings and the formal agreements and written instruments actually signed. It is conceded on all sides that at the meeting on January 11th the plan of constituting Patrick J. Byrne and John L. Byrne as trustees in liquidation was discussed, and that no conclusion was reached, but legal advice was to be taken as to it. It was understood by all present, however, though the minutes do not disclose that any such action was taken, that the stockholders, who had been thus suddenly thrown out of employment, should each receive \$100 from the company to tide over their personal financial needs, and that Patrick J. Byrne and John L. Byrne were each to receive \$25 per week for services as liquidators. John F. Malloy and John W. Brady, the legal counsel of the company, decided that, under the provisions of the charter of the company, the suggested plan for all the stockholders to turn over their shares of stock to Patrick J. Byrne and John L. Byrne to act as trustees could not be used. By the charter, no stockholder could hold or own more than 20 shares, nor less than 10 shares of stock, and this was considered a bar to the method. There is another provision of the charter which provided that, in case a stockholder desired to withdraw his shares, the company had the

right to buy them at a valuation of the stock to be made by two appraisers, one appointed by the company and one by the withdrawing stockholder. (See section 8, par. "b," of the charter.)

Mr. Brady was present at the meeting held on January 14, 1908, at which all the stockholders were present, except Michael J. Byrne, who, by the way, does not seem to have participated in the preliminary arrangements. Preparations had been made by Mr. Brady of a plan, and the papers and proceedings necessary to carry them into effect had been prepared in advance by him, including the minutes of the proposed meeting. He explained to those present that it was unadvisable to liquidate by a receivership, and gave reasons, and stated the difficulties preventing the transfer of all the shares to two of the stockholders to liquidate, but that "they could get around the difficulty by paragraph 'b' of section 8" of the charter; that is, having the shares of the withdrawing stockholders assigned to the company, the assignors to receive from the company \$100, as agreed upon at the prior meeting. So far there does not seem to be much dispute about the facts. It is also undisputed that at this meeting on January 14, 1908, certain things were done:

(1) All the stockholders indebted to the company (and they were all so indebted, except Michael J. Byrne) signed a paper, in the form of an agreement with the company, signed for the company by Patrick J. Byrne, as president, and F. A. Eberhardt, as secretary, of the Christiana Window Glass Company, reciting the indebtedness of the individual stockholders to the company, by reason of the amounts withdrawn by them, and stating the several amounts, and agreeing further as follows:

"That in the event of the sale of the property, real and personal, of the said party of the first part each of the parties of the said party of the second part shall have deducted from his share of the proceeds of such sale, the amount of money in which he is indebted to the said party of the first part."

This agreement was read to and fully understood by all present.

(2) Each stockholder signed a form for assignment of his shares on the back of the certificate, the name of the assignee being then blank, and the certificates were left with the company.

(3) The number of directors was reduced from five to three. Three directors resigned, whereby Patrick J. Byrne and John L. Byrne were left as the only surviving directors, and Michael J. Byrne was then elected to be the third director.

[1] It is claimed by the complainants that it was the clear understanding of all present that this was a method adopted to constitute the three directors liquidators, whose duty it was to collect the assets, including a sale of the plant, pay all the debts and di-

vide the balance among all the stockholders equally, including all those who had technically withdrawn as stockholders, each one being charged with the amounts due from him to the company, and the two directors, Patrick J. Byrne and John L. Byrne, to be paid a salary for their services as liquidators; that they had not really withdrawn as stockholders; that they never appointed an appraiser to value the stock for them; that they could hold the liquidating directors to the responsibility of trustees, and obtain an accounting for their dealing with the trust property.

On the other hand it is claimed that the withdrawals of the complainants as stockholders were actual and real, the company having become the purchaser and assignee of their shares made under the charter for \$100 after due appraisal thereof, and that they thereby definitely and finally disposed of all their legal and equitable rights as stockholders, and had no right to an accounting from the liquidating directors.

It is clear beyond doubt that the contentions of the complainants are proven by the testimony. By the testimony of the complainants, by that of Mr. Brady (pages 603, 605, 664 and 665 of the testimony) and of John L. Byrne (pages 873, 874 and 878), the plan of a trusteeship having been declared impracticable, the method actually adopted was substituted to accomplish the same purpose, viz., constitute the 3 directors liquidators, and that after liquidation the stockholders, meaning all the 13 persons, including the complainants, who held shares of stock at the cessation of business, should share the surplus; if any there was, for distribution, notwithstanding the apparent termination of their interest and rights as stockholders by the assignment of their stock. The only witness most interested to deny this, not only does not do so, but practically admits it to be true. In his testimony, John L. Byrne, on page 879, testified as follows:

"Q. You had told these withdrawing stockholders that so far as you could bring it about that after the debts of the Christiana Window Glass Company had been paid and its affairs settled, if there was any surplus left you would see that it was divided among the stockholders least overdrawn?

"A. Yes; I told them that and would have done more. * * * (The rest of the answer being immaterial.)

See, also, pages 881 and 882. Again on pages 906 and 907 he testifies:

"X. I hand you 'Complainants' Exhibit No. 1,' Mr. Byrne, executed on the 14th day of January, 1908, by the stockholders, and I will ask you what you mean when you testify that this paper was executed to protect you?

"A. I had agreed personally, understand, if there was any money left over after the payment of the debts, that I would be will-

ing and do all in my power to distribute that among the people least overdrawn. I didn't keep the books and had no access to them. I wanted to know exactly how each man stood, so that if there was anything left over there would be no comeback on the others, and I wanted this for my own protection, and, therefore, they all signed it.

"X. That is, if there was any distribution of the surplus?

"A. If there was any.

"X. If there was any, the ones least overdrawn were to receive it?

"A. That is it.

"X. That is the understanding you had with the men?

"A. What is that?

X. What you have just testified to; if there was any money left after the payment of the debts it would be distributed among those least overdrawn?

"A. Yes.

"X. On this 14th day of January?

"A. Yes.

"X. 1908?

"A. Yes.

"X. Mr. Byrne, if the plant had sold for \$20,000 10 days after the 14th day of January, would you have divided that surplus, according to that understanding?

"A. I certainly would."

In addition, there is the agreement between the company and all the stockholders, except Michael J. Byrne, which is the written evidence of that which was so clearly understood. This is the "Complainants' Exhibit No. 1," which, as John L. Byrne says on page 882, was drawn for the purpose of making this arrangement clear and fixing the amounts due from the several stockholders to the company. Mr. Brady says that this was drawn and signed so that "in case there should be a distribution of surplus there would be a means of ascertaining how much each man should have deducted from his share." (See page 656.) The sum of \$100, which it was agreed should be paid to the stockholders, was not treated on the books of the company as payments on account of the purchase of the stock, but as to nine, at least, of the stockholders was charged as loans, or advances, to them according to the plan theretofore adopted by the company before cessation of business.

In view of the clear understanding of all the stockholders, except Michael J. Byrne, of what was intended to be done, and of the things that were done, it seems unimportant that there was no actual authority given by the directors to the president and secretary to execute for the company the agreement between it and the stockholders (Complainants' Exhibit No. 1), or that Michael J. Byrne was not a party to it. It is equally immaterial that the minutes of the meetings of the stockholders and directors, drawn by Mr. Brady in advance, and which were afterwards copied into the minute book,

show that certain stockholders wanted to withdraw and sell their stock and had signed a declaration to that effect, when admittedly no such paper was signed and no such action was either taken or contemplated by any of those stockholders, or by any one else, except as a legal step to accomplish the main purpose of making the directors liquidating trustees. Even if the appraisal had been other than a pretense and empty formality, there was no evidence of the selection of an appraiser by the withdrawing stockholders. So also it is immaterial that these stockholders assigned absolutely to the company their shares, for this also was but another step in the general plan, and it clearly appears that it was not intended, either by assignor or assignee, to be an absolute transfer, such as would terminate all rights, legal and equitable, of the assignor in the assets of the company.

It is plain from all the testimony, and indeed from the undisputed testimony, that all the 13 stockholders retained their rights as stockholders and were subject to their liabilities as debtors to the company, and that the corporation had in effect, though not in form, become dissolved, and the 3 directors constituted trustees to wind up its affairs. It follows, necessarily, that they are subject to all the limitations put on trustees in dealing with the trust property for their own benefit.

Finding it so clearly established by the undisputed evidence that the 3 directors were actually constituted liquidating directors with the duties, powers and limitations applicable to all trustees, it is unnecessary to consider the probabilities to be easily and naturally inferred from the facts. Neither John L. Byrne nor Patrick J. Byrne had any real financial interest in the company, being indebted to the company to an extent far greater than their proportionate part of the surplus assets of the company. Some of the assigning stockholders were very slightly indebted to the company. Every one, including John L. Byrne, felt sure that there would be some surplus for division among the stockholders. Two of the liquidating directors received a salary for their services as such by an arrangement with the stockholders. Several of the retiring stockholders showed, not only curiosity, but their personal interest in the company by visiting the plant to ascertain the progress of the efforts to sell it. The payment of \$100 to each stockholder could hardly have been considered a fair transaction of purchase of their shares of stock, for their interest in the company was not equal, some being indebted to the company in large amounts and others in triflingly small amounts, the range of difference being from \$4,772.42 to \$54.38.

These and other facts throw side lights on what was done by the stockholders of this unsuccessful co-operative venture, and

make clear the real purpose that ran through the technical forms and proceedings used.

The complainants, being entitled to an accounting from the liquidators of their stewardship, claim that they have not acted rightly towards the trust property, but that one of the trustees, and through him a corporation which he had promoted, had obtained a profit by a purchase and resale of the greater part of the property of the Christiana Window Glass Company. What was done by the liquidators? Two of them, Patrick J. Byrne and John L. Byrne, collected the accounts receivable, sold the manufactured product on hand and endeavored to sell the plant, paying themselves the salaries agreed on and paying to the stockholders in installments the sum of \$100 each, and charging the payments as additions to the overdrafts previously made by them. They also reduced the indebtedness of the company. In August, 1908, there remained to be disposed of only the plant, and apparently diligent, but unsuccessful, efforts to sell it were made. The creditors of the company were evidently not pressing for payment, but Michael J. Byrne had refused to renew his indorsement of the note of the company to the bank for \$4,100, due November 17, 1908. At a special meeting of the directors, all three of them, Michael J. Byrne, Patrick J. Byrne and John L. Byrne, being present, a resolution was adopted, that the company, "in order to get the best price for the plant and real estate owned by it and pay as far as possible its debts which are maturing, give an option to purchase said plant and real estate to John L. Byrne for the sum of \$7,000, said option to continue for three months from date." A written agreement to that effect was signed by the company.

[2] There can be no doubt that if John L. Byrne had taken title to that property, either directly from the company, or through a mesne contemporaneous conveyance to a third person, and had paid value for it, the stockholders would have had a right to avoid the transfer, and if he had resold it at a profit, have obtained participation in those profits, provided they had asserted their rights with promptness after knowledge of the transaction of the trustee. Such are the limitations upon trustees in dealing with themselves respecting the trust property, whether they be the sole trustee or one of several trustees, and such are the rights of the cestui que trust.

There are two cases in the courts of Delaware where the disqualification of the trustee to buy the trust estate was fully stated, namely, *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76 (1819), and *Downes et al. v. Rickards et al.*, 4 Del. Ch. 416. In both it is stated emphatically that the trustee cannot be the purchaser of the estate for which he is trustee, however honest the circumstances of any individual case may be. In

the latter case, *Downes et al., v. Rickards et al.*, Chancellor Bates said:

"The principle is that one shall not act for himself in any matter with respect to which he has duties to perform, or interests to protect, for another. * * * The principle looks not merely to prevent fraud in the management of the sale, but with a broader object of relieving trustees from any possible conflict between duty and self-interest. * * * The prohibition does not depend upon any question of fraud or improper advantage made by the purchase. However fair the sale and adequate the price, the court will set it aside. In view of the difficulty of unravelling fraud in these transactions, the policy of the rule is to exclude the possibility of it by making the prohibition absolute."

[3] Where the trustee remains in possession of the land of the cestui que trust which he has purchased, the sale is declared void; but where the trustee has parted with the land at an advanced price, he is made to account for the difference in value. *Van Dyke v. Johns*, supra. When the sale is declared void, or the difference in the price accounted for, all those who are interested may come in to share in the amount recovered, according to their respective interests. *Van Dyke v. Johns*, supra.

The same principles apply to cases where one trustee buys from himself or from his cotrustees. Numerous cases to the same effect were cited by the complainant.

By the minutes of the meetings of directors of the Christiana Window Glass Company it appears that the option was given to John L. Byrne by the directors, and by the answer of the company, which John L. Byrne was authorized by the directors to make for the company, and which is filed in this suit, it is stated that the agreement was made to enable John L. Byrne to organize a corporation to take the title to the property. It was a transaction, then, by which one of the three liquidating directors bought the chief asset of the corporation without the knowledge of the stockholders. Being one of three persons charged with the duty to sell the property, he became the purchaser of it, or at least obtained a right to buy it, and so obtained control of the disposition of it. The testimony establishes the ignorance of the complainants of the acts complained of until shortly before the filing of the bill.

The defendants, meaning thereby chiefly the Byrne Glass Company and John L. Byrne, assert that the rule respecting trustees does not apply to this case, and cite numerous cases to support the proposition that a director may purchase from the corporation, property of the corporation, the burden of sustaining the transaction by showing that it was proper, fair, made in good faith and for an adequate consideration being upon the director so purchasing, in or-

der to retain the bargain and the profits thereof. *Hancock v. Holbrook et al.*, 40 La. Ann. 53, 3 South. 351; *Skinner v. Smith et al.*, 134 N. Y. 240, 81 N. E. 911; *Pneumatic Gas Co. v. Berry et al.*, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. Ed. 1003; *Ryan v. Williams* (C. C.) 100 Fed. 172; *Union Trust Co. v. Carter* (C. C.) 139 Fed. 717; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189; *Barr v. Pittsburgh Plate-Glass Co.*, 57 Fed. 86, 6 C. C. A. 260; *Strobel v. Brownell*, 16 Misc. Rep. 657, 40 N. Y. Supp. 702; *Ashurst's Appeal*, *Estate of Montour Iron Co.*, 60 Pa. 290.

On the other hand, the complainants claim that in all the cases so cited the sale by a corporation to a director was either previously consented to, or subsequently ratified, by its stockholders, or that there had been laches in attacking the sale. The complainants' counsel assert, and probably correctly, that these cases show an application of the general rule that a trustee may, with the consent of the cestui que trust, purchase trust property, subject to an impeachment thereof for actual fraud. There is, in fact, an apparent divergence in the strictness of the rule applied respecting the dealings of the directors of the corporation with the corporation respecting its property. There are numerous decisions which prohibit a director from purchasing property of a corporation without the consent of the majority of the stockholders, including the following cited by the complainant: *Robbins v. Butler*, 24 Ill. 387; *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578; *Hoyle v. Plattsburgh*, 54 N. Y. 314, 13 Am. Rep. 595; *Hoffman v. Cumberland*, 16 Md. 456, 77 Am. Dec. 311; *Bowes v. Iron Co.*, 11 Moore P. C. 463. But even if it would have been a legitimate transaction with respect to the officers of a corporation under ordinary circumstances, the purchase of the property by John L. Byrne was not proper under the facts in this case. Patrick J. Byrne and John L. Byrne, two of the three directors, in addition to the duties towards the stockholders which they had in common with all directors of other corporations, had assumed a special and peculiar relation to those who had been legally stockholders and still were stockholders equitably, notwithstanding the assignment of their stock and other evidence of withdrawal from relationship to the company. To the stockholders, legal and equitable, Patrick and John L. Byrne held the relationship of trustee and cestui que trust. They could not sell and convey the trust property to themselves, or to one of them, without the knowledge of the cestui que trust. If they did so, the cestui que trust could either repudiate the conveyance, or ratify it and obtain an accounting for the value received by the trustees. What was, in fact, done under the option?

The option to buy the plant was given by the two trustees to one of them, and it was so given in order that another corporation

could be formed to take title to the property. This is proved by the minutes of the directors of the Christiana Window Glass Company and the answer of the company. Possessing this option, obtained from his cotrustees, this director, with his wife and son, about November 1, 1908, formed a new corporation, the Byrne Glass Company, to which company the conveyance was made on November 18, 1908, through Edward J. Byrne, acting concededly as a conduit, he having no interest or pretense of interest. These two deeds were not recorded until June 14, 1909. Of this new corporation this trustee director was not only a stockholder, director and the president, but quite evidently the leading spirit and active manager, as well as the originator and promoter of it. True, he held only 3 of the 127 shares of the capital stock of the Byrne Glass Company, and his wife held 121 and his son 3 shares. It should be noted, however, that the evidence of John L. Byrne shows that his wife put only \$400 into the company for shares, being money borrowed by her from her father, and that about \$1,000 more put into it for her was money which John L. Byrne had made in carrying on business after the closing down of the Christiana Window Glass Company and was substantially his money and not hers (page 912 of the testimony). There was some evidence that John Doyle, the father of Mary E. Byrne, furnished \$2,000 to her and that this went to the Byrne Glass Company, but she did not obtain an increase in the number of shares of stock held by her, but became thereby, at most a creditor of the company. Nor is it quite clear that the son actually paid for his 3 shares of stock, though he testified that he did so.

So it appears that probably the only person really interested as stockholder in the Byrne Glass Company, besides John L. Byrne, was his wife to the extent of \$400, about one-third of the actual alleged capital, and no clear proof is given of the actual payment by her to the treasury of the company of even the sum of \$400. None of the moneys of the stockholders of the Byrne Glass Company were used to buy the property of the Christiana Window Glass Company, for the only consideration claimed for that sale was the assumption of the debts of the grantor company. But even assuming that the wife and son had paid in full for the stock held by them, and were without notice or knowledge of the peculiar relationship of John L. Byrne to the plant, is the Byrne Glass Company in such a position that it can hold the title as against the stockholders of the Christiana Window Glass Company, or any profit which may have been made by a resale?

The defendants urge that the sale and conveyance was from the Christiana Window Glass Company to the Byrne Glass Company, and that a contract between the two

corporations is not rendered vulnerable by the fact that John L. Byrne was a director in both corporations, and cites 3 Thomp. on Corp. 4079, 4080; Rolling Stock Co. v. Railroad Co., 34 Ohio St. 450, 32 Am. Rep. 380; Booth v. Robinson, 55 Md. 419; Leavenworth v. Chicago, etc., Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; Public Hall Co. v. Bank, 144 Ind. 34, 42 N. E. 1097; Library Hall Co. v. Pittsburgh Ass'n, 173 Pa. 30, 41, 33 Atl. 744; Shaw v. Davis, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; Manufacturers' etc., Bank v. O'Reilly, 97 Mo. 38, 10 S. W. 865; Genessee, etc., Ry. Co. v. Retsof, etc., Co., 15 Misc. Rep. 187, 36 N. Y. Supp. 896; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17.

But this rule, if it be a sound one, is not applicable here, for the facts in this case show that the transaction with the Byrne Glass Company should be tested by the same rules as though it had been with John L. Byrne, or his wife, or the two together. The Byrne Glass Company was formed to take title to the plant, and paid no money for it, but, as a consideration, assumed the payment of the debts of the grantor, which were, in fact, paid after the sale of the plant by the Byrne Glass Company, and from the proceeds of that sale. The company consisted practically of John L. Byrne and his wife, and there is no equity in favor of the stockholders of the Byrne Glass Company against those of the Christiana Window Glass Company. A trustee cannot sell trust property to his wife, any more than to himself, because of the unity which exists between them in the marriage relation. Bassett v. Shoemaker, 48 N. J. Eq. 538, 20 Atl. 52, 19 Am. St. Rep. 435; Dundas' Appeal, 64 Pa. 325.

Having reached the conclusion that John L. Byrne was in legal effect one of the trustees in liquidation of the affairs of the Christiana Window Glass Company, by special arrangement and not entirely as the ordinary result of the relationship of stockholder and director, it is not a question of intercorporate dealings of independent bodies, but one where the ordinary rules applicable to trustees dealing with corporate property. Should a court of equity allow a trustee to sell and convey trust property to a corporation organized by the trustee to buy it, and of which purchasing corporation the trustee and his wife, or even the trustee, his wife and son were the sole stockholders, particularly if there is grave doubt that the son had paid value for his stock in the purchasing corporation? To state the question is to show the answer. No court would justify a trustee in organizing a corporation in which he and his wife were the only stockholders to buy trust property from himself. This is surely within the danger line where there may be a mixing up of interests and that conflict of duty and

self-interest which courts try to prevent by enforcing rigidly a rule which prohibits a trustee to deal with himself. The possibility of fraud is excluded by such absolute prohibition. This prohibition is the ounce of prevention of fraud or injustice which is better than the pound for the cure thereof. The trustee is relieved even of temptation to deal unfairly with the trust property, or to obtain some advantage from the management of it by the uncompromised rigidity of the prohibition against his buying it directly or indirectly, even for full value, unless the beneficiary with knowledge which enables him to deal on equal terms with the trustee consents to, or ratifies his act, or unreasonably delays to avoid the transaction after notice or knowledge of it.

There is in the bill no allegation of actual fraud in the transaction, but only of illegality therein. There are, however, some indications of secrecy by the withholding of the deeds from the Christiana Window Glass Company to Edward J. Byrne and from him to the Byrne Glass Company for nearly seven months, which if necessary might be considered as evidence of fraudulent intent, and there is also evidence as to the inadequacy of the price fixed for the land. But as the limitations on the dealings of the trustee is independent of fraud, or inadequacy of price, no stress is laid on the above features of the case.

What was done with the property by the Byrne Glass Company? After using the plant for a short time in its business, the Byrne Glass Company sold the real estate to Bennett, Brown & Bennett, Incorporated, for \$18,750, and by deed dated July 17, 1909, conveyed the property to the purchaser. The purchase price was paid and secured as follows: \$6,250 in cash and a purchase-money mortgage given for the balance, \$12,500, payable in four years in installments, with interest at the rate of 5 per centum. This mortgage was assigned by the mortgagee to Artisans' Savings Bank as collateral security for the payment of \$6,000 loaned August 5, 1909, to the Byrne Glass Company by the assignee. Bennett, Brown & Bennett, Incorporated, also made a second mortgage to William S. Prickett for \$1,200. This conveyance and these mortgages and the assignment of the purchase-money mortgage are not alleged to be invalid, nor is it sought to set them aside. The rights of the grantee and of the assignee of the purchase-money mortgage are recognized. It is the interest of the Byrne Glass Company in the mortgage that the complainants seek to reach. It is the refusal to account with the stockholders of the Christiana Window Glass Company for the sale of the property of the company which is the cause of action. By the bill it is prayed:

(1) That each of the complainants be declared to be the owners of 10 shares of stock of the Christiana Window Glass Company; (2) that the officers and directors of that company account for the sales of the property of that company; and (3) that the purchase-money mortgage for \$12,500 be declared to be the property of the Christiana Window Glass Company. There is no prayer respecting the Byrne Glass Company, except such as is incident to the last prayer, but under the prayer for general relief the complainants may be afforded whatever relief is needed by a decree against that company.

John L. Byrne being disqualified to purchase the trust property if the conveyance had been made to him and he still held title to it, the conveyance would be declared void. The same prohibition applied to the conveyance to the Byrne Glass Company, and if it still held the legal title, the deed would be declared void. Inasmuch as that company paid no value for the property, but as a consideration for the conveyance assumed payment of the debts of the Christiana Window Glass Company, and paid these debts after the resale by it of the property to Bennett, Brown & Bennett, Incorporated (now called Peninsula Cut Stone Company), out of the proceeds of that sale, there is no equity to be adjusted with the Byrne Glass Company, or its stockholders. As the sale to Bennett, Brown & Bennett, Incorporated, was a bona fide purchase without notice of any trust, and for value paid, the conveyance to it cannot be avoided. So also the transfer to the Artisans' Savings Bank is valid as a transfer as collateral security for the loan of \$6,000 made by it to the Byrne Glass Company.

Therefore the prayers of the bill will be granted and a decree will be made accordingly. Each of the complainants will be declared to be equitable owners of 10 shares of the capital stock of the Christiana Window Glass Company and entitled to their rights as such, subject to their liabilities as debtors to the company, and the purchase-money mortgage will be declared to be an asset of the Christiana Window Glass Company, subject to the debt due the Artisans' Savings Bank. In addition, the preliminary injunction will be so modified, and such other orders made in the decree, as will give the relief appropriate to the facts in accordance with the conclusions herein announced. Concerning the form of the decree, counsel will be heard, unless it be agreed on between them. If possible, the several and respective rights of all parties should be so settled in this suit and by this decree, even if an amendment to the bill, or the prayers thereof, be necessary.

S. ANDERSON & SON v. SHATTUCK.
(Supreme Court of New Hampshire. Cheshire.
Nov. 7, 1911.)

1. WORK AND LABOR (§ 14*)—RIGHT TO RECOVER—FAILURE TO COMPLY WITH CONTRACT.

The fact that the building was destroyed by fire while uncompleted four days after the contract required it to be complete would not prevent the contractor from recovering on a quantum meruit for the material and labor already put into the building; the owner having consented to the work continuing after the date fixed for completion.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.*]

2. WORK AND LABOR (§ 29*)—AMOUNT OF RECOVERY—BUILDING CONTRACTS—FAILURE TO COMPLETE.

While, where the cessation of the work results from the contractor's breach of a building contract, he is entitled to recover from the owner the reasonable value of the benefits conferred estimated upon the basis of the agreed price for the entire work, less any damage suffered by the owner for the contractor's breach, the measure of damages in some cases being determined by deducting from the contract price the cost of completing the work, yet where neither party is at fault, as where the building accidentally burned before completion, the contractor was entitled to recover, in an action on the quantum meruit, such part of the contract price as the cost of the work and materials actually done and furnished bears to the cost of the whole work and materials agreed to be done and furnished, so that it was error in such case to determine the contractor's recovery by deducting from the contract price for the whole work the amount it would have cost, at the time of the fire, to complete the building according to the contract.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 56-58; Dec. Dig. § 29.*]

3. DAMAGES (§ 124*)—NOMINAL DAMAGES—FAILURE TO COMPLETE BUILDING.

A contractor would be liable to the owner for failure to complete the building on a certain date as agreed for only such damages as were proved to have actually resulted from such breach, so that, if the incomplete building was wholly destroyed by fire only four days after the date fixed for completion, so that it could not have been rented or occupied before it was destroyed had it been completed as provided, the owner was not entitled to recover any actual damages by way of loss of profits for breach of the contract to complete.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

4. INSURANCE (§ 582*)—PROCEEDS—INTEREST OF PARTIES—BUILDING CONTRACTS.

Where the parties to a building contract incorporated therein a provision requiring the owner to keep the building insured, the policies to cover the work incorporated therein and materials for the same in and about the premises, and to be payable to the parties "as their interests may appear," for the purpose, as it appeared, of protecting the contractors against loss by fire to the building in which their only interest was that of lienor, the value of their insurable interest at the time of a fire wholly destroying the building must be determined by the contract price, so that they may recover out of the insurance moneys received only the amount due them under the contract, and not an amount equal to the cost of the work and materials incorporated in the building.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1448-1485; Dec. Dig. § 582.*]

5. INSURANCE (§ 582*)—PROCEEDS—PARTIES INTERESTED—BUILDING CONTRACTS—CONSTRUCTION.

Where a building contract required the owner to keep the building and materials insured, the policies to cover the work incorporated in the building and "materials for the same in or about the premises," payable as their interest might appear, upon destruction of the building by fire before completion, the contractors were entitled to receive from the insurance moneys the fair value of lumber owned by them which had been brought upon the premises at the time of the fire to be used in the building, though it had not then been attached thereto.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1448-1485; Dec. Dig. § 582.*]

Report from Superior Court, Cheshire County; Mitchell, Judge.

Action by S. Anderson & Son against Edmund C. Shattuck. On report from the superior court. Judgment for plaintiffs, and case discharged.

In October, 1908, the parties entered into a written contract by which the plaintiffs agreed to provide the materials and perform the work necessary for the erection of certain additions to the defendant's hotel, according to specifications furnished by an architect, and to complete the work by June 15, 1909. For this the defendant agreed to pay the plaintiffs \$10,762.50, partial payments to be made at various times during the progress of the work. Certain supplementary contracts were afterward made for additions, etc., for which the defendant was to pay the plaintiffs \$496.05, making the whole contract price \$11,258.55. It was also stipulated that the defendant should maintain insurance on the building against loss by fire, "payable to the parties as their interest may appear." The plaintiffs, not having completed their contract on June 15th, as they had agreed, continued to work on the building with the knowledge of the defendant until June 18th, when both the old and the new parts of the hotel were entirely destroyed by fire, without fault of either party. It is found as a fact that the effect of the fire was to terminate the contract, according to the understanding of the parties. At this time a substantial part of the new structure was incomplete and not ready for occupancy. The fair value of the labor and materials incorporated in the building by the plaintiffs was \$10,764.58. The fair value of the labor and materials that would have been required to complete the building, as it stood on the day of the fire was \$2,500. The plaintiffs also claimed to recover for four mantels which were completed at that time, but which had not been taken from the manufactory where they were built; but the court ruled that, as they had not been attached to the building, the plaintiffs could not recover therefor, and they excepted. The court also ruled, subject to the plaintiffs' exception, that for the work and materials they had furnished they

were entitled to recover the difference between the whole contract price and the cost that would have been incurred in completing the building according to the contract, less certain payments the defendant had made, amounting to \$5,484.15. The defendant claimed that he was entitled to damages for loss of prospective rents resulting from the failure of the plaintiffs to finish the building by the time stipulated in the contract. This claim the court denied, and the defendant excepted. Certain other small items were allowed in set-off, amounting to \$408.44. By an amendment, the plaintiffs were allowed to file a bill in equity for relief under the contract of insurance. Lumber of the plaintiffs of the fair value of \$185.42, which was upon the premises, was destroyed by the fire. As it had not been attached to the building, the court denied the plaintiffs' claim to recover in the action at law on this account, and they excepted. It was not included in the estimated value of the materials used in the building. The question whether it could be recovered from the insurance money collected by the defendant was reserved.

James H. McMahon and Cain & Benton, for plaintiffs. Henry A. Cutter and Charles H. Hersey, for defendant.

WALKER, J. [1] At the time of the fire the plaintiffs were engaged in constructing the building under the contract, with the acquiescence and consent of the defendant, although the time limited in the contract for the completion of the building had expired four days before. The fact that the time limit had expired does not affect the legal theory, in accordance with which the plaintiffs' right to recover for the benefits they had conferred upon the defendant must be determined. The plaintiffs, with the assent of the defendant, were rightfully engaged in the prosecution of the work at the time of the fire. They had already performed a substantial part of the work they contracted to do, when the fire destroyed the buildings with the attendant result of terminating the contract in accordance with the understanding of the parties when they executed it. In accordance with the decision in *Dame v. Woods*, 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133; s. c., 75 N. H. 38, 70 Atl. 1081, it is found that the labor and materials actually furnished by the plaintiffs were attached to the defendant's real estate as the work progressed and constituted a benefit to the defendant for which the plaintiffs are entitled to recover. Upon this point there is no contention. The principal question presented relates to the rule or principle by which the plaintiffs' recoverable damages shall be determined.

[2] It is necessary to bear in mind that the plaintiffs' action at law is not based upon a breach of the written contract by the defendant. There has been no breach of the express contract by the defendant,

and neither party is in fault for the fire which put an end to the contract, and caused the situation now existing between the parties. But justice does not require that they should remain in that situation, or that the contractors should be remediless, merely because they cannot maintain an action against the defendant upon the contract. As was said in *Dame v. Woods*, 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133: "This proceeding is not an action upon the special contract, but of quasi contract, to recover the benefits, if any, which the plaintiff may have conferred upon the defendant by his part performance of the special contract." In cases where the part performance results from the plaintiff's breach of the contract, as by his voluntary failure to fully perform the work he agreed to do, he is entitled to recover what the benefits conferred upon the defendant are reasonably worth estimated upon the basis of the agreed price for the entire work, less any damage suffered by the defendant in consequence of the plaintiff's breach of the special contract (*Danforth v. Freeman*, 69 N. H. 466, 468, 43 Atl. 621; *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. 456; *Charlier v. Marshall*, 56 N. H. 478; *Horn v. Batchelder*, 41 N. H. 86; *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713); and in some cases the sum the defendant should pay the plaintiff may be "conveniently ascertained by deducting from the contract price" (*Danforth v. Freeman*, supra) the cost of completing the work (*Horn v. Batchelder*, supra). Subject to the plaintiffs' exception, the superior court in accordance with this rule determined the amount of the defendant's liability by deducting from the contract price for the whole work the amount it would have cost at the date of the fire to complete the building according to the terms of the contract. While the plaintiffs were not entitled to recover the whole contract price without diminution, they were not chargeable with the cost of completing the building, unless they had in some way broken their contract and caused such damage to the defendant. The charge of \$2,500 which represents the cost of completing the work could only be sustained on the ground that it represented the defendant's damages caused by the plaintiff's failure to finish the building. But the plaintiffs committed no breach of the contract in this respect. The damage to the defendant, whatever it was, was caused by the fire for which no one is responsible. "In such a case neither party is in fault, and therefore is not responsible to the other party for failing to fulfill. In a recovery upon quantum meruit there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he receives such part of the entire amount as is equal to the part he has performed of the whole contract." 3 Suth. Dam. § 709. If there had been no fire, and the plaintiffs without any reasonable ex-

cuse had abandoned the contract and refused to finish the work, they might have been liable to the defendant for what it would cost to complete the building; but such liability would result from the plaintiffs' breach of the contract, which is wanting in this case.

Nor is this a correct method of ascertaining the benefits which the plaintiffs had conferred upon the defendant. If the contract price for the whole work was less than its reasonable cost, which seems to be the fact, it would clearly be inequitable to the plaintiffs to deduct from the contract price the cost of completing the work. Justice would require that the sum deducted should bear the same relation to the cost as the contract price does. Upon such a theory the plaintiffs would receive, for the work and materials rendered to and accepted by the defendant, pay for the same regulated and determined by the contract price for the whole work; and that is evidently what they are entitled to. To state the same idea in another and more practical way, "the plaintiff was entitled to recover such a part of the contract price as the work and materials he had done and furnished was of the work and materials he agreed to perform and furnish." *Dame v. Wood*, 75 N. H. 38, 39, 70 Atl. 1081, 1082.

It only remains to ascertain how this ratio is to be determined. It is found in the case that the cost of the work and materials actually furnished and appropriated in the building is \$10,764.58. If \$2,500, the cost of finishing the building, is added to that sum, the entire cost of the completed structure would appear to be \$13,264.58. By a simple process of division ($10,764.58/13,264.58$), it would further appear that the plaintiffs at the time of the fire had furnished to the defendant 81 $\frac{1}{2}$ per cent. approximately of the work and materials he had agreed to furnish. Consequently he should receive 81 $\frac{1}{2}$ per cent. of the whole contract price (\$11,258.55), or \$9,138.19. This may not be the only way of ascertaining what part of the work had been done at the time of the fire, but upon the facts reported it seems to be a reasonably convenient and accurate method. By any correct method the same result would follow. From the amount thus determined should be deducted payments made by the defendant (\$5,184.15) and sundry other items (\$408.44) about which there is no dispute, when the balance due the plaintiffs would be \$3,245.50. As the plaintiffs are entitled to recover such part of the agreed price as the work actually done bears to the whole work agreed to be done, it is manifest error to compute the amount of his recovery by a smaller ratio of the contract price. As already shown, the fundamental error of the superior court consists in charging the plaintiff with the damages caused, not by him, but by the unavoidable accident of the conflagration which destroyed the defendant's property.

[3] But the defendant insists that he

should have damages, by way of set-off, for the plaintiffs' failure to complete the work by June 15, 1909. He says that he was entitled under the contract to a completed building on that date, and that his damages on this account are the loss of profits he would have received from renting the premises from that date up to the time when the building could by reasonable diligence have been made ready for occupancy. If it is conceded that there was a breach of the contract by the plaintiffs in this respect, they would be liable for only such damages as the defendant could prove at the trial naturally resulted from the breach. If it appeared that for any reason he suffered no damage on that account, as, for instance, that the building if it had been completed was not rentable, the fact that it was not completed on the day specified in the contract would not cause him any substantial injury. But even more clearly does this result follow when it is found that the building was totally destroyed by fire in four days after it should have been completed. It could not be rented because it did not exist. The fact that it was destroyed by fire is conclusive evidence negating the idea that the defendant might have rented it if the plaintiffs had completed it on time. If the defendant's contention is sound that he is entitled to recover for loss of rents caused by the plaintiffs' failure to finish the building by June 15th, he must show at least that the building was in existence during the period for which rent is claimed. He could not reasonably hope to succeed in this contention when he conceded that, if the plaintiffs had performed their contract, he would in all probability have had no building to rent. It is not seriously contended that the defendant would have had tenants occupying the building during the four days previous to the fire, or that he suffered any substantial damage by his nonoccupation of the building during that brief period. It is unnecessary, therefore, to consider whether he waived his right to such damages. No error is apparent in the ruling of the court disallowing the defendant's claim for damages for loss of profits, caused by the failure of the plaintiffs to complete the work on June 15th.

The plaintiffs claim that the supplementary contract by which they were to furnish certain mantels of special dimensions for the defendant's building should be regarded as a distinct and independent contract, and that, as they had procured them upon the defendant's order or request, they should be allowed to recover for them, although they had not been placed in position, but remained in their possession. But there is nothing in the case to indicate that this supplemental contract, like several others, was not intended to be taken as a part of the original contract and to be subject to the same interpretation as though it had been

incorporated in the contract in the first instance. The prices agreed upon for the extra work and materials were intended to be added to the original contract price, which thus increased would constitute the full contract price for the entire work, and, as the plaintiffs receive their compensation by taking a fractional part of the contract price, they are not entitled to recover specifically for articles they agreed to furnish under the contract.

[4] Thus far we have considered the questions as they arise in the action at law. Under their bill in equity, the plaintiffs claim that they are entitled to recover the full value of the labor done and materials furnished by them out of the proceeds of the policies of insurance. This question is presented by the facts reported by the court upon which no ruling was made. In the building contract the defendant agreed to keep the building insured during the progress of the work against loss or damage by fire, the "policies to cover all work incorporated in the building and of materials for the same, in or about the premises, and to be made payable to the parties * * * as their interest may appear." The defendant took out policies covering the property mentioned in the contract, in the joint names of himself and the plaintiffs, to the amount of \$7,500, and also policies in his own name for \$14,000. These amounts have been paid or deposited by the companies, subject to the order of the court as to the rights of the plaintiffs therein. The plaintiffs' contention rests upon the construction to be put upon the phrase in the contract, "as their interest may appear." Is the plaintiffs' interest to be measured by the cost of the labor and materials actually furnished by them, or by the price agreed upon in the contract? The answer to this question depends upon the intention of the parties as evidenced by the contract. The parties understood that from day to day as the work progressed the materials incorporated in the building, together with the attendant labor, constituted material additions to the defendant's real estate. The plaintiffs were not the owners of the materials after they were attached to the defendant's building, and, of course, they had no interest in it as owners. Their claim to the insurance money, therefore, cannot be sustained upon that ground. Upon a reasonable construction of the contract, it is clear that the parties had in mind the plaintiffs' lien on the building for work and materials furnished by them, and the value of this lien would vary according to the amount of work done and the payments the defendant might make on account. If at the time of the fire the defendant had paid the plaintiffs all that it is now found they were then entitled to, they would have had no insurable interest in the property and

would have been entitled to no part of the insurance money. Their lien would have been discharged, as a mortgagee's lien is discharged by the payment of the mortgage debt. As the parties merely intended by means of the insurance to protect the plaintiffs against loss by the destruction of the building by fire, in which their only legal interest was that of a lienor, the value of their insurable interest at the time of the fire must be determined by the contract price, which is the measure of the protection afforded by the lien. No other result is possible upon a reasonable construction of the contract. The plaintiffs are not entitled to receive from the insurance fund an amount equal to the cost of their work and materials incorporated into the building, but only so much as is due them therefor under the contract from the defendant, which has already been determined in the action at law.

[5] The court ruled, subject to the plaintiffs' exception, that they were not entitled to be reimbursed from the insurance money for the value of some lumber which they had brought to the premises to be used in the construction of the building and which was burned at the time of the fire. The agreement provided for insurance upon materials "in or about the premises." The lumber was about the premises, was owned by the plaintiffs, and was intended for, but had not been used in or attached to, the building. The lumber seems to fall within the description of the property to be insured; and, as the plaintiffs' interest in it appears to be that of an owner, no reason is apparent why under the contract for insurance they are not entitled to receive from the insurance fund the fair value of it. The ruling of the court upon this point cannot be sustained.

Upon a revision of the findings in accordance with the views herein expressed, there will be judgment for the plaintiffs.

Case discharged. All concurred.

McINTIRE v. LAUCKNER.

(Supreme Judicial Court of Maine. Nov. 23, 1911.)

1. WILLS (§ 457*)—CONSTRUCTION—EXCEPTIONS FROM DEVISE.

A reservation in a devise may be construed as an exception, to effectuate testator's intent.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 457.*]

2. DEEDS (§ 138*)—EXCEPTIONS AND RESERVATIONS.

A reservation may be said to vest in the grantor some new right or interest not before existing in him, while an exception in a grant retains in him title to what is excepted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. DEEDS (§ 143*)—RESERVATION—OPERATION—LIFE ESTATE.

Unless a reservation to a grantor contains words of inheritance, it gives an estate for his life only.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 143.*]

4. WILLS (§ 584*)—DEVISE—EXCEPTIONS—OPERATION.

Under a devise "reserving" a burial lot covering one-fourth of an acre for the use of testator's family forever in common, the lot excepted descends to testator's heirs in fee, though no words of inheritance were contained in the reservation; the "reservation" being construed as an exception.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1273; Dec. Dig. § 584.*]

5. WILLS (§ 584*)—DEVISE—EXCEPTIONS—OPERATION.

Where a devise in a will proved in 1849 excepted a family burial lot recited as covering one-fourth of an acre, but the boundaries were never marked beyond a lot 32 feet square, the exception is inoperative to give testator's family title beyond the lot actually marked.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 584.*]

6. STATUTES (§ 263*)—RETROACTIVE OPERATION—PUBLIC RECORDS.

Laws 1855, c. 129 (Rev. St. c. 20, § 6), requiring a description of land appropriated for a family burial lot to be recorded, was not retroactive, and hence is not applicable to an exception of a burial lot from a devise made in 1849.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 263.*]

7. EASEMENTS (§ 18*)—RIGHT OF WAY BY NECESSITY.

Under a devise of a tract of land excepting a burial lot for the use of testator's family forever surrounded by the land devised, testator's heirs had a right of way by necessity from an adjacent town road to the lot.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

8. EASEMENTS (§ 63*)—ACTION FOR OBSTRUCTION—NATURE—TRESPASS QUARE CLAUSUM OR CASE.

An action for damages for obstructing a right of way leading from a town road to a burial lot was on the case, and not in trespass quare clausum, where it was not claimed that defendant entered the burial lot, though it was alleged that he broke and entered plaintiff's inclosure.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 130; Dec. Dig. § 63.*]

Report from Supreme Judicial Court, Sagadahoc County.

Action by Jane M. McIntire against Charles G. Lauckner. On report. Judgment for plaintiff.

Action on the case to recover damages for the obstruction of an alleged right of way leading from a townway to a burial lot alleged to be owned by the plaintiff, but surrounded by the defendant's land. Plea, the general issue, with a brief statement alleging that "said plaintiff is not and never has been the proprietor of a certain burial lot inclosed in whole or in part as set forth in the plaintiff's said writ," and that the "said plaintiff never had the right to pass and

repass over nor a right of possession to any right of way as set forth in plaintiff's said writ." An agreed statement of facts was filed, and the case reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Edward C. Plummer, for plaintiff. George W. Hunt, for defendant.

WHITEHOUSE, C. J. This is an action on the case in which the plaintiff seeks to recover damages for the obstruction of a right of way leading from a town road to a burial lot surrounded by the defendant's land. The defendant denies that the plaintiff is owner or part owner of the burial lot in question, and denies that she had any right of way to it over the defendant's land. The case is reported to the law court on a brief statement of facts, with a stipulation that, in the event of decision in favor of the plaintiff, the damages are to be assessed at \$10.

The plaintiff's contention is based on a reservation in a devise contained in the will of her grandfather, William Sprague, who had title to the land now owned by the defendant, on which the burial lot is situated. This will was made by the testator in 1844, and approved and allowed in 1849. The reservation is as follows: "I reserve the burying ground on my farm to be one quarter of an acre of land where my wife and children are buried, and order gravestones for myself to be provided by my executors and paid for out of my estate, the graveyard to be for the use of the family forever in common."

It appears from the agreed statement of facts in the case that the boundaries of the burial lot in which the testator's wife and children are buried are permanently marked by stone fence posts, from which, however, the rails originally affixed thereto have disappeared in the lapse of time and process of decay, and that the size of the burial lot thus located by the stone posts is 32 feet square. It further appears from the agreed statement "that the distance from the town road at the bars alongside the road and giving access to the burial lot is 368 feet to the entrance of the inclosed part of the lot; that no part of the inclosed burial lot has been ploughed up by defendant, and none of the bodies there been disturbed by him; that a monument and a small gravestone mark the graves of William Sprague's wife and the grave of William Sprague, respectively, and have been continuously in position there for some 60 years, and that the plaintiff's son is buried there; that the ground has been ploughed up by defendant so as to completely encircle the graveyard, and leave no pass-

able right of way thereto from the bars at the town road; that no statutory record of the graveyard has ever been made; that defendant owns the ground surrounding the graveyard, and did own it at the time of the alleged trespass, subject to the right of passage over it by plaintiff from the public road to the graveyard if such a right of way shall be found by the court to have existed; that there is not now, and never has been, a made roadway from the bars to the graveyard, but the regular approach to the yard from the town road always has been in practically a straight line from the bars to the yard; that this right of way was obstructed as claimed by the defendant at the time plaintiff had occasion to use it; that no monuments or other boundary marks indicating the limits of the fourth of an acre which the testator attempted to reserve have ever been set up beyond the stone fence posts around the burial lot 32 feet square as above stated; that the defendant purchased the property surrounding the burial lot in 1888 from Rachel Jewell, granddaughter of William Sprague, by deed of warranty, in which there are no reservations of the burial lot, and that the ground surrounding the inclosed lot is, and has been, an open field."

[1-4] 1. The purpose obviously sought to be accomplished by the "reservation" in the devise of William Sprague above stated can be effected by construing the reservation as an exception, as the court is often required to do in order that the intention of the parties may not be defeated. A reservation may be said to vest in the grantor some new right or interest not before existing in him, and, if it does not contain words of inheritance, it will give only an estate for the life of the grantor. The operation of an exception, on the other hand, is to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title. *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352, and cases cited.

It is not in controversy that William Sprague had title in fee simple to all the land in question, and the burial lot excepted from the devise in his will descended to his heirs in fee without words of inheritance. *Wood v. Boyd*, 145 Mass. 179, 13 N. E. 476; *Stockbridge Co. v. Hudson Co.*, 107 Mass. 290; *Winthrop v. Fairbanks*, 41 Me. 307. Thus the plaintiff became one of the owners of the burial lot 32 feet square, the bounds of which were conspicuously marked by stone fence posts.

[5] 2. But there is no evidence that the "one-quarter of an acre" which William Sprague attempted to "reserve" from his devise has ever been appropriated to the purposes of a burying ground either during the lifetime of William Sprague or by his heirs since his death. It has never been definitely located upon the surface of the earth. Its

boundaries have never been marked by monuments of any kind indicating its location with reference to the burying ground 32 feet square which was inclosed by a fence of stone posts and rails. There is an entire absence of any description from which it can be determined whether the "one-quarter of an acre" was to be 2 rods wide and 20 rods long, with the inclosed lot 32 feet square constituting a part of it, or was to be in the form of a square with the inclosed lot in the center of it. The language of the will reserving "the burying ground on my farm to be one quarter of an acre of land" warrants the inference that the burying ground 32 feet square had not been inclosed by the stone posts and rails at the date of the will, and it may also be inferred from all the evidence that the testator or his heirs at some time prior to the defendant's purchase in 1888, having reached the conclusion that four square rods would be sufficient for that burial lot, decided not to incur the needless expense of fencing 40 square rods, and thereupon erected the inclosure of stone posts and rails around the lot of about 4 square rods. In any event, this is the only lot that was ever definitely located, and must be deemed the full amount of land that it was the intention of the testator or his heirs to appropriate for that burying ground. The reservation or exception in the devise of William Sprague is inoperative and ineffectual to give the plaintiff title in anything more.

[6] 3. St. 1855, c. 129 (R. S. c. 20, § 6), requiring a description of land appropriated for a family burying ground to be recorded in the registry of deeds, was not designed to be retroactive, and is not applicable to the reservation in this case made in 1849. Nor does section 5 of chapter 20 affect the question here presented.

[7] The testator and his heirs had a right of way by necessity from the town road to the inclosed burying ground in question. Such a right "results from a grant or reservation implied from the existing circumstances in which the grantee, or, in case of reservation, the grantor is thereby placed. When a landowner conveys a portion of his lot, the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall for like reason prove useless to the grantor." *Whitehouse v. Cummings*, 83 Me. 91, 21 Atl. 743, 23 Am. St. Rep. 756.

In the case at bar the lot reserved by the testator in the devise in question was entirely surrounded by his own land, and was inaccessible except through that land. It is conceded in the statement of facts that a right of way by necessity had received practical recognition among the parties for more than 60 years, and that during all this time the course of travel to the burial lot has

been in a straight line from the bars at the town road. It is also conceded that by the acts of the defendant complained of in the plaintiff's writ this way was obstructed and rendered impassable, and that the burial lot was inaccessible by any other way than over the defendant's land.

[8] The defendant very properly contends that trespass quare clausum will not lie in favor of one whose right of way over the land of another has been obstructed by the owner of the land. The declaration in the plaintiff's writ, however, is not in trespass quare clausum, but in a plea of the case, and the gist of his action is the obstruction of the plaintiff's right of way to the family burial lot. It is true that in accordance with his contention that 40 square rods had been excepted for the burial lot the plaintiff incidentally avers in his declaration that the defendant in plowing up and obstructing the right of way "broke and entered the plaintiff's inclosure," but it is not claimed that the defendant entered the inclosure of four square rods, and the gravamen of the complaint is that the defendant rendered the right of way impassable.

It is the opinion of the court that judgment must be entered for the plaintiff, and, in accordance with the stipulation of the parties, the certificate must be:

Judgment for the plaintiff for \$10.

ARUNDEL REALTY CO. v. MARYLAND ELECTRIC RYS. CO.

(Court of Appeals of Maryland. June 23, 1911.)

CONTRACTS (§ 9*)—INDEFINITENESS—SPECIAL RAILROAD RATES.

Plaintiff's assignors were induced to purchase certain suburban land from defendant company, and develop the same on defendant's parol promise to grant a special rate for the transportation of passengers between the city and such suburb. There was no agreement as to what the rate would be, nor as to the length of time it should be maintained. After the property had been purchased, defendant advertised a rate to such suburb of 11 cents round trip by commutation, and maintained the same for 11 months and until plaintiff had sold a large number of lots, and had succeeded in deriving a large revenue from the exploitation of such property, when defendant canceled the rate and raised the fare to 25 cents, by reason of which plaintiff's property greatly depreciated in value, and was rendered unsaleable. *Held*, that defendant's promise was too indefinite to sustain an action for breach thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10-20; Dec. Dig. § 9.*]

Appeal from Circuit Court, Anne Arundel County.

Action by the Arundel Realty Company against the Maryland Electric Railways Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

James M. Munroe, for appellant. Charles A. Marshall and Robertson Griswold, for appellee.

PATTISON, J. The appeal in this case is from a judgment of the circuit court for Anne Arundel county sustaining the demurrer to the amended declaration filed by the appellant and entering thereon a judgment for costs in favor of the appellee.

The declaration alleges: That on the 7th day of June, 1908, the defendant company sold unto John W. Jarden and Clarence W. Gould a tract of land known as the Yeald-hall farm in Anne Arundel county, at and for the sum of \$12,000, which has been paid. That in the sale thereof the defendant represented that, "by reason of its proximity to the city of Baltimore and of its situation on the line of its railroad, it would make a most desirable property for suburban homes," and among the inducements offered by the defendant to the plaintiff to purchase and develop the same for such purpose, "was a promise of the defendant to give to said Jarden and Gould a special rate between Baltimore city and the said farm, now called 'Woodlawn Heights,' for the benefit of all purchasers of lots at Woodlawn Heights." That, after the purchase of said land, the plaintiffs, at the suggestion and by the inducement of the defendant, expended large sums of money in laying off said property in avenues and streets, blocks, and lots, and in surveying, plotting, and advertising said property, etc. That the defendant printed upon its official time-table a notice of the special rate offered, to wit: "Woodlawn Heights, between Shipley and Wellham, 15 minutes from Baltimore by the Electric Short Line. Eleven cents round trip by commutation." The declaration further alleges: That Jarden and Gould, in order the more effectually to conduct said business and develop and sell said property, associated with them John T. Moylan and Bruner R. Anderson, and caused themselves to be incorporated under the name and style of the Arundel Realty Company, to which corporation the said Jarden and Gould transferred and assigned "all their rights and interests, as well as all their duties and obligations under their aforesaid agreement and contract with the defendant in reference to the development of said Woodlawn Heights property and the sale of lots there situate, and all their rights to the special rate between Baltimore city and Woodlawn Heights as agreed between the defendant and the said Jarden and Gould as hereinbefore set out," which transfer and assignment so made was with the approval and consent of the defendant company, and that thereafter the company continued "for a long space of time to advertise on its time-tables the said special rate from Baltimore city to Woodlawn

Heights and to circulate the same to the public from the ticket offices." That under the inducement aforesaid a large number of said lots had been sold, upon the installment plan, by Jarden and Gould and the appellant company at prices aggregating \$35,000, which were yielding to the appellant company a large profit, and it was in receipt of a large income from the regular payment of the installments due and payable from time to time by the purchasers of said lots. That certain purchasers of lots had erected dwellings on them, whereby the unsold property had enhanced in value. Other purchasers of lots were about to erect dwellings on their lots, and other persons were negotiating for the purchase of other lots at a large profit to the plaintiff, and that the business of the plaintiff was successful and prosperous, and yielded to it a large revenue and income. That "without the knowledge or consent of the plaintiff, and without previous notice to it, the defendant on the 7th of May, 1909, canceled the said special rate between Baltimore and Woodlawn Heights, and refused to sell any commutation tickets between said points as previously agreed by the defendant, as hereinbefore set out, and refused to sell any round trip tickets between said points, and raised the rate of fare from 11 cents by commutation to 25 cents." That, although repeatedly called upon to restore said rate, the defendant company has refused to do so, and that, by reason of the acts of the defendant above stated and complained of, the business of the plaintiff at Woodlawn Heights has been greatly injured and practically ruined. That sales of lots have ceased. That the erection of buildings at Woodlawn Heights has ceased, and the property of the plaintiff has been greatly depreciated in value and rendered unsalable.

The declaration discloses that the property so purchased by Jarden and Gould was granted and conveyed, at the request of the purchasers, by the defendant company to the Arundel Realty Company, no deed ever having been executed to the purchasers, but it is not alleged in the declaration that the said conveyance contained any covenant or promise that the special rate mentioned in the declaration should be given to the grantee. The promise sued on in this case is a mere general verbal promise to give a special rate without the same being fixed or established, and with no time therein stated for which such rate should be maintained, and it is for a breach of this alleged promise that the plaintiff is seeking to recover. The breach complained of consists in the cancellation of the special rate, "eleven cents round trip by commutation," fixed and established after the contract of purchase, and the establishing of a rate of 25 cents one way, as we understand it, and the defendant's refusal to restore the former rate.

We have been referred to no case, nor have we been able to find one, where the contract

was for a special rate given by the railroad company as in this case, but there are a number of decisions, not only of this court but in other jurisdictions, where the validity of contracts made for the location of public stations along the line of the road has been passed upon. In some jurisdictions such contracts have been held to be absolutely illegal (*Burney v. Ludeling*, 47 La. Ann. 73, 16 South. 507; Fla. Cent. v. State, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; Greenwood on Public Policy, § 149, pp. 316-321); while in others the contract is held to have been performed after a reasonable time, when changed conditions warrant a removal or relocation. In the case of Md. & Pa. R. Co. v. Silver, 110 Md. 517, 73 Atl. 300, this court said: "It has been held in a number of well-reasoned cases that the covenant on the part of the railroad company to erect and maintain a station at a certain place along its line, even if originally valid, is fairly complied with by the erection and maintenance of such a station for a period of years, and, until the exigencies of the business, the convenience of the public, and the welfare of the railroad demands its removal." *Whalen v. Baltimore & Ohio Railroad Company*, 112 Md. 197, 76 Atl. 167. In the case of *Whalen v. Baltimore & Ohio Railroad Company*, supra, this court said: "Considering the language used in the covenant before us, it is to be observed that, while it distinctly provides for the construction and maintenance of the turnout and siding on Mr. Dorsey's land and the stopping of the cars at that point, it is entirely silent as to the duration of the maintenance of these structures or that service. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates. In order to arrive at the real purpose and meaning of parties to a contract, the court, according to the accepted canons of construction, considers the language employed, the subject-matter, and the circumstances under which it was made." This action, unlike the cases of Md. & Pa. R. Co. v. Silver, and *Whalen v. Baltimore & Ohio R. R. Co.*, is not brought upon a covenant contained in a deed, but it is brought upon an alleged verbal 'promise by the defendant to give to the said Jarden and Gould a special rate between Baltimore city and the said farm now called Woodlawn Heights, for the benefit of all purchasers of lots at said Woodlawn Heights.' If it is to be understood from this promise that the special rate referred to has reference to the charge that was to be made for the transportation of passengers upon the defendant's road between Baltimore city and Woodlawn Heights, although this is not clearly stated, such rate was not fixed and established in and by said promise or agreement, nor does it allege that the said special rate was thereafter to be established by agreement between the purchasers and the defendant company; and the

length of time for which it was to be maintained was not therein stated. The defendant, after the sale of the lands, printed upon its time-tables the rate or charge for transporting passengers over its road between the lands so sold and Baltimore city to be 11 cents round trip by commutation. But there is no statement therein that said rate or charge was fixed or established in accordance with or pursuant to any agreement made by and between the purchasers and the defendant, and, so far as the declaration discloses, such rate may have been established without conference with the purchasers, Jarden and Gould.

It is not contended in this case by the appellant that the special rate was to last for all time, but only for a reasonable time thereafter, and that the time it was maintained was not a reasonable time. Thus the injuries complained of exist in the deprivation to the appellant of such special rate between the date of its cancellation and the date when it would have been discontinued had it been maintained for what is regarded by the appellant company a reasonable time. As was said in the case of *Whalen v. Baltimore & Ohio R. R. Co.*, supra: "In order to arrive at the real purpose and meaning of a contract, the court, according to the accepted canons of construction, considers the language employed and the subject-matter and the circumstances under which it was made." We will thus apply this rule to this case. The subject-matter here is the procurement of a special rate over the defendant's road between Baltimore and the property of the appellant company. The alleged contract made in relation thereto is said by the appellant company to have been made in June, 1908, at the time of the purchase of this land by Jarden and Gould, and continued in operation until May, 1909, in which time, the declaration alleges, the plaintiff had sold a large number of lots, to wit, about 400, at prices aggregating \$35,000, and that the business of the plaintiff of developing and selling lots at Woodlawn Heights was successful and prosperous, and yielded a large revenue and income to the plaintiff. The rate or charge for transportation of passengers is subject to frequent changes, and has not that permanency of character that is found in the location of a railroad station, and a reasonable time for which rates, when established, should be maintained under a contract of this character, would naturally be of a shorter duration than that under a contract for the maintenance of a railroad station where no time was mentioned in either. It cannot be claimed that a reasonable time would necessarily have extended to a time when the plaintiff had sold all the lots, for, to have done this, it might have required years. Had they desired that the rate should have been maintained until all the lots had been sold,

they should not have contented themselves with a contract so general and indefinite as the one in this case, but by adequate and proper language should have provided for the maintenance of such rate until all the property was sold. *Texas & Pacific R. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Whalen v. Baltimore & Ohio R. R. Co.* Even then the deprivation of such special rate would have been felt by the owners of the individual lots, for whose benefit it is said this contract was made, and such deprivation would have been felt by them for all time.

This alleged contract is, indeed, a very general and indefinite one. The assignors of the appellant company accepted it so general in its character as to provide only for a special rate. Such rate was not then fixed and established, and was not fixed and established until after the sale of the land was made, and then, so far as the declaration discloses, was made by the defendant company, possibly without conference with the plaintiff. Any special rate, not confined to the one named in the declaration, however slight may have been the difference between such special rate and the regular rate, would have been a literal compliance with the contract made, and, in fact, it is not disclosed by the declaration that the rate now established is not a special rate; that is, less than the regular rate.

The defendant company has raised the questions, first, as to the sufficiency of the consideration for the promise as alleged in the declaration; and, secondly, that the rights acquired by the original purchasers, Jarden and Gould, from the defendant company, by reason of the alleged promise, were not assignable. We have not, nor will we, pass upon these questions, as it is not necessary in the determination of this case.

In view of the general and indefinite character of the promise or agreement sued on, and the absence therein of any stipulation as to the time that the special rate was to be maintained, and also in view of the time for which such special rate was maintained, we are of the opinion that there was no error in the action of the learned judge below in sustaining the demurrer, and we will affirm the judgment appealed from.

Judgment affirmed, with costs to the appellee.

SCHAUB v. O'FERRALL et al.

(Court of Appeals of Maryland. June 24, 1911.)

Opinion Filed Oct. 25, 1911.)

1. JUDGMENT (§ 683*)—RES JUDICATA—PARTIES BOUND.

An attorney retained by a woman to represent her in a pending divorce case against her husband, and to recover property due her, in part assigned by her to the attorney, may not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

sue the husband and third persons procuring, pursuant to a conspiracy, false testimony defeating the action, but his remedy is by application for new trial, for, though he was not a party to the action, he is governed by the law governing the rights of parties in such cases.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. § 683.*]

2. TORTS (§ 13*)—LIABILITY FOR FALSE TESTIMONY.

A witness giving false testimony pursuant to conspiracy of others to procure the giving of false testimony, resulting in miscarriage of justice, is not liable civilly to the party injured thereby.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 14-17; Dec. Dig. § 13.*]

Appeal from Superior Court of Baltimore City.

Action by Francis J. Schaub against John P. O'Ferrall and others. From a judgment for costs for defendants, rendered on sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

James Fluegel, for appellant. John P. O'Ferrall, for appellees.

PER CURIAM. The judgment in this case will be affirmed for reasons to be stated in an opinion to be hereafter filed.

Judgment affirmed, with costs to the appellees.

PATTISON, J. The question presented by this appeal is one of pleading, and involves only the sufficiency of the averments of the third amended declaration. To this declaration the defendants demurred, and the court below sustained the demurrer and entered judgment for the defendants for costs, from which judgment this appeal was taken.

As we are to determine whether the ruling of the lower court was correct in sustaining the demurrer to the declaration, it will be well for us to set forth the declaration, which is as follows: "For that this plaintiff (Schaub) was in the month of September, 1909, and had been for many years prior thereto, a practicing attorney at law in Maryland and particularly in Baltimore city, where he enjoyed a lucrative practice as a lawyer. That he had been retained by one Margaret A. Boland in the year 1909 to represent her professionally as her lawyer in a pending divorce case between her and her husband, the defendant John H. Boland, and to recover for her a large sum of money and considerable personal property which her husband had covenanted to give her, irrespective of the said divorce case, and which said claim for money and personal property due to the said Margaret A. Boland had been by her in part assigned to this plaintiff for a valuable consideration. That in a cause then pending in the circuit court No. 2

of Baltimore city the said Margaret A. Boland had obtained a divorce from the defendant, John H. Boland, on the ground of his adultery, but had not as yet received from him the moneys and property so due to her as aforesated, in which this plaintiff had an interest. That to recover the same the said Margaret A. Boland filed a petition in said court to require the said John H. Boland to pay the same to her. That the payment of the same to her had been also guaranteed to her by the joint obligation of the defendant John H. Boland and that of the defendant Edward L. Kaufman, who was then his copartner in the glass and paint business in Baltimore city. That the defendants Boland and Kaufman had failed and refused to pay the said moneys or deliver the said chattels to the said Margaret A. Boland, or to this plaintiff as her solicitor and lawyer as demanded by him. That the said defendants were represented by a lawyer, who is the defendant John P. O'Ferrall. That the defendant John H. Boland became acquainted and socially intimate with the defendant Pearl R. Ohle, a lewd woman and a prostitute, in the fall of the year 1909, and introduced her to the defendants Kaufman and O'Ferrall. That the said John H. Boland did thereupon, after unlawfully, willfully, corruptly, and wickedly conspiring with the other defendants in this case to ruin, injure, and defame this plaintiff in his profession as a lawyer and particularly as the attorney for the said Margaret A. Boland, threaten him that, if he persisted in pressing her claim as aforesaid against him, the defendants would injure and ruin the plaintiff in his profession, and would have the said prostitute, Pearl R. Ohle, falsely testify in the said pending case of Margaret A. Boland versus John H. Boland in the circuit court No. 2 of Baltimore city that she had seen the plaintiff in the home of his said client in Baltimore city in her bedroom. That the plaintiff and his said client appeared to be affectionate toward each other, and that in the month of September, 1909, the plaintiff and his said client had occupied a bedroom together in a hotel in New York City while being registered under the name of Tremane, and while the said divorce suit as aforesated was then pending in said court." That the plaintiff, well knowing that such testimony on the part of the said Ohle would be rank perjury, refused to be swerved from his duty as the attorney for the said Margaret A. Boland, and proceeded in the circuit court No. 2 in the case then pending to press her said claim as aforesated. That the defendant, Pearl R. Ohle, did thereupon in pursuance of said unlawful, wicked, malicious and corrupt conspiracy and combination with the other defendants herein named, and after she had received various sums of money and pres-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ents from the said John H. Boland, falsely testify to the said matters and things aforementioned in accordance with the threat so made to this plaintiff by the said John H. Boland (and which matters and things all the defendants knew to be false and unfounded in fact), in the said cause then pending for the recovery of the moneys and property so due to the plaintiff's client, in which he had an interest in the circuit court No. 2 of Baltimore city. That, as a result of the said perjury of the said Ohle in pursuance of said conspiracy, the course of justice was perverted in said cause, and the said avowed and corrupt object of the said conspiracy was accomplished by the plaintiff being thus injured in his good name, fame, and reputation as a practicing lawyer and as the attorney for the said Margaret A. Boland, and he and the said Margaret A. Boland were thereby deprived of the moneys and chattels which, but for said foul, corrupt, unlawful, and willful conspiracy, they would, in the cause then pending in the circuit court No. 2, have obtained. "That, in consequence of the said perjury by the said defendant Ohle, the decree for an absolute divorce that was obtained by the said Margaret A. Boland against the defendant John H. Boland theretofore and in which divorce case this plaintiff had acted as her lawyer and solicitor was set aside, and her bill of complaint was dismissed; and this plaintiff says that thereby he was unjustly caused to suffer in his reputation as a practicing attorney in said cause, and in his profession as a lawyer, and other wrongs, financial losses, and damages did he thereby sustain."

The lower court in sustaining the demurrer held that the facts alleged in the declaration, if true, do not constitute a valid cause of action. The record, however, does not disclose the grounds upon which the trial judge based his decision. It will be seen that the declaration, consisting only of one count, avers that the plaintiff "had been retained by one Margaret A. Boland * * * to represent her professionally as her lawyer in a pending divorce case between her and her husband, the defendant John H. Boland, and to recover for her a large sum of money and considerable personal property which her husband had covenanted to give her, * * * and which said claim for money and personal property due to the said Margaret A. Boland had been by her in part assigned to this plaintiff for a valuable consideration. * * * That to recover the same the said Margaret A. Boland filed a petition in said court (in the divorce proceeding aforesaid) to require the said John H. Boland to pay the same to her. * * * That the defendant Pearl R. Ohle did thereupon, in pursuance of said unlawful, wicked, malicious, and corrupt conspiracy and combination (such conspiracy and combination being set out in the declaration), with the other defendants herein named,

falsely testify to said matters and things aforementioned * * * in said cause then pending for the recovery of the money and property so due to the plaintiff's client in which he had an interest in the circuit court No. 2 of Baltimore city. That, as a result of the said perjury of said Ohle in pursuance of said conspiracy, the course of justice was perverted in said cause, * * * and he and the said Margaret A. Boland were thereby deprived of the money and chattels, which, but for said false, corrupt, unlawful, and willful conspiracy, they would in the cause then pending in the circuit court No. 2, have obtained."

[1] 1. The plaintiff, as shown by that part of the declaration immediately above quoted, seeks to recover in this suit by reason of said alleged perjury the loss alleged to have been sustained by him in his failure to recover for his client from the defendant in that case, and one of the defendants in this case, the alleged money or property of his client, in which, as the declaration herein alleges, he had an interest by assignment from her. All the authorities we have found are against his right to recover in this suit for such alleged loss. There does not appear to be any conflict of authority on this point. This court said in the recent case of *Roschen v. Packard*, 81 Atl. 174, and others, decided at the April term, 1911, and not yet officially reported: "The allegations that the appellees made false statements in their answer to the petition for mandamus, and that certain of them committed perjury at the trial of that case, do not state a cause of action. The controverted questions of fact which were in issue in the mandamus case and which were disposed of there cannot again be retried. Upon all the questions involved in that case the judgment therein rendered is conclusive upon the plaintiff, and the finding of the jury in that case cannot be reviewed or inquired into in this suit." *Smith v. Lewis*, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; *Homer v. Fish*, 1 Pick. (Mass.) 441, 11 Am. Dec. 218; *Dunlap v. Glidden and Others*, 31 Me. 436, 52 Am. Dec. 625. In the case of *Smith v. Lewis* the declaration sets forth a suit brought by Lewis against Smith and others in Connecticut, in which Lewis obtained a judgment. It is then alleged therein that Lewis, in order to prove the matters necessary to maintain his suit, unlawfully and corruptly, and with the view and design to deceive the court and jury and to injure the plaintiff, procured one Stephen Burritt to commit willful and corrupt perjury by making a deposition altogether false and known to be so by the defendant, and which was given in evidence in the trial, on which evidence, and no other, the plaintiff in the former suit prevailed. Chief Justice Kent in passing upon the rulings of the court below in sustaining the demurrer to the declaration in that case said: "This suit is an attempt to

overhaul the merits of the verdict and recovery in Connecticut. If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. * * * It would be against public policy and convenience, it would be productive of endless litigation, and would be contrary to established precedent to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary in the trial of the first suit." As was said in the case of *Dunlap v. Glidden*: "If the judgment was obtained, as contended, by fraud and perjury, the plaintiff has ample remedy by law. The court which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial so that upon a further investigation justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted who had unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford the most convincing evidence that a review of the action should take place." The plaintiff in this suit, it is true, was not the plaintiff in the former suit, but the alleged loss sustained by him, as stated in this declaration, resulted from his failure to recover for his client the property and money sued for in such former suit, and in which property and money he had, as he alleges, an interest by assignment from her. The recovery by *Schaub* in the former suit was dependent upon the recovery by his client, the plaintiff, in such suit. Thus the plaintiff here is governed and controlled by the principles of law stated in the above-mentioned authorities and his right to recover in this suit for such alleged loss is thereby prevented.

[2] 2. Moreover, whatever may be the liability, if any, of the other defendants in this case for procuring the said *Pearl R. Ohle* to testify falsely, as it is alleged, to the defamatory words concerning the plaintiff in this case set forth in the declaration, it is clear from all the authorities that no action would lie against the witness, *Pearl R. Ohle*, even though such testimony was in pursuance of the conspiracy charged against the defendants, including the witness, in this suit. This court in the case of *Hunkel v. Voneiff*, 69 Md. 188, 14 Atl. 501, 9 Am. St. Rep. 413, quotes approvingly from *Starkie on Slander*, in which that author said: "Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and, though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in de-

livering their testimony." In the same opinion the court also quoted from the opinion of the court in *Dawkins v. Rokeby*, Law Rep. 8 Queen's Bench, 255, in which the court there said: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the prima facie presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice." After *Dawkins v. Rokeby* came the case of *Seaman v. Nethercliff*, which is also cited by this court in the case last referred to, and which was tried before *Coleridge, C. J.*, at nisi prius and afterwards decided by him and *Brett, J.*, in Law Rep. 1 C. P. Div. 540, and subsequently by the Court of Appeal in Law Rep. 2 C. P. Div. 53. The judges who heard the case on appeal said: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue." This court in *Hunkel v. Voneiff*, after citing other English authorities in which the same principle is laid down, said: "A different view as to the extent of the privilege has been taken by the courts of many of the states, and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decisions of our own courts, and are at liberty to settle the law for this state according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down." And in the case of *Kimball v. Harman and Burch*, 34 Md. 410, 6 Am. Rep. 340, this court said: "It is clear, therefore, as well upon the authority of other cases as that of *Saville v. Roberts*, 1 Ld. Raym. 374, that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." From what we have said it is clear that no action lies against the defendant *Ohle*. The de-

fects that we have pointed out are sufficient in our opinion to render the declaration bad. We will therefore affirm the judgment of the court below in sustaining the demurrer to the declaration.

Judgment affirmed, as per curiam heretofore filed, with costs to the appellees.

WARD v. NEWBOLD et al.

(Court of Appeals of Maryland. June 22, 1911.)

1. SPECIFIC PERFORMANCE (§ 28*)—SALES—REAL ESTATE—CONTRACT—CERTAINTY.

Where a contract for the sale of real estate purported to reserve certain ground rents, but contained no provision as to how the rents were to be created, or when or for what time the lease should run, the contract was not subject to specific performance, as equity will not compel performance of a contract which is not certain in all its parts.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

2. VENDOR AND PURCHASER (§ 68*)—"GROUND RENTS"—TERM.

Where a contract for the sale of real estate reserved certain "ground rents," such term did not in itself mean a rent reserved under a lease for 99 years renewable forever.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 101; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 4, p. 3176; vol. 8, p. 7676.]

3. SPECIFIC PERFORMANCE (§ 26*)—CONVEYANCE OF REAL PROPERTY—GROUND RENTS.

A contract for the sale of real estate providing for the "future creation" of two certain ground rents to be conveyed by the purchaser to the seller, no such ground rents being in existence when the agreement was made or thereafter created, was not subject to specific performance, since equity will not decree specific performance of an agreement to convey property which has no existence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 59; Dec. Dig. § 26.*]

4. SPECIFIC PERFORMANCE (§ 74*)—CONTRACT FOR THE SALE OF REALTY—DWELLING HOUSES—CONSTRUCTION—SPECIFIC RELIEF.

Where a contract for the sale of real estate not only required the vendee to create certain ground rents and convey same to the vendors, but also provided that he should erect certain dwelling houses on the property to be "trimmed out and papered" before delivery of the deed, the contract was not subject to specific performance, since equity will not specifically enforce contracts to build or repair.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 209; Dec. Dig. § 74.*]

5. PLEADING (§ 214*)—IRREPARABLE LOSS OR INJURY—ADMISSIONS BY DEMURRER.

An allegation in a bill for specific performance that complainants would suffer irreparable loss and injury if performance was not decreed was a mere conclusion of law not admitted by demurrer so as to show that breach of contract could not be adequately compensated for by damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

6. SPECIFIC PERFORMANCE (§ 114*)—BILL—PRAYER FOR RELIEF.

Where a bill for specific performance of a contract for the sale of real estate prayed first

for exact performance of the contract as written, a following prayer for such further and other relief as the case might require only authorized the granting of consistent relief, so that complainant on being unable to enforce specific performance could not recover pecuniary damages in that suit.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 350-372; Dec. Dig. § 114.*]

Appeal from Circuit Court of Baltimore City; Alfred S. Niles, Judge.

Bill by David M. Newbold and another against Edward L. Ward for specific performance. From an order overruling a demurrer to the bill, defendant appeals. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

S. S. Field, for appellant. Joshua Horner, Jr., for appellees.

PEARCE, J. This is an appeal from an order of the circuit court of Baltimore city overruling a demurrer to a bill for the specific performance of a contract which is transcribed herein in full as follows:

"This agreement, made this 25th day of May, in the year one thousand nine hundred and seven, between David M. Newbold and Eliza A. Newbold, his wife, of Baltimore, Maryland, of the first part, and Edward L. Ward of the same place of the second part.

"Witnesseth that the said parties of the first part do hereby bargain and sell unto the said party of the second part, and the latter doth hereby purchase from the former the following described property, situate and lying in Baltimore city, and being located on the west side of Stevenson street, and beginning about two hundred and seventy-five feet and six inches north of Fort avenue, and running thence north on the west side of Stevenson street sixty-five feet, with a depth of even width of seventy-two feet, more or less, to the center of an alley ten feet wide, in fee simple and free and clear and discharged from all claims, liens and incumbrances of every kind, at and for the price of eleven hundred and ninety-one dollars and sixty-six cents, which purchase money is to be paid as follows: In two ground rents of forty-two dollars each to be created, upon lots thirteen feet front on Stevenson street, and with a depth to said ten-foot alley, and forming part of the original lot herein sold to the party of the second part, said lots to be improved with two-story dwelling houses, containing six rooms each, and it is further agreed that said ground rents so to be conveyed shall be capitalized at six per cent. with the rents beginning November 1st, 1907, and whatever difference there may be between the two ground rents capitalized at six per cent., and the purchase money of eleven hundred and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ninety-one dollars and sixty-six cents shall be paid in cash by the parties of the first part to the party of the second part, and if said rents shall be created before November 1, 1907, then the said parties of the first part are to pay the ground rents so conveyed to them to the said party of the second part from the date of such creation to said first day of November 1907, which would entitle them to collect said rents from the date of creating the same. And it is further agreed between the parties hereto, that no interest shall be paid on said purchase money of eleven hundred and ninety-one dollars and sixty-six cents by said party of the second part from the date of this contract to said 1st day of November, 1907, and that the two ground rents which the parties of the first part are to take shall be those rents which the parties of the first part are to take (shall be those rents) under the fourth and fifth houses to be erected on said lot. And it is further agreed between the parties hereto that the parties of the first part will at the time of the signing of this contract execute unto the said party of the second part a deed from said lot in fee and free of all liens, claims and incumbrances, which deed shall convey said lot by a good and marketable title, and that said deed shall be held in escrow by David M. Newbold, Jr., and when said houses so to be erected are trimmed out and papered, said deed shall be delivered to the party of the second part, and he shall in turn deliver a deed to said parties of the first part for said two ground rents, they paying unto him the difference between the purchase price for said lot and the said rents capitalized at six per cent. in cash.

"Taxes to be adjusted to date hereof, and city and street charges of every kind to be paid or allowed by the parties of the first part.

"Witness our hands and seals the day and year first above written:

"David M. Newbold. [Seal.]

"Eliza A. Newbold. [Seal.]

"Witness: G. N. Melsel.

"Edward L. Ward. [Seal.]

"Witness: Chas. H. Corbett."

The appellant contends in support of his demurrer: First. That the contract is uncertain, in that it is not stated how rents are to be created or when or for what time the leases shall run, one of its provisions requiring the creation of ground rents; and, because it requires the building of houses, the materials for which, and the character not being specified; nor does the contract specify when the houses are to be built. Second. That the contract is unenforceable, because a court of equity will not supervise the building of houses or a building contract. Third. That the contract provides for the creation of ground rents, which implies a les-

see or lessees, and that an equity court cannot compel a lessor to make or provide a lessee to sign any lease.

[1] No rule is better established than that which enumerates "certainty in all its parts" as one of the essentials of every agreement to merit the interposition of a court of equity, and that, "if any of these essentials are wanting, courts of equity will not decree a specific performance." *Griffith v. Frederick County Bank*, 6 Gill & J. 439; *Gelston v. Sigmund*, 29 Md. 343; *Hornor v. Woodland*, 88 Md. 512, 41 Atl. 1079.

In *Howard v. Carpenter*, 11 Md. 278, the bill prayed that the defendant be commanded to make a lease for 99 years under an agreement or writing which failed to fix the rent to be paid, and the court said of the paper, "If for no other reason it is defective in not showing what rent was to be paid."

In *Myers v. Forbes*, 24 Md. 598, the contract sought to be enforced provided for a lease of certain lots at a stipulated annual rent with the privilege to the lessee of buying out the "ground rent" within three years at the rate of 6 per cent. per annum, but was altogether silent as to the term for which the intended lease was to be made. The court said: "The insuperable difficulty in granting the relief prayed, consists, in our opinion, in the want of definiteness and certainty in the terms of the contract. * * *

The term or duration of a lease is an essential part of it, and in the absence of any stipulation in that respect a court of equity cannot decree a specific performance of a contract to lease"—citing *Howard v. Carpenter*, supra, to show that the rent must be definitely fixed, and then adding that "the length of the term is just as necessary a part of the lease as the rate of rent reserved." That case has been approved in *Thomson v. Gortner*, 73 Md. 482, 21 Atl. 371, and in *Gortner v. Gale*, 86 Md. 689, 39 Atl. 527.

[2] In the face of the specific decision of the point in *Myers v. Forbes*, supra, and the approval of that case, upon that point, so late as 86 Md., 39 Atl., we cannot adopt the argument of the appellee that the term "ground rent" in this state, *ex vi termini*, means a rent reserved under a lease for 99 years renewable forever. The contention is not sustained by the case of *Crane v. Judik*, 86 Md. 66, 38 Atl. 129, 131, cited for that purpose by the appellee, as the ground rent referred to in that case was for 99 years renewable forever. Specific performance was refused in that case because the court found that the ground rent was not "an old, original, well secured, ground rent for \$240," as stated in the advertisement and report of sale of the auctioneer, but was comparatively recent, and was subject to reduction to \$140, and was far from being well secured. There is nothing in that opinion to show that if the ground rent had answered the description under which it was sold, but had been

for a less period than 99 years renewable forever, the court would have refused the relief upon the theory or assumption that the term "ground rent" in this state necessarily imports a rent reserved upon a lease of 99 years renewable forever. Upon this view of the law, "an insuperable difficulty," in this case, as in *Myers v. Forbes*, supra, in granting the relief prayed, is found in the want of definiteness and certainty in this essential term of the contract.

In *Popplein v. Foley*, 61 Md. 383, where it was sought to enforce a written contract for a lease, the lease contained no statement of the term for which it was to be made, but the bill alleged that it had been agreed the term should be for 99 years renewable forever, and that this had been omitted from the contract by mistake or oversight, and the bill prayed that the contract be so reformed as to correct this mistake, and be specifically executed as reformed, and it was so ordered. The court intimated in the opinion in that case that but for the decision in *Myers v. Forbes*, they should be inclined to hold that the agreement contemplated leases for 99 years renewable forever, but they nevertheless abided by that decision, and required the mistake to be established by proof, and the contract to be reformed accordingly *before* granting its specific performance.

[3] But there are other difficulties in the way of granting the specific performance of this contract. It provides for the *future creation* of two certain ground rents to be conveyed by the appellant to the appellees. No such ground rents existed when the agreement was made, and none such now exist. In 26 Amer. and Eng. Enc. 39, it is said a court of chancery will not decree specific performance of an agreement to convey property which has no existence. This statement of the law would scarcely seem to require the support of adjudged cases, but it was so held in *Kennedy v. Hazleton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576, where ample authorities are cited for the statement. Mr. Justice Gray said: "A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title, * * * and if it appears by the bill, or otherwise, that the want of title (even if caused by the defendant's own act, as by his conveyance to a bona fide purchaser) was known to the plaintiff at the time of beginning the suit, the bill will not be retained for the assessment of damages, but must be dismissed, and the plaintiff left to his remedy at law." The case stated in the bill in that case, and admitted by the demurrer, was this: "The defendant agreed in writing to assign to the plaintiff any patents he might obtain for improvements in steam boilers. He did invent such improvement, and, with intent to evade his agreement and to defraud the plaintiff, procured a patent for this invention to be

obtained upon the application under oath of a third person as the inventor, and to be issued to him as the assignee of that person, and has made profits by manufacturing and selling boilers embodying the improvement so patented. The plaintiff seeks by bill in equity to compel the defendant to assign the patent, and to account for the profits received under it."

So, in *Burton v. Shotwell*, 13 Bush (Ky.) 271, it was held that a contract whereby B. agreed to exchange real estate with S., for stock in a corporation which had not been organized at the time the suit was brought, could not be specifically enforced. In that case the bill prayed for specific execution of the contract in the alternative—that is, that S. be compelled to accept title to the real estate, and pay the agreed sum, \$55,500, *either* in the stock of the company *as agreed* in the contract, *or* in cash—and, as the court found S. had purposely defeated the organization of the company, he was decreed to pay the plaintiff the sum of \$55,500 in cash *as compensation for the breach of his contract*. Further reference will be made later herein to the granting of this form of relief in the case before us.

[4] The contract in this case also requires the defendant to improve two of the lots to be conveyed to him, by erecting upon each "a two-story dwelling house containing six rooms * * * to be trimmed out and papered" before delivery of the deed from the plaintiff to the defendant, and the prayer of the bill is for *this specific relief*, as well as for the creation of the ground rents before mentioned and their conveyance to the plaintiff.

The *general* rule is certainly well settled that courts will not specifically enforce contracts to build or repair, although some exceptions have been made to this rule. Story's Equity Jurisprudence, § 726; Fry on Spec. Per. § 98; Pomeroy on Spec. Per. (2d Ed.) § 23; 36 Cyc. p. 581. In *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430, these exceptions are thus enumerated: "First, where the work to be done is defined; second, where the plaintiff has a substantial interest in its execution which cannot be adequately compensated for by damages; and, third, where the defendant has by the contract obtained for the plaintiff possession of the land upon which the work is to be done." The record does not bring this case within any of these exceptions. The work is absolutely undefined except that the houses are to be of two stories, to contain six rooms, and are to be trimmed and papered.

It may be assumed, as each lot is only 13 feet front, that the whole front should be occupied by the house, but the lots are 72 feet deep, and how can the court determine the depth of the houses to be built? Are they to be 40, 50, or 60 feet in depth? This difficulty would seem to be insuperable, even if it could be held, as argued by the appellee,

that the building regulations of the city of Baltimore, would sufficiently define the material and general structure, since the size of the house must largely govern the cost. A house 60 feet in depth would certainly cost much more than one of the same frontage with a depth of 30 or 40 feet. There is nothing in this contract to show what size or character of houses have been erected in that neighborhood, or indeed whether there are any houses erected in that neighborhood, which might be supposed to furnish a guide to the court in decreeing as to the character of the houses contemplated by this contract.

In *Busey v. McCurley*, 61 Md. 436, 48 Am. Rep. 117, the court said: "In all such cases the agreement must be sufficiently definite to guide the court in the direction to be given for the specific performance, or, at any rate, that it may be made certain and definite upon proper inquiry."

In that case, the relief prayed was in the alternative; either that the complainant might have a dwelling house suitable to her condition and circumstances in life, to be vested in her absolutely as covenanted by her deceased husband in an antenuptial settlement, or a sum of money equivalent to the value of such house. There was proof in that case that her husband had built a house designed by him for her under that covenant, and that its fair value was \$6,000, but that he had sold and conveyed that house to his daughter in his lifetime. The court in that case, however, did not decree the erection of a house of that character and description, to cost \$6,000, but decreed the payment of that amount to her in lieu of such a house.

[5] The allegation in the bill of irreparable loss and injury is a mere conclusion of law not admitted by the demurrer, and not to be taken as proof that the breach of contract cannot be adequately compensated for by damages. And the defendant has not been let into possession of the land, nor the title transferred, the deed being held in escrow to await the erection of the houses and the creation of the ground rents.

[6] In this case the prayer for relief is not in the alternative as in *Busey v. McCurley*, supra. The prayer is, first, for exact performance of the contract as written; and, second, for such further and other relief as the case may require.

It is uniformly held that relief which is entirely distinct from, and repugnant to, the special relief prayed cannot be granted under a general prayer. 16th Enc. Pl. & Pr. 806; and this rule has nowhere been better observed than in Maryland. In *Chalmers v. Chambers*, 6 Har. & J. 30, the court said, "As to the relief to be given, under a general prayer, the rule is that it must be agreeable to the case made by the bill, and not different from it, or inconsistent with it;" and that case is approved in *Gibson v. McCormick*, 10 Gill & J. 108; *Hitch v. Davis*, 3 Md. Ch. 275; *Sloan and Atkinson v. Safe Deposit & Trust Co.*, 73 Md. 245, 20 Atl. 922; and *Riverside Brick Co. v. Wheatley*, 92 Md. 412, 48 Atl. 715.

In the last case Judge Briscoe said, "It is a well-established rule, and has been repeatedly held by this court, that a party cannot have relief which is contrary to the purpose of his bill and not within its scope," and that where it was clear that the relief sought by the plaintiff was not *specifically* contained in the prayer of the bill, to grant it under the general prayer would not be warranted by the facts alleged and proved in the case, or, as in the case before us, admitted by the demurrer. Certainly, the relief afforded by a personal monetary decree such as the learned judge below would pass if his decree were affirmed, is distinct from and repugnant to the special relief prayed by the bill. One asks the *execution* of the contract as written; the other proposes to substitute for performance of the contract, pecuniary damages for its breach or nonperformance, and in our opinion the rule above stated requires the reversal of the decree appealed from, leaving the plaintiff to his remedy at law for breach of contract.

Decree reversed and bill dismissed, with costs to the appellant above and below.

MILLER et al. v. MANTIK.

(Court of Appeals of Maryland. June 23, 1911.)

1. SALES (§ 340*)—ACTION FOR PRICE OR VALUE—SPECIAL CONTRACTS—ACTIONS.

Where there is a special contract of sale of goods a recovery, if any, must be thereon instead of on a quantum meruit, and where there has been a breach of the contract the party guilty of the breach cannot abandon the contract and elect to stand on the common counts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

2. CONTRACTS (§ 303*)—BREACH—ACTS CONSTITUTING.

A party guilty of a breach of contract may be excused therefor where his act constituting the breach is occasioned by some act of the other party to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1424-1433; Dec. Dig. § 303.*]

3. CONTRACTS (§ 316*)—BREACH—WAIVER.

A breach of contract by one party thereto may be waived by the other party affected thereby.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382-1387, 1480-1492; Dec. Dig. § 316.*]

4. SALES (§ 182*)—BREACH OF CONTRACT—WAIVER—QUESTION FOR JURY.

A seller agreed to sell canned tomatoes, and the buyer agreed to furnish the cans for a specified allowance, but failed to deliver the cans. The seller made some deliveries thereafter, but did not make all the deliveries called for. *Held*, that the issue of the seller's waiver of the buyer's default was for the jury in determining the right of the seller to abandon further performance, the question of waiver being for the jury where it has to be deduced from the actions of the parties, while it is usually for the court when arising as a question of estoppel.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 494; Dec. Dig. § 182.*]

5. TRIAL (§ 243*)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

In an action for the price of canned tomatoes delivered by the seller under a contract requiring the buyer to furnish cans, the evidence showed that the buyer failed to furnish cans when demanded, and the issue was whether the seller, by making some deliveries thereafter, waived the buyer's default, so that he could not abandon further performance. *Held*, that a charge that if the seller continued to deliver after the buyer's refusal to supply cans the buyer could recover damages for the seller's breach to make complete delivery, and a modification by an addition that there could be no recovery if the jury found that the seller demanded the necessary cans, and the buyer refused to furnish them, were not inconsistent with each other, but the modified charge merely presented to the jury the question of the seller's waiver of the buyer's default.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 243.*]

6. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

An instruction which ignores a large part of the evidence of a party is erroneous, especially where the instruction is the only one given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

7. TRIAL (§ 267*)—INSTRUCTIONS—REQUESTS—MODIFICATION.

Where the issue whether a seller of canned tomatoes waived the buyer's refusal to furnish the necessary cans was for the jury, a modification of a requested prayer dealing with the

question as one of law so as to submit the question to the jury was proper.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 267.*]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by William B. Mantik against William Miller and another, copartners trading as Miller Bros. & Co. From a judgment for plaintiff, defendants appeal. *Affirmed*.

Argued before BOYD, C. J., and PEARCE, BURKE, URNER, and STOCKBRIDGE, JJ.

Myer Rosenbush, for appellants. B. B. Shreeves, for appellee.

STOCKBRIDGE, J. On the 6th of August, 1910, the parties to this case entered into a written contract by which the appellee, the plaintiff below, agreed to sell to the appellants 2,000 cases No. 2 full standard tomatoes and 1,500 cases No. 3 full standard tomatoes. The buyer was to furnish the cases and cans for the fruit, and be entitled to a specified allowance for so doing. Deliveries were to be made when packed during the season of 1910, not later than October 1st. The vendor commenced deliveries upon the same day the contract was signed, and, according to the plaintiff's evidence, continued making them up to the 30th day of September, by which time the full amount of the No. 2 variety had been delivered and 735 of the 1,500 cases of No. 3. The present suit is brought, not on the written contract, but in assumpsit to recover upon the basis of a quantum meruit for a balance due for goods actually delivered, but not paid for by the buyer. There should be but little difficulty in determining the principles controlling the case.

[1] The general rule is unquestionably that where there is a special contract, the recovery, if any, must be had by an action upon that, rather than by a suit based on a quantum meruit, and where there has been a breach in the contract, the party guilty of the breach cannot abandon his contract and elect to stand upon the common counts, *Dougherty v. Gring*, 89 Md. 544, 43 Atl. 912; *Townes v. Cheney*, 114 Md. 362, 79 Atl. 590, decided January term, 1911.

[2, 3] But the party guilty of the breach may be excused from that default where his act or failure, constituting the breach, is occasioned by some act of the other party (*Meyer v. Frenkil*, 113 Md. 45, 77 Atl. 369), or the breach of the contract may be waived by the party to be affected by it.

[4] The defense to the present suit is the nondelivery of 765 cans of No. 3 tomatoes, as constituting a breach of the agreement. The nondelivery is admitted by the plaintiff, who insists, nevertheless, that this was due to the refusal of the defendants to furnish cans in accordance with the agreement, and the failure of the defendants to make the payments

as stipulated. The fact that the plaintiff did make some deliveries after the time when the defendants had refused or failed to deliver cans is urged by the defendants as showing a waiver on the part of the plaintiff of any right he may have had to abandon the further performance of the contract. It is upon this theory that the first prayer of the defendants was presented, which sought to take the case from the jury. This prayer was not presented until all the evidence upon both sides was in, and that evidence abounded in contradictions upon matters of fact, from which a waiver might or might not be found to have resulted. The question of waiver may sometimes be one of law for the court, and then it usually arises as a question of estoppel (*Spring Gardens Co. v. Evans*, 9 Md. 1, 68 Am. Dec. 30; *Farmers' Ins. Co. v. Baker*, 84 Md. 561, 51 Atl. 184), or it may be a question for the jury under proper instruction from the court, where it has to be deduced from the actions of the parties (29 Am. & Eng. Ency. 1108). In this case the defendants' first prayer asked the court to find an estoppel from the conduct of the plaintiff. This was manifestly error in view of the conflicting testimony, and the prayer was properly refused. The plaintiff in this case offered no prayers, and the defendants two.

[5] The second prayer of the defendants was as follows, and granted by the court with a modification, that modification being the addition of the words in italics:

"Defendants' Second Prayer.

"At the request of the defendants, the jury are instructed that by the uncontradicted evidence, three facts appear:

"(1) That the plaintiff was required by his contract to deliver to defendants, on or before October 1, 1910, 2,000 cases No. 2 and 1,500 cases No. 3 full standard tomatoes. (2) That plaintiff failed to deliver said quantity to defendants within the time prescribed, although requested to do so by defendants. (3) That plaintiff continued to deliver large quantities of tomatoes to defendants, after defendants' alleged refusal to supply cans to plaintiff, and accordingly the defendants are entitled to recover against the plaintiff, by way of recoupment, as follows:

"(1) The difference between the market value of the undelivered tomatoes at the time plaintiff refused to make said delivery, and the price of said tomatoes as specified in said contract, if any, *unless the jury shall*

find that the plaintiff demanded from the defendants the necessary cans, and that the defendants failed or refused to furnish said cans. (2) That brokerage commission and cash discount specified in said contract, upon the gross value of the canned tomatoes delivered, as charged against defendants by plaintiff. (3) And if the jury shall find that 1,225 cases of the tomatoes delivered by plaintiff to defendants were not 'full standards,' but were 'seconds,' and that the market price of 'seconds' is and was lower than the market price of 'full standards,' then the defendants are entitled to recover against the plaintiff an amount equal to the difference between the contract price of 'full standards' and the market value of 'seconds,' upon said number of cases.

"And if the jury shall find that the aggregate of said amounts is equal to or greater than the sum of \$396.27, which is the amount of plaintiff's claim disputed by the defendants, then their verdict must be in favor of the defendants. Granted as modified."

This modification was excepted to by the defendants. It has been strenuously urged upon the court that the modification made by the trial court was inconsistent with the language of the preceding paragraph, numbered 3. We do not so regard it.

[6] To have granted the prayer in its original form would have been to send the case to the jury with an instruction which entirely ignored a large portion of the plaintiff's evidence, and such an instruction is serious error (*Jackson v. Jackson*, 80 Md. 192, 30 Atl. 752), particularly so where such instruction is the only one given the jury.

[7] In addition to this, but for the modification the case would have been presented to the jury in a form dealing with the question of waiver as purely one of law, while the effect of the language added by the judge before whom the case was tried, was to submit this question as one of fact to be passed on by the jury, and as already indicated the facts testified to made this question one peculiarly for the jury.

Four exceptions were reserved in questions of evidence, but none of them have been seriously pressed in this court, and it is sufficient to say that, whether the action of the learned judge who heard the case was correct in each instance or not, it is not perceived how the defendants were injured as the result of any of the rulings.

Judgment affirmed, with costs.

NEW CUMBERLAND BOROUGH v. RIVERTON CONSOL. WATER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WATERS AND WATER COURSES (§ 192*)—MUNICIPAL WATER SUPPLY—RIGHT OF WATER COMPANY.

It is immaterial whether a borough ordinance, providing for the supply of water to the borough, permits the construction of a water line in the streets, where the ordinance contains no limitation affecting the company's charter right to enter on the streets and lay their mains, since water companies are not required to obtain permission of the borough to lay pipes in the streets; their charters giving them that right without such permission.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279; Dec. Dig. § 192.*]

2. WATERS AND WATER COURSES (§ 188*)—MUNICIPAL WATER SUPPLY—RIGHTS OF WATER COMPANY.

Where a borough ordinance authorizes a water company to supply water to the borough, the company is not prevented from exercising charter rights which are not inconsistent with the ordinance, simply because no direct reference to the particular rights to be exercised are to be found therein, even if it be conceded that the general rights of the company, inconsistent with the municipal grant, would be limited by its terms.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287; Dec. Dig. § 188.*]

3. WATERS AND WATER COURSES (§ 188*)—WATER COMPANIES—PRIVILEGES.

Where a borough ordinance authorizes a water company to enter on the streets of the borough to supply water to the borough and its inhabitants, the water to be taken from certain mountain springs, so long as the consumption should not exceed the supply of such springs, in which event the additional water might be pumped from a certain creek, the laying of a proposed new line from the creek named will not be enjoined, on the ground that the ordinance provision limited the right of the company to pipes conveying water from the springs, so long as they furnish a sufficient supply, since the company had a right to provide for the future by making the water from the creek presently available.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 188.*]

4. WATERS AND WATER COURSES (§ 192*)—MUNICIPAL WATER SUPPLY—RIGHTS OF WATER COMPANIES—INJUNCTION.

That an additional main about to be laid by a water company is to be used to transport water beyond the borough is not ground for an injunction to prevent its laying a new main, at the suit of a borough, which has passed an ordinance authorizing the company to supply water to the borough and its inhabitants, where it will also furnish water for the borough, and be used to furnish a circulating supply with the old pipes, as well as to furnish increased fire protection.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 192.*]

5. EQUITY (§ 389*)—HEARING—FINDING.

In a suit in equity, litigants and the reviewing court are entitled to direct, definite answers to all requests for findings, since eva-

sive replies merely serve to confuse, and not to assist, a proper determination of the issues.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 830; Dec. Dig. § 389.*]

6. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERROR—SETTING OUT EXCEPTIONS.

Under equity rule 67, providing that on appeals to the Supreme Court such matters only as have been excepted to and finally passed upon by the court below shall be assigned for error, and rule 65, providing that if no exceptions be filed all objections shall be deemed to be waived, assignments of error should show that objections were taken in the court below, and should be to the final action of the court on exception.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 724.*]

Appeal from Court of Common Pleas, Cumberland County.

Bill in equity by the Borough of New Cumberland against the Riverton Consolidated Water Company. From a decree for defendant, plaintiff appeals. Affirmed.

Bill in equity for an injunction to restrain the defendant company from entering upon the streets and highways of the plaintiff borough and constructing thereon, without its consent, the water line referred to in the opinion below.

The following excerpts from the opinion of the court below state the facts material to this report: "The borough of New Cumberland is the plaintiff, * * * while the defendant is a water company, organized by the merger of six other corporations, one of them being the Mountain Water Company, and which was incorporated under the general laws of the commonwealth on February 15, 1896. The complaint of the plaintiff is in substance that the defendant supplies * * * other places with water, and for the purpose of supplying such other municipalities and places outside of the borough of New Cumberland have constructed, or are in process of constructing, a filtering plant on the banks of the Yellow Breeches creek * * * outside of the limits of the borough of New Cumberland; and that for the purpose of conveying the filtered water from the above-mentioned filtering plant to the consumers northward and outside of the borough of New Cumberland the said company proposes and has surveyed and made plans and commenced to dig and install a main water line from said filtration plant to the consumers of said company outside of the borough of New Cumberland, within the borough limits, without the consent of said borough; that said work has just started at the corner of Second and Geary streets within said borough, and the defendant has declared its purpose to be to convey said main supply water line through the said borough upon the line of said Geary street for a distance of about 1,200 feet, the size of said pipe to be from 12 to 16 inches in diameter; this being done without the consent of the borough au-

thorities, and against their protest. * * * It is also averred that the Mountain Water Company supplies water under an ordinance passed by the borough of New Cumberland on January 20, 1896, and is bound by its provisions. The prayer is that the company defendant may be enjoined from digging trenches and laying water pipes on Geary street, or other streets and highways of the borough, and it be decreed that it has no authority so to do. * * *

"The allegation in the bill that the pipe line proposed to be laid is solely for the conveyance of water to localities outside of and beyond the borough of New Cumberland was not supported at the hearing, * * * but the contrary was clearly shown, and not contradicted. * * * The general manager testified that 'the purpose is to supply, not only the territory north of New Cumberland, but also to supply a circulating system in New Cumberland, and to increase its pressure.' Richwine, secretary and treasurer of the defendant company, testified that 'the object of the company was to give a larger supply of water for fire protection;' that what was proposed to be installed 'was a gridiron system, a cross system, connecting each pipe line, so as to give a certain flow, and so there will be no dead ends, so the water will flow through all the pipes of the system—a cross connection of each pipe line with the other.'

* * * The defendant is erecting a station and filter plant * * * and other improvements to its system, involving necessarily a very large outlay of money, and testimony was offered to show that one of the incentives to do this was that there had been complaint by citizens of New Cumberland as to the water supply; * * * that by the laying of the proposed new and larger pipe, and making connections with those formerly laid, it will give the circulation required to prevent water from becoming stagnant in the 'dead ends,' which has heretofore obtained in the existing system of distribution; also that by means of this new pipe line and the proposed connections the company will be enabled to give New Cumberland and the other communities which it serves a much more abundant supply, and that of pure filtered water, and a pressure much more serviceable for fire purposes, as already stated. It was also shown * * * that the establishment of the pumping station and purification works, the laying of a new force main from there to a new reservoir north of White Hill, and the laying of additional street mains in White Hill, Lemoyne, and New Cumberland were submitted to Samuel G. Dixon, commissioner of health of the commonwealth, and were approved by him, and permits given to the company defendant * * * to make the proposed additions and changes to its system, under the powers conferred upon him by the provisions of an act of assembly, approved April 22, 1905 (P. L. 260).

"The defendant insists, and we think with

some force, that these permits of the commissioner of health should be regarded under the powers conferred upon him by the act of assembly of April 22, 1905 (P. L. 260), in the nature of orders or decrees, which were obligatory upon the company, and which it could not disregard; but, even if they be not regarded as legally enforceable, yet it cannot in any aspect of the case be treated otherwise than as most influential in determining whether the plans which the defendant seeks to carry into execution are wise and justifiable, or not. It was also urged that the ordinance of January 20, 1896, given to Horner and assigned to the Mountain Water Company, authorizes the entry upon the streets and alleys of the borough.

"After hearing and giving due consideration to what has appeared before us, we have been unable to discover that there is any valid or reasonable objection to the carrying out of its plans by defendant. Indeed, on the other hand, what is proposed seems to promise beneficial results. The borough of New Cumberland will have a larger and an abundant water supply to draw from. To that from the springs and runs in York county will be added pure filtered water from an inexhaustible source, circulation will be insured in the pipes, and stagnation, with consequent deterioration, avoided, while the additional pressure provided will render it more serviceable in case of fire, and insure better protection. As a matter of course, the ditches dug in which to lay pipes will be filled up, and the streets put in equally as good condition for public travel as they were before being entered upon by the defendant. We are therefore of the opinion that the plaintiff is not entitled to the relief sought by it in this bill."

The bill was dismissed, after a hearing on the merits, and the plaintiff appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

J. W. Wetzel, for appellant. S. B. Sadler, for appellee.

MOSCHZISKER, J. While there are numerous specifications of error, the appellant's principal contentions are that the court below failed to give full and proper effect to the ordinance of councils referred to in its opinion; that it admitted incompetent testimony; that it failed to understand and misapplied the actions of the health authorities in relation to the matters before it for adjudication; and that the answers to the plaintiff's requests for findings were "evasive, indefinite, and not responsive to the issue raised in this case." Though much might be said in criticism of the manner in which certain parts of the adjudication are stated, after a thorough consideration of the whole record, we are not convinced that an

incorrect result was reached, or that any of the alleged errors calls for a reversal.

[1] Whether or not the orders and permits of the state health authorities to the defendant company were sufficient warrant in law to justify the construction through the plaintiff borough of the water line here objected to, and whether or not the municipal ordinance permits such construction, it is not necessary to decide; for "water companies are not required to obtain permission of a borough to lay pipes in its streets, for the manifest reason that their charters give them the right to enter upon the streets and lay their mains without such permission" (*Dorrance v. Bristol Borough*, 224 Pa. 464, 472, 73 Atl. 1015, 1018); and there is no limitation in the ordinance which would affect the defendant's right to construct the line in question.

[2] Should it be conceded that all general rights of the water company inconsistent with the municipal grant would be limited by the terms of the ordinance, that would not prevent the defendant from exercising charter rights which are not inconsistent, simply because no direct reference to the particular rights desired to be exercised are to be found in the ordinance; in other words, the maxim, "*Expressio unius est exclusio alterius*," is not to be applied in the construction of this ordinance, so as to deprive the water company of its charter rights.

[3] It is provided in the ordinance that Horner and his assignees shall have the right "to enter upon the streets and high-ways of the said borough for the purpose of supplying good water to said borough and the inhabitants thereof. * * * Said water to be mountain water taken from the springs or runs in Fairview township, York county, Penna., so long as the consumption of the borough shall not exceed the supply of such springs or runs as may be selected by said Horner, in which event the additional water shall be pumped from the Yellow Breeches creek." The appellant contends that this limits the right of the defendant company to pipes conveying water from the springs and runs referred to, so long as they continue to furnish a sufficient supply. It appears, however, that the water which is to run through the new line is to come from the Yellow Breeches creek, a source of supply named in the ordinance. Even though there may be a sufficient quantity of mountain water from the springs and runs to supply the present needs of the borough, it does not follow that the water company, fixed with the obligation to keep up such supply, could not provide for the future by making the water from the Yellow Breeches creek presently available in the borough. Hence the limitation contended for fails.

[4] The findings of the court below are that the new main is not to be used exclu-

sively to supply distant points, but "it will also furnish water for the borough of New Cumberland," and "is to be used for furnishing a circulating system of water with the old pipes, as well as to furnish increased fire pressure" needed within the borough. Under these circumstances, the fact that it may also be used by the defendant company for the purpose of transporting water beyond the borough limits would not be sufficient to justify us in reversing the court below for refusing the relief asked for by the plaintiff.

We are satisfied by our examination of the record and by what is stated by the learned president judge of the court below, to the effect that he was not influenced in reaching his conclusions by any testimony in the nature of hearsay, that no harmful error was committed in the rulings on the evidence.

[5] Some of the answers to requests may be justly criticised as "evasive." Litigants, and this court, are entitled to have direct, definite answers placed upon the record to all requests for findings, and when the replies are evasive they merely serve to confuse, and not to assist a proper determination of the issues. The answers complained of have caused us additional labor in examining the evidence, but we are satisfied that no material harm has been done to the plaintiff.

[6] Equity rule 67 provides that upon appeals to the Supreme Court such matters only as have been excepted to and finally passed upon by the court below shall be assigned for error. The preceding rules provide for the taking of exceptions in the trial court, and rule 65 that, "if no exceptions be filed, all objections shall be deemed to be waived." The assignments in this case do not show that exceptions were taken, or, if taken, how disposed of. For instance, the first specification is: "The learned court below erred in its answer to the first finding of fact for the plaintiff," quoting the request and answer. This specification should have shown that there was an exception taken, and the assignment of error should have been to the final action of the court on the exception. In *Landis v. Evans*, 118 Pa. 332, 335, 6 Atl. 908, we said: "The assignments of error are an essential part of the pleadings in this court, and as such should be so complete in themselves as not to require reference to other parts of the record." Here we must look in other parts of the record for the exceptions and the rulings thereon.

We will not specifically pass upon the 25 specifications of error; such of them as it would serve any useful purpose to discuss have already been touched upon. They are all dismissed, and the final decree of the court below is affirmed, at the cost of the appellant.

SHAMBACH v. MIDDLECREEK ELECTRIC CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

DEATH (§ 25*)—SUIT BY WIDOW—COMPROMISE.

Under Act April 15, 1851 (P. L. 669), giving an action for wrongful death, and Act April 26, 1855 (P. L. 309), on the death of a husband, the right of action is in the widow, and her minor children are not necessary parties, and she has a right to compromise the claim when she does so in good faith, without the consent of the guardian of the children.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 27; Dec. Dig. § 25.*]

Appeal from Superior Court.

Action by Ida Shambach against the Middlecreek Electric Company. From a judgment of the Superior Court, affirming a judgment for defendant notwithstanding the verdict, plaintiff appeals. Affirmed.

The opinion of Morrison, J., in the Superior Court, to which, Henderson, Orlady, and Beaver, JJ., dissented, was as follows:

"This is an action of trespass based on the death of Henry Shambach, caused, as alleged, by the negligence of the defendant. The verdict of the jury has settled the question of the defendant's negligence and the lack of contributory negligence by the deceased, and these questions are not raised in this appeal.

"The deceased was survived by his widow, Ida Shambach, and nine children, named in the declaration, all, or nearly all, of them minors. By the Act of April 15, 1851, P. L. 669 (see section 19, p. 674), an action is given for the death of a person when caused by unlawful violence or negligence; and by the Act of April 26, 1855 (P. L. 309), the persons entitled to recover are the husband, widow, children, or parents of the deceased, the sum recovered going to them in the proportion they would take the personal estate of the deceased in the case of his or her intestacy. These acts determine the right to recover, which does not exist at common law and has no existence outside of them. It has been decided that these acts are in *pari materia*. And it is conclusively established by a line of decisions of our Supreme Court that, when there is a husband or widow, children are not only not necessary, but not even proper parties, but it is necessary to name them in the declaration. *Huntingdon & Broad Top Railroad Co. v. Decker*, 84 Pa. 419; *Haughey v. Pittsburg Rys. Co.* (2), 210 Pa. 367, 59 Atl. 1110; *Black v. B. & O. R. R. Co.*, 224 Pa. 519, 73 Atl. 903. The right of said action cannot be assigned by the widow to the child, so as to enable suit to be brought in her name for its benefit. *Marsh v. Western New York & Penna. R. R. Co.*, 204 Pa. 229, 53 Atl. 1001. And by the plain terms of the act of 1855 the children cannot bring suit for themselves in their own names while the widow is living.

"In the present case, after the widow had brought the action to recover damages for herself and the nine children of the deceased, and had named the latter in the declaration, as required by the act of 1855, she, on December 10, 1907, in consideration of \$750 paid to her by the defendant, executed and delivered, under her hand and seal, a release and discharge of the defendant from all claims and demands of any kind for or by reason of, or in any way growing out of, the accident, or death of said Henry Shambach. Thereafter it was sought at the trial of the case to recover, notwithstanding this release, the proportion of the damage claimed by the children, to wit, two-thirds of such sum as might be allowed by the jury. It is conceded that the widow favored such recovery. The defendant's counsel offered said release in evidence and claimed that it ended the suit; in substance, that the widow having the statutory right to bring and carry on the suit, and recover damages allowed by the court and jury, necessarily had the right to compromise and settle the suit for a good and valuable consideration. The trial judge admitted the release in evidence, notwithstanding the objection of plaintiff's counsel, and noted an exception and sealed a bill for plaintiff, reserving the question of the effect of the release, and submitted the case to the jury, and the result was a verdict in favor of the plaintiff for \$1,320.80 for the use of the children. Thereupon defendant's counsel moved the court for judgment *non obstante veredicto*, and upon argument and consideration the court subsequently granted such judgment for the defendant. To this judgment the plaintiff excepted, and the court sealed a bill of exceptions as required by the Act of April 22, 1905 (P. L. 286).

"We do not understand that any question is raised as to the sufficiency of the release to end the case, provided the widow, plaintiff, had the power to compromise the claims of the children and release their rights. It thus appears that the single question now raised for decision is: Was the court right in holding that the widow, plaintiff, had the power to compromise and settle the case without the consent of a guardian of the minor children, and without the approval of the court whose wards the said minors were? It is conceded that this exact question has not been decided by either of the appellate courts of this state. At the argument and on first consideration of this question we were inclined to think the court erred in granting judgment for the defendant *non obstante veredicto*. But on more careful consideration of the acts of assembly, the authorities, the opinion of the court, and the arguments of the able counsel representing both sides of the case, we are forced to the conclusion that the judgment is right. It having authoritatively been decided in many

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

cases by our Supreme Court that the widow is the proper party to sue in her own name and carry the suit to judgment and collection, it is difficult to see why she may not compromise and settle the case for a valuable consideration when she is not overreached or defrauded.

"The able counsel for plaintiff cites and relies with much apparent confidence on the following cited and other cases: *Lewis v. Turnpike Co.*, 203 Pa. 511, 53 Atl. 349, 93 Am. St. Rep. 774, where Mr. Justice Mitchell said: 'The act first gives the right of action and then prescribes the mode of distribution of the sum recovered, but that necessarily means distribution among those entitled to sue. It would be absurd to suppose that in the same sentence the statute meant to give part of the damages to those to whom it had denied the right of action.' We think the counsel draws an erroneous conclusion from this language. It refers mainly to the question of distribution, and what is said about the right to sue refers to those who under certain conditions have that right. If the widow be dead, the children have a right to sue. A portion of the damage belongs to them, and they are interested in the distribution. But the language of Mr. Justice Mitchell does not mean that the children are parties to the suit of the widow except that they are to be named in the declaration for the purpose of distribution.

"We also think the language of Mr. Justice Sterrett in *Birch v. Railway Co.*, 165 Pa. 339, 30 Atl. 828, does not bear the construction put upon it by plaintiff's counsel. Counsel argues from that authority that, even where the widow survives, the children have the right to maintain an action. This view is in conflict with the act of 1855 and with the adjudicated cases thereon. The children do not have the right to sue and carry on an action while the widow is alive. Counsel also cites *Lehigh Iron Co. v. Rupp*, 100 Pa. 95, but we do not think that case sustains plaintiff's contention. On page 99, Mr. Justice Trunkay, speaking for the Supreme Court, said: 'When a husband or wife recovers damages, and there are children of the deceased, the provisions of the statute for distribution under the intestate law apply, and strictly accord with the main object of the statute, which is a remedy for the loss to the family.' That case concedes that the suit is to be brought and carried on by the husband or wife, but that the children are interested in the distribution, and it does not sustain the proposition that the children are necessary parties to the action. The learned counsel also cites a number of cases where the widow and children were joined as plaintiffs, but they must and do concede that the authoritative decisions of the Supreme Court are that the suit should be brought in the name of the widow while she survives.

Counsel cite and urge upon our consideration a decision by the late Judge Simonton in *Styles v. Steel Co.*, 2 Dauphin Co. R. 257, and 7 Del. Co. R. 456. That case is not binding upon us, although we entertain great respect for a decision of that able judge. The case is not well reported, but it seems to have been an attempt on the part of the widow to discontinue an action brought to recover damages caused by the death of the husband and father. What Judge Simonton really decided was that the widow could not discontinue the suit. It must be borne in mind that when the action is pending it is always within the discretion of the court whether or not the plaintiff shall be allowed to discontinue it. There may have been strong reasons why that case was not allowed to be discontinued. The widow might have been moved by improper motives. It must be and is conceded that the children have an equitable right or title to their shares of the damages recovered by the widow, and, if she does not recognize their rights, she will be declared a trustee of the fund upon a proper application to a court of equity having jurisdiction of the parties. *Allison et al. v. Powers*, 179 Pa. 531, 36 Atl. 333; *Lewis v. Turnpike Co.*, 203 Pa. 511, 53 Atl. 349, 93 Am. St. Rep. 774.

"In support of the judgment of the court below we do not see that much can be added, with profit, to the lucid opinion of Judge McClure in support of his decision. In that opinion he refers to and cites a large number of cases from courts of other states arising under statutes more or less similar to ours. The great weight of those authorities in Tennessee, Rhode Island, Minnesota, Mississippi, etc., is in support of the conclusion that the widow in the present case had the power to make the compromise and settlement in question. As showing the view of another common pleas judge, the case of *Toole v. Jones*, 32 Pittsb. Leg. J. 387, is cited. In that case the court said: 'The statute having invested the widow with the power to bring suit for herself and children, she could compromise and settle the claim without suit when it is done fairly'—in which case she would be accountable to the children for two-thirds of the amount received just as though she had recovered at the end of a suit. Much importance is attached by appellant's counsel to some cases decided by the Supreme Court of Texas, and also cases under a similar statute of the territory of Arizona. These cases held that the widow could not remit any portion of a verdict in favor of the beneficiaries (*Southern Pacific Co. v. Tomlinson*, 163 U. S. 369, 16 Sup. Ct. 1171, 41 L. Ed. 193); the Texas cases holding that the widow had no power under the statute of that state to compromise or release the rights of her minor children. As we understand the statutes referred to, they require a specific finding by the jury in favor of each beneficiary, and

that distinguishes them from our statutes which authorize a general verdict for the widow or husband plaintiff.

"We have been referred to an interesting opinion by District Judge Archbald in *Paolo v. Laquin Lumber Co.*, in the Circuit Court of the United States for the middle District of Pennsylvania. That was an action to recover damages under our acts of 1851 and 1855, and we are much impressed with the reasoning of that able judge, and he reaches a conclusion, expressed as follows: "The right to compensation for the death of a person rises no higher than that of the one who is authorized to sue for it; and, the right to sue being given by the statute to the widow who is living, no other is qualified. The children have no interest except in the damages which she recovers, and only after she has recovered them. There is no severable share which entitles either of them by himself, as here, to a direct and separate cause of action. It is true that in *Toole v. Jones*, 32 Pittsb. Leg. J. 387, a suit was sustained in the name of the wife for the use of the children, after she had settled and released her individual damages; but, if that is to be taken as opposed to the views which are here expressed, it is contrary to what was decided in *Marsh v. Western New York & Penna. R. R. Co.*, 204 Pa. 229 [53 Atl. 1001], and is therefore no authority. In the *Marsh Case*, also, the widow refused to prosecute, which would seem to present as strong a ground for allowing the child to sue for itself, as where she herself is qualified; and yet it was held insufficient to do so."

"District Judge Rand in the Circuit Court of the United States for the Southern District of New York, in the case of *Conover v. Penna. R. R. Co.*, 176 Fed. 638, held as follows: 'It is quite clear under the law of Pennsylvania that the widow alone is the person in whom the right of action is vested. (Citing several Pennsylvania authorities.) All the proceeds she holds in trust for herself and children; but there is no provision anywhere in the statute by which the interest of the children may be apportioned in the action, and the proceeds are to be turned over to her for distribution. I think that payment to her, or settlement with her, was an effective bar just as it is in the case of any other trustee, and that the person who deals with her need not follow the application of the proceeds.' The judge then refers to the case of *Southern Pacific Co. v. Tomlinson*, 163 U. S. 369, 16 Sup. Ct. 1171, 41 L. Ed. 193, and points out why that decision does not apply under the Pennsylvania statutes: 'In the first place, they were all parties to the record, a procedure which was permitted by the statute. The widow was therefore in the position of trying to compromise the interests of other parties to the record than

herself. In addition, as permitted by the statute, the jury has assessed separately the recoveries for each of the parties plaintiff, and it is obvious that the widow, being only one of the parties plaintiff, had no right to interfere with the rights of any other than herself. In view of the fact that the Pennsylvania courts do not admit the children as parties plaintiff at all, that case has no bearing upon the Pennsylvania statutes.'

"It is argued with much earnestness that the view taken by the court below upholding the right of the widow to compromise and settle the claim might result in the children losing their two-thirds of the recovery. This is true. But it is a legislative rather than a judicial question. Under the act of 1855, as construed by our Supreme Court, the children are not parties to the suit, but are only required to be named in the declaration for distributive purposes. It does seem that the statutes which allow the person, who is only entitled to one-third of the recovery, to settle and adjust the claims of those entitled to the other two-thirds is faulty; but this can only be remedied by the Legislature.

"Notwithstanding the very able and earnest argument and reargument of this case on the part of the able counsel for the appellant, we are not convinced that the court below erred in entering judgment for the defendant non obstante veredicto.

"The assignments of error are dismissed, and the judgment is affirmed."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZISKE-ER, JJ.

Grant Herring and F. S. Wagenseller, for appellant. C. E. Sprout and Charles P. Ulrich, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the Superior Court.

CITIZENS' GAS CO. OF PORT ALLEGHENY v. WHITNEY et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. APPEAL AND ERROR (§ 969*)—REVIEW—DISCRETION OF TRIAL COURT—SEVERANCE OF TRIAL.

The trial court's discretion in ruling on a motion for severance in ejectment will not be reversed unless there has been an abuse in the exercise of that discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3845; Dec. Dig. § 969.*]

2. ACTION (§ 60*)—SEVERANCE.

In ejectment, a severance is properly refused where the return to the writ shows both defendants to be in possession of the premises, one as lessor of the other, and they file a joint appearance and joint answer, setting up the privity of title, and prepare all their pleadings with a view to a joint defense, and there is no reason for not permitting such defense.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 699-707; Dec. Dig. § 60.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. EJECTMENT (§ 95*)—EVIDENCE—SUFFICIENCY.

Evidence warranting a finding that the two defendants in ejectment had notice of an outstanding unrecorded conveyance of the premises to plaintiff when they purchased is sufficient to sustain a verdict for the plaintiff.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 95.*]

4. APPEAL AND ERROR (§ 882*)—REVIEW—ESTOPPEL TO ALLEGE ERROR—INVITED ERROR.

In ejectment against two defendants, a reversal of the judgment for plaintiff is not required by the fact that the court at the instance of counsel for one of the defendants, over objection of the plaintiff, erroneously ruled that the testimony of the other defendant called by the plaintiff, as under cross-examination, should not affect the defendant asking such ruling, where the latter's counsel, without relying on the ruling, treated the witness as competent for all purposes and on cross-examination elicited an answer on a material point, which it made a part of its case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

5. APPEAL AND ERROR (§ 882*)—REVIEW—ESTOPPEL TO ALLEGE ERROR—INVITED ERROR.

Parties who induce the court to commit an error are thereby prohibited from availing themselves of it in any court of review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Citizens' Gas Company of Port Allegheny against B. L. Whitney and another. From a judgment for plaintiff, defendants appeal. Affirmed.

The facts are stated by the lower court in its charge to be as follows:

"This is an action of ejectment brought by the Citizens' Gas Company of Port Allegheny, a corporation, against B. L. Whitney, and the Bradford Gas Company, also a corporation, to recover possession of an oil and gas right in 42 acres of land.

"It appears in this case that the title to this tract of land was in Joseph N. Sherwood in April, 1901; that Joseph N. Sherwood made a deed to the Citizens' Gas Company dated March 23, 1904. This deed to the Citizens' Gas Company was not recorded until March 22, 1906, when they placed it upon record in the recorder's office of this county. It further appears that after the making of the deed to the Citizens' Gas Company and before the recording of that deed, namely, on January 30, 1906, Joseph N. Sherwood made a deed for the same property to B. L. Whitney, one of the defendants in this case, who immediately placed his deed on record, the deed having been made January 30, 1906, and placed upon the record February 1, 1906. Following that, on February 6, 1907, which you will observe was over a year after Mr. Whitney got his

deed, Mr. Whitney made a lease to the Bradford Gas Company for the purpose of operating for oil and gas on this same tract of land."

Plaintiff presented this point:

"(1) If the jury believed from the evidence of Whitney which is uncontradicted that the Bradford Gas Company had notice from him of the sale to the Citizens' Gas Company of the oil and gas rights in and to the land in controversy before taking its lease from Whitney, and if the jury find from the evidence that the defendant Whitney had notice from Sherwood or any other person interested in the premises of the said sale from Sherwood to the Citizens' Gas Company at any time before the final completion of his purchase from Sherwood and delivery of the deed to him, the verdict must be for the plaintiff. Answer: We affirm this point."

Defendant presented these points:

"(2) Under all the evidence in the case, the verdict should be for the defendant. Answer: We refuse this point."

"(9) That, it appearing that the defendant Bradford Gas Company was not in possession of any oil or gas on, in or under said land at the time of the service of the writ of ejectment upon it in this case, there can be no recovery against the Bradford Gas Company. Answer: This point is refused.

"(10) That under all evidence in this case the plaintiff cannot recover against the Bradford Gas Company. Answer: This point is also refused."

The court charged, in part, as follows:

"The evidence as to the notice to the Bradford Gas Company is the evidence of Mr. Whitney. You heard that evidence read. He tells you he did inform the representative of the Bradford Gas Company that Mr. Sherwood had sold the oil and gas, or that the Citizens' Gas Company has a deed for the oil and gas. That evidence is uncontradicted. If you find Mr. Whitney is telling the truth, he is uncontradicted in the case. Then you would be justified in finding that the Bradford Gas Company had notice of this conveyance, and, if you so find, then they could not recover. Mr. Whitney goes so far as to say, as we remember his testimony, that he told Mr. Shaw or the representative, whoever it was, of the Bradford Gas Company, that the Citizens' Gas Company's deed was on the record. Now, if that is so, then that was actual notice to the Bradford Gas Company that the Citizens' Gas Company had a prior deed, and they would get no title."

Verdict for plaintiff and judgment thereon. Defendant appealed.

Errors assigned were (1) in refusing the petition of the Bradford Gas Company for a separate trial; (2-5) answers to points as above; and (6) portion of charge, quoting it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHIZSKER, JJ.

John G. Johnson, W. E. Burdick, and F. P. Schoonmaker, for appellants. J. E. Mullin, D. H. Jack, and Sheridan Gorton, for appellee.

ELKIN, J. This is an action of ejectment to determine the title and recover the possession of the oil and gas in and under certain lands described in the writ. The plaintiff never took actual possession of the land under its deed for the purpose of operating for oil and gas, but this is not a bar to its right to recover possession, as was decided in *Barnsdall v. Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207, 28 L. R. A. (N. S.) 614. The suit having been properly brought, the only question for our determination is whether error was committed at the trial.

[1] The first assignment relates to the refusal of the trial judge to grant a severance upon the petition of the Bradford Gas Company. The general rule is that the granting of a severance in civil suits of this character rests in the discretion of the trial judge, and his ruling will not be reversed unless there has been abuse in the exercise of that discretion.

[2] We fail to find any such abuse of discretion in the present case as to warrant a reversal on this ground. The defendants filed a joint appearance and a joint answer and prepared all their pleadings with a view to making a joint defense. Certainly under such pleadings it cannot be said that one of the defendants was entitled to a severance as a matter of right. The Bradford Gas Company was a lessee of Whitney and necessarily stood upon the title of its lessor. If Whitney had no title, his lessee acquired no right or privilege. The return to the writ showed both defendants to be in possession of the premises. The joint answer of the defendants sets up the privity of their title which they undertake to assert and defend. There is nothing unusual about this joinder of defendants in actions of ejectment. The act of March 21, 1772 (1 Smith's Laws, p. 370), provides that the landlord may defend with the tenant who has been sued in ejectment, while the act of May 8, 1901 (P. L. 142), clearly contemplates that all claimants to the premises, whether in possession or not, shall be made parties to the writ. The trend of decision and of statutory procedure in recent years, while requiring one in possession to be made a party, recognizes and approves the practice of joining all parties claiming title to or interest in the premises, and as a general rule this may be done without respect to privity of title or unity of interest. See *Warvelle on Ejectment*, § 96, and following pages. In the case at bar both defendants are in possession. They appeared jointly, answered jointly, and there is no rea-

son why they should not jointly defend. This is a case in which the plaintiff was entitled to have the whole controversy settled in one trial. The learned trial judge was clearly right in refusing to grant a severance.

[3] The question of title involved here depends upon whether Whitney and the Bradford Gas Company had notice, actual or constructive, either or both, of the deed from Sherwood to the appellee company. This deed was executed first in point of time but was not recorded until after the deed to Whitney had been executed and recorded. If Whitney was a bona fide purchaser of the premises without notice of the unrecorded deed, he took a good title. If, on the other hand, he had notice of the outstanding unrecorded deed to appellee, he was bound by that notice, and took the risk of that being a valid conveyance. All of this was a question of fact to be determined by the jury under proper instructions by the court. The question was submitted to the jury, and the verdict shows that they believed both Whitney and the Bradford Gas Company had notice of the conveyance to appellee at the time of their respective purchases. The evidence was sufficient to warrant such a finding. Indeed, upon a review of the whole record we do not see how any other conclusion could be reached. There is only one error called to our attention by the assignments which has any substantial merit. The evidence of Whitney shows that at the time of making the lease to the Bradford Gas Company he gave notice that the appellee company had a deed for the oil and gas in the premises and that the deed was then on record. There is no doubt as to the testimony of Whitney, and the only question is whether it could be considered as affecting the rights of the Bradford Gas Company.

[4] The plaintiff called Whitney as if on cross-examination. The court ruled it was proper to do so, but that his testimony on such cross-examination should in no wise affect the Bradford Gas Company. To that part of the ruling limiting the effect of the testimony upon the Bradford Gas Company the plaintiff excepted and a bill was sealed. The examination of the witness was then proceeded with at length. He was first examined by counsel for plaintiff, then cross-examined by counsel for the Bradford Gas Company, and then re-examined on every phase of the question relating to the subject of notice. While the court had ruled that his testimony should not affect the Bradford Gas Company, counsel for this company undertook on cross-examination to elicit answers tending to show that the witness, Whitney, had not given any such notice. In other words, the parties themselves treated the witness as competent for all purposes and so conducted the examination. The court erred in its ruling limiting the effect of the testimony of this witness; but this error

was induced by counsel for the Bradford Gas Company and was made over the objection of counsel for plaintiff. To make this error the ground of reversal would work a hardship on appellee company which had protested against it and would give an unfair advantage to the party inducing it. This ought not to be permitted unless imperatively required by rules of practice or of law.

[5] We think the rule announced in some of the federal courts is sound and covers this case. It was held in the United States Circuit Court of Appeals that: "They had not invited the error of that ruling, but had protested against it. This was all they could do. The plaintiffs had induced the court to commit an error, and were thereby prohibited from availing themselves of it in any court of review." *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637. The application of the rule depends to some extent upon the facts of each particular case, and there may be cases in which it could not be applied without doing violence to established rules of law. In the present case no such barrier exists. The Bradford Gas Company did not rely on the ruling of the court limiting the effect of the testimony of this witness, but undertook on cross-examination to strengthen its case by showing that Whitney had told its representative that he had no notice at the time of the purchase from Sherwood of the prior deed to plaintiff. This was the crux of the case and the point toward which the whole examination was directed. The Bradford Gas Company had the benefit of his answer and made it part of its defense. Under these circumstances we think it must be held to have waived the limitation it induced the court to make, and that it made the witness competent for the general purposes of the case. The trial judge in such cases has a large measure of discretion and may permit parties to elicit material facts in order to ascertain the truth without regard to the technical consideration of who called the witness. *Gantt v. Cox & Sons Co.*, 199 Pa. 208, 48 Atl. 992. This was the substantial result of what was done in the present case. The ruling complained of was practically disregarded, and the witness was examined by all parties with a view of ascertaining the truth. The court approved of this course of procedure as indicated by subsequent rulings and by questions frequently asked from the bench. As we view the record there was a just and fair trial upon the merits, and we see nothing to warrant a reversal upon technical grounds.

The question as to constructive notice need not be discussed, because the evidence was ample to show actual notice, and the verdict of the jury establishes the fact.

Judgment affirmed.

HOWARD v. STILLWAGON et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

VENDOR AND PURCHASER (§ 335*)—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY PAID.

Plaintiff agreed to buy and defendants to sell property, the price to be paid partly in cash and partly in stated installments, with interest, to secure which payment defendants were authorized to enter judgment for the sum due, or to confess judgment in ejectment against plaintiff on his failure to pay. The agreement also provided that on any default it should be void, as to the sellers, at their option. Part payments were made on the principal, together with interest, after they were due, but were accepted without protest. Subsequently the sellers, without notice that no further indulgence would be granted, and without tendering a deed and demanding the balance of the price, entered judgment in ejectment, and were put in possession of the property. *Held*, that the defendants rescinded their contract, and could no longer derive any benefit therefrom, and were bound to place plaintiff in statu quo by returning the price received.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.*]

Appeal from Court of Common Pleas, Fayette County.

Action by Leslie A. Howard against Anna M. Stillwagon, and others. From a judgment for defendants non obstante veredicto, plaintiff appeals. Reversed, with direction that judgment be entered on the verdict.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZIS-KER, JJ.

H. S. Dumbauld and Robinson & McKean, for appellant. W. J. Sturgis and S. J. Morrow, for appellees.

BROWN, J. There is no fact in dispute in this case. By an agreement in writing, dated April 18, 1904, the appellees agreed to sell to the appellant, and he agreed to buy from them, a lot of ground in the borough of Connellsville for \$5,800. The property was incumbered by a mortgage for \$2,100, which he agreed to assume, and the balance of the purchase money was to be paid as follows: \$600 cash upon the signing of the agreement, \$400 within two weeks, \$1,350 in three months, and \$1,350 in six months; the deferred payments bearing interest. The contract provided that, "on failure of the second party to pay the purchase money, or any part thereof or the interest and taxes as above mentioned, then this agreement to be void, as it regards the first parties, at their option." By the terms of the agreement, the appellees were authorized to enter judgment against the appellant for the purchase money, and a further provision authorized any attorney to confess judgment in ejectment against him upon his failure to pay it. The last installment was due on October 18, 1904,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

but up to that time the appellant had paid only \$1,777 and some interest. Subsequently he paid the appellees \$864.42 and interest. So far as can be gathered from the records, these payments were accepted by the appellees without complaint or protest, and the appellant was justified in believing that they would not insist upon strict compliance with the terms of the agreement, so far as the times of payment were concerned. Up to June 12, 1906, he had paid them \$3,005.36, which included \$553.94 interest.

The appellees had two remedies under the agreement for the appellant's default in paying the purchase money. In affirmance of their contract with him, they could have entered judgment against him, and enforced payment out of any property which he might have owned, including that which was the subject of the agreement. This they did not do but, in accordance with the option which they had reserved to themselves in the agreement, they treated it as void, and, on November 13, 1906, without giving the appellant notice that no further indulgence in making payment would be granted, and without tendering him a deed and demanding the balance of the purchase money, they entered a judgment in an amicable action of ejectment to recover possession of the property. Upon this judgment, a writ of habere facias possessionem was duly executed, and the appellees were put in possession of the property. The stipulation in the agreement that, on the default of the appellant in paying the purchase money, or any part thereof, the appellees might, at their option, treat it as void gave them the authority to rescind, and their action in summarily repossessing themselves of the property was a rescission of the contract between them. *Campbell v. Hickok*, 140 Pa. 290, 21 Atl. 362; *Scott v. Hough*, 151 Pa. 630, 25 Atl. 123; *Seaton v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467. If the appellees elected to treat the agreement as void, as they did, nothing is to be found in it, and nothing was developed at the trial, to justify their keeping the appellant's money. The moment they exercised their option to treat the agreement as void, and to rescind their contract with the appellant, he was, in the absence of anything shown to the contrary, entitled to get back what he had paid. When they rescinded the agreement, they could no longer derive any benefit, directly or indirectly, from it (*Sanders v. Brock*, 230 Pa. 609, 79 Atl. 772); and they were bound to place the plaintiff in statu quo by returning the purchase money which they had received from him.

In contending that the entry of judgment

against the appellant in the amicable action of ejectment was a complete adjudication of the rights of the parties to the contract, and that he cannot therefore recover back what he paid on account of the purchase money, counsel for appellees overlook the plain terms of the agreement signed by them. They had the right, as already observed, to enforce payment of the balance of the purchase money; but they expressly reserved to themselves another right—to treat the agreement as void—with no right, however, if they should so treat it, to keep what the appellant had paid them on it. The rights of each of the parties must be found in the agreement, and, in the absence of anything therein authorizing the appellees to treat as forfeited to them the purchase money which the appellant paid them, and which they accepted from him before they undertook to rescind after they had the right to do so, their claim to retain it is no more favored by the law than in equity. Even if they had resold the property at a loss, they could not have retained out of the moneys paid them by the appellant more than sufficient to reimburse them for the loss sustained.

After directing a verdict for the plaintiff, the court entered judgment for the defendants under the act of April 22, 1905 (P. L. 286), and cited *Jones v. Scott*, 209 Pa. 177, 58 Atl. 281, as authority for doing so. A very different question was presented in that case, and it has no bearing upon the question which was before the court below, and is now before us on this appeal. All that was there decided was that the court below had not erred in opening a judgment entered against Scott in an amicable action of ejectment, and restoring to him possession of the premises upon his paying the balance of the purchase money, counsel fees, and costs. In the opinion of Mr. Justice Dean, the reasons are stated which justified the equitable interference by the court. This appellant asked for no relief from the judgment and execution against him in the amicable action of ejectment. He acquiesced in what the appellees did under their right to treat the agreement as void; and he was bound to do so, for such was the agreement between them. All that the appellant now asks is that, as the appellees elected to treat as void their agreement to sell him the lot of ground, they return to him what he paid them on account of the purchase money, and to this he is entitled. The assignments of error are sustained, the judgment is reversed, and the record remitted, with direction that judgment be entered for plaintiff on the verdict.

GOULD et al. v. RANDAL.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. JUDGMENT (§ 747*)—CONCLUSIVENESS—JUDGMENT CONCLUSIVE.

Where in ejectment plaintiff claims title through a sheriff's sale on a judgment, and the defendant claims that the plaintiff's title is defective, in that the bond on which the judgment was entered was void because the mortgage accompanying it was invalid, that the vendition exponas on which the sale was made was void because of its issuance after the death of the defendant without notice to his legal representative, and that the trial court had no jurisdiction of the action of ejectment because of Act April 20, 1905 (P. L. 239), defining the rights and liabilities of purchasers of realty at judicial sales and of persons then in possession thereof, and a verdict is rendered for plaintiff, defendant is not thereafter entitled to have the judgment on the bond opened by a court of equity and proceedings thereon declared void and the sheriff's deed canceled and the judgment on the bond stricken off, nor to require the administrator of the defendant to make defense to the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.*]

2. JUDGMENT (§ 70*)—CONCLUSIVENESS.

In ejectment, where plaintiff claims title under a sheriff's sale on a judgment on a bond, the trial court properly refused to permit an attack on the judgment in the absence of any allegations that it was collusive or intended to defraud complainant, since a third party has no right to attack a judgment entered on a warrant of attorney either directly or collaterally in the absence of such allegations.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 70.*]

3. JUDGMENT (§ 70*)—CONFESSION—SETTING ASIDE.

A judgment entered on a warrant of attorney has all the qualities and effect of a judgment entered on a verdict after a trial, until it has been set aside or reversed in an appropriate proceeding instituted for the purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 104-108; Dec. Dig. § 70.*]

4. JUDGMENT (§ 456*)—EQUITABLE RELIEF—LACHES.

A judgment will not be opened at the instance of the administrator nine years after its rendition, where the judgment has been collected by execution and title to real estate would be invalidated by the opening or setting aside of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863-866; Dec. Dig. § 456.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Isador M. Gould and another against Harry L. Randal. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZISKER, JJ.

V. Gilpin Robinson and B. I. De Young, for appellants. Stanley Folz and Leon H. Folz, for appellee.

MESTREZAT, J. [1] We must affirm this decree or reverse our judgment in Randal v.

Gould, 225 Pa. 42, 73 Atl. 986. That was an action of ejectment for the real estate involved in this controversy, and was brought in the court of common pleas No. 2 of Philadelphia county by the defendant in this proceeding against Gould, the plaintiff, who filed this bill. The plaintiff in the ejectment suit claimed title through a sheriff's sale made on the judgment in which Mary C. Bell, wife of Alonzo Bell, was the defendant. The defendant claimed title through Mary C. Bell by a deed from Alfred F. Fisher, who was the grantee of Mary C. Bell and her husband. The judgment on which the sheriff's sale was made was entered about two years after the conveyance of the property by the Bells to Fisher; but on the trial of the ejectment the plaintiff alleged and the jury found that the sale of the Bells to Fisher was made to cheat and defraud Randal, and to hinder, delay, and defraud him in the collection of the debt due him from Mary C. Bell, and that Gould took title to the property with notice and knowledge of the fraudulent character of the conveyance. Gould contended that Randal's title was defective, and set up as a defense that the bond of Mary C. Bell on which the judgment was entered in common pleas No. 5 of Philadelphia county was void because the mortgage accompanying it was a nullity, that the vend. ex. on which the sale was made by the plaintiff was void because it was issued after the death of Mary C. Bell without notice to her legal representative, and that the trial court had no jurisdiction because of the remedy provided by the Act of April 20, 1905 (P. L. 239). The judgment in that case in favor of the plaintiff, affirmed by this court, judicially determined that these defenses were insufficient to defeat Randal's title to the premises in controversy. This judgment concludes Gould not only as to matters relied on by him to defeat the action, but also as to all other matters of which he could have availed himself as a defense to the ejectment. *Schwan v. Kelly*, 173 Pa. 65, 33 Atl. 1107; *Dutton's Est.*, 208 Pa. 350, 57 Atl. 719.

The present proceeding is a bill filed by Gould against Randal while the ejectment was pending, and prays that the judgment entered in common pleas No. 5 on the bond given by Mary C. Bell to Randal be opened and that all proceedings thereon be declared void; that the sheriff's sale made thereon be set aside and the sheriff's deed be canceled; that the judgment be stricken off; that Gould be authorized to make defense to the judgment; and that Mary C. Bell's administrator be required to make defense to the judgment. The reasons and grounds set forth in the bill in support of the relief prayed for are substantially the same as those set up by Gould as a defense in the ejectment suit. The matters sought to be litigated in this proceeding have been determined in an action between

the same parties in a court of competent jurisdiction and are therefore *res adjudicata*. The validity of Randal's title to the premises in question was at issue in the ejectment suit. His title depended upon the validity of the bond of Mary C. Bell and the judgment entered thereon, and the subsequent sheriff's sale by which the title was vested in Randal. These matters were adjudicated in that action, and the judgment is conclusive as against Gould. The present bill raises the same issues and for the same purpose, to wit, to defeat Randal's title to the real estate in controversy. Gould had his day in court in the ejectment suit and his rights adjudicated as to every question raised in this bill, and therefore the learned court committed no error in dismissing the bill on the ground that "the present proceeding is an effort to retry in a court of equity a cause already determined in a court of law."

[2] The appellant lays stress on the fact that on the trial of the ejectment case in common pleas No. 2 the court would not permit the judgment entered in common pleas No. 5 by Randal against Mrs. Bell on which the real estate was sold to be attacked. This was clearly right. It is not alleged that the judgment was collusive or was entered to defraud Gould, and hence he, as a third party, has no right to attack it either directly or collaterally. *Drexel's App.*, 6 Pa. 272. If, however, Gould had any standing to attack Randal's judgment against Mrs. Bell on any ground whatever, except for fraud or collusion which is not alleged, he could not do so in the ejectment suit.

[3] The judgment was entered by virtue of a warrant of attorney, and until set aside or reversed in an appropriate proceeding instituted for the purpose it had all the qualities and effect of a judgment entered on a verdict after a trial. *Braddee v. Brownfield*, 4 Watts, 474; *Montague v. McDowell*, 99 Pa. 265. It is wholly immaterial that the judgment was entered in common pleas No. 5 and not in common pleas No. 2, where the ejectment suit was being tried. It was as conclusive on Gould in the latter court as in the court in which it was entered—it was not the subject of collateral attack in either court.

[4] The judgment of Randal against Bell being valid and subsisting and ripe for execution, the plaintiff had the right to enforce payment by execution process. This he did, and it resulted in the sale by the sheriff of the defendant's real estate which the plaintiff in the writ purchased and for which he brought the ejectment. To sustain his title he was compelled to rely on the regularity and legality of the proceedings on his judgment, which therefore became an issue in that action and was finally and conclusively adjudicated by the judgment of this court entered in that case.

Randal's judgment against Mrs. Bell was entered on May 8, 1902, and laches now prevent her administrator from attacking its validity. After the lapse of so many years and the collection of the judgment by execution process, it is too late to invoke the equitable powers of the court to open or strike it off and thereby invalidate the title to real estate depending on its validity.

The bill in equity to open the judgment and set aside the proceedings thereon, subsequently prosecuted to a final decree, was pending at the time the same relief on the same facts was asked by a petition presented to the law side of the court. The plaintiff could not maintain both proceedings at the same time, and therefore the court did not err in refusing the petition. *Freeman v. Laferty*, 207 Pa. 32, 56 Atl. 230; *Mellerio v. Freeman*, 211 Pa. 202, 60 Atl. 735.

The order refusing the petition to open the judgment is affirmed, as is also the decree dismissing the bill in equity.

RIFFERT et al. v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 454*)—EXECUTION—SALE—WAIVER OF IRREGULARITIES.

Where, after a writ of *venditioni exponas* has been issued and stayed, an administrator *d. b. n. c. t. a.* is substituted as defendant, and he permits a pluries writ to be issued and the property to be sold by the sheriff and a sheriff's deed to be executed and acknowledged, he waives such irregularities affecting innocent purchasers at the sale as that the executor of defendant was the substituted defendant at the time the *fi. fa.* was issued, though he had previously renounced as executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 454.*]

2. EXECUTION (§ 247*)—SALE—SETTING ASIDE—EVIDENCE.

An attack on a sheriff's sale, in an action of ejectment 60 years after the sale because the purchaser had been an assignee for creditors of the defendant in execution, will not be sustained, where there is no evidence that the purchaser had ever accepted under the deed of assignment or knew that he was named therein.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 247.*]

3. EJECTMENT (§ 95*)—EVIDENCE—WRIT OF EJECTMENT.

Where defendants in ejectment rely on a sheriff's deed executed and recorded 60 years before the commencement of the action, the fact that one of the writs of execution cannot be found does not defeat their title, where the record shows that the writ was issued.

[Ed. Note.—For other cases, see *Ejectment*, Dec. Dig. § 95.*]

4. EXECUTION (§ 315*)—SALE—CONVEYANCE—RECORD.

That no minute of the acknowledgment of a sheriff's deed, recorded in the sheriff's deed book in 1840, appears in the common pleas

minutes of that year, does not affect the title thereunder.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 315.*]

Appeal from Court of Common Pleas, Northumberland County.

Ejectment by John R. Riffert and others against the Lehigh Valley Coal Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Ejectment for land in Mt. Carmel township. At the trial the court charged as follows:

"The plaintiffs in this case, numbering nearly a hundred, are the heirs of Valentine Brobst, deceased. Valentine Brobst lived in the early part of the last century, and up to his death, which occurred on March 18, 1837, in the city of Reading, Berks county, this state, and owned large tracts of land in several counties, among others the tract of land for which this action of ejectment has been brought. He owned that tract of land from 1816 up to the time of his death.

"On October 26, 1835, one William Silvis entered in this court a judgment, by confession, against Valentine Brobst, which judgment was for \$4,500, real debt. No steps were taken towards the collection of this judgment by execution prior to the death of Valentine Brobst.

"February 15, 1837, three days more than a month before his death, Valentine Brobst made an assignment for the benefit of creditors to William Silvis and another. Although proceedings were subsequently had under the deed of assignment, as shown by the records of the Berks county courts, this assignment made in Berks county and there recorded (Berks county having jurisdiction of their accounts), etc., yet it nowhere appears that William Silvis ever accepted the trust under this assignment, or that he ever knew that he was one of the assignees named therein. William Silvis, the plaintiff in the judgment, about which I have just spoken, lived in Northumberland county, many miles distant from Reading and in those days a long journey.

"Valentine Brobst died testate, and one of the executors of his will was a man by the name of Keim. Keim never took out letters testamentary, as appears from the records of the orphans' court of Berks county; but, by a paper dated April 18, 1838, renounced the trust. When this paper was filed does not appear, but one Samuel S. Jackson was granted letters de bonis non cum testamento annexo on May 23, 1838. Notwithstanding Keim had never taken out letters testamentary, on April 23, 1838, he was substituted as executor in the case of William Silvis v. Valentine Brobst, the judgment I spoke of a few moments ago. This substitution was by agreement of one Dunn, acting as at-

torney for Keim, executor, and is dated April 16, 1838; the agreement for substitution antedating the renunciation by two days. The judgment then stood William Silvis v. Keim, Executor of Brobst.

"On May 10, 1838, a writ of fieri facias was issued. That writ was stayed. On May 17, 1838, an alias writ of fieri facias was issued, and under that writ condemnation and inquisition proceedings were had and the land condemned. On September 10, 1838, a writ of venditioni exponas was issued, which was stayed by plaintiff's attorney. On September 25, 1839, a pluries venditioni exponas issued; an alias in the meantime having been issued and stayed. Up to this time the judgment stood and all the proceedings thereon, Silvis v. Keim, Executor. On November 30, 1839, Samuel S. Jackson, administrator, etc., was, by agreement, substituted. January 29, 1840, the third pluries venditioni exponas was issued, the second having, in the meantime been stayed, and under this the lands levied upon were sold (among which was the land in suit in this case) to William Silvis for the sum of \$9,800. The sheriff's deed was duly acknowledged. This sheriff's title to Silvis became and is now vested in the defendant in this case.

[1] "It is contended by the plaintiffs that this sheriff's sale was void, first, because there was, as they allege, no personal representative of the dead defendant on record. He had not been brought into court and was not upon the record at the time the fieri facias issued and at the time of the inquisition and condemnation of the land. The record itself is regular. We only know from proof, introduced here upon trial dehors the record, that Keim had never accepted the trust imposed upon him by the will of Valentine Brobst. He was named in the will as one of the executors of Valentine Brobst. He was substituted by an agreement of an attorney acting for him; but there is nothing in the case to show that there is any irregularity in this record which was brought to the knowledge of Silvis, the purchaser at the sheriff's sale, and we believe that the irregularity cannot affect his title.

"But subsequent to the condemnation proceedings before the sale, namely, before the second and third pluries writs of venditioni exponas issued, Jackson, the duly appointed administrator with the will annexed, was substituted and came upon the record as defendant by agreement. He was a party to the record, etc., at the time of the sheriff's sale and the acknowledgment of the deed by the sheriff.

"We are of the opinion that under the authorities cited, especially *Diese v. Fackler*, 58 Pa. 109, and *Spragg v. Shriver*, 25 Pa. 282, 64 Am. Dec. 698, he will be held to have waived any irregularities that would affect

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

an innocent purchaser, if there were any that had theretofore taken place in the proceedings. He could have taken a rule and have had the sheriff's sale set aside on account of the irregularities that are now here alleged, and no doubt if he had done so the sale would have been set aside. If he stood by and permitted the sale to go on and the sheriff's deed to be acknowledged, the title, taken by an innocent purchaser, cannot be affected by these irregularities, which should have been taken advantage of before, and which the acknowledgment of the sheriff's deed cured.

[2] "There is complaint, on the part of the plaintiffs, that Silvis became a purchaser at this sale. They say that was in fraud of the rights of their ancestors, the then heirs of Valentine Brobst, because he was one of the assignees named in the deed of assignment, about which I have spoken. The party who alleges fraud must prove it. There is not a particle of evidence, as I have said, that he ever accepted under this deed of assignment or even knew he was named therein, and courts and juries are not permitted to lightly infer fraud, and in this case you would have to find it without any evidence, which is not permitted.

[3] "Another complaint is that one of the writs of execution cannot be found. Very naturally the papers, in a case where they were so multitudinous as in this case, would be lost in such a long lapse of time, and it is no surprise that they are not to be found. The record shows that they were issued, and that is sufficient.

[4] "Another complaint is that there is no minute of the acknowledgment of the deed in the common pleas minutes of April term, 1840. There is a minute of the acknowledgment of the deed contained in the book called the sheriff's deed book, and the minute is in due form, signed by the prothonotary. We know of no law that will compel a prothonotary to keep his minutes all in one book, or that will prevent him keeping the minutes of the court in a book which may be termed and labeled on the back thereof 'Sheriff's Deed Book.' Some 15 or 16 deeds were acknowledged that April term, as shown by the minutes and record of the acknowledgment contained in this sheriff's deed book, or this so-called sheriff's deed book, and very few, if any of them, are minute in the regular common pleas minute book of that date. We think that the law has been complied with in the minute contained in the sheriff's deed book.

"We have come to the conclusion that this sale was regular on its face, that there was no notice to bidders and buyers of any irregularity, and that Silvis took a good title to these lands. Silvis and those who claim under him have paid the taxes on these lands from 1840, from the time of this sheriff's

sale, down to the present time. They took possession of the land back in the fifty's or sixty's and even earlier than that, built some houses on them, as the evidence shows, and collected rents. The houses have been occupied from 1854 to the present time, and the rents have been paid over to the Lehigh Valley Coal Company, the present owners. They have, during all these years, been collecting the royalties for sand and stone, and other improvements have been put upon the property.

"Even though it were to be determined that the Silvis title was void, yet we believe that the plaintiffs at this late day, after the lapse of more than 60 years, would not be permitted to come in and assert title. However that may be, we feel confident that Silvis took a valid title, and, of course, it is admitted that this sheriff's sale was regular and the sheriff's vendee took good title, and therefore the plaintiffs cannot recover. The only thing for you to do, gentlemen of the jury, is to return a verdict in favor of the defendant."

Verdict and judgment for defendant. Plaintiffs appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZISKER, JJ.

George B. Reimensnyder, James Scarlet, George M. Lutz, and George H. Neff, for appellants. D. W. Kaercher, S. P. Wolverton, Jr., and F. W. Wheaton, for appellee.

PER CURIAM. The facts developed at the trial fully appear in the charge of the learned trial judge, and they warrant his direction of a verdict for the defendant.

The judgment is affirmed.

COMMONWEALTH v. LEE.

(Supreme Court of Pennsylvania. July 6, 1911.)
CRIMINAL LAW (§ 570*)—INSANITY AS A DEFENSE.

To establish the defense of insanity, the evidence must so preponderate in favor of insanity as to overbalance the presumption and proof of sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1285-1288; Dec. Dig. § 570.*]

Appeal from Court of Oyer and Terminer, Philadelphia County.

George Lee was convicted of murder in the first degree, and appeals. Affirmed.

At the trial it appeared that the prisoner, a Chinaman, on July 14, 1908, shot and killed Lee Chit, another Chinaman. The defense was insanity. A large number of experts were called both by the prisoner and the commonwealth, and their testimony was conflicting. Verdict of guilty of murder of the first degree, upon which judgment of sentence was passed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

A. S. L. Shields and Cornelius Haggarty, Jr., for appellant. Wm. Findlay Brown, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

PER CURIAM. The defense of insanity was made for the prisoner, and it was unavailing. The sole assignment of error, asking for a reversal of the judgment passed upon him, is to that portion of the charge of the learned trial judge in which, in commenting on the defense of insanity, he said: "It is the duty of the prisoner, or some one in his behalf, his counsel, to satisfy you by evidence and by appropriate argument that this man was in such a state of mind at the time the act was committed that he is not to be held responsible for what he did. He is bound to show you by such amount of evidence, a preponderating amount of evidence, that is, an overbalancing amount of evidence, when taken in connection with the evidence on the other side and taken in connection with the presumption of sanity, as will satisfy you, as reasonable men, as intelligent men, that this man did not know what he was about."

This was a strictly correct instruction. Evidence of insanity, set up in defense of one charged with a crime, must be preponderating when weighed against the presumption of sanity and the evidence of the commonwealth in support of it. While we have repeatedly held that it is error to instruct the jury that the evidence of insanity must clearly preponderate, that insanity must be clearly proved, and the jury fully satisfied of it, we have as often said, and as late as *Com. v. Lee*, 226 Pa. 283, 75 Atl. 411, that it must preponderate, and, when it so preponderates, it overbalances the presumption and proof of sanity. The words are synonymous. Without overbalancing evidence of insanity, the presumption of sanity stands.

The assignment of error is overruled, the judgment is affirmed, and the record remitted for the purpose of execution.

QUADE v. COLUMBIA & PORT DEPOSIT RY. CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. EMINENT DOMAIN (§ 153*)—COMPENSATION—PERSONS ENTITLED—VENDOR AND PURCHASER.

Damages awarded in condemnation proceedings belong to the owner at the time of the appropriation, and not to a subsequent purchaser, in the absence of anything to show such an intent.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 407-416; Dec. Dig. § 153.*]

2. EMINENT DOMAIN (§ 293*)—PROCEEDINGS TO ASSESS COMPENSATION—ISSUES AND PROOF.

Where the purchaser of land subsequent to the filing of a bond in condemnation proceedings by a railroad company institutes proceedings against the railroad company to assess damages and avers that the land injured was his property at the time the injury was committed, and this is contradicted by proof at the trial, he cannot introduce evidence of an assignment of the damages by his vendor without an amendment of the pleading to allege such assignment.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 293.*]

Appeal from Court of Common Pleas, Lancaster County.

Action by Christian F. Quade against the Columbia & Port Deposit Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The court charged as follows: "In this case the land in question was taken on March 19, 1907; that being the day upon which the bond was filed and approved in this court. The property was not conveyed to the present plaintiff, Christian F. Quade, until March 29th, or two weeks afterwards. When it was conveyed to him, it was conveyed subject to what the railroad company had taken, and subject to their rights under their bond, and, if any injury was done to the property by reason of the railroad company having taken one-tenth of an acre of it, it was an injury to Frederick F. Quade, the former owner. The damages that he would be entitled to are personal, and do not run with the land, so that a subsequent owner had no standing to recover any damages for the taking of that land. We are therefore bound to instruct you that under the law and the evidence your verdict must be for the defendant." Verdict and judgment for defendant. Plaintiff appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

B. F. Davis, for appellant. W. U. Hensel, for appellee.

ELKIN, J. The learned trial judge in refusing the motion for a new trial in a concise statement summed up the whole situation, and disposed of the contentions of appellant in the following paragraph: "However, in any aspect of the case, we do not think the plaintiff is entitled to a verdict. If he bases his claim on the injury he has sustained to his business or as lessee, we answer that the issue did not make that a question for the jury, nor was there a scintilla of testimony to support it. If he bases his claim on the ownership of the land taken, we answer that he was not the owner of any that was taken. If he bases his claim on the assignment, we answer that was not a question which the jury was sworn to try, and the whole proceeding from the petition

to the appointment of viewers shows it was not to recover the damages by the plaintiff, as Frederick Quade's assignee." This controversy started as a condemnation proceeding to assess damages for land appropriated under the right of eminent domain by the appellee company. The appellant here, after the filing of the bond to secure the damages, presented his petition asking for the appointment of viewers to assess them. The viewers were appointed, and did assess the damages. From the report of the viewers appellant took an appeal to the court of common pleas. An issue was framed and a statement filed in which it was averred, *inter alia*, that "the plaintiff was at the time of the committing of the injuries or grievances herein-after mentioned, and had been for a long time previous thereto, and now is, the owner of real estate, to wit, a hotel property," being the property alleged to have been injured by the appropriation of the right of way. At the trial he proved himself out of court by introducing evidence showing that he did not own the land at the time of the appropriation. Whether this was a mistake of law, or of fact, we do not know, nor does the record inform us.

[1] It is settled, however, beyond peradventure of doubt that upon the filing and approval of the bond the title to the right of way passed to the appellee company. From that time the grasp of the owner was released from the property, and he was remitted to recourse upon the bond for such damages as he may have sustained. *Dilts v. Railroad Co.*, 222 Pa. 516, 71 Atl. 1072. It is equally well settled that damages arising by reason of the taking belonged to the owner at the time of the appropriation and do not pass to a subsequent vendee, in the absence of anything to show such an intent. *Losch's Appeal*, 109 Pa. 72. Such damages are a personal claim of the owner of the property at the time the injury occurred, and do not run with the land or pass by a deed silent as to the damages resulting from such a taking. It is perfectly clear, therefore, that appellant failed to make out a case when his proofs showed that the land did not belong to him at the time of the appropriation. The fact that he subsequently took title to the property by a deed containing no mention of the appropriation, or of any claim for damages by reason thereof, gave him no right of action for injuries resulting to the prior owner. It is perfectly clear, therefore, that up to this point appellant failed to make out a case.

[2] He relies on one other point which must be considered. After the taking of testimony at the trial had been concluded, during the interval of an adjournment of court, appellant secured an assignment from the prior owner of his claim for damages which

was offered in evidence. He therefore contends that his right of action must be sustained on this ground. To do so is to ignore the pleadings in the case. The issue was made up with appellant as plaintiff and appellee as defendant. The statement averred that the land injured was the property of plaintiff at the time the injury was committed. The case was tried as between the parties thus named, and upon the issue thus pleaded. If we are to have any regard for orderly procedure in the trial of causes, parties must be held to be bound by their own pleadings, and this was the position taken by the learned trial judge. Leave to amend the pleadings was neither asked nor allowed, but all parties stood upon the record thus presented until the trial judge directed a verdict for defendant. If appellant desired to stand upon the assignment of the claim for damages, he should have amended his pleadings so as to cover such a claim. Under these circumstances, we see no error in the conclusion reached by the trial judge. The issue which the jurors were sworn to try did not include the prior owner as a party, nor was the assignment of the claim for damages made the basis of the action to recover. Certainly the court was not bound to try the case upon issues not set out in the pleadings. *State Line R. R. Co. v. Playford*, 14 Atl. 355, is strongly relied on to sustain the position of appellant. In that case the claimant was a mortgagee in possession of the land at the time the railroad was constructed and the bond to secure damages was given to him. These important facts are entirely lacking in the case at bar. The rule of that case does not apply to the facts of the present case. While it is true the bond in such cases is intended as a protection to the landowner, or to any party injured, this does not mean that any party claiming an injury can proceed without reference to rules of pleading and practice to assert his claim. Claims of this character, like all other issues, must be presented and tried in a regular and orderly way under the pleadings.

Judgment affirmed.

EHRHART v. ESBENSHADE.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. LANDLORD AND TENANT (§ 272*)—DISTRESS FOR RENT.

Where an appraisal of goods distrained by a landlord for rent is made before the lapse of five full days after the seizure, and is followed by a sale, the landlord is a trespasser, and liable in damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 272.*]

2. TIME (§ 10*)—SUNDAY.

Where the last day for replevying goods levied on under distress for rent falls on Sun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

day, the tenant has all of Monday in which to replevy, and no appraisement can be made until Tuesday.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34-52; Dec. Dig. § 10.*]

Appeal from Court of Common Pleas, Lancaster County.

Action by Alexander Ehrhart against Christian B. Esbenshade. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows:

"The act of assembly requires the landlord to give notice to the tenant that he must replevy the goods within five days after the levy on the landlord's warrant has been made. In this case the sheriff, who was the defendant's bailiff, made the levy on December 8th, which was on a Tuesday, and at the same time he gave notice to the plaintiff, Mr. Ehrhart, that he must replevy the goods on or before December 14th, which was six days afterwards, as you will observe, or they would be sold in order to raise money to pay the rent. Now, it so happened that the 14th day of December fell on Monday, and the 13th day was on Sunday. In other words, that, in order to give the tenant five days in which to replevy these goods, he would have until Sunday evening to replevy them. But the courts further hold that, where the last day falls on Sunday, the tenant shall be given the whole of the next day in which to replevy the goods. In other words, in this case the last of the five days having fallen on Sunday, there could be no appraisement under the law until the 15th, not on the 14th, as was done in this case. And, as the goods were appraised on the 14th, they were appraised one day sooner than the law allows, and therefore the landlord was a trespasser from the very beginning. Any act done under these proceedings was a trespass against the rights of the plaintiff, and any act done subsequently amounted to the same thing.

"Nor does it make any difference that the plaintiff suffered no injury in not having been given that full day in which to replevy the goods. In other words, it does not make any difference whether he intended to replevy them or not. The courts hold the landlord to a strict compliance with all the provisions of the law, and, as the landlord failed in this particular in this case, the plaintiff is entitled to recover damages in this proceeding. Of course, this depends upon your believing the testimony, but, as that is the testimony on both sides that the appraisement was made on Monday, December 14th, which I told you is a day sooner than the law permitted it to be you can have no difficulty in coming to the conclusion that the plaintiff is entitled to recover. So that the only question really for your consideration is, What is he entitled to recover?

"The law says in such case the tenant shall recover the value of the goods taken and sold at the time they were taken, and such other injury as he may sustain by reason of having been deprived of their use. Now, there is no proof there was any injury sustained here by reason of having been deprived of their use. So the plaintiff can recover nothing on that item. He can recover the value of the goods, and your verdict should be for the value as you ascertain it from the evidence."

Verdict and judgment for plaintiff \$2,350 as damages, and \$150 for loss and inconvenience.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. U. Hensel and W. M. Franklin, for appellant. C. E. Montgomery, for appellee.

PER CURIAM. [1,2] The goods of the tenant were appraised a day too soon, and the landlord was a trespasser. *Davis v. Davis*, 128 Pa. 100, 18 Atl. 514. A verdict against him was unavoidable, and, though harsh as it seems to be, there is nothing in the assignments of error that would justify us in disturbing it.

Judgment affirmed.

In re FITZPATRICK'S ESTATE.

Appeal of BARRY.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. WILLS (§ 524*)—CONSTRUCTION.

Testator created a trust for the benefit of his sister for life, and gave the principal at her death "to her children in equal shares, but in the event that no children survive her, then I give and bequeath the same to my legal heirs." The sister died without children surviving her. Held, that the heirs of testator living at the time of his death were entitled to the principal of the fund at the death of his sister.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1117; Dec. Dig. § 524.*]

2. WORDS AND PHRASES—"THEN."

The word "then" as used in connection with the devise of property, has been held to be an adverb of time, but the general rule is that it does not point to the time, but indicates the event.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6941-6946; vol. 8, p. 7815.]

Appeal from Orphans' Court, Lancaster County.

In the matter of the estate of John J. Fitzpatrick. From a decree dismissing the exceptions to the adjudication, John F. Barry appeals. Affirmed.

From the record it appeared that testator, John J. Fitzpatrick, died December 14, 1889, leaving to survive him, his sister, Catharine R. Eckert, and a nephew and two nieces, the children of a sister who died before the testator. The auditing judge construed the clause of the will quoted in the opinion of

the Supreme Court as giving the remainder, after the death of his sister without children, to the testator's legal heirs at the time of his death. He therefore awarded one-half of the corpus to Charles W. Eckert, the executor of Catharine R. Eckert, and the remaining one-half of the corpus to the nephew and two nieces share and share alike. The exceptions to the adjudication complained of the award of one-half of the fund to the representative of Catharine R. Eckert, on the ground that Mrs. Eckert was not a legal heir within the meaning of the will.

Argued before MESTREZAT, POTTER, ELKIN, and MOSCHISKER, JJ.

John E. Malone and Richard M. Reilly, for appellant. J. A. Coyle of Coyle & Keller, for appellees.

ELKIN, J. John J. Fitzpatrick in his last will and testament provided, *inter alia*, as follows: "I give and bequeath to my hereinafter named executor, the sum of twelve thousand dollars in trust as follows: the same to be invested at interest in good security and the net income thereof to be regularly paid to my sister, Catharine, wife of Charles W. Eckert, during her lifetime and after her death I give and bequeath said principal sum of twelve thousand dollars to her children in equal shares, but in the event that no children survive her then I give and bequeath the same to my legal heirs." The sister for whose benefit the trust was created died without leaving issue, and the question arises, To whom shall the corpus of the trust estate be distributed?

The learned court below directed the distribution to be made to the "legal heirs" of the testator living at the time of his death. In so doing he applied a rule of construction of almost universal application. The rule is never varied unless from the four corners of the will a different intention clearly appears. This is conceded by learned counsel for appellant, but it is urged that the will considered as a whole does show a different intention. With this contention we cannot agree.

[1] The will was drawn by a skillful hand, and the language used to express the intention of the testator is clear and unambiguous. A trust was impressed upon the fund set apart for the benefit of the sister during the period of her life. At her death the principal sum was to be divided among her children in equal shares, "but in the event that no children survive her then I give and bequeath the same to my legal heirs." No children did survive the sister, and hence the contingency happened for which the testator made provision. In that event, the principal sum was to go to his legal heirs. Who are his legal heirs? This question has been asked and answered in numerous adjudicated cases. They are the heirs living at the death of the testator unless a different intention clearly appears from the will itself. In the present case violence would be done to the plain meaning of words if it should be held that a different intention clearly appears. On the contrary, giving the language used its natural import, the clear intention of the testator seems to have been to provide for the contingency in the event that his sister die leaving "no children survive her."

[2] In the construction of wills there are instances in which the word "then" as used in connection with a devise of property has been held to be an adverb of time, but this is not the general rule, which is that it does not point to the time, but indicates the event. In the case at bar we are clear that it refers to the event upon the happening of which the legal heirs take, and not to the time when their right to take begins. To this effect can be cited the following cases: Buzby's Appeal, 61 Pa. 111; Ashton's Estate, 134 Pa. 390, 19 Atl. 699; Stewart's Estate, 147 Pa. 383, 23 Atl. 599; McCrea's Estate, 180 Pa. 81, 36 Atl. 412; Fuller's Estate, 223 Pa. 626, 74 Atl. 623. To this might be added a long line of cases in our own state as well as from other jurisdictions. We think the case was properly disposed of by the learned court below.

Decree affirmed, costs to be paid out of the estate.

SISTERS OF CHARITY OF ST. ELIZABETH v. MORRIS R. CO.

TOWMBLY v. SAME.

(Supreme Court of New Jersey. Dec. 13, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 393*)—RESTRICTION OF CORPORATE ACTION.

While quo warranto is the proper proceeding by which to challenge the legality of corporate existence or the de jure right to exercise corporate powers, certiorari is the appropriate writ by which a corporation, when acting as a state agency, may be kept within the bounds of the authority conferred upon it, the transgression of which will result in a direct invasion of the private property of the prosecutor.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 393.*]

2. EMINENT DOMAIN (§ 264*)—PROCEEDINGS TO TAKE PROPERTY—REVIEW—CERTIORARI.

The appointment of commissioners to condemn the lands of the prosecutors at the instance of a railroad company incorporated under the general railroad act having been removed into this court by certiorari, the prosecutors filed certain reasons under which they propose to challenge the right of the defendant to use its power of condemnation to take the lands of the prosecutors for the purpose of allowing a trolley company to construct its line thereon. *Held*, that a motion to strike out these reasons should be denied.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 264.*]

Certiorari by the Sisters of Charity of St. Elizabeth against the Morris Railroad Company, and by Florence Adele Vanderbilt Towmbly against the same defendant. Motion by defendant to strike out certain reasons filed by the prosecutors. Denied.

Argued before GARRISON, TRENCHARD, and KALISH, JJ.

McCarter & English and Lindabury, Depue & Faulks, for prosecutors. Alan H. Strong, for defendant.

GARRISON, J. This is a motion by the defendant in certiorari to strike out certain reasons filed by the prosecutors. The certiorari was allowed by the Supreme Court Justice who had appointed commissioners to condemn the lands of the prosecutors in proceedings instituted by the defendant, a railroad company incorporated under the general railroad act. The lands sought to be taken by condemnation by the defendant lie between the two points to which the tracks of a trolley company have been laid, and one of the claims of the prosecutors is that the powers of condemnation granted to the defendant for the construction of a steam railroad are being used by it to secure lands for the construction of the road of a trolley company which this latter company cannot lawfully take by condemnation because it has not complied with the act under which it is incorporated by obtaining the consent of the municipality through which it is seeking to construct its road.

Such use of the power of condemnation granted for one purpose to eke out a lack of power for which it was not granted is characterized by the prosecutors in their reasons as a fraud upon each of the statutes involved, and to this question the testimony of the prosecutors was addressed in the examination of witnesses under the rule obtained for that purpose. In the course of the taking of such testimony, certain witnesses connected with both the steam railroad and the trolley company refused, under the advice of counsel, to answer questions tending to sustain this contention of the prosecutors. Thereupon a motion was made before us to compel the witnesses to answer or to attach them for contempt. Upon this motion the position taken by the counsel of the defendant was that the questions were directed at the corporate existence of the defendant which could not be attacked by certiorari but only upon quo warranto; the position of counsel for the prosecutors being that he had a right to adduce lawful testimony in support of his reasons. The difficulty of deciding the meritorious question in a punitive proceeding against a witness led to the withdrawal by the defendant of its motion, and the substitution therefor of the motion now before us which is to strike out the reasons themselves upon the ground that the testimony taken to support them can present only questions that cannot be decided upon certiorari.

The merits of the defendant's motion having been argued without objection by the prosecutors as to the propriety of the motion itself, the latter will be assumed for the purpose of deciding the former. It must also by a familiar rule be assumed upon such motion that the prosecutors will be able to prove those facts the right to prove which is challenged.

[1] It is fully conceded by the counsel of the prosecutors that certiorari is not the proper remedy by which to attack or inquire into the legality of the corporate existence of the defendant, and also that, as to persons dealing with or proceeding against a corporation, it is enough that it may be de jure, and is a de facto, corporation. This concedes the main point taken by the defendant's counsel, and, if such point were dispositive of the rights involved, would end the matter in favor of the defendant's contention.

There remains, however, over and above all that is covered by this concession, the case of a prosecutor in certiorari, such as the present, who is not dealing with a corporation or seeking to proceed against it, who does not need to dispute its corporate existence or to attack the legality thereof or seek to have it destroyed, but who, being a landowner, claims the right to keep

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

his land until it is taken from him by the lawful exercise of the state's right of eminent domain. To such a prosecutor the corporate existence of the defendant is a matter of entire indifference, as also is its authority to exercise lawfully the state's right of eminent domain; the sole contention necessary for the protection of his property being that such right shall not be unlawfully exercised beyond the limits for which it was granted or be fraudulently diverted from the legitimate uses for which it was granted to a use for which it was not lent by the state to the defendant. This contention appeals not to the law by which corporate existence is determined, but rather to those doctrines by which the law of agency is defined and applied.

The right of eminent domain is a sovereign power, and it is elemental law that its exercise by a corporation under legislative sanction constitutes such corporation the state's agent for the exercise of such sovereign power for the purposes for which such agent was authorized to use it and for no other purpose. Whenever, therefore, such agent seeks to employ the sovereign right thus granted to it for a purpose other than that for which it was granted it is acting outside of its agency and in excess of its authority and for such acts, when they constitute an invasion of private property, the mere fact of incorporation affords no valid support.

Such acts constitute both a public and a private injury; for the public wrong the remedy is the forfeiture of corporate existence at the suit of the Attorney General, but for the private injury the remedy goes no further than to keep the corporation within the bounds of its lawful authority which is the peculiar and indeed the original function of the writ of certiorari.

That the remedy of the state and of the individual stand on totally different grounds and are not mutually exclusive appears from the consideration that, if upon quo warranto this court should deny the public redress sought by the Attorney General, the landowner would be in precisely the same situation after such quo warranto as he was before with respect to the right to insist that the agent of the state be kept within the bounds of the authority granted to it by the state, and that his lands be not taken from him in invitum by the exercise of an authority which, being in excess of what was granted, was, in legal effect, nonexistent.

That this is upon general principles a proper use of the writ of certiorari does

not admit of serious doubt. Numerous decisions illustrating such use of this writ establish the principle upon which its use in the present case is justified. *Doughty v. S. & E. R. R. Co.*, 21 N. J. Law, 442; *Morris & Essex R. R. Co. v. Central R. R. Co.*, 31 N. J. Law, 205; *Hoboken Land & Imp. Co. v. Hoboken*, 35 N. J. Law, 205; *Morris & Essex R. R. Co. v. Hudson Tunnel Co.*, 38 N. J. Law, 548; *Richards v. Dover*, 61 N. J. Law, 400, 39 Atl. 705; *Hampton v. Clinton Water Co.*, 65 N. J. Law, 158, 46 Atl. 650; *Philadelphia & Camden Ferry Co. v. Inter-City R. R. Co.*, 73 N. J. Law, 86, 62 Atl. 184; *Shamberg v. N. J. Shore Line R. R. Co.*, 73 N. J. Law, 572, 64 Atl. 114.

In *Essen v. Secretary of State*, 72 N. J. Law, 432, 60 Atl. 1102, it was held that the mere filing of a location could not be reached by certiorari, but that an ordinance based thereon would invoke the function of such writ.

A somewhat similar use of the writ of certiorari is illustrated by *Austin v. Atlantic City*, 48 N. J. Law, 118, 3 Atl. 65, where a deed by which 1,400 grantees were constituted freeholders was denied validity to qualify such tenants in common as recommenders for liquor licenses upon the ground of the fraudulent use of an otherwise valid legal title.

The case of *National Docks R. R. Co. v. Central R. R. Co.*, 82 N. J. Eq. 755, upon which counsel for the defendant mainly relies, arose in and was decided by the court of equity under conditions so widely different from those now sub judice that its citation is hardly relevant. In that case the Court of Chancery was asked to deny corporate power to an incorporated company, and as this, in effect, determined the corporate existence, the Court of Errors and Appeals very properly held that it could not be decreed in a suit inter partes. The difference between a denial of corporate power and a claim that such power shall be lawfully exercised would seem to be too plain for elaboration.

[2] The conclusion to which we have come is that, while the legality of corporate existence may not be challenged upon certiorari, the exercise of the right of eminent domain in excess of that granted by the state may be challenged and kept within legal bounds by such writ at the instance of a landowner to whom it has been allowed, and that for the purpose of making out such a case the reasons filed by the prosecutors will be allowed to stand.

The defendant takes nothing by its motion.

BREINTNALL v. SADLER

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 142*)—QUESTION FOR JURY—TITLE TO OFFICE—SURRENDER.

Whether or not the conduct of an incumbent of an office in respect to an executive order retiring him therefrom constituted a surrender by him of the said office, when conflicting inferences may be drawn, is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

2. APPEAL AND ERROR (§ 856*)—REVIEW—NONSUIT—WRONG REASON.

A judgment of nonsuit, although erroneous upon the ground upon which it was directed, will not be reversed if justified upon some other ground that should have operated upon the mind of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406-3434; Dec. Dig. § 856.*]

3. TRIAL (§ 139*)—APPEAL AND ERROR (§ 856*)—TAKING CASE FROM JURY—NONSUIT.

A nonsuit is properly ordered, where the plaintiff has conclusively failed to sustain the burden cast upon him by the issue; but, where a nonsuit is erroneously ordered with respect to the issue, it cannot be sustained upon a point not put in issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139;* Appeal and Error, Cent. Dig. §§ 3406-3434; Dec. Dig. § 856.*]

Error to Supreme Court.

Quo warranto by Edmund Willson, Attorney General, on the relation of R. Heber Breintnall, against Wilbur F. Sadler, Jr. Judgment for defendant, and relator brings error. Reversed, and venire de novo awarded.

McCarter & English, for plaintiff in error. Gilbert Collins, Nelson B. Gaskill, Asst. Atty. Gen., and the Attorney General, for defendant in error.

GARRISON, J. By an information in the nature of a quo warranto, R. Heber Breintnall, as relator, challenged the right of Wilbur F. Sadler, Jr., to hold the office of Adjutant General of New Jersey. Upon the trial of the issue presented by the pleadings the relator was nonsuited upon the ground that he "had retired upon his own application; that his retirement was voluntary, not involuntary."

In order to appreciate the significance of the voluntary character thus ascribed to the relator's retirement from the office in question and its bearing upon the legal controversy, the issue presented by the pleadings must be stated.

The information set forth that the relator on February 25, 1903, was appointed and commissioned Adjutant General of New Jersey and entered into the said office and performed the duties thereof until March 2,

1909, on which day he was retired from the said office by an executive order made by the Governor of the state acting upon and in conformity with an act of the Legislature approved on that day, the so-called Vredenburg act. Act March 2, 1909 (P. L. p. 13). This executive order, the information avers, was made "contrary to the will of the relator," and without the previous sentence of a court-martial, without which, the relator averred, he could not be lawfully removed from his said office.

[1] The ultimate controversy was the defendant's title to the office of Adjutant General; and this initial pleading of the relator. In its legal effect, was a charge that the office in question was not vacant when the defendant was appointed to fill it. Having made this essential averment, the information went on to state that on April 15, 1909, the defendant was nominated, confirmed, and commissioned Adjutant General of New Jersey and entered upon and still holds the said office to the exclusion of the relator therefrom. The issue of fact tendered perhaps unnecessarily by the information therefore was that the executive order by which the relator was retired from office was contrary to his will; the averment that he could not lawfully be removed from office saving by the sentence of a court-martial being by way of inducement merely. Thus informed of the nature of the attack upon his title, the defendant by his plea tendered the issue thus suggested. In doing so it was open to the defendant to make the issue he tendered turn wholly upon the relator's voluntary vacation of the office by a traverse of the issuable facts stated in the information, or to make it turn upon the relator's removal from office in invitum by an averment to that effect in his plea (since matters of inducement are not properly traversable). He adopted the former course by the direct allegation that on the day in question the relator vacated and surrendered the office of Adjutant General, reciting the executive order of that date and the relator's conduct in respect thereto by way of inducement, but making no averment that the relator had been removed from office otherwise than by his own acts as aforesaid. The issue thus tendered was not varied by the relator's replication that he did not voluntarily vacate or surrender the said office.

Upon the trial of the issue thus squarely presented it was error to nonsuit the relator. This error, as we see it, resulted from the trial court's giving conclusive effect to the recital contained in the executive order, viz., that it was made "on his (General Breintnall's) own application." This recital, so far from being conclusive evidence of the truth of the fact therein stated, was not even evidential of such fact, as against the relator, unless he had authorized such a statement

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to be inserted in said order or at least had knowledge that it was so inserted, neither of which conclusively appeared. On the contrary, as to each of these matters conflicting inferences might legitimately be drawn by the jury. The jury could not avoid finding that the relator did not wish to relinquish his office, and also that all parties concerned were acting under the belief that the relator had been legislated out of office by the Vredenburg act, regardless of his volition in the matter, and also that when, under these circumstances, the Governor had suggested to the relator that he voluntarily withdraw from his office, the relator had informed the Governor that he would not resign. In the light of these facts, it was a fair question, about which reasonable men might differ, whether the proper construction to be placed upon the relator's conduct with respect to the executive order retiring him from the office of Adjutant General was that he resigned his said office, or that, in bowing to the authority of a vis major, he observed the forms that were proper for him to observe as an officer and a gentleman.

It was a relevant and perhaps significant circumstance that, on the very day on which the Governor approved the Vredenburg act and signed the executive order retiring the relator in conformity therewith, the relator addressed a letter to the Governor which began, "As I am about to retire *by operation of law*," to which the Governor in a letter of March 3, 1909, the next day replied, "I regret that these (our official relations) are to be broken off because of the *requirements of the law*."

Enough has been said to point out the general ground upon which we think that it was error for the trial court to withdraw from the jury the determination of the question of fact placed in issue by the parties. In view, however, of the retrial of such issue, we should further point out that there was error in the overruling of the question put to the witness Godfrey, "State how you happened to insert those words in the order?" those words being "on his own application" (referring to the relator). The answer to this question by the witness who was the draftsman of the order must have thrown light upon the question whether such words were inserted with or without Gen. Breintnall's knowledge, and hence, however answered, the matter thus brought out would be relevant. The objection therefore that the inquiry was irrelevant and immaterial was not well founded. It may also be well to draw attention to the fact that the question at issue is only indirectly concerned with the inclinations and preferences of the relator with respect to his retirement from office. The question at issue is: Did Gen. Breintnall vacate the office of Adjutant General by resigning it or surrendering it; not whether such vacation, if it so occurred, was in conformity with his inclinations or his pref-

erences? Indirectly it is true the relator's wishes and preferences in the matter are to be taken into account, since it is easier to believe (in a doubtful case) that a man did that which accorded with his inclinations; and correspondingly more difficult to believe that he did that which was directly contrary to them. These secondary considerations, however, while having their proper place, must not be permitted to usurp the place of the primary issue which may be broadly stated to be: Was the condition that existed in the office of Adjutant General after the order of March 2, 1909, was issued, the result of Gen. Breintnall's withdrawal from office? Upon this question the testimony, oral and documentary, is all of it relevant and none of it conclusive; which is to state that there was a jury question.

[2] Having thus reached the conclusion that there was error in the nonsuit ordered at the trial, upon the ground upon which it was directed, the question arises whether the judgment can be sustained upon some other ground, since it is a recognized rule of appellate procedure that a judgment will not be reversed if it was justified upon a ground that should have been, although it was not, influential with the trial court. *Sypherd v. Myers*, 80 N. J. Law, 321, 79 Atl. 340. It is said that such a ground exists independently of the question which, under our decision, should have been submitted to the jury; and that, even if the jury found that the relator had not surrendered his office, he should have been nonsuited upon the ground that the Vredenburg act removed him from office, and that he was not protected by the Constitution from removal from office without the sentence of a court-martial; in fine, the nonsuit is sought to be justified upon the ground that the relator was removed from his office in invitum. [3] The trouble with this contention is that, in seeking to lay hold of the rule of appellate procedure that we have just stated, it does violence to the fundamental rule that the rights of parties are at all stages of litigation to be disposed of within the issues they have framed or tried. We have, at some pains, pointed out what this issue was, in the present case, and that the fact that the relator was removed from his office in invitum was not within this issue. The pleadings nowhere contain any allegation of such removal unless it be the matter of inducement stated by the relator in the information, which, being neither traversed nor met by a contrary averment in the plea, is either out of the case or else to be taken conclusively against the defendant. Now, a nonsuit is ordered, under our practice, where the plaintiff has conclusively failed to sustain the burden cast upon him by the issue; but never, as far as I am aware, is a plaintiff nonsuited for a like failure with respect to a matter not at issue unless the parties have in fact so "tried out" a matter that they may

be deemed to have considered the pleadings amended so as to present it as an issue. In the present case there was no such trial of the issue of removal from office. It is true that counsel stated as a ground for nonsuit that the provision of the Constitution forbidding removal from office excepting after a court-martial did not apply to the Adjutant General, but the injustice of supporting the nonsuit upon a point thus interjected into the case is manifest. If the removal of the relator from office had been made an issue, it would have been open to him to show at the trial not only that he was a commissioned officer, and that he had not been court-martialed, but also that he was an honorably discharged Union soldier, as practically recited in the very order that removed him from office, thus invoking not only the constitutional protection of his office, but also the personal protection of the tenure of office act. He could probably also have shown that an Adjutant General has no "command" from which to be "withdrawn" (under the fourth section of the Vredenburgh act), and hence have argued that that act did not apply to the office of Adjutant General, important and far-reaching questions none of which were presented by the issue that the relator had voluntarily withdrawn from office. We have not considered these questions, and express no opinion respecting them other than that, dealing as they do with a matter not at issue, they raise, by indirection, in the appellant court questions of public importance that were not placed in train for decision in the court of first instance.

The judgment of nonsuit is reversed, and a venire de novo awarded.

STOUT v. COOK et al.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

1. WILLS (§ 524*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—"SURVIVING CHILDREN."

Where there is a devise or bequest for life followed by a devise or bequest to the "surviving children" of the testator, at the termination of the life estate, the quoted words mean those of the children of the testator who survive at the death of the life tenant, and unless, on taking the whole will into consideration, the words are plainly used in another sense, they do not include surviving children of predeceased children of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

For other definitions, see Words and Phrases, vol. 8, p. 7811.]

2. WILLS (§ 524*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES.

Where a testator ordered his residuary estate to be divided into seven equal parts of which he gave one to each of his sons absolutely, and directed his executors to invest the remaining shares and pay the interest and profits therefrom to his daughters during their lives, and provided that on the death of either of the

daughters leaving no child or children her share should be a part of the residue, the interest and profits of which were to be paid in equal proportions to his surviving children during their natural lives, the share of a daughter dying childless goes to the surviving children of testator, and no part of it to the children of predeceased children of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

3. WILLS (§ 524*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES.

Where a testator provides that on the death of one of his daughters without child or children, her share of the residuary estate is to go to his surviving children, the fact that in the event of the death of all other children before the death of a daughter without child or children the testator would die intestate as to such share if the provision of the will be construed as excluding children of predeceased children, does not require a construction giving the children of the predeceased children a share in such remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

Appeal from Court of Chancery; Howell, Vice Chancellor.

Bill in equity by Gideon Lee Stout, surviving executor, against Margaret S. Cook and others. From a decree (77 N. J. Eq. 153, 75 Atl. 583) for defendants Margaret S. Cook and others, the complainant appeals. Reversed and rendered.

Halsey M. Barrett and W. J. Magie, for appellant. John R. Hardin and Joseph D. Lee, for respondents.

GUMMERE, C. J. The appeal in this case was filed by the executor and trustee of John W. Stout, deceased (who died in the year 1861), to obtain a construction of the will of the decedent. After providing for the payment of his debts, and setting aside a portion of his estate for the use of his wife during her life, and making certain bequests of small amounts to friends and relatives, the testator then disposed of his residuary estate as follows: "The whole residue of my estate I order and direct shall be divided into seven equal parts or shares, and to each of my sons, to wit, Jacob, Thomas and Gideon Lee, I give and bequeath absolutely, and without condition or qualification, one full part or share, and the remaining four shares of the residue of my estate I order and direct my executors, the survivors or survivor of them, to invest at interest on good landed security, and the interest and profits arising therefrom I direct to be paid from time to time as the same may be received in equal shares or proportions to each of my four daughters (their respective receipts to be a full discharge for the same), during their respective natural lives, and on the death of either of my said daughters I give and bequeath her share of the said residue of my estate to the child or children of such deceased daughter in equal shares or proportions; and in case such deceased daughter shall leave no child

or children such share shall be esteemed as part of the residue of my estate, the interest and profits of which to be paid in equal proportions to my surviving children during their natural lives, and on their respective deaths the principal to be paid to the child or children of such deceased child, such child or children to take the parent's share." He then provided that any advancements made to either of his sons-in-law should be deemed and taken as advancements made to the one of his daughters who was the wife of such son-in-law, and should be charged to and deducted from such daughter's share or proportion of his estate; and that any advancements made by him to any of his children should be charged to and deducted from such child's share of his estate. Finally he provided that the portion of his estate which had been set aside for the benefit of his wife during her life should, at her death, be added to the residue of his estate, and be subject to the provisions of his will touching the same. The testator's daughter Augusta died in 1907, without leaving a child or children, and the complainant seeks by his bill to be informed by the court which of the testator's lineal descendants, by the true construction of his will, are entitled to take that share of his estate which was invested for the benefit of his daughter Augusta during her life. But two of the testator's children were living at the time of the death of Augusta, viz., her brothers Gideon Lee and Thomas. Her brother Jacob had died before her, without issue, but leaving an adopted daughter surviving him who is a defendant in this litigation. Her three sisters were also dead, each of them having left children who are also parties defendant. Her brother Thomas died during the pendency of this suit, leaving children surviving him, and upon his death his executor was substituted for him as a party defendant. Gideon L. is still living, and has issue, who are also defendants herein.

The question to be determined is whether, by the terms of the bequest over "to my surviving children during their natural lives, and at their respective deaths the principal to be paid to the child or children of such deceased child; such child or children to take the parent's share," only those of the testator's children who survived Augusta—that is to say, Gideon L. and Thomas, and their respective children—take the share of the testator's estate which was set apart for the benefit of Augusta during her life, or whether the children of her respective sisters who had predeceased her are also entitled to participate in the distribution of that share; and if, by the true construction of the testator's will, these children are so entitled, then whether the adopted daughter of her deceased brother Jacob is also entitled to share in such distribution.

[1] It is entirely settled by the decisions in this state that where there is a devise or

bequest for life, followed by a devise or bequest to the "surviving children" of the testator, at the termination of the life estate, the words "surviving children" are to be taken as meaning those of the children of the testator who are surviving at the death of the life tenant; and that, unless, upon taking the whole will into consideration, the words are plainly used in some other sense, this meaning, which is the ordinary and natural one to be given to them, must prevail. *Ashurst v. Potter*, 53 N. J. Eq. 610, 32 Atl. 698; *Id.*, on Appeal, 54 N. J. Eq. 699, 37 Atl. 1117. Unless, therefore, an examination of the whole will of the testator makes it plain that, in using these words, he did not intend that they should be read in their ordinary and natural sense, the property which was held for the benefit of his daughter Augusta during her life passed at her death to his sons Gideon L. and Thomas for their lives, and to their children after their respective deaths, to the exclusion of all other descendants of the testator.

[2] And that this is so is conceded by counsel for the children of the other daughters of the testator, and is not controverted by counsel for the adopted daughter of the son Jacob; but they contend that the natural construction to be given to these words is plainly shown by the general scheme of the will not to be the one intended by the testator, and their claim is that the clear purpose of the testator, as exhibited by a consideration of the whole will, was to bestow this portion of his estate upon those of his children who should survive Augusta, and upon the issue of those of his children who should have died before her, in equal shares per stirpes, in case Augusta should leave no child or children surviving her.

From the previous recital of the provisions of the testator's will it is obvious that no portions of that instrument, except the provision which disposes of the residuary estate, and that which directs the deduction of advancements made to his children and to the husbands of his daughters, throw any light upon his purpose with regard to the participation of his children in his estate. The argument is that those two provisions exhibit "an intention to divide his estate equally between his children, showing no favoritism whatever;" and this intention is said to be made manifest by the fact that he divided his residuary estate, including the portion set aside for his widow during her life, into seven equal parts, and gave to each of his children either outright, or by stirpes, one of those equal shares. A like contention was made in the case of *Ashurst v. Potter*, supra, where the question before the court involved the construction of a will quite similar in its purport to that now under consideration, and the children of a son of the testator who had predeceased a daughter who died without issue claimed to be entitled to take as the representatives of their fa-

ther, and was thus dealt with by Emery, V. C., before whom the case was heard (opinion, page 613 of 53 N. J. Eq., page 700 of 32 Atl.): "This argument, as applied to the present dispute, seems to me to beg the very question in issue. So far as relates to the original share of the residuary estate, the brothers are put on a basis of equality both as to shares and extent of estate, but the sister's original share is made unequal in extent by being limited to a life interest. The estate in remainder, in the share given to the sisters, is a new subject of disposition, as to which the testator has disclosed no intention whatever, except by the clause now in dispute. This clause gives the remainder, as he might well have intended to give it, to the surviving brothers and sister of a daughter dying without issue and without reference to the children of a deceased brother. Nowhere in the will have the children of the sons been mentioned as objects of the testator's bounty, and as the words of limitation over in their natural construction exclude these children, the theory that they must be so construed as to include them in order to effectuate a supposed intention of the testator to equalize the brothers and their respective children as to this share, seems to me to be without foundation." The decision in that case was affirmed in this court upon the opinion of the learned Vice Chancellor, and the portion just quoted is, consequently, the expression of our view upon the soundness of the argument there made. It seems to us to be dispositive of the present contention, for, although the words used by the testator in the cited case were "her" (that is, his daughter's) "surviving brothers and sisters," the reasoning of the learned Vice Chancellor would have been equally applicable had the testator used the words "my surviving children."

It is further contended that the intention of the testator that the issue of a child who should predecease a daughter dying without issue surviving her, should share in the portion of his estate set aside for her benefit, is plainly evidenced by his providing that such portion should be esteemed as part of the residue of his estate, such residue having already been divided into as many shares as he had children. The claim seems to be that such portion was not only thereby directed to become a part of the residue, but was, by necessary inference, to be distributed in the same way in which the original residue was distributed. But this obviously is not so. Under the scheme of the will the sons, as has already been pointed out, were to take their shares of the original residue outright, while their interest in that part of the added residue, if they take anything as survivors, is merely the income thereof so long as they shall live, with remainder to their children. In other words, the testator intentionally made a different disposition of

so much of his estate as should fall into the residue by reason of the death of a daughter without leaving issue, from that which he made of the primary residuary estate. Further than this: He dealt with this added portion of the residue upon the theory that no part of its corpus would be distributable immediately upon its falling in, for he provided that only the interest and profit should be paid to the first takers of it during their natural lives, and that the corpus should then be paid to their respective children, a disposition of it which negatives the idea that the children of deceased children should share in it.

[3] Lastly, it is said that a construction of this will which permits only those of the children of the testator who should survive a daughter dying without leaving children to share in the distribution of that part of his estate which was set apart for her benefit, and excludes children of deceased brothers and sisters from participation therein, cannot be justified because, under such a construction, the testator might readily have died intestate as to a part of his estate—for example, by the death of all of his children before Augusta—and that it will not be presumed that the testator intended to leave any part of his estate undisposed of. It must be conceded that no presumption of an intention to die intestate as to any part of his estate is allowable, when the words of a testator's will may fairly carry the whole. But, although no such intention will be presumed, it, nevertheless, not infrequently happens that a testator unintentionally dies intestate as to some part of his estate, by reason of his failing to contemplate the happening of a contingency which actually occurs after his death; and, as was said by Halsbury, L. C., in *Inderwick v. Tatchell*, L. R. Appeal Cases (1903) page 122, courts are not at liberty, because an event has happened which the testator has not provided for, to disregard the ordinary rule of construction that words must be read according to their natural and reasonable meaning, and inject into the will a provision which the testator would probably have made had he contemplated the happening of the contingency. In the present case a reading of the will satisfies us that the testator did not contemplate the contingency suggested by counsel, and did not attempt to provide against it. We find nothing in any of its provisions which will justify the conclusion that the testator used the words "my surviving children" in other than their ordinary and natural sense; and, therefore, we hold that, by the true construction of the provision under consideration, the two sons of the testator, Gideon L. and Thomas, and their respective children, were alone entitled, upon the death of their sister Augusta, to share in the distribution of that portion of the testator's estate which had been set aside for her benefit during her life.

Reaching this conclusion we hold that the

decree appealed from, which adjudged that the children of the deceased sisters of the daughter Augusta were entitled to share in such distribution must be reversed, and a decree in conformity to the views herein expressed must be entered; and it will be so ordered.

STOUT v. COOK et al.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

Appeal from Court of Chancery; Howell, Vice Chancellor.

Bill in equity by Gideon Lee Stout, surviving executor, against Margaret S. Cook and others. From the decree, Audrey Osborn, adopted daughter of Jacob Stout, deceased, appeals. Affirmed.

Mark A. Sullivan and Robert H. Griffin, for appellant. Halsey M. Barrett, W. J. Magie, John R. Hardin, and Joseph D. Lee, for respondents.

PER CURIAM. For the reasons set forth in the opinion of this court (81 Atl. 821) in deciding the appeal of certain others of the parties to this cause, so much of the decree as is appealed from by Audrey Osborn will be affirmed.

VAN CLIEF v. MELVILLE et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

FRAUDULENT CONVEYANCES (§ 122*)—TRANSACTIONS INVALID—MORTGAGE.

A corporation in financial straits executed a mortgage on all its property to trustees to secure all creditors who should assent to its terms before a certain date and extend the time of payment of their claims. The mortgage recited that it was given only upon the assent and extension of time by creditors owning 75 per cent. of the claims. Additional advances of moneys to be made by or through the trustees were also secured by the mortgage as a first lien. The trustees were given full discretion and authority to disburse the moneys so advanced. The business of the corporation was to be conducted under their oversight, and their expenses were to be a first lien. Some creditors did not assent. A receiver was afterward appointed for the corporation, and, upon a foreclosure by the trustees, filed an answer setting up the invalidity of the mortgage under section 12 of the statute of frauds (2 Comp. St. 1910, p. 2618). *Held*, that the discretion reposed in the trustees as to the disbursement of moneys advanced by or through them was so broad as to evince an intent to hinder, delay, and defraud creditors, and that the mortgage was invalid even as to the advances.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 122.*]

Appeal from Court of Chancery.

Bill in equity by William S. Van Clief, trustee, against Frank Melville and others. Decree for plaintiff, and defendants appeal. Reversed in part and affirmed in part, and remanded.

The bill in this case was filed to foreclose a mortgage given by the Frank Melville Amuse-

ment Company and by Frank Melville and wife to William S. Van Clief, the complainant, Albin Harry Cortright, as trustees. The receiver of the Frank Melville Amusement Company filed an answer setting up that the mortgage was void under the sixty-fourth section of the corporation act (2 Comp. St. 1910, p. 1638) and the twelfth section of the statute of frauds (2 Comp. St. 1910, p. 2618). The facts are as follows: In 1907 the amusement company conducted what was apparently a profitable enterprise, but in August of that year was in financial straits, probably because of the fact that the receipts, while showing a profit over the running expenses, were not sufficient to pay the cost of the plant. Suits were pending and lien claims were filed, including lien claims by Van Clief and by Cortright. These two lien claims were filed when they were for the purpose of inducing a more favorable settlement of a large claim then in the hands of an attorney for collection. Negotiations and creditors' meetings followed, as a result of which the mortgage in suit was given. It bears date October 21, 1907, a few days after the scheme had been approved at a meeting of creditors, but it was not acknowledged until January 6, 1908. The delay seems to have been due to the effort to secure the assent of creditors of the amusement company in accordance with the provisions of the mortgage. The total amount of claims as appears by a statement assented to both by the amusement company and by the trustees named in the mortgage, including the complainant, was \$72,119.98, but of this amount \$15,292 claimed by Cortright himself was proven fictitious. The valid claims amount to \$56,827.98. Slightly over 75 per cent. of that amount assented. The provisions of the mortgage are peculiar. It recites the willingness of the mortgagors to give security for their debts "upon said creditors accepting such security, and in consideration thereof giving an extension of time until October 1, 1908," conveys all the property of the amusement company, and also property used in connection with the enterprise, which in equity belonged to the company though the title was in Melville, provides that it is given only upon the receipt from creditors owning 75 per cent. of the claims of extensions of payment to October 1st and the assent of the said creditors to the terms of the mortgage, and that the remaining 25 per cent. may share in the benefits by executing and delivering to the mortgagors like extensions and assents on or before February 6, 1908, being one month from the date when the mortgage was acknowledged. It provides for additional advances to the extent of \$10,000, to be made only through the trustees. The advances are to be applied as the trustees direct. They are given full discretion and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

authority with regard to all disbursements, and the loans and advances are to be a first lien on the mortgaged premises prior and paramount to the lien of the other claims. The mortgagors are to remain in full possession of their park property, business, franchises, and appurtenances to manage and control the same, and receive and control all rents, royalties, earnings, revenues, and income thereof and therefrom in the same manner and with the same effect as if the mortgage had not been made, with the right to make such changes and alterations as they may deem best. The trustees are authorized after May 1, 1908—that is, after the beginning of the next season for such amusements as the company conducted—to appoint a bookkeeper. The books are to be at all times open to inspection and audit by the trustees. There are provisions for the advancement by the trustees of the expenses necessary to keep the enterprise going, which are to be a first lien upon the mortgaged property.

Richard Boardman (Condict, Condict & Boardman, Robert S. Hudspeth, and George H. Peirce, on the brief), for appellants. Elmer W. Demarest (Roberson & Demarest, on the brief), for respondent.

SWAYZE, J. (after stating the facts as above). The learned Vice Chancellor held that the mortgage was invalid as far as it attempted to secure the then existing debts of the amusement company, but that, although the company was insolvent, the mortgage was valid security for the subsequent advances notwithstanding section 64 of the corporation act (2 Comp. St. 1910, p. 1638), for the reason that the trustees, particularly Van Clief, who advanced the money, had no notice of the insolvency. He did not consider whether or not the mortgage was invalid under section 12 of our statute of frauds (2 Comp. St. 1910, p. 2618). If we thought it necessary to consider the effect of section 64 of the corporation act, we should have some difficulty in finding, as the Vice Chancellor did, from the facts in the case that Van Clief was without notice of the insolvency; but it is unnecessary to pass upon that question, for the reason that the case can be disposed of under the twelfth section of the statute of frauds. The above recital of facts suffices to show that as to antecedent creditors the case comes within the rule of *Owen v. Arvis*, 26 N. J. Law, 22, and *National Bank of the Metropolis v. Sprague*, 21 N. J. Eq. 530. Notwithstanding what Vice Chancellor Pitney said in *Sipley v. Wass*, 49 N. J. Eq. 463, 473, 24 Atl. 233, the authority of these cases has not been at all shaken by the later decisions of *Muchmore v. Budd*, 53 N. J. Law, 369, 22 Atl. 518, and *Clinton Bank v. Cummins*, 89 N. J. Eq. 577. *Muchmore v. Budd* turned upon the question whether the bill of sale amounted to an as-

signment for the benefit of creditors within the meaning of our statute relating to such assignments, and it was held it did not. If not, the case was an ordinary one of preference of creditors. In neither that case nor in *Bank v. Cummins* was the question of fraudulent intent involved. In the present case it was clearly the intent of the parties to the mortgage that creditors who did not assent should be deprived of any right to share in the security, which covered all the property of the amusement company, so that the effect was that creditors unwilling to assent to the terms proposed by the debtors were shut out. This was exactly the scheme condemned in *National Bank of the Metropolis v. Sprague*. The present case differs in that the mortgage secures future advances, and was sustained only to that extent. The reargument was directed upon the point whether a mortgage had in part because in contravention of the statute of frauds could be sustained in part by a court of equity in view of the plain language of the statute declaring that "a conveyance contrived in fraud, covin or collusion with intent to hinder, delay or defraud creditors of their lawful actions should be utterly void and of no effect." Upon further consideration, we think we need not pass on that question. The mortgage shows upon its face that the provisions as to future advances were contrived to defraud creditors of their lawful actions. It provides for advances not exceeding \$10,000 to be made in installments as the same may be approved by the trustees from time to time for the maintenance of the business, for inn and tavern or restaurant and beer saloon license, rent, water taxes, and other taxes, wages, or arrears thereof, stock in trade, insurance of buildings, and the general carrying on and safeguarding of the properties and business between its date and the ensuing 1st of June. The trustees agree to advance for such purposes at least \$5,000 in such installments and at such times as to them and Melville shall seem proper. Any sums advanced by them or other persons are to be applied as they direct, and they have full discretion and authority with regard to all such disbursements. These provisions are so broad as to authorize the trustees to advance money and apply it to the payment of pre-existing debts at their discretion. The object of the provision seems from the testimony to have been to permit the trustees to pay small creditors who were pressing for payment and annoying the management of the enterprise. Payments of this kind were made. Such a provision, while it may have been at the time intended only for the benefit of small creditors, was susceptible of being used for the benefit of Van Clief himself, and the effect of vesting such discretion in the trustees was to make it possible for them to substitute the first lien which the mortgage gave to the advances, for the inferior lien that favored

creditors might otherwise have, merely by using the money to pay those creditors. A better scheme to hinder, delay, and defraud creditors of their lawful actions cannot readily be devised. The assenting creditors no doubt thought that the trustees intended that the advances should be used for the purpose of carrying the enterprise through to another season for out-door amusements, with the hope that it would prove profitable enough to enable the corporation to pay its debts, but the discretion reposed in the trustees was much broader than that. Under *Muchmore v. Budd*, this scheme cannot be called a general assignment, but, in substance, it is an arrangement by which the corporation appoints its own receivers, authorizes them to continue the business, and create a first lien upon the property prior to the claims of existing creditors, and use the proceeds of the new loans for such purpose as they deem best. As to nonassenting creditors, such a scheme is illegal, and is within the reason that led the court to condemn the mortgage in *National Bank of the Metropolis v. Sprague*.

It is urged that the state of the record prevents creditors from profiting by this appeal because a decree *pro confesso* has been taken against them in the court of chancery. It is conceded that there were creditors who did not assent to this scheme. The receiver represents them. He raised the issues by proper pleading in the Court of Chancery, and is entitled to press the objections to the mortgage in this court. The fact that some of the creditors, whose counsel signed the brief in behalf of the appellants, assented to the arrangement, is of no moment. The receiver is the appellant, representing the rights of nonassenting creditors. The question of equities that may have arisen by reason of the assent of many creditors to the scheme is not now before us. That will naturally arise in the Court of Chancery upon the distribution of the fund now in the hands of the receiver.

For the reasons stated, the decree is reversed and the record remitted to the Court of Chancery for further proceedings in accordance with this opinion.

The Vice Chancellor decreed that the judgment of the Commonwealth Roofing Company constituted a valid and subsisting lien on the property sold, and was to be first paid. The assent of the Commonwealth Roofing Company to an extension of time for payment of the judgment was distinctly made upon the understanding that the judgment should remain as a lien on the property levied on under the execution, and should not be attacked or questioned by the amusement company or the trustees named in the mortgage. We see no reason to doubt the correctness of the Vice Chancellor's decree in favor of the Commonwealth Roofing Com-

pany, and in that respect the decree will be affirmed. The Commonwealth Roofing Company is entitled to its costs.

STROCK et al. v. MAYOR AND CITY COUNCIL OF EAST ORANGE et al.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

CERTIORARI (§ 70*)—APPEAL—QUESTIONS REVIEWABLE—QUESTION NOT RAISED IN COURT BELOW.

The question whether the Legislature may amend the title of P. L. 1907, p. 279, by an amendatory act (P. L. 1908, p. 163), the title of which does not express a purpose to change such title, not raised in the Supreme Court on certiorari to review a resolution of the playground commissioners of a city acting under the statutes and P. L. 1909, p. 76, nor in the Court of Errors and Appeals on error, will not be considered.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 195-208; Dec. Dig. § 70.*]

Error to Supreme Court.

Certiorari by Estelle I. Strock and another against the Mayor and City Council of the City of East Orange and others to review a resolution of the Playground Commissioners of the city. There was a judgment of the Supreme Court (80 N. J. Law, 619, 77 Atl. 1051) dismissing the proceedings, and plaintiffs bring error. Affirmed.

Ralph E. Lum, for plaintiffs in error.
Borden D. Whiting, for defendants in error.

PER CURIAM. This writ of error brings under review a judgment of the Supreme Court affirming certain resolutions of the board of playground commissioners of the city of East Orange and dismissing the writ of certiorari that had been allowed for the review of those resolutions. The various grounds of attack that are here made upon the validity of the resolutions seem to have been made in the Supreme Court, and are specifically and satisfactorily disposed of in the opinion delivered by Mr. Justice Parker in that court. The opinion concedes, *arguendo*, that, if land is dedicated to public use for certain purposes, it is not within the power of the municipality or of the Legislature to authorize the diversion of such land to other purposes without first exercising the right of eminent domain and paying to the owner of the fee a proper compensation therefor. This concession is not at all essential to the argument, and we must be understood as neither approving or disapproving of it.

An examination of the acts of the Legislature from which the playground commissioners derive their powers suggests a query that has not been the subject of discussion by counsel. The statutes in question are found in P. L. 1907, p. 279, P. L. 1908, p. 163, and P. L. 1909, p. 76. The first of these

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is entitled: "An act to provide for the establishment of public playgrounds in cities of this state, and for the maintenance, control and management thereof." The second is entitled: "An act to amend an act entitled, 'An act to provide for the establishment of public playgrounds in cities of this state, and for the maintenance, control and management thereof,' approved May seventh, one thousand, nine hundred and seven." This title contains no intimation that the title of the act of 1907 is to be amended; but the first section reads as follows: "The title of the act to which this act is an amendment be and the same hereby is amended to read as follows: 'An act concerning playgrounds and recreation places in cities of this state and providing for the establishment, equipment, control, use and regulation thereof.'" The act of 1909 treats the title of the act of 1907 as having been amended by the act of 1908, for the title of the act of 1909 is: "A supplement to the act entitled, 'An act concerning playgrounds and recreation places in cities of this state, and providing for the establishment, equipment, control, use and regulation thereof,' approved May seventh, one thousand, nine hundred and seven." Whether it was competent for the Legislature to amend the title of the act of 1907 by an amendatory act, which latter act did not express in its title that any change was proposed to be made in the title of the act (see *Sawter v. Shoenthal*, 80 Atl. 101), and whether, if the act of 1908 be inefficient to amend the title of the act of 1907, the validity of the act of 1909 (which adopts the amended title for its own) is affected thereby, are questions that need not now be determined, because they were not raised either in the Supreme Court or in this court.

The judgment under review should be affirmed.

COLONIAL LAND CO. v. ASMUS.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 192*)—RENT—INJURY TO OR DESTRUCTION OF BUILDING.

Under the supplement of March 5, 1874, to the landlord and tenant act (P. L. 1874, p. 27; Gen. Stat. p. 1923, pl. 35), where the lessee relies upon either the injury or the total destruction of the building or buildings as a defense to an action for the rent, it must appear that the injury or destruction occurred without the fault of the lessee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 777, 778; Dec. Dig. § 192.*]

2. LANDLORD AND TENANT (§ 192*)—RENT—INJURY TO OR DESTRUCTION OF BUILDING.

Where the tenant sublets the premises, he makes the subtenant his representative to this extent; that in order to establish a defense

against the claim of the landlord in chief for rent, based upon the injury or total destruction of the building or buildings, under the supplement of March 5, 1874, to the landlord and tenant act (P. L. 1874, p. 27; Gen. Stat. p. 1923, pl. 35), it must appear that the subtenant was without fault.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 777, 778; Dec. Dig. § 192.*]

Error to Supreme Court.

Action by the Colonial Land Company against Adolph E. Asmus. Judgment (80 N. J. Law, 637, 77 Atl. 1022) for plaintiff, and defendant brings error. Affirmed.

J. Emil Walscheid, for plaintiff in error.
James R. Bowen, for defendant in error.

PER CURIAM. This writ of error brings under review a judgment of the Supreme Court affirming the judgment of a district court rendered against the defendant as guarantor of the rent reserved in a written lease made by the plaintiff to one Interman. The demised premises contained 71 acres of land, upon which had been constructed a race track, with stables and other structures; the principal and most valuable building being a clubhouse. On January 15, 1910, a fire occurred that resulted in the total destruction of the clubhouse; the other leased buildings being only slightly injured. Some time prior to the fire Interman had sublet the clubhouse, and the subtenant was in possession of it at the time of the fire.

The action was brought to recover an installment of rent for the month of February, 1910. The defense was rested upon that supplement to the landlord and tenant act (P. L. 1874, p. 27; Gen. Stat. p. 1923, pl. 35), which enacts: "That whenever any building or buildings erected on leased premises shall be injured by fire without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof the rent shall cease until such time as such building or buildings shall be in complete repair; and in case of the total destruction of such building or buildings, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth the lease shall cease and come to an end; provided always, that this section shall not extend or apply to cases where the parties have otherwise stipulated in their agreement of lease."

[1] We agree with the view expressed in the opinion delivered by Mr. Justice Bergen in the Supreme Court that the legislative intent disclosed in this enactment is that the tenant, in order to have the benefit of the act in case of either the injury or the total destruction of the building or buildings, must be without fault.

[2] We also agree that, where the tenant sublets the premises, he makes the subtenant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his representative to this extent; that, in order to work a defense as against the landlord in chief, it must appear that the subtenant was without fault.

The Supreme Court appears to have proceeded upon the theory that the total destruction of one out of several buildings upon the leased premises would work a termination of the lease under the second branch of the section quoted from the statute. Whether this is the correct view, or whether, on the other hand, the destruction of one out of several buildings is to be treated as an "injury by fire" rather than a "total destruction," is a question that is not presented by this record, and upon it we express no opinion. In the recent case of *Carley v. Liberty Hat Mfg. Co.*, 79 Atl. 447, 33 L. R. A. (N. S.) 545, there was a total destruction of the buildings upon the leased premises.

The judgment under review herein should be affirmed.

STRICKLAND v. NATIONAL SALT CO. et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 166*)—INSTRUMENTS NEGOTIABLE—CERTIFICATE OF INDEBTED- NESS.

A certificate of indebtedness which contains, in addition to a promise to pay money, an agreement to keep free from incumbrance property on which the value of collateral, pledged for the security of the certificate depends, is not a negotiable instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 418; Dec. Dig. § 166.*]

2. CORPORATIONS (§ 152*)—STOCK—AGREEMENTS AS TO DIVIDENDS—VALIDITY.

A corporation issued certificates of indebtedness equal in amount to expected dividends on the preferred and common stock for the time the certificates had to run, and pledged as collateral stock of another company acquired from the stockholders of that company to whom the certificates were issued. Those stockholders at the same time pledged stock of the first corporation issued to them in exchange. It was agreed that the dividends received on the latter stock should be applied to the payment of the certificates. *Held*, that, in substance, this was an attempt to secure the payment of dividends, whether earned or not, and was an illegal transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

3. CORPORATIONS (§ 560*)—RECEIVERS—REMEDIES.

Where an act of a corporation violates an express prohibition of the statute, the receivers of the corporation may avail themselves of the illegality, although the corporation has received a benefit from the illegal transaction. *Camden & Atlantic R. R. Co. v. Mays Landing & Egg Harbor R. R. Co.*, 48 N. J. Law, 530, 7 Atl. 523, distinguished.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.*]

(Additional Syllabus by Editorial Staff.)

4. CORPORATIONS (§ 487*)—"ULTRA VIRES CONTRACT."

Ultra vires contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expressly prohibited by statute and contrary to the public policy of the Legislature.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 487.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7145-7146.]

Appeal from Court of Chancery; Stevenson, Vice Chancellor.

Bill in equity by Chauncey H. Strickland against the National Salt Company and others. From a decree (77 N. J. Eq. 328, 76 Atl. 1048) for defendants, complainant appeals. Affirmed.

The appellants claim the amount due on a certificate in the following form:

"\$———. Jersey City, N. J.
"National Salt Company (of New Jersey) hereby agrees to pay at the office of the American Trust Company, Cleveland, Ohio, to ———, or order, ——— dollars, in ——— equal semiannual installments, beginning ———. The failure to pay any installment when due shall make all future installments become at once due and payable. Until such default shall have occurred the National Salt Company may at any time cause its liability under this instrument to be discharged by paying the amount of all future installments hereby secured to the American Trust Company, of Cleveland, Ohio, in trust to pay the same to the registered holder hereof upon demand.

"Said National Salt Company has agreed that no contract for the purchase of exhaust steam entered into by the United Salt Company prior to October 1st, 1899, and that no improvements erected or to be erected by the United Salt Company for utilizing said steam in the manufacture of salt shall be mortgaged, incumbered or in any manner disposed of until this obligation is paid or discharged, and that until such time no money borrowed or advanced by the National Salt Company for extending, improving or operating any property of the United Salt Company shall be made a charge upon or lien against the property or assets of the United Salt Company. And until such payment or discharge shall be made, said National Salt Company has further agreed that the United Salt Company shall not otherwise than by license sell or dispose of any interest in any patented process for the manufacture of salt, now owned by the United Salt Company, or for which it shall have applied for letters patent prior to November 15th, 1899, and that upon all licenses issued by said Salt Company there shall be paid to it a royalty of at least 25 cents per ton, settlement for which shall be made quarterly. To joint-

ly and ratably secure the payment of this obligation and others of like tenor and also the performance of the foregoing agreements, said National Salt Company has indorsed in blank and deposited with the American Trust Company, of Cleveland, Ohio, as trustee, all stock of the United Salt Company acquired by it under an option given by certain stockholders of said company, bearing date July 20th, 1899. The terms upon which said stock has been deposited are set forth in a declaration of trust executed by said National Salt Company, dated October 2nd, 1899, and filed at the office of said Trust Company.

"Upon surrender and cancellation of this obligation the National Salt Company will from time to time upon demand issue new agreements of like tenor for such amounts as the holder may desire, not exceeding, however, in the aggregate the amount then remaining unpaid hereon.

"This instrument shall not be valid until countersigned and registered by the said Trust Company.

"National Salt Company,

"By _____,

"President.

"Attest: _____,

"Secretary.

"Countersigned and registered:

"The American Trust Company,

"By _____."

This claim was disallowed by the receiver, and his determination was affirmed by the Vice Chancellor (77 N. J. Eq. 328, 76 Atl. 1048). The facts as far as now material are as follows: The National Salt Company contracted for the purchase of the capital stock of the United Salt Company, an Ohio corporation. One and one-fourth shares of preferred stock and $1\frac{1}{4}$ shares of common stock of the National Company and \$106.25 in cash were to be exchanged for, each share of the United stock, the cash to be paid in 10 equal semiannual installments on the 1st days of January and July of each year. Certificates, of which that of the appellant is one, were issued in the necessary amounts to cover the total due to each United stockholder at the rate of \$106.25 per share. The amount was exactly equivalent to the dividends on the preferred stock and 10 per cent. dividends on the common stock of the National Company for the five years the certificates had to run. The National Company deposited the United stock thus acquired with the American Trust Company of Cleveland, Ohio, to secure payment of the certificates. The declaration of trust executed by the Trust Company set forth that the stock was held to secure also the performance of the National Company's agreement to permit no contract for the purchase of exhaust steam entered into by the United Company prior to October 1, 1899, and no improvements erected or to be erected for utilizing said

steam to be in any manner mortgaged, incumbered, or disposed of until the certificates were paid or discharged, until which time no moneys borrowed or advanced by the National Company for extending, improving, or operating the property of the United Company were to be made a charge upon or lien against the property or assets of the United Company. The deposited stock was also to secure an agreement of the National Company that, until the certificates were paid or discharged, the United Company (which was about to pass into the control of the National Company) would not otherwise than by license dispose of any interest in any patented process for the manufacture of salt then owned by the United Company, or for which it had applied for letters patent prior to November 15, 1899, and that, upon all licenses issued under such patent, there should be paid a royalty of at least 25 cents per ton. Upon performance by the National Company of its agreement and upon payment of the certificates, the United stock was to be returned by the Trust Company; but, in case of default in payment or the violation of any of the agreements, the Trust Company upon the demand of any holder of the certificates was to sell the stock, or so much as was necessary, to pay the amounts due upon the certificates and to satisfy and release all liens or claims upon the contracts, improvements, or patented processes, and to apply the proceeds to the payment of the balance due on the certificates and the discharge of the liens and incumbrances.

At the same time that the National Company deposited with the American Trust Company its United Company stock the former stockholders of the United Company deposited with the same Trust Company their certificates of the preferred and common stock of the National Company received in exchange, which were to be held, managed, and controlled by the Trust Company until all indebtedness of the National Company upon the certificates was fully paid or discharged, but in no event later than January 1, 1905 (that is, the date when by their terms they became due). This National Company stock deposited by the former stockholders of the United Company was to be held by the Trust Company until that time upon trust to receive all dividends and retain them until the installment next to become due upon the certificates should have become due and payable, and then to apply the same to the payment of such installment. In short, the stock of the United Company and the stock of the National Company to be issued in exchange therefor were both held by the Trust Company to secure the payment of the certificates and the performance of the contracts against incumbering the corporate property of the United Company, and thereby diminishing the se-

curity for the payment of the certificates, and the dividends declared upon the National Company's stock, instead of being paid to the owners of that stock as dividends, were to be applied to the payment of the amount due to them as creditors upon certificates of indebtedness; in other words, they waived their right to receive dividends on the National stock in exchange for certificates of equal amount, and agreed that their own dividends should be applied to the payment of their own certificates of indebtedness. In effect this transmuted their contingent right as stockholders to dividends into an absolute right as creditors to receive a debt.

As a result of the complicated arrangement above detailed, the National Company secured possession of the corporate property of the United Company, and conducted the business for a time. Certain stockholders of the National Company took proceedings in the Ohio courts to have the arrangement declared illegal as in violation of the Ohio anti-trust act, and a decree to this effect was entered in the Ohio courts. At that time there was in the hands of the American Trust Company a balance of deposit on account of dividends on the National stock amounting to \$42,848.70, which was disposed of by the Ohio court, a part of it paid to the American Trust Company for its services, and the balance distributed between counsel in the suit.

William J. Wallace, Henry W. Bean, and George R. Beach (John L. Wilkie, Chester A. Jayne, and Paul Bonyngne, on the brief), for appellant. Charles W. Fuller and Henry B. Twombly, for receivers.

SWAYZE, J. (after stating the facts as above). It is unnecessary to consider many questions that were ably argued at the bar as the case can be disposed of by the determination of the following: (1) Were the certificates negotiable? (2) If not negotiable, were they illegal? (3) Is the defense of illegality open to the receiver?

[1] 1. It is conceded that the instrument in suit is anomalous in form. It is not exactly a promissory note nor a corporate bond, both of which are negotiable. The instrument partakes of the character both of a sealed note and of a corporate bond, but contains unusual provisions which we think deprived it of the protection with which the law surrounds negotiable instruments. By the negotiable instruments act of 1902 (P. L. 1902, p. 583) it is enacted in section 5 that an instrument which contains an order or promise to do another act in addition to the payment of money is not negotiable, and then follow four exceptions, which permit certain provisions to be inserted in the instrument without affecting its negotiability. These exceptions are: (1) Provisions authorizing the sale of collateral securities in case the instrument be not paid at maturity; or (2) au-

thorizing a confession of judgment if the instrument be not paid at maturity; or (3) waiving the benefit of any law intended for the advantage or benefit of the obligor; or (4) giving the holder an election to require something to be done in lieu of the payment of money. Although this act was not passed until after the certificates in question were issued, it was in this respect intended as a codification of the common law. Whether this contract is governed by the law of New Jersey, where it purports to have been made, or by the law of Ohio, where it was to be performed, or by the law of New York, where it is said to have been delivered, is immaterial. The New York negotiable instruments act was passed in 1897 (Laws 1897, c. 612), and contains the same provision. The Ohio act was passed in the same year, 1902 (Laws 1902, p. 162), and, if the certificate is an Ohio contract, the common law must prevail. There is nothing to show that the common law of Ohio differed from the law of New Jersey. In any event, therefore, the rule of law applicable is that set forth in the fifth section of the negotiable instruments act. None of the exceptions in that section covers the present case.

The certificates in form contain a statement of an agreement on the part of the National Company that no contract for the purchase of exhaust steam and no improvements erected or to be erected by the United Company for utilizing said steam shall be mortgaged, incumbered, or in any way disposed of; that no money borrowed or advanced by the National Company for extending, improving, or operating any property of the United Company shall be a charge upon or lien against the property or assets of the United Company; and that the United Company shall not dispose of its patents otherwise than by licenses and for a royalty of at least 25 cents per ton. This is not a statement of the transaction which gives rise to the instrument, and therefore permissible under section 3 of the act, but a promise to do an act in addition to the payment of money, and therefore under section 5 makes the instrument not negotiable. While the certificates state the agreement in the past tense, there is no other written agreement to that effect, and nothing more than a similar recital in the declaration of trust by the National Company and the American Trust Company. We think the mere grammatical form in which the agreement is stated is not important, and that in effect the certificate contains an agreement for the protection of the assets of the United Company against incumbrances and waste for the purpose of maintaining the value of the stock of that company held as collateral for the certificates. The agreement is couched in negative terms as an agreement not to do certain things, but that is not decisive. The object of the provision of the negotiable instruments act was to provide against giving the ex-

traordinary advantages of negotiability to all sorts of agreements other than for the payment of money; and, although stated in the negative form, the agreement is, in substance, within the meaning of the statute, a promise to do an act in addition to the payment of money. It is, in substance, a promise to keep the security free from incumbrances and of the same value as when it was pledged. Our view of the scope of the language of the statute is confirmed by the language in which the first exception in section 5 is couched. This exception is of an agreement authorizing the sale of collateral securities in case the instrument be not paid at maturity. The agreement in the present case authorized a sale upon contingencies other than nonpayment at maturity. The certificates refer to the declaration of trust for the terms upon which the stock pledged as collateral had been deposited, and the necessary effect is to import into the certificates those provisions of the declaration of trust. *McClelland v. Norfolk & Southern Railroad Co.*, 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397. This is so even if the only effect of the recital in the certificates is to give notice to the holder of the provisions of the declaration of trust; for, if he has notice, he takes the certificates subject to the terms thereof, and, since the Salt Company and the Trust Company were bound by the express terms of the declaration of trust, the obligor, the obligee, and his transferee, who, of course, takes with the same notice, and the trustee, are all bound. One of the provisions of the declaration of trust authorizes the sale of the collateral if the Salt Company violates any of the agreements. A sale of the collateral for the violation of an agreement merely intended to preserve the value of the collateral is certainly not within the exception of an agreement authorizing a sale of collateral in case an instrument be not paid at maturity, since it authorizes the sale upon a condition other than that permitted by the statute. We reach this result with hesitation because the United States Circuit Court of Appeals in the Second Circuit was of a different opinion (*National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479), and it is with reluctance that we differ from that tribunal and from the eminent judge who spoke for it. The force, however, of that opinion, is weakened by the fact that the same court at an earlier stage of the proceedings had reached an opposite result. *National Salt Co. v. Ingraham*, 122 Fed. 40, 58 C. C. A. 356. It was suggested in the argument that the later opinion of the Circuit Court of Appeals had the indorsement of the Supreme Court of the United States which had refused to review the case by certiorari. We do not understand, however, that the United States Supreme Court under the act of 1891 (act March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 547]) uses the writ of

certiorari as a writ of error to review every ruling of the Circuit Court of Appeals on questions of law. It was to avoid clogging business in the United States Supreme Court that the act of 1891 was passed, and the court has expressly declared that it will exercise the power to review by certiorari sparingly and only when the circumstances of the case satisfy it that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and the courts of the state, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise. *Forsyth v. Hammond*, 168 U. S. 506, 17 Sup. Ct. 685, 41 L. Ed. 1095. The refusal of the court to grant the writ of certiorari determined only that the case was not of sufficient importance to justify its review, not that the decision of the court below was correct. We have dealt with the certificate in this respect in accordance with the common law as codified in the act of 1902, for the reason that this certificate was issued prior to that act. We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability, unless it answers the requirements of the statute. Mr. Machen, in his excellent work on Corporations, at section 1740a, calls attention to the danger of holding that the negotiable instruments act prevents a further development of the law merchant; but that question is not now before us.

[2] 2. Since the certificate is not negotiable, it is open to the defense that it was illegal in its origin. We deem it unnecessary to pass upon the effect of the decree of the Ohio court that the contract between the National Company and the United Company, out of which this certificate arose, was illegal under the Ohio anti-trust act. It is enough for us that it violates section 30 of our corporation act (P. L. 1896, p. 286), which, as it stood from 1896 to 1904 covering the period when the certificate was issued, provided that no corporation should make dividends except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock except according to the act. We do not question the right of the National Company to agree to pay in cash for the United stock a sum of money equal in amount to the dividends for a certain number of years, and, if that were all that the case revealed, the most that could be said would be that the directors had made an improvident bargain, but not an illegal one. The case, however, shows a different situation, for it shows that the transaction was not in fact and in substance an exchange of one stock for another with a cash bonus. If it had been that, the stockholders of the United

Company would have been entitled to receive their stock in the National Company, and to take from time to time the dividends thereon for their own use. Instead of doing so, they were content with a title to the National stock shorn of the right to dividends for the five years which the certificates had to run, and they put the stock out of their possession and in the hands of the Trust Company for the purpose of securing the payment to themselves of the amount of the certificate they themselves held. The same object would have been accomplished by providing in the certificates that any amount paid to the stockholders by way of dividends should be credited thereon, and the object of depositing the stock of the National Company with the Trust Company must have been to give the certificates the appearance of a debt due for part of the purchase price of the United stock, when, in fact, it was a promise to pay the amount of dividends agreed upon whether they were earned or not. If an arrangement of this kind is legal, the thirtieth section of the corporation act has no vital force, for, to evade it, a corporation need only issue certificates of indebtedness covering the dividends which the parties may expect during the whole life of a corporation, and thus capitalize into a present debt the hopes of future earnings. We think such a transaction is in contravention of our statute.

[3, 4] 3. It is said, however, that the National Company got control of the corporate property of the United Company, and ought not now to escape from payment of the price. This does not fully state the situation. In form, at least, the National Company acquired only the stock of the United Company, and even this it immediately pledged as collateral, and its own stock, which it gave in exchange, also was immediately pledged as collateral by the stockholders of the United Company. The exchange of stock was therefore still an executory agreement, and the National Company was not to receive the United stock and the stockholders of the United Company were not to receive the National stock until payment of the certificates. But, although in form the transaction was still executory, it is fair to the appellants to concede that as a result of the transaction the National Company got control of the corporate assets and property of the United Company, and, although in form the only change was in ownership of the stock of the United Company, in substance, there was a change of control of that company's assets. Under such circumstances the appellants urge that the doctrine approved in this court in *Camden & Atlantic Railroad Co. v. Mays Landing & Egg Harbor Railroad Co.*, 48 N. J. Law, 530, 7 Atl. 523, is applicable. We think this case is distinguishable.

The doctrine of that case is applicable only to ultra vires contracts in the proper sense of the term; that is to say, contracts which are beyond the statutory powers of the corporation. It is not applicable to contracts expressly prohibited by statute and contrary to the public policy of the Legislature. The opinion of the court clearly recognizes the distinction, for in speaking, at 48 N. J. Law, 564, 7 Atl. 528, of the case of *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, Mr. Justice Van Syckle says: "The propositions maintained by the court were that acts of a corporation, which are not per se illegal or malum prohibitum, or contrary to public policy, but which are ultra vires, affecting only the interests of stockholders, may be made good by the assent of shareholders, so that strangers to them, dealing in good faith with the corporation will be protected in reliance on those acts." On page 568 of 48 N. J. Law, on page 528 of 7 Atl., he distinctly says: "Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion. They cannot furnish the basis for a legal cause of action." The present case comes within the class of transactions forbidden by statute, and therefore illegal and contrary to public policy, so that it is outside even of the liberal rule of the case just cited. The case of *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. Law, 497, 41 Atl. 690, a decision of the Supreme Court went upon the ground that under our act a corporation might purchase its own stock. The remark by Mr. Justice Dixon at the close of the opinion must be read in the light of what he had previously said. It is plainly no authority in case of an act forbidden by the express terms of the statute.

We think, therefore, without expressing an opinion as to the other matters dealt with in the opinion of the learned Vice Chancellor, that his decree should be affirmed, with costs.

STRICKLAND v. NATIONAL SALT CO. et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

Appeal from Court of Chancery; Stevenson, Vice Chancellor.

Suits by Chauncey H. Strickland against the National Salt Company and others. From decrees for defendants, complainant appeals. Affirmed.

William J. Wallace, Henry W. Bean, and George R. Beach (John L. Wilkie, Chester A. Jayne, and Paul Boynge, on the brief), for appellant. Charles I. Fuller and Henry B. Twombly, for receivers.

PER CURIAM. The orders in these cases upon the various appeals are affirmed for the reasons stated in the opinion in No. 20 (81 Atl. 828).

SAMKIWICZ v. ATLANTIC CITY R. CO.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—OPERATION—MAINTAINING CROSSINGS—CONTRIBUTORY NEGLIGENCE.

It is the duty of every railroad company, controlling a right of way, to provide and keep in repair a safe and sufficient passageway over it, where any public highway shall cross the same, of such width and character as shall be suitable to the locality in which the same is situated as required by "An act concerning railroads" (Revision 1903) Act April 14, 1903 (P. L. p. 645) § 26, and when it appears that the edge of a plank used to provide a crossing is so worn as to permit the foot of a person crossing the same to slip between the worn plank and rail, and hold the foot so that it cannot be released, by any reasonable effort, in time to avoid injury to it by a train passing along the rail, an inference may be drawn that the crossing was not in good order, and the question whether the company negligently omitted to maintain a safe crossing was one which should be submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1154; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—OPERATION—MAINTAINING CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that "he took all chances of the injury and cannot recover." That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning thereby conveyed, but it does not conclusively convict him of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1186; Dec. Dig. § 350.*]

Error to Circuit Court, Atlantic County.

Action by Peter Samkiwicz against the Atlantic City Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Willard Morgan and C. V. D. Joline, for plaintiff in error. Howard Miller, for defendant in error.

BERGEN, J. The plaintiff's foot was so crushed by defendant's car that an amputation became necessary, for which he brought suit and recovered damages. The case made by him justified the inference that in attempting to walk over the defendant's railroad at a highway crossing, his foot caught between the planking and the rail of the track, from which he was unable to extricate himself before a freight train, with the motive power at the end of the train farthest from him, was backed against him and his foot cut off; that the planking next to the rail was old, and the edges so worn as to allow plaintiff's foot to slip between the planking and the rail. It also appeared that

although there were gates at the crossing, placed there by the defendant to be lowered when an approaching train intended to cross the highway, they were not lowered at the time the plaintiff undertook to cross the tracks; that no whistle was blown or bell rung to indicate the approach of this train; that, when the plaintiff undertook to cross, the train was about a quarter of a mile away from him; that he made every possible effort to loosen his foot as the train was approaching, and in this he was assisted by at least one other person, but their efforts were unavailing, and while the wheels of the first truck passed over his foot, the car was stopped before the wheels of the second truck reached him. With the record in this condition the defendant moved for a nonsuit which the trial court refused, and an exception was taken, upon which is rested the first assignment of error. While the railroad company has the right, when lawfully authorized, to cross a public highway with its rails, it must so construct its roadbed over the highway as not to unnecessarily interfere with its safe use by the public. *Pennsylvania Railroad Co. v. Matthews*, 36 N. J. Law, 531. Planking, or some other efficient material, must be placed between the rails where they cross a public highway, so as to afford to the public a sufficient method by which it may safely cross its rails.

[4] It is the duty of every railroad company, controlling a right of way, to provide and keep in repair a safe and sufficient passageway across it, where any public highway shall cross the same, of such width and character as shall be suitable to the locality in which the same is situated, as required by "An act concerning railroads" (Revision of 1903) P. L. 1903, p. 645, § 26, and this implies that it be maintained in such condition as to be reasonably safe for public use, and when it appears that the edge of a plank, used to provide a crossing, is so worn as to permit the foot of a person crossing the same to slip between the worn plank and rail and hold the foot so that it cannot be released, by any reasonable effort, in time to avoid injury to it by a train passing along the rail, an inference may be drawn that the crossing was not in good order, and the question whether the company negligently omitted to maintain a safe crossing was one which should be submitted to the jury, and there was no error in the refusal to nonsuit. At the close of the whole case the defendant moved that a verdict be directed for the defendant, but the plaintiff's case was not so shattered by the testimony offered by the defendant as to justify the allowance of this motion. The utmost that can be said regarding defendant's evidence is that it tended to contradict the testimony of plaintiff's witnesses, and therefore to which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

side credence should be given was essentially a jury question. The plaintiff in error in its brief, on this branch of the case, urges that there should have been binding instructions for the defendant, because Dickinson, one of its witnesses, a civil engineer, testified that the planking was neither old nor new; that the opening between the planking and the rail was the regulation opening; that there was some wear to it, but that it was nearly square. In this he was corroborated by two other witnesses. Another witness, Clark, testified that there was a little rounding on the edge of the planking; that it was worn slightly—that is, it was slightly rounded on the edge, and that there was no danger that a person would get his foot caught if he walked straight ahead. The plaintiff's case showed that his foot was caught sideways between the rail and the plank, and the defendant urges that this could not have happened if he had walked straight across the track.

We do not think that any conclusive inference of contributory negligence can be drawn from this testimony. The testimony is that the plaintiff was walking straight across, and it is not denied that his foot was caught, and a jury might, we think, fairly find from the evidence that the condition of the planking was such as to throw the foot lengthwise between the defective plank and the rail. We find no error in the refusal to direct a verdict.

[2] The only other assignment of error argued, and that is presented in the supplemental brief for the plaintiff in error, is the seventh. The court was asked to charge "if the jury believe that he went under the gates after the gates were down, he took all chances of the injury and cannot recover."

This request assumes that in all cases where it appears that a person is injured while undertaking to cross a railroad on a public highway, when the crossing gates are down, a conclusive presumption arises that he is guilty of contributory negligence, and that he takes all the chances of being injured, without considering any other fact pertinent to the issue to be determined. In deciding the legal propriety of a request to charge, its relation to the facts proven in the particular case must be considered. The gates when down give warning that a train is approaching, but if one seeing he has ample time to cross, attempts it, and is prevented by some negligent act of the railroad company from proceeding, so that he cannot escape from the track until he is injured, it could not be said that he was guilty of contributory negligence, for the immediate cause of the injury was the negligent act of the defendant. In the present case the uncontradicted proof is that plaintiff could have safely crossed, but for the alleged negligence of the defendant in not maintaining the crossing in a reasonably safe condition. The request refused elimi-

nates every condition other than that relating to the situation of the gates, and would amount to a direction for defendant if in fact the gates were down when plaintiff undertook to cross the track. In passing upon the question of contributory negligence the jury would have the right to determine whether the plaintiff had acted as a reasonably prudent man should when, as he testifies, the freight train was about a quarter of a mile away at the time, with the engine at the end of the train farthest from plaintiff, a circumstance which led him to think that it was likely to move the other way, and that he could cross in safety if the crossing had been in good condition. The jury could well have inferred, under these and other conditions shown, that the plaintiff was not guilty of contributory negligence. It is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that "he took all chances of the injury and cannot recover." That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning thereby conveyed, but it does not conclusively convict him of contributory negligence.

In this case, if we assume that the gates were closed, and the plaintiff attempted to cross by going under them, there was no causal connection between the act of the plaintiff and the cause of his injury, which was a defect in the crossing, if it was defective, for his foot would have caught in the same way even if the gates had been open. "To exonerate defendant from liability for its negligence which also caused plaintiff's injury, it is not sufficient that plaintiff, by his act contributed thereto, but it must further appear that in doing that act he was at fault, and guilty of what the law calls negligence. * * * In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of the danger and such care in avoiding it as a prudent man, reasonably careful of his safety, would exercise." *New York, etc., R. R. Co. v. Bell*, 53 N. J. Law, 283-289, 21 Atl. 1052. But such duty does not extend to dangers from causes ab extra. *Watson v. Camden & Atlantic R. R. Co.*, 55 N. J. Law, 125, 26 Atl. 136, 19 L. R. A. 487, 39 Am. St. Rep. 624.

"In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is, whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence as well as to the negligence of the defendant. If the faulty

act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant's negligence." *Menger v. Laur*, 55 N. J. Law, 205-216, 26 Atl. 180, 20 L. R. A. 61.

The plaintiff in error cites the following cases in support of the request: *Allerton v. Boston & Maine R. R. Co.*, 146 Mass. 241, 15 N. E. 621. In this case plaintiff's intestate, on leaving defendant's train, started to cross the railroad on a public street while the gates were down without looking to see whether any train was approaching on the other track, and she was injured by a train which she could have seen if she had looked. Under these conditions she would be guilty of negligence in not looking, and the court said, "There was no express or implied invitation to her to cross, nor any excuse for her to cross without looking for the coming train." The fact that the gates were down was an incident tending to show negligence on her part, as it was warning that a train was coming, which emphasized her duty to look for a danger of which she was warned, but it was not held to be conclusive.

In *Cleary v. Phila. & R. R. Co.*, 140 Pa. 19, 21 Atl. 242, the plaintiff's intestate thought that the gates were down for a particular train to pass on one of the tracks, and while standing on one track, he was struck by a train coming from the opposite direction on another track and killed. The court said, "he stepped in front of a moving train in broad daylight." His negligence was apparent, for the place was a dangerous one of which he was warned by the closed gates.

In *Sheehan v. Phila. & R. R. Co.*, 166 Pa. 354, 31 Atl. 120, it appears that plaintiff went upon the track in front of an approaching train and was injured. The court refused to consider his testimony that he stopped, looked, and listened, and held that he was guilty of contributory negligence in disregarding the warning and going upon the track in front of an approaching train. The opinion is very brief, and the facts meager, but the case was held to be controlled by *Cleary v. Phila. & R. R. Co.*, supra.

Wyatt v. Great Western Railway Co., 118 E. C. L. Rep. 709, is also relied upon, but this case has no application, for it is based upon the interpretation given to a statute, which required that gates of a certain character should be kept constantly closed at railway crossings, and to be opened when the circumstances justified it with due regard to safety, and this was held to be a prohibition to the public to pass over the railway except when the gates were open.

The facts in this case showed that the

gates were closed and the plaintiff, desiring to cross, undertook to open them, when one of them of its own weight flew back and struck his horse, which became unmanageable, and the plaintiff was thrown out of his carriage and injured. The decision for the defendant was put upon the ground that the law prohibited the plaintiff from crossing when the gates were down, intimating that he might have a remedy against the company if it did not open the gates when it should. None of these cases support the claim that one who attempts to cross a railroad when the crossing gates are down assumes all chances of injury, and cannot recover simply because he attempts to cross when the gates are down, in each case there was another element bearing on the question of negligence. The request was too broad when applied to the evidence in the case and was properly refused.

The result is that the judgment under review will be affirmed.

PAUL et al. v. WILSON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 271*)—CLAIMS AGAINST ESTATE—COLLECTION.

A testator, while managing his factory building upon his land, had contracted certain debts for coal, supplied to him by complainants in carrying on his factory business. By his will he directed the business to be continued after his death under the management of his son, and appointed him, with two others, his executors. His son and his executors continued the business after his death in the factory, and contracted debts for coal furnished the factory by the complainants to carry on the business, and it was held, that the latter debts (the executors having defaulted in their payment) were under well-settled principles chargeable, in equity, as liens against the land; but that the debts contracted by the testator for the coal furnished before his death in the business by the complainants were payable out of the general assets of his estate, for the collection of which the complainants have an adequate remedy at law.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1044-1051; Dec. Dig. § 271.*]

2. EXECUTORS AND ADMINISTRATORS (§ 271*)—ASSETS OF ESTATE—CLAIM.

The testator's intention, clearly marked throughout his entire will, was that the net rents received by his trustees from the continuation of his factory business should be set apart by them as a sinking fund, in trust primarily, to discharge his mortgage debts, and that his other, or general debts, should be satisfied out of his personality in exoneration of the rents of his factory property.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 271.*]

Swayze, Bergen, and Bogert, JJ., dissenting.

Appeal from Court of Chancery.

Bill in equity by Frederick W. Paul and another against Washington Wilson and others, executors of Edward Wilson, deceased, and others. From a decree for complainants, defendants appeal. Reversed, with directions.

S. Howell Jones, for appellants. Joseph N. Tuttle, for respondents.

VREDENBURGH, J. The original decree of the Chancellor brought up by this appeal was made November 10, 1910, and adjudged that the defendants forthwith pay to the complainants the sum of \$1,628.55 for coal furnished by them for the use of a certain factory building in Newark, N. J., called the "Wilson Building" standing upon premises (described in the bill of complaint) which had been owned by the defendants' testator, Edward Wilson, deceased. The defendants having failed to pay the sum so decreed to be paid by them, a decretal order was signed on February 18, 1911, by the Chancellor, pursuant to leave reserved on the foot of the decree, adjudging that sum to be a lien and charge upon the premises described in the bill of complaint, and that the same be sold to satisfy unto the complainants the said amount of money, together with interest, costs, and counsel fee. From this decretal order of February 18, 1911, the defendants have appealed upon grounds specified in their petition of appeal, to the effect that the said total sum of \$1,628.55 was not chargeable upon, and should not have been decreed to be a lien upon, said lands; and upon further grounds to the effect that the sum of \$488.40, portion of said total sum, was a debt contracted by the testator during his lifetime, and was a general debt of the deceased testator to be paid out of his estate by his executors in the same way as any other of his contract debts.

[1] The learned Vice Chancellor, who advised this decree and decretal order, expressed himself in his memorandum filed in the cause, as governed by the decision of the Court of Chancery in *Ferry v. Laible*, reported in 31 N. J. Eq. 586, and on appeal to this court in 32 N. J. Eq. 791. He was of the opinion that the complainants' right, as creditors, to resort to the land invested in the business, by the direction of the testator's will for the payment of debts created in the business, was established by the decision he cited. We concur with the view expressed by the Vice Chancellor, and with his conclusion that the bills for coal furnished by the complainants for the carrying on of the business in the Wilson Building to the extent the coal was contracted for and furnished after testator's death should be imposed as a lien on the premises; but differ with his conclusion so far forth as he held that the bill for coal furnished by the complainants before testator's death for the

carrying on of said business, and which had been contracted by testator before his death (amounting to \$488.40), was properly chargeable in equity as a lien against the premises. The decision of the Court of Chancery to which he refers (to the extent it was affirmed by this court) held that where a testator directs his executors to continue his business after his death, and they incur debts in its prosecution, that then so much of his assets as he has directed should be embarked in the business after his death will stand charged in equity for the payment of the debts of the business. On the appeal of this case to this court, it was also here determined that such executors carrying on testator's business after his decease are personally liable for the debts so contracted, and that trade creditors have for reasons expressed in the opinion an equitable right to resort to the property engaged in such business for the payment of their claims arising out of it, if their remedy against the executors be unavailing. It should not escape notice that in the opinion of this court in that case it was declared that the inability of the executors to personally meet the complainants' claim must appear by the evidence (if not conceded by the parties) before resort could be had to the property embarked in the business. In the case now before us there is no direct averment of the insolvency of the executors individually made in the bill, nor is such insolvency disclosed in the evidence taken at the hearing before the Vice Chancellor. The testator's estate was not declared insolvent by the executors, and there is in the case no allegation or suggestion even of any special reason for the interference of equity in order to compel payment of testator's general debts. It must therefore be assumed that the complainants' remedy at law is adequate so far as the collection of the general debts of the testator out of his estate is concerned, and no reason is perceived why the complainants should not have taken the ordinary course of procedure required for the collection of the debt contracted by the testator before his death, out of the general assets of his estate. *Rutherford v. Alyea*, 54 N. J. Eq. 411, 34 Atl. 1078; *Loehnerberg v. Loehnerberg*, 63 N. J. Eq. 496, 52 Atl. 710.

There are other considerations which lead us to the conclusion that the decree, to the extent that it charges the \$488.40 item to be a lien upon the land, is erroneous.

[2] The will discloses no testamentary intention that any other than the "current" expenses of the posthumous management of the testator's property in the business in question should be incurred by the executors. The only clause of the will having an important bearing upon this subject is the seventh. By that the testator orders and directs that his real estate, known as the Wilson Building, with all the buildings, engines, machines, and other appurtenances,

shall be continued under the management of his son, Washington Wilson (one of the executors), who shall receive out of the rents \$2,000 per year as compensation for his services as manager, to be charged as a current expense of the property, and he adds: "I direct that my trustees after providing out of the rents of said works for the proper maintenance and repair of the property and for taxes, insurance, compensation of manager aforesaid, and other current expenses, shall first apply the net rents to the payment of the interest on all the *mortgages* which may be outstanding on my property at the time of my decease, whether in Newark, N. J., or elsewhere, and secondly, two-thirds of the residue of said net rents shall be paid to my wife during her life so long as she shall remain unmarried, but not exceeding \$3,000, in any one year, and the remainder shall be set apart annually as a sinking fund and applied when deemed proper, to discharge the principal of mortgages made by me upon lands and buildings whereof I shall die seized, wherever situate, in England or America." A will speaks only from and after death, and the property thus devoted by the testator to the indicated business was not certainly intended by him to be burdened with any expense, other than the current or running expense of the management, to be incurred after testator's death; nor to expenses incurred by him in its prior management. He refrains from any allusion here either to his general debts, or to those contracted by him in the business while under his own management. As to these he had, by the very first clause of his will, expressly directed that his debts should be paid out of his personal estate, and I quote its words, viz: "First: I direct my debts to be paid out of my personal estate, as soon as practicable after my decease, *except* my debts secured by *mortgages* made by me upon my real estate which I direct my executors to pay out of the income of my estate in manner hereinafter specified." He expressly distinguishes, by the above clauses, and a subsequent clause of his will (to be referred to hereafter), his *mortgage* debts from his *other* debts. The former he intends shall be paid from the rents of his property devoted to the specified business, while the latter he intends shall be satisfied from his personality alone. The legal maxims, "*Expressio unius est exclusio alterius*," and "*Expressum facit cessare tacitum*," apply pointedly here. To burden the rents of the Newark property with the payment of the testator's general debts would, it seems to me, be flying in the very teeth of his expressed intention, and a court of equity would properly refuse to entertain such a claim unless it appeared there were no other assets or property of testator from which such debts could be satisfied.

Again, to impose upon the Newark property especially the burden of paying testator's general debts, would result to the prejudice of the interests of testator's two daughters, who are residuary legatees under the sixteenth and ninth clauses of his will, and are not parties to the suit. The latter clause reads: "Ninth: And if there be any income remaining after the satisfaction of all my *mortgages*, and of the annuity of \$4000, per year, to my wife, my executors and trustees shall divide the residue, if any, equally between my two daughters, Johannah (Joy) Wallace and Chrtian May Loveland, to each one half payable quarterly, until the death or remarriage of my wife."

It seems unnecessary to extend this opinion farther upon these lines. The result is that the decree should be reversed for the purpose of modification so as to conform to the views above indicated.

SWAYZE, BERGEN, and BOGERT, JJ., dissenting.

IMPERIAL REALTY CO. v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

INJUNCTION (§ 37*)—TITLE IN DISPUTE—RIGHT OF WAY.

Where complainant asserts that it has an easement over defendant's land, and seeks to restrain the defendant from interfering with its use, and defendant disputes its right, equity will not interfere by injunction until such right is established at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. § 37.*]

Appeal from Court of Chancery.

Suit for an injunction by the Imperial Realty Company against the West Jersey & Seashore Railroad Company. From a decree granting an injunction (77 Atl. 1041), defendant appeals. Reversed.

Bourgeois & Coulomb, for appellant.
Thompson & Smathers, for respondent.

GUMMERE, C. J. The complainant, the Imperial Realty Company, by its bill in this case seeks an injunction restraining the defendant from interfering with its free use and enjoyment of an alleged right of way over lands of the defendant, the right of way being, as is claimed, an alley 20 feet in width, located at the rear of the complainant's land. The defendant by its answer denies the existence of such an alley, or that the complainant has any right of way over, or easement in, the land sought to be covered by it.

It is the settled law of this state that where the fundamental right under which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the complainant prays equitable relief is the legal title to an easement in lands of the defendant, and that right is in substantial dispute, its establishment at law is necessary to justify the interference of a court of equity. *Todd v. Staats*, 60 N. J. Eq. 507, 46 Atl. 645; *Borough of South Amboy v. Penna. R. R. Co.*, 77 N. J. Eq. 242, 76 Atl. 1038; *Mason v. Ross*, 77 N. J. Eq. 527, 77 Atl. 44. The learned Vice Chancellor who heard the cause in the court below, while recognizing the existence of this rule, considered that it did not apply to the case in hand because he found from the proofs submitted that the legal right of the complainant was not substantially in dispute, its existence being made clear, as he conceived, by facts which were not denied. He, for this reason, proceeded to final hearing on the merits, without first requiring the complainant to establish the existence of its alleged easement by an action at law.

We are not entirely satisfied that the dispute between the parties as to the present existence of the right asserted by the complainant was unsubstantial. But, be that as it may, there was certainly much more than a formal dispute with relation to the extent of that right. The complainant asserted that it had an easement of way over all portions of a strip of land 20 feet in width belonging to the defendant, and this claim was disputed by the defendant. The Vice Chancellor concluded that the complainant had failed to establish its easement to the full extent of its claim, and held that under the proofs its right was clear only to a way 10 feet in width; and then restrained the defendant from interfering with the complainant in its use of the way as so defined. In the late case of *Borough of South Amboy v. Penna. R. R. Co.*, supra., the primary matter in dispute was the width of a public road. After a consideration of the proofs submitted, the Court of Chancery adjudged that it was "at least two rods wide," and undertook to settle the rights of the parties upon that basis. It was held in this court that the action of the Court of Chancery was unwarranted, for the reason (among others) "that the proper forum for settling the width of a highway is a court of law, and the proper method for its correct determination is a trial by jury." *Opinion*, 77 N. J. Eq. 246, 76 Atl. 1038. The principle underlying the decision is, of course, that the extent of a purely legal right, as well as the existence thereof, is a matter to be settled at law, and, until it is so settled, the aid of a court of equity in its enforcement cannot properly be invoked.

For failure of the complainant to establish at law the extent of its claimed right before filing its bill, the decree below must be reversed.

REISMAN v. PUBLIC SERVICE CORPORATION OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 316*)—EXPLOSIVES (§ 11*)—INJURY TO THIRD PERSON—INDEPENDENT CONTRACTOR—NEGLIGENCE.

Plaintiff was struck and injured by a rocket set off during an exhibition of fireworks in a pleasure resort owned or controlled by defendant, which exhibition she was witnessing pursuant to invitation from the defendant. The fireworks were set off under the direction of one R., under contract with the defendant, and it was fully proved that R. and his employes were uncontrolled as to the manner of doing the work, except that the time and place, when and where the fireworks were to be set off were fixed by defendant; and that certain designated fireworks were stipulated for at an agreed contract price. The arrangements for witnessing the exhibition were controlled by defendant's servants, who kept the spectators at a distance of from 300 to 400 feet away from the place of setting off the fireworks, and on the other side of a sheet of water. *Held*, that R. was an independent contractor, and that for any negligence of himself or his servants in setting off the rocket, defendant was not responsible; and *held*, further, that there was no evidence of negligence of defendant in the arrangements made for witnessing the exhibition, and that a nonsuit was properly directed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316; * *Explosives*, Dec. Dig. § 11.*]

Bergen, Kalisch, and White, JJ., dissent.

Error to Circuit Court, Camden County.

Action by Minnie Reisman against the Public Service Corporation of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Wescott, for plaintiff in error.
Lewis Starr, for defendant in error.

PARKER, J. The question is whether there was error in the direction of a nonsuit in the Camden circuit court. The declaration charges that the defendant operated a pleasure resort called Wood Lynne Park, and invited plaintiff into the same for the purpose of entertainment and amusement; and that while she was there defendant's agents negligently and without warning set off a sky rocket which struck and injured plaintiff.

The undisputed or indisputable facts are that the defendant owned or controlled the resort in question; that plaintiff was invited to enter it as an incident of being a passenger on defendant's trolley car, and did enter it accordingly for the purpose of witnessing an exhibition of fireworks; that defendant's agent, one Le Cato, had employed one Romain who was in the fireworks business, to give the exhibition; that the place designated for the setting off of the fireworks was upon an island, to which the spectators

did not have access, and from which the plaintiff and other spectators were separated by a sheet of water, the distance between them and the fireworks being between 300 and 400 feet; and that defendant employed policemen to control the spectators and keep them within the limits set apart for them. All these details were arranged by or under the authority of defendant. As to the setting off of the fireworks, the evidence is equally clear that while there was in all probability a written contract between Romain and the defendant or its agent Le Cato, the defendant neither had nor exercised any control whatever over Romain except as to the place and time, where and when the fireworks were to be set off, and that certain stipulated fireworks were to be furnished for the agreed price. The written contract, if one existed, was not put in evidence because plaintiff had not called for it under subpoena or otherwise, and defendant was not put to its proof. As to this phase, the case stood substantially as counsel for plaintiff puts it in his brief: "The corporation said to Romain through Le Cato, its authorized agent: 'How much will you charge for producing and exhibiting fireworks?' Romain stated his terms, they were accepted, the price paid and the display given."

The accident was apparently due to a misdirected rocket falling or shooting into the crowd and striking the plaintiff; and as will be seen from the abstract of the declaration at the head of this opinion, the attempt is to hold the defendant as for the negligence of an agent or servant in setting off the rocket in question. But as we read the brief of plaintiff's counsel (there was no oral argument) no such claim is now made. He says: "There is no pretense that the rocket which did the mischief was improperly discharged. It flew so far, after being discharged, as to injure the plaintiff. This consequence the defendants were bound to foresee and provide against, if reasonable care would have foreseen and provided against it." Apparently the case is rested on the proposition that it should have been left to the jury to say whether defendants were not negligent in so fixing the place for the exhibition and the place for the spectators with reference to each other as that a rocket set off in the former could injure a spectator in the latter.

Whether the case is rested on this ground or on the ground of negligence in Romain or his employes, the nonsuit was properly directed. As to the management of exhibitions and spectators, we do not see how any greater care could have been exercised without placing the spectators too far away to see advantageously. In this respect the case resembles the case of *Sebeck v. Plattdeutsche Volksfest Verein*, 64 N. J. Law, 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512, which arose out of a fireworks accident under very similar circumstances. In that case

the crowd was only 100 feet away, instead of three times that distance, yet this court held that while the proprietors of the place in question were bound to use reasonable care to provide a safe place from which to view the exhibition that duty was performed by keeping the crowd back to the distance mentioned. In the case at bar the distance was much greater, and the preservation of that distance was insured not only by the police, but by the intervening sheet of water.

As to the negligence, if any, in discharging the rocket, there is no direct proof, and the claim must be based on the maxim *res ipsa loquitur*. But as we have already seen, any claim on this score is disclaimed; and, if it were not, still it could not avail, because the negligence, if any, was that of an independent contractor. The argument seems to be that notwithstanding the uncontradicted proof showed that Romain was employed as a fireworks expert for a lump sum to set off certain designated fireworks on defendant's property, and was not controlled in any way by defendant or its agents as to the method and details of his work, except the place and time of its performance, and that none of the employes of the defendant had anything to do with setting off the fireworks, and their duties were confined to keeping the crowd back, nevertheless this co-operation in the management of the entertainment made Romain a servant and not an independent contractor.

In 26 Cyc. 1546, an independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work." The evidence for the plaintiff brought Romain fully within the definition just quoted, and which we deem adequate for the purpose of this case. It follows, therefore, that for any negligence of himself or his own employes in setting off the fireworks, the defendant is not responsible. The case of *Crowley v. Fireworks Co.*, 183 N. Y. 353, 76 N. E. 470, 3 L. R. A. (N. S.) 330, cited for plaintiff, is really against his contention, for the defendants in that question were the contractors employed to give the exhibition.

So, as there is no evidence of negligence of defendant, in making the arrangements for giving and witnessing the exhibition, and any negligence of Romain is not imputable to defendant, and as there is no pretense that defendant failed to use due care in selecting a skillful and competent contractor, there was nothing for a jury to lay hold of, and the nonsuit was rightly ordered.

The judgment will be affirmed.

BERGEN, KALISCH, and WHITE, JJ., dissent.

REISMAN et al. v. PUBLIC SERVICE CORPORATION OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

Error to Circuit Court, Camden County.

Action by Annie Reisman and Moritz Reisman against the Public Service Corporation of New Jersey. Judgment for defendant, and plaintiffs bring error. Affirmed.

John W. Wescott, for plaintiffs in error.
Lewis Starr, for defendant in error.

PER CURIAM. This case arose out of the same occurrence as the case of Minnie Reisman against the same defendant, 81 Atl. 838, decided at the present term of this court, and the two cases were tried together and submitted on the same briefs in this court.

For the reasons given in the opinion filed in the Minnie Reisman Case, the judgment of nonsuit entered in the circuit court will be affirmed.

BERGEN, KALISCH, and WHITE, JJ.,
dissent.

HENRY et al. v. THOMPSON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

EQUITY (§ 46*)—JURISDICTION OF EQUITY.

Where two contesting claimants to the proceeds of a life insurance policy consent that the insurance company pay the fund to one, without thereby prejudicing the right of the other to enforce his claim thereto, and where the rights of each depend upon the interpretation of a written contract which does not require reformation, and no discovery is called for, no ground for equitable relief exists. The recipient has a fund which the other claims is unlawfully withheld from him, and, if he is right, he can recover whatever is due him in an action at law, for either the possessor is entitled to retain the fund or bound to pay it over to the other, and this situation presents no ground of equitable jurisdiction.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 46.*]

Appeal from Court of Chancery.

Bill in equity by Andrew Henry and another, executors of Frederick A. Prince, deceased, against James L. Thompson, administrator of Sarah E. Moody, deceased, and another. From a decree for defendants (78 Atl. 14), complainants appeal. Reversed and remanded, with directions.

The Washington Life Insurance Company by a policy duly executed and delivered insured the life of Frederick A. Prince to the extent of \$10,000, payable on his death to his wife, Mary L. Prince, for her sole use, if living, and, if not living, to her and her husband's children or their guardian, if under age, for their use, or, if no children living, then to the executors or administrators

of the said Frederick A. Prince. The husband survived his wife, and they had no children, but in 1889 Mary L. Prince assigned all her right, title, and interest in the policy to Sarah E. Moody, and guaranteed the validity and sufficiency of the assignment and warranted the title to the policy. The husband consented to the assignment which was expressed as follows: "I hereby consent to the assignment of the within policy by my wife." Sarah E. Moody died January 2, 1907, and Frederick A. Prince January 15, 1909, and thereafter, contesting claims being made by the respective representatives of Mrs. Moody, and of Mr. Prince, the insurance company refused to pay, unless it was released by both parties from further liability. The claimants then consented to have the money paid to the executors of Frederick A. Prince, and to release the company, subject to the terms of a written agreement made by the claimants that the consent to such payment should not be construed as affecting the right of the administrator of Mrs. Moody to the moneys paid, but that it should be received by the complainants, and by them deposited with the Jersey City Trust Company, there to remain until a court of competent jurisdiction should finally determine which of the claimants was legally entitled thereto. The money was received by the executors of Frederick A. Prince and deposited with the trust company, which, with the consent of the parties, issued and delivered to James A. Gordon, as trustee, a certificate of deposit for the amount. Thereupon the executors of Frederick A. Prince filed his bill of complaint in this cause, claiming that under the policy the wife's interest was contingent upon her surviving her husband, and, as she did not, that no right to the fund passed to her assignee, and prayed that they be decreed to be entitled to the fund. The administrator of Mrs. Moody answered and substantially admitted the charges set out in the bill of complaint, but denied that the complainants were entitled to relief, and prayed to be dismissed. The defendant also answered by way of cross-bill, claiming that Mrs. Moody was the sole beneficiary under the policy, and that the consent to the assignment by her husband estops him, and therefore his representative, from claiming the fund. The Vice Chancellor heard the case and advised a decree that the complainants' bill be dismissed, and that the defendant, the administrator of Mrs. Moody, under his cross-bill was entitled to the fund, which Gordon, the trustee, was directed to immediately pay over to the administrator. From this decree the complainants have appealed.

James A. Gordon, for appellants. H. O. Hance, for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BERGEN, J. (after stating the facts as above). The situation resulting from the facts stated is that two antagonistic claimants to the fund due from the insurance company agreed that payment might be made to one, both releasing the company, upon a stipulation between the two claimants that such payment would not affect the legal rights of either party to the fund, so that, instead of three parties to the controversy, there remained but two, one of whom had the fund which the other claimed, and, if the claim was supportable, it could be enforced by an action at law for money had and received to his use. There are no equities to administer or enforce. If the defendant in this proceeding is entitled to the fund, he could have brought his action at law against the insurance company, and, if that company had any reasonable doubt as to the rights of the respective claimants, it could have filed a bill of interpleader, but when the claimants agreed to discharge the company upon payment to one of them, under an agreement that the rights of the other should not be affected by such payment, no possible ground for equitable relief arises from that condition. Neither can call upon the other to interplead, and no trust requiring equitable interference has been created by the acts of these parties. The defendant has consented that the insurance company may pay the fund to the complainants if his right of action be preserved; that is, he cannot proceed to enforce his claim against the company, but may against the other claimant who is put in possession of the fund, subject to such lawful claim of the other as he may be able to establish. He may demand it, and, upon refusal, bring his action at law to recover the money which he claims the complainants refuse to pay over, and the proceeding instituted in the present cause amounts to little more than an ordinary collection suit. The contract in question presents no feature subjecting it to equitable cognizance, no attempt is made to reform it, nor is any discovery prayed, and the defendant has a complete remedy at law. The learned Vice Chancellor dismissed the bill of complaint because he determined that the fund belonged to the defendant, and then advised a decree according to the prayer of the defendant's cross-bill. He was clearly right in dismissing the bill of complaint, not for the reason given by him, but because it disclosed no ground for equitable relief, but, when he advised a decree in favor of the defendant upon the cross-bill, we think he assumed a jurisdiction which did not exist.

The decree in favor of the defendant will be reversed, and the cause remitted to the Court of Chancery, to be there disposed of in accordance with the views herein expressed.

NAGLE v. CONARD et al.

SAME v. SONDERGAARD et al.

(Court of Chancery of New Jersey. Feb. 7, 1911.)

1. WILLS (§ 449*)—CONSTRUCTION—INTESTATE.

A testator, owning parcels of land absolutely or in remainder, after the death of a life tenant, devised them to his executor in trust to collect the income and apply the proceeds in a manner prescribed until his youngest child attained the age of 21. The will contained no residuary devise. *Held*, that testator died intestate as to the corpus of the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

2. TRUSTS (§ 182*)—POSSESSION—RIGHT OF HEIRS IN INTESTATE PROPERTY.

Where testator devised real estate to his executors in trust to collect the income and dispose of the same until the youngest child arrived at the age of 21, but made no disposition of the corpus of the property, the trustees could not be deprived of the possession of the property until the termination of the trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 182.*]

3. MORTGAGES (§ 295*)—MERGER OF ESTATES—EQUITABLE RULE.

A merger of a mortgage in the legal title is not allowed, unless for special reasons, and to promote the intent of the party; and where the equities are subverted by keeping the mortgage alive, and no injury is wrought thereby, it is not extinguished.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 815-831; Dec. Dig. § 295.*]

4. MORTGAGES (§ 295*)—MERGER OF ESTATES—EQUITABLE RULE.

A declaration of a testator in his will, devising his estate in remainder in trust and bequeathing a mortgage on the property, that it was not his intention that there should be any merger prevents a merger, though the declaration was made several years after the conveyance of the equity of redemption to testator, since he need not so have made his election as to a merger until some other person was about to acquire an interest; and the mortgage on the premises is property of the legatee, subject to the conditions imposed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 815-831; Dec. Dig. § 295.*]

5. WILLS (§ 840*)—CONSTRUCTION—CONDITIONS ON LEGACIES.

A testator, owning land in remainder, incumbered by a mortgage, and the mortgage, devised the land to the executor in trust for specified purposes, and bequeathed the mortgage to his wife, and declared that on the death of the life tenant the executor should manage and collect the income, out of which they should pay the mortgage, but did not devise the corpus of the estate. The wife accepted the gift and assigned the mortgage. *Held*, that the assignee took the mortgage subject to all equities, and the mortgage must be satisfied, as far as the corpus is concerned, as specified.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 840.*]

6. MORTGAGES (§ 273*)—OBLIGATION OF LIFE TENANT.

Where a landowner, when conveying the land, reserved a life estate and assumed payment of the interest on a mortgage executed to secure his bond, he was bound to pay both principal and interest in the first instance, and

could not evade such payments for the purpose of destroying the remainder.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 273.*]

7. WILLS (§ 821*)—ACCEPTANCE OF GIFTS—PERFORMANCE OF CONDITIONS.

Where decedent owned both a mortgage on certain land and the land itself, and bequeathed the mortgage to one, who takes it under provisions in the will for its payment from the income of the mortgaged premises, and thereafter such legatee purchases such premises from one having a life interest therein, the legatee and her assignee of the mortgage must protect the remainder by payment of the mortgage as prescribed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.*]

8. WILLS (§ 865*)—INTESTATE ESTATES—RIGHTS OF BENEFICIARIES.

A declaration by testator that a legacy to a grandchild shall be in lieu of all interest to which he may be entitled in the estate, by virtue of the will or otherwise, and that a daughter has received all she is entitled to, does not prevent the daughter and granddaughter from sharing in the intestate estate of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

9. EXECUTORS AND ADMINISTRATORS (§ 315*)—CONSTRUCTION—JURISDICTION OF EQUITY.

A court of chancery will not give directions concerning the distribution of a testamentary fund until the time for distribution arrives.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

Suits by Dorothea Nagle against Harry Conard and others for the construction of a will of Peter Nelson, deceased, and by same complainant against Jeppe Sondergaard and others for the foreclosure of a mortgage. Heard on bills, answers, replications, and proofs. Decree of foreclosure rendered.

The above cases were heard together, and are to be decided upon the same proofs. The first bill is filed for the construction of a will and directions to trustees; the second is a foreclosure suit, in which it is necessary that the same will shall be construed, in order to determine the rights of the parties.

Peter Nelson died in November, 1908, leaving a will, dated April 16, 1908, which was admitted to probate in Middlesex county. After a devise to his widow of some real estate in Florida and considerable personal property, he made the following provisions concerning his estate in Perth Amboy:

"Third. I devise to my executors herein-after named, or to such as may qualify, and to his or their successors in the trust, the properties at present numbered three hundred and five, three hundred and seven, three hundred and nine, three hundred and eleven, and three hundred and thirteen, on State street in the city of Perth Amboy, New Jersey, together with all the fixtures therein, in trust however for the following uses and purposes: To collect the income therefrom and to pay all taxes, water rates, insurance and other charges, against the same, including reasonable and just charges for their

services, and to keep said property in good repair, and to keep the same rented to good tenants, and out of the income therefrom to pay to my wife Caroline Nelson the sum of two hundred dollars each and every month during the term of her natural life. They are directed to devote the remainder of the net income from said properties to the payment of the interest and principal of the mortgage standing against the same. Any surplus after the application of the income as above directed shall belong to my wife Caroline Nelson and my children by my said wife Caroline Nelson, and shall be invested by my executors for their use and benefit, and when such children shall all come of age the fund last mentioned, if any, derived from said properties shall be turned over to them in equal parts share and share alike. No property shall be deeded to any one as long as my wife or one of my children is living.

"Fourth. I devise to my said executors or to the one who shall qualify and to their or his successors in the trust, the properties at present numbered three hundred and thirty-five, three hundred and thirty-seven, three hundred and thirty-nine, three hundred and forty-one and three hundred and forty-three, on State street in the city of Perth Amboy, New Jersey, together with all fixtures therein, in trust however for the following uses and purposes: To collect the incomes therefrom, and pay all taxes, water rates, insurance and other charges against the same, including reasonable and just compensation for their services, and to keep said properties in good repair, and to keep the same rented to good tenants. All rents from this property shall be put out at interest in good securities or in bank, my said wife Caroline Nelson to receive the interest of the same, semi-annually. When all the children are of age, then this sum, if any, shall be equally divided between my said wife and the children, share and share alike. No deed to be made as long as my wife or one of the children lives.

"Fifth. I direct that my wife Caroline Nelson, or her administrators or executors, out of the income received from the properties described in paragraph 'four' shall pay to my granddaughter Eleanor Lynch, upon her becoming of age, or upon her marriage before her attaining her majority, the sum of two thousand dollars, or if said Eleanor Lynch shall die before she becomes of age or marries, the said sum shall be paid to my children in equal proportions, or to the heirs of their bodies, such heirs taking the portion of their ancestor. If my said wife should die before receiving the full sum of two thousand dollars from the properties described in paragraph 'four,' then this bequest to Eleanor Lynch shall be payable out of any other property received by my wife

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

from me, but the sum of two thousand dollars hereby bequeathed to said Elanor Lynch shall be in lieu of all interest to which she may be entitled in my estate by virtue of this will or otherwise, and when any property is herein devised or bequeathed to my children or heirs, or their heirs, the words children and heirs shall not be construed to include said Elanor Lynch, my intention being that said Elanor Lynch shall not receive more than two thousand dollars of my estate under any circumstances.

"Sixth. I own an estate in remainder in the properties at present numbered three hundred and forty-five and three hundred and forty-seven State street, and numbered at present one hundred and nine, one hundred and eleven, one hundred and thirteen, one hundred and fifteen and one hundred and seventeen Fayette street, in the city of Perth Amboy, New Jersey, and my son-in-law, Jeppe Sondergaard, owns an estate for life therein and has the revenue therefrom during his life, out of which he is obliged to pay the taxes, water rates, insurance and other charges against said properties, and keep the same in good repair, and also to pay the interest on a mortgage of ten thousand dollars which I hold on said properties, and which is bequeathed to my wife Caroline Nelson in this will. I give and devise my estate in remainder in these properties, with the fixtures therein, to my executors, and their successors or successor, and the survivor or survivors of them in trust for the following uses and purposes: After the death of my said son-in-law Jeppe Sondergaard they shall manage said properties and collect the incomes therefrom, out of which they shall pay all current expenses for taxes, water rates, insurance, repairs, and a fair and reasonable compensation for their services, and the net income derived therefrom they shall apply to the payment of the said mortgage of ten thousand dollars, until the same is extinguished, as it is not my intention that there shall be any merger of said mortgage by reason of my holding an estate in remainder in said properties. After the payment of said mortgage I direct that the net income of said properties be divided into three equal parts, one part to be paid semi-annually to Emilie Sondergaard, the wife of Jeppe Sondergaard, if she survives her husband, the remainder to be put at interest for my children until they become of age, when it shall be turned over to them. If at any time the Fayette street properties have to be renovated or rebuilt, then the interest of said Emilie Sondergaard ends as well in the State street properties as in the Fayette street properties.

"Seventh. In case of the death of a child by my marriage with my present wife, before reaching the age of twenty-one years, or before marriage, the part of the deceased shall go to the surviving child or children by my second marriage. In case of marriage

the part shall go to the surviving spouse, or, if there be children of the marriage, then to them, but in case of the death of all of my children by my present wife before reaching the age of twenty-one years, their mother surviving, the part herein given to them shall go to their mother for and during her natural life, and after her death to such of my children or their heirs as my said wife shall by will direct.

"Eighth. In case of the death of all my children and their heirs before my decease, then I direct that the properties herein devised to them shall be held in trust by my executors for my sons-in-law Jeppe Sondergaard and Michael Henry Nagle, and the children of my brother Hans Henry Nelson, in equal parts.

"Ninth. As I have deeded the old homestead to my daughter Dorothea Nagle, and she has had the full revenue or rents of the same for a number of years, I consider she has received all she is entitled to, as I consider her share is equal to the other children."

The testator appointed Harry Conard and his widow, Caroline Nelson, to be the executors of the will, and gave them full power to dispose of any real estate which might be necessary to carry out its provisions.

On August 3, 1901, the testator owned the premises in Perth Amboy now covered by the mortgage which is sought to be foreclosed in the second suit. On that day he made a conveyance thereof to his daughter, Andrea Sondergaard. Mrs. Sondergaard and her husband, by way of satisfying the consideration money, joined in a bond to Nelson for \$10,000, payable in one year with 4 per cent. interest. To secure this bond, they likewise joined in the execution of the mortgage in question. This transaction put the title in Mrs. Sondergaard, subject to the mortgage, and subject, also, to a prior mortgage for \$10,000, concerning which there is no controversy. Mrs. Sondergaard died in 1902, leaving a will by which she gave all her property to her surviving husband, who, on August 28, 1902, conveyed the mortgaged premises to Nelson, reserving to himself (Sondergaard) "the use and occupation of the said above-described premises for and during the time of the natural life of the said Jeppe Sondergaard." By the first item of the will, this mortgage was bequeathed to Mrs. Nelson, the widow. After the testator's death, Mrs. Nelson and her coexecutor joined in an instrument, in writing, by which the mortgage was assigned to Mrs. Nelson, and a few days later she assigned it to the complainant, who is now attempting to foreclose it. The particular provisions of the will touching said mortgage are found in item 6.

Frank J. Higgins and Merrit Lane, for complainant. Thomas Brown and Freeman Woodbridge, for defendant Elanor Lynch. Adrian Lyon, for executors and Caroline Nelson, individually, and her children.

HOWELL, V. C. (after stating the facts as above). [1] It was claimed that the testator made no final disposition of his Perth Amboy real estate, and that if he did the same was void as contravening the rule against perpetuities. I do not find it necessary to discuss the question whether, under the terms of the will, the period of the vesting of the estate is so remote as to violate the rule, for the reason that I deem it very plain from a careful reading of the instrument that he disposed of the income from his property only, and made no final disposition of the corpus. The third item directs the executors to collect the income from the properties therein described, to make such disbursements as are necessary, and out of the remainder to pay the wife \$200 per month, and to devote the remainder of the income to the payment of the interest and principal of the mortgage against the same. The testator then, continuing his directions as to the income, orders that the surplus thereof shall go to his wife Caroline and her two children, and shall be invested by the executors for their use and benefits; and that when these children come of age the fund so accumulated shall go to them in equal shares. It is quite manifest that in that item of the will there is no residuary devise. The fourth item deals with another block of property. It makes due provision for the collection of the rents and for disbursements incident to the ownership of the land, orders an investment of the income, so that his wife Caroline may receive the interest of the accumulated income semiannually, and finally directs the division of this income accumulation to his wife and children when the children come of age. It is quite as manifest that there is no residuary devise of that property. The sixth item of the will deals with an estate in remainder; his son-in-law Jeppe Sondergaard, holding the intervening life estate. There is in that item also distinct and particular directions about the income, and an appropriation of it, not only to the expenses of maintaining the property, but to the payment of the mortgage, which is sought to be foreclosed by the second bill. After all those payments out of the income, the remainder thereof is to be accumulated for his children, and to be paid to them when they come of age. Neither does that item contain any residuary devise. It was argued that there was a devise by implication to the testator's "children" of the residuary estate; but I am not able to find in the will any words which lead to any such result. I therefore come to the conclusion that the testator meant to and did deal only with the income from these three pieces of property; and that as to the corpus thereof he died intestate.

[2] But there are provisions in the will which prevent the heirs at law from taking immediate possession of the properties. Between the present time and period of dis-

tribution, there stands a valid, active trust, by virtue of which the executors and trustees have the right, and are in duty bound, to administer the income therefrom until the youngest of the testator's children shall arrive at the age of 21 years. This trust cannot be disturbed, nor can the executors and trustees be deprived of the possession of the property until the termination thereof according to the terms of the will; and consequently there can be no partition. *Smith v. Gaines*, 39 N. J. Eq. 545; *Roarty v. Smith*, 53 N. J. Eq. 253, 31 Atl. 1031.

In *Simmons v. Hadley*, 63 N. J. Law, 227, 43 Atl. 661, trustees under a will were in the possession of lands; they were sued in ejectment by one of the heirs at law, who insisted that some of the purposes of the trust were void within the rule against perpetuities. There were, however, active trusts which were in course of execution which were undoubtedly good, and it was held that ejectment could not be maintained until the determination of the valid trusts.

[3] It is said that, because Peter Nelson at one time held the mortgage, and also had title to the fee in remainder, his equitable right merged in the legal right and extinguished the mortgage. It is a thoroughly well-settled rule that merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party; and that, where the equities are subserved by keeping the mortgage alive, and no injury or injustice is thereby wrought, it is not extinguished. *Clos v. Boppe*, 23 N. J. Eq. 270; *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Swayze v. Schuyler*, 59 N. J. Eq. 75, 45 Atl. 347; *Harron v. Du Bois*, 64 N. J. Eq. 657, 54 Atl. 857. Practically the same rule exists in controversies in the common-law courts, where merger is favored. *Woodhull v. Reid*, 16 N. J. Law, 128; *Thompson v. Boyd*, 21 N. J. Law, 58, affirmed 22 N. J. Law, 543; *Duncan v. Smith*, 31 N. J. Law, 325; *Mulford v. Peterson*, 35 N. J. Law, 127; *New Jersey Insurance Company v. Meeker*, 40 N. J. Law, 18. It seems that there should be added to the rule this qualification: If there is an intervening estate, incumbrance, or equity, that of itself would be sufficient to prevent a merger of the mortgage with the equity of redemption, provided the incumbrance be not one which the owner has assumed to pay, or one against which he is estopped from defending. *Jones on Mort.* § 848. This qualification was applied in the case of judgment liens in *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

[4] There is, however, in the will evidence that the testator never meant that the estates should merge. Speaking of this particular mortgage, he says, "as it is not my intention that there shall be any merger of said mortgage by reason of my holding an estate in remainder in said properties." Although this declaration was made six years

after the conveyance of the equity of redemption to Nelson, it is held that the party in whom the assets legally and equitably are so united is not required to make his election that there should or should not be a merger immediately. He may wait until some other person is about to acquire an interest, and if he then does any act which clearly shows that he regards the equitable title as still subsisting this is almost conclusive evidence that he did not intend that there should be a merger. *Cliff v. White*, 12 N. Y. 525; *Security Title Company v. Schlender*, 190 Ill. 609, 60 N. E. 854; *Jones on Mort.* § 855. I must hold, therefore, that the mortgage in question is a subsisting and valid lien upon the premises in question in the hands of Caroline Nelson, the original legatee thereof; but in making the bequest of the mortgage to his wife the testator had a right to impose upon her and upon the gift such conditions as he chose, provided the same were not in themselves illegal.

[6] By the will he directs his executors, of whom his widow is one, to pay and satisfy the mortgage money out of the income of the property. The direction is this: "After the death of my son-in-law Jeppe Sondergaard they [the executors] shall manage said properties and collect the income therefrom, out of which they shall pay all current expenses for taxes, water rates, insurance, repairs, and a fair and reasonable compensation for their services, and the net income derived therefrom they shall apply to the payment of the said mortgage of ten thousand dollars, until the same is extinguished."

The question then arises whether Mrs. Nelson, or her assignee, will be permitted to foreclose the mortgage in the face of her obligation as executor and legatee to see to it that it (principal and interest) shall be satisfied to her out of the net income of the premises. I pause here to say that the complainant, as assignee, stands in the shoes of Mrs. Nelson. The instrument of transfer was claimed by the complainant to give her a better position than Mrs. Nelson had, and by the defendants to create some equity in favor of Eleanor Lynch. I find, however, that it operates as a mere assignment of the mortgage, subject to all equities, so far as the complainant is concerned, and that Eleanor Lynch can make no claim under it.

The testator owned the mortgage, and he owned the land. In uniting the two estates, he could say whether they should merge or not. In separating them unmerged, he had a right to say how they should be thereafter treated, and what their future relation should be. If he had chosen so to do, he might have released the lands in question from the lien of the mortgage, and by his will, without other instrument, have charged the mortgage debt in suit upon other and different lands. His dominion over the two estates was paramount and predominant. Mrs. Nelson could

get only what he gave her. She cannot enlarge her right or abridge the right of other devisees. She takes title to the mortgage debt incumbered by the testator's peculiar notions as to the manner in which, and the fund from which, the same should be paid to her. And the complainant or transferee takes no other or greater right than Mrs. Nelson had.

[8] While this argument points in the direction of preventing the complainant from foreclosing the mortgage against the remainder or the equity of redemption, I see no reason why foreclosure of it should not be permitted against the life estate of Sondergaard. It was Sondergaard's duty to pay the mortgage; the bond is his; he joined in the mortgage. Primarily he is the one to pay it. When he created his life estate by the deed of August 26, 1902, he assumed the burden, among other things, of paying the interest on the mortgage. He was therefore bound at law and in equity to pay both principal and interest of this obligation in the first instance. He certainly cannot evade these payments for the purpose of destroying or otherwise interfering with the remainder. In my opinion, as between the complainant and Sondergaard, the mortgage money was due and payable. By its terms, it was due when the life estate was created, and Sondergaard has no defense to the suit, nor, indeed, has he attempted to make any.

[7] In addition to the fact that Mrs. Nelson is an executor of the will, and so stands in a fiduciary relation to all the parties in interest, there is yet another reason why the foreclosure of this mortgage as against the remainder ought to be held up, and that is that it is a settled doctrine of courts of equity, and agreed on all sides, that no man shall be allowed to disappoint a will under which he takes a benefit; or, as it was put by Vice Chancellor Grey, in *Bird v. Hawkins*, 58 N. J. Eq. 246, 42 Atl. 595: "He may not accept the benefits which a will confers, without he also performs the duties which it imposes. This doctrine has been carried to the extent that one who accepted a benefit under a will, given upon terms that the beneficiary should convey his own estate to some one else named by the testator, has been obliged so to convey away his own property." Mrs. Nelson cannot be heard to say that she will take the mortgage bequeathed to her, but will reject the provision for its payment from the income from the mortgaged premises. Her assignee is in the same position. It is clearly her duty to protect the remainder for whom it may concern, and not to give aid or countenance to any proceeding having for its object the destruction of their right.

[8] The next question is whether Eleanor Lynch and the complainant, Dorothea Nagle, can share in the residuary fund of which the testator died intestate. It is claimed that neither of them can so participate, for the

reason that they are excluded therefrom by particular and specific words of the will itself. As to Elanor Lynch, the testator declares that the demonstrative legacy to her of \$2,000 "shall be in lieu of all interest to which she may be entitled in my estate by virtue of this will or otherwise * * * my intention being that said Elanor Lynch shall not receive more than two thousand dollars of my estate under any circumstances." As to Dorothea Nagle, the words are: "I consider she has received all she is entitled to, as I consider her share is equal to the other children." Having these words in mind, are they sufficient to exclude these two persons from participation in the residuary fund above mentioned? A recent text-writer on this subject has declared that the courts are nearly unanimous in holding that, where the testator does not by will dispose of the whole of his estate, no negative words of exclusion can prevent the remainder of the property from passing under the statutes of descent and distribution; that it not infrequently happens that the testator by name specifically provides that certain of his relatives shall not receive any part of his estate; and that in such case such a provision is entirely ineffectual as to intestate property. Page on Wills, § 467. An early case on the subject is *Creswell v. Cheslyn* (1762) 2 Ed. 124. There the testator by his will gave his residuary personal estate to his three children in equal shares as tenants in common. Subsequently by a codicil he declared that C., one of his children, should not be one of his residuary legatees, and he gave to C. a pecuniary legacy instead. It was held that as to one-third of his estate he died intestate, and that this share did not go to the other two, but went according to the statute of distributions. Lord Northington, L. C., says that the reason for the decision was that the testator had made no devise over of the share of which he had deprived one of his children; and that therefore the other two could have no greater interest than they had by the original will. He says: "I must therefore declare that the clear residue of the testator's personal estate, not specifically bequeathed, must be divided into three equal parts." The decree in this case was affirmed in the House of Lords, in *Cheslyn v. Creswell*, 3 Bro. P. C. 246, without an opinion. In *Pickering v. Stamford* (1797) 3 Vesey, Jr. 492, Lord Loughborough declared that neither an heir at law, nor, by parity of reason, the next of kin, can be barred by anything but a disposition of the heritable subject or personal estate to some person capable of taking; and that, notwithstanding the words of the will, he would take what was not disposed of. In *Johnson v. Johnson* (1841) Sir Lancelot Shadwell, V. C., dealt with a will which contained these words: "I direct that my wife Harriet Johnson and her child Harriet (whom I entirely disclaim) shall be cut off from any part of my property and shall not receive any benefit or advantage therefrom."

It was held that these words did not exclude the widow and next of kin from sharing in the intestate property, for the reason that there was no devise over of the shares of which the will had deprived them.

In *Harris v. Davis* (1844) 1 Collyer, C. C. 416, Sir J. L. Knight Bruce, V. C., had before him a will in which the testator had given personalty to several of his children, including his son Henry; by a codicil he revoked all that part of his will which left a legacy to Henry, but made no devise over of that share. The vice chancellor held that Henry's share of the residuary personal estate lapsed for the benefit of the next of kin, including Henry. In *Sykes v. Sykes* (1868) L. R. 4 Eq. 200, a testator, by a codicil to his will, revoked all the provisions in favor of his son Henry, and in lieu thereof placed in the hands of trustees a large sum of money upon trust to invest and hold the proceeds for Henry and his wife and children, but made no devise over. The case was heard before the Master of the Rolls and came before Lord Cairns, L. C., on appeal. He says: "I understand the law with regard to the construction of wills upon this point to be perfectly clear and well settled. If there be a devise or a bequest in a will to a number of persons nominatim as tenants in common, and if there be afterwards by codicil a revocation of the devise or bequest made to one of them, the share of the residue, the devise or bequest of which is so revoked, does not again fall into the residue, but becomes undisposed of for the heir at law, or for the next of kin, as the case may be. That was decided, if it had not been decided before, in the case of *Creswell v. Cheslyn*, and for upwards of a hundred years it has governed the succession of property in this country." The same rule was applied in *Fitch v. Weber* (1848) 6 Hare, 145.

In the case of *Gallagher v. Crooks*, 132 N. Y. 338, 30 N. E. 746, the will contained the following clause: "He [John N. Gallagher] is to have nothing from my property, and I hereby cut off from inheriting anything or property of mine his wife [Rebecca] or any person in any way related to her either by blood or by marriage with the exception of himself, and he only in the way I have stated above." It was found that the testator had died intestate as to some of his property and suit was brought by the widow and children of John N. Gallagher, who had died, to recover a share thereof. Follett, C. J., says: "The clause in the will above quoted, by which the testator attempted to disinherit his brother, his wife, and their descendants, does not defeat the right of these plaintiffs to the estate, unless the persons to whom the testator attempted to devise the remainder were in existence. In case a testator fails to make a legal devise of his realty, or, if having legally devised it, the devise fails for any cause, the heir will inherit, notwithstanding there is an express provision in the will that

he shall not take any part of the estate. There must be a legal devise to cut off the right of the heir to inherit. Mere words of disinheritance are insufficient to effect that purpose." The rule so announced seems to prevail in New Hampshire. *Wells v. Anderson*, 69 N. H. 561, 44 Atl. 103. The two leading English cases above referred to (*Creswell v. Cheslyn* and *Sykes v. Sykes*) were approved of by this court in *Burnet v. Burnet* (1879) 30 N. J. Eq. 595, in an opinion by Vice Chancellor Van Fleet. In that case a legacy was void, for the reason that the legatee was a witness to the execution of the will; and the question was whether that share fell into the residuary estate, or whether as to it the will was not entirely inoperative. The vice chancellor held to the broad principle that the will was inoperative; and that therefore as to that share the testator died intestate.

Finally, our Court of Errors and Appeals, in *Graydon v. Graydon*, 25 N. J. Eq. 561, decided the point in a case arising under a will which provided that, if the testator's son John should marry a certain person prior to a certain date, then, to use his words: "My will is and I order that he take no part or share of my estate either of principal or interest, and the provision heretofore made for him is upon condition that he do not marry," etc. "If he do I hereby declare such provision void and revoked." And, in case he did so marry, then his executors should dispose of his estate as if John were dead in his lifetime, intestate, and without issue. His son violated the provision by contracting the forbidden marriage, and the question was whether his widow and children, he having died, took any portion of the residuary estate. The chancellor held that they did not, but the Court of Errors and Appeals declared that they were entitled to share in the residue, upon the principle that the heir at law would not be disinherited, except upon words free from doubt. No allusion was made to the principle of decision of the English cases, which is not only that the heir will not be disinherited, except upon the clearest statement, but also that the failure to make a devise over of the forfeited share is sufficient in itself to show that the testator did not intend to debar the persons whose shares were forfeited from participating in the undisposed-of residue. The rule was followed in *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471. No cases are cited in the *Graydon* Case as authorities for the conclusion to which the court arrived. It appears, however, from the cases hereinabove cited that the judgment of Judge Dairimpe, who wrote the opinion, is founded on well-established principles.

[9] In accordance with these authorities, I must therefore hold, for the purposes of the foreclosure suit, that both Mrs. Nagle and Eleanor Lynch are entitled to participate in

the intestate property, as tenants in common, with the other interested parties. However, no directions can now be given in the suit for the construction of the will as to the eventual distribution of the residuary property so undisposed of. It is a well-settled rule that this court will not give directions concerning the distribution of a fund until the time for distribution arrives. The only directions which can be included in the decree will relate to the disposition of the income and the interest thereon and the accumulation thereof, as directed by the will. *Hoagland v. Cooper*, 65 N. J. Eq. 407, 56 Atl. 705. Indeed, the point would not have been considered at this time, if it had not been deemed necessary in the foreclosure suit. This view makes it unnecessary to determine presently whether the conveyance to the complainant of the homestead is or is not an advancement under our statute of descents.

The decree in the foreclosure suit may provide for a sale of the life estate of Jeppe Sondergaard, but for reasons hereinabove stated, the sale will not affect the remainder. Whatever moneys may be raised by a sale of the life estate will be credited upon the mortgage, and eventually it will be satisfied in the manner provided for by the will.

RIVA v. JERSEY CITY, H. & P. ST. RY. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 635*)—RECORD—OMISSIONS—PRINTED BOOK.

Writ of error dismissed because the printed book does not show that return has been made to the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 635.*]

Error to Supreme Court.

Action by Felice Riva against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for defendant, and plaintiff brings error. Writ of error dismissed.

Randolph Perkins, for plaintiff in error.
William D. Edwards and Edwin F. Smith, for defendant in error.

PER CURIAM. So far as the printed book discloses, no return has been made to the writ of error herein. Under the established practice of this court, we are not called upon to look beyond the printed book. *McLaughlin v. Davis*, 64 N. J. Law, 360, 45 Atl. 967; *Davis v. Littell*, 64 N. J. Law, 595, 46 Atl. 631; *Conrad v. Bocker*, 70 N. J. Law, 823, 58 Atl. 1019; *Negley v. New York Life Ins. Co.*, 70 Atl. 129.

The writ of error should be dismissed.

HUSTON v. ROE.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 109*)—ACCOUNTING—CREDITS.

An administrator of an estate, which included 35 head of cattle, who paid to a receiver appointed to manage the farm belonging to the estate an amount derived from milk receipts as rent for pasture for the cattle, resulting in a benefit to the estate, was entitled to be allowed the amount as a credit upon his account.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 435-447; Dec. Dig. § 109.*]

Appeal from Prerogative Court.

Henry Huston, as administrator of the estate of Catherine A. Roe, deceased, appealed from a decree sustaining exceptions by Minnie Roe to his final accounting, and, from a decree of the Prerogative Court (78 Atl. 162) affirming the original decree, he appeals. Decree reversed, and record remitted for modification of decree.

Henry Huston and Theodore Simonson, for appellant. Charles M. Woodruff, for respondent.

PER CURIAM. We agree with the result reached in this case by the orphans' court and with the decree of affirmance by the ordinary (78 Atl. 162), except in a single particular. The disallowance of the accountant of the item of \$114.23 we think was wrong. This amount represents one-third of the milk receipt for which the accountant claimed allowance. The accountant's intestate had 35 head of cattle which came to the hands of her administrator at her death, which had to be fed and cared for, and his only means to this end was the farm. A receiver for the farm premises was appointed by an order providing that he "should take charge of the mortgaged premises, manage the same and cut and gather and harvest the corn, buckwheat and hops now (then) growing and to take charge and possession of the crops therein mentioned and sell the same under direction of this court." This amount, one-third of the milk receipts, the accountant claims to have paid to the receiver as rent for the pasture of decedent's cows. By the terms of a lease, the tenant was entitled to another third and to have the cows remain as against Mrs. Roe until the following April. We therefore deem this a reasonable and proper arrangement for the accountant to make, in order to sustain and care for the cattle, and it resulted in a benefit to the estate. The item should be allowed to the appellant as a credit in his account.

The decree will therefore be reversed, and the record and proceedings be remitted to the Prerogative Court to the end that the decree may be modified, by allowing to the ac-

countant credit for this expenditure. This disposition of the case being a substantial affirmance, costs in this court will not be allowed to the appellant.

GOODMAN v. LEHIGH VALLEY R. CO. OF NEW JERSEY (two cases).**MAYS v. SAME.**

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)**1. RAILROADS (§ 484*)—OPERATION—INJURIES BY FIRES—QUESTIONS FOR JURY.**

The differences in the evidence taken in these cases and that taken at a former trial of the same cases (see 78 N. J. Law, 318, 74 Atl. 519) held not sufficient to have required the trial court to nonsuit or to direct a verdict for defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

2. DISCOVERY (§ 79*)—STATUTORY PROCEEDINGS—EFFECT OF ANSWERS AS EVIDENCE.

The introduction in evidence of an answer to an interrogatory under section 140 of the Practice Act of 1903 (P. L. p. 575) is not conclusive on plaintiff as to the matters of fact covered by such answer.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 90-102; Dec. Dig. § 79.*]

3. RAILROADS (§ 482*)—OPERATION—ACTIONS FOR FIRES—SUFFICIENCY OF EVIDENCE.

Under the conditions shown to have existed, a jury was justified in finding the communication of fire from the burning farm buildings of plaintiff Goodman's testator to those of plaintiff Mays over a distance of 1,180 feet.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

4. WITNESSES (§ 255*)—EXAMINATION—REFRESHING MEMORY.

A witness may refresh his memory from a written memorandum made by him or under his direction, even if such memorandum contains statements of fact other than those within the personal knowledge of the witness, so long as he does not undertake to give testimony therefrom that is beyond the limits of his own knowledge.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

5. EVIDENCE (§ 113*)—RELEVANCY—VALUE.

In an action for damages to real estate by fire set by a railroad locomotive, evidence of the cost of the buildings burned is relevant to the inquiry as to the damage sustained.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

(Additional Syllabus by Editorial Staff.)**6. RAILROADS (§ 481*)—OPERATION—ACTIONS FOR FIRES—ADMISSIBILITY OF EVIDENCE.**

In an action for fire caused by the operation of a railroad, evidence as to the effect of use of screens in engines on another railroad was proper as tending to show the tendency of screens to deteriorate under conditions substantially similar.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 481.*]

7. RAILROADS (§ 485*)—OPERATION—ACTIONS FOR FIRES—INSTRUCTIONS.

In an action for fire caused by the operation of a railroad, the refusal to charge the jury to disregard all evidence as to the existence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

diaphragms on engines of another railroad is not error, where the court charges that defendant was not required to install diaphragms, and that no liability resulted from its failure to do so.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 485.*]

8. RAILROADS (§ 453*)—OPERATION—ACTIONS FOR FIRES—CARE.

Under P. L. 1903, p. 673, § 57, requiring railroads to use all practicable means to prevent the escape of fire from locomotives, a charge that due care in inspecting the screens on engines means a high degree of care was proper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660; Dec. Dig. § 453.*]

9. WITNESSES (§ 271*)—CROSS-EXAMINATION—MEMORANDA.

That a memorandum from which a witness testified was not offered in evidence was no bar to his being cross-examined on it, whether it was a means of refreshing present recollection or the record of past recollection.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 958-962; Dec. Dig. § 271.*]

Error to Supreme Court.

Actions by Edward V. Goodman, executor of James E. Goodman, deceased, and others, against the Lehigh Valley Railroad Company of New Jersey. From judgments for plaintiffs, defendant brings error. Affirmed.

McCarter & English, for plaintiff in error. Clark McK. Whittemore, for defendants in error.

PARKER, J. These writs of error bring up for review the judgments entered in the Supreme Court after a third trial of the three causes. All three were tried together before Mr. Justice Swayze at the Union circuit, and verdicts rendered for the respective plaintiffs. Upon rule to show cause the verdicts were set aside except as to a minor claim which has never been seriously questioned. At the second trial the cases were submitted on the same evidence produced at the first trial, and the trial court in view of the Supreme Court opinion on the rule to show cause (75 N. J. Law, 277, 68 Atl. 63) excluded all but the minor claim from the consideration of the jury; but, the resulting judgment being removed to this court by writ of error, we held that the case was one proper for submission to the jury upon all the claims (78 N. J. Law, 317, 74 Atl. 519). Accordingly, the suits were sent back and tried a third time; the old evidence not being used (except in the case of a deceased witness) but the witnesses being examined anew. Upon verdicts for the plaintiffs there were rules to show cause which were argued before the Supreme Court and subsequently discharged, and judgments entered which are now before us for review.

A number of assignments of error were argued and will be noticed in due course. The two principal ones are based on the refusal to nonsuit, and to direct a verdict for defendant as to the main claim, which will be

treated as if it were the only issue in the case.

[1] The argument in favor of the nonsuit is that there was no evidence sufficient to go to a jury, or to warrant a jury in finding for plaintiff, on the question of communication of fire from defendant's engine. In our former decision we held that there was; and the circumstances of the case, which were fully set forth in the opinion of the chancellor (78 N. J. Law, 317 et seq., 74 Atl. 519), need not be here repeated. It is urged, however, that the opinion indicates that our decision in that regard rested mainly on the testimony of the witness Axel, who was not sworn or produced at the second trial; and that a different state of facts appears in the evidence now submitted. But we are clearly of opinion that the communication of fire was a question for the jury. The conditions of hot dry weather, continued drought, resulting in dryness of ground and buildings, proximity to the track, direction and force of the wind, all favored the setting of fire from such a spark, and when combined with the evidence that fire can be communicated by a spark at such a distance, and that the fire broke out almost immediately after the train passed, the sum total raises a legitimate inference for the jury that the fire was so communicated.

[2] The point is made that plaintiffs nullified this inference and put their case out of court by putting in evidence certain interrogatories and answers as provided by section 140 of the Practice Act, and especially the answer to the seventh interrogatory, which declares that the defendant used all practicable means to prevent the escape of fire, etc., and for that purpose provided screens in its locomotive to arrest and prevent as much as practicable the escape of fire. But we see no force in this proposition. The answers, of course, are evidence; but they are evidence at best of an interested party, and of no more force than the testimony of one witness called for plaintiff contradicting that of a previous witness. The jury may select the testimony which appears to it most worthy of credence, and reject the other.

The nonsuit was therefore properly denied.

The claim that a verdict should have been directed is based on the voluminous evidence as to the character, condition, and inspection of the spark-arresting screens. As was said in the former opinion (78 N. J. Law, 323, 74 Atl. 521): "If it must be fully credited, and constituted the only evidence that bore upon the care exercised by the defendant, it demonstrated that the defendant had used all practicable means to prevent the communication of fire, and had fulfilled its statutory duty." But it is contradicted in substantially the same way as before, viz., by testimony indicating that sparks did es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 81 A.—54

cape and were of sufficient size to travel over 150 feet, and that such sparks would not escape from a screen that was in good order. It is true that this last point does not rest upon the admission of one of defendant's witnesses, as at the former trial; but there was evidence to that effect that the jury were warranted in considering, and with the weight of which, if of probative force, we are not here concerned. So it would have been error to control the verdict on this point.

[3] The next point argued relates to the Mays Case alone, and it is that, assuming the jury were entitled to find a verdict for plaintiffs in the Goodman Cases, there was no evidence to show that the setting of the Goodman fire was the direct and proximate cause of the Mays fire. We have no difficulty whatever on this score. The Mays buildings were directly to leeward of the Goodman buildings and about 1,180 feet away. The Goodman fire consumed in less than an hour the house, barns, and out-buildings; vast volumes of smoke and sparks being blown toward the Mays property by the strong wind. There is no suggestion of another cause for the Mays fire, and that fire was first discovered on the roof of the ice house. So far from there being no evidence to justify a jury that the Mays fire resulted from the Goodman fire, we consider that there was ample evidence, and that the jury was fully justified in so finding. Such a finding being warranted, the chain of causation is as complete as if the fire had spread over the ground, as in *D., L. & W. R. R. v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214, or as if it had been communicated by burning oil floating down stream, as in *Kuhn v. Jewett*, 32 N. J. Eq. 647.

We pass to certain questions raised on the admission and rejection of evidence, and relating to the charge.

[6] The evidence of plaintiff's witness Pease about the effect of use of screens in engines of another railroad company was proper as tending to show the general tendency of screens to deteriorate under conditions substantially similar, and thus raise an inference that screens retained as long as defendant's screens had been retained would probably have become unreliable.

[4] The next point relates to the testimony of James E. Goodman, who had died before the third trial, and whose testimony on the first trial was read. It is based on the twentieth and twenty-first assignments of error. The twentieth is that witness was allowed to use a memorandum to refresh his recollection; the twenty-first, that he was allowed to use a memorandum to which were appended values of the articles mentioned therein, in giving his testimony. The objection to the memorandum was that it had been made up by the witness and his wife and son in concert, each contributing some particulars of the inventory of personal

property destroyed, and the values, with which he or she was particularly acquainted; and it is now urged that this resulted in Mr. Goodman testifying to articles and values of which at first hand he knew nothing. But we find no such point raised by the exceptions. He was allowed to use it "to refresh his recollection," but for no other purpose. For that purpose it was entirely proper, although of course his testimony should have been restricted to items of which he had personal knowledge. He was then examined and cross-examined on various items without any question being raised whether he had such knowledge or not; and hence the court was not called upon to rule further than as above noted. Such ruling was correct.

[7] The evidence as to existence of diaphragms on engines of the Central Railroad was proper as tending to throw light on other conditions obtaining in those engines with respect to appliances for preventing the escape of sparks. But it is complained that the court should have charged the jury, as requested, to disregard all the diaphragm evidence as immaterial to the issue. We are not sure that it was immaterial to the issue; but it is a sufficient answer to say that defendant was fully protected by a charge that defendant was not required to install diaphragms, and that no liability resulted from its failure to do so.

The other matters brought up need not be discussed at length. The fourth request, so far as defendant was entitled to have it charged, was covered by the second, which was charged. The same may be said of the fifth.

[8] The court charged the seventh, and in commenting on it said that due care in inspecting the screens meant a high degree of care. This was fully justified by the language of the statute that all practicable means to prevent the escape of fire shall be used. P. L. 1903, p. 674, § 57. The eighteenth request was substantially covered by other portions of the charge so far as it did not consist of comment on the evidence.

No error was committed by the admission of the question to witness McDonald. The objection came too late, and the grounds urged were unintelligible. The question to the witness Goodman as to who would have occasion to go into the barn was manifestly proper as bearing on the course of business at the barn. The witnesses Turner, Maxfield, and Rehrig, if experts on screens, as is conceded, were obviously qualified to give testimony on the life of sparks.

[9] The fact that the memorandum from which the witness Shannon testified was not offered in evidence was no bar to his being cross-examined on it; whether it was a means of refreshing present recollection (*Wigmore*, Ev. § 762) or a record of past recollection (*Id.* § 753).

The objection now made to a question to witness Taylor was not made at the trial. The objection was that the testimony was irrelevant and incompetent; but it was certainly relevant, and the lack of personal knowledge of the witness, now urged for its exclusion, was not brought out until long afterward, on cross-examination; and there was no motion then made to strike it out.

[8] The evidence as to cost of the farm buildings was clearly admissible on the question of damages. Of course, the cost was not the measure of damages; but such cost is a fact to be considered in ascertaining the fair value of the buildings at the time of the fire and from that the depreciation in value of the farm by reason of the fire.

We find no error in the record, and the judgment will, accordingly, be affirmed.

GOODMAN v. LEHIGH VALLEY R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

Error to Supreme Court.

Action by Edward V. Goodman against the Lehigh Valley Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

McCarter & English, for plaintiff in error. Clark McK. Whittemore, for defendant in error.

PER CURIAM. For the reasons expressed in the opinion in the case of Goodman, executor, against the same defendant (81 Atl. 848), decided at the present term, the judgment under review will be affirmed.

MAYS v. LEHIGH VALLEY R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

Error to Supreme Court.

Action by Edward Mays against the Lehigh Valley Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

McCarter & English, for plaintiff in error. Clark McK. Whittemore, for defendant in error.

PER CURIAM. For the reasons expressed in the opinion in the case of Goodman's executor, against the same defendant (81 Atl. 848), decided at the present term, the judgment under review will be affirmed.

SMITH et al. v. WILSON.

(Court of Chancery of New Jersey. Nov. 16, 1911.)

1. DESCENT AND DISTRIBUTION (§ 129*)—RIGHTS OF HEIRS—EXONERATION—COMMON LAW.

At common law, the heirs at law of a deceased mortgagor had a right of action to com-

pel the administrator to discharge a mortgage made by the deceased on land.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 471; Dec. Dig. § 129.*]

2. QUIETING TITLE (§ 30*)—PROCEEDINGS—PARTIES.

To a bill by heirs against an administrator to compel exoneration of their land from a mortgage made by the deceased, if a bill quia timet to establish the complainants' right in case their land should be applied to the payment of the mortgage debt, for which the personal estate is primarily liable, the holders of the mortgage debt are not necessary parties.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 64-66; Dec. Dig. § 30.*]

3. EXECUTORS AND ADMINISTRATORS (§ 224*)—TIME FOR PRESENTMENT OF CLAIMS—STATUTORY PROVISIONS.

Under the express provision of P. L. 1898, p. 738, § 67 et seq., claims of heirs against an administrator for exoneration from a mortgage made by the deceased, not presented before the rule to bar creditors is made absolute, are barred.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 224.*]

4. EXECUTORS AND ADMINISTRATORS (§ 224*)—PAYMENT OF CLAIMS—STATUTORY PROVISIONS—"CREDITOR."

An heir entitled to exoneration by the personal estate from a mortgage, held by a third party, is a creditor within Orphans' Court Act (P. L. 1898, pp. 738, 740) §§ 67, 70, which provides for publication by an administrator or executor of notice to creditors to bring in their claims within nine months from the date of such order, and that, after the expiration of such time, the court may, by final decree, order that all creditors not presenting their claims within such time shall be barred.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 224.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

5. DESCENT AND DISTRIBUTION (§ 129*)—RIGHTS OF HEIRS—STATUTORY PROVISIONS—EXONERATION.

2 Gen. St. 1895, p. 2112, § 47, and its supplements, which makes the mortgaged property the primary fund out of which debt secured is to be paid, and permits the personal remedy on the bond only after the remedy against the land has been exhausted, abolishes the right of heirs to be exonerated from a mortgage debt, created and owed by the ancestor or testator out of the personal estate of such ancestor or testator.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 471; Dec. Dig. § 129.*]

6. DESCENT AND DISTRIBUTION (§ 129*)—RIGHTS OF HEIRS—EXONERATION.

The right of the heir or devisee at common law to exoneration was not allowed, where he received land, incumbered by a mortgage which secured a debt which the ancestor or testator did not owe.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 171; Dec. Dig. § 129.*]

7. EXECUTORS AND ADMINISTRATORS (§ 450*)—PRESENTMENT OF CLAIM FOR EXONERATION—EVIDENCE—LIMITATIONS.

Evidence, in an action by heirs of a married woman against her administrator to compel exoneration of their land from a bond and

mortgage, made by the deceased to secure her own debt, held insufficient to show a presentment of the claim to the administrator within the time required by the Orphans' Court Act (P. L. 1898, p. 738) § 67 et seq., and before the claim was barred by a final rule against creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 450.*]

8. DESCENT AND DISTRIBUTION (§ 129*)—RIGHTS OF HEIRS.

The right of heirs who have presented no claim against an administrator for exoneration of their land from a mortgage made by deceased within the time required by law to present a claim, where the estate is settled and a surplus remains in the administrator's hands as provided by P. L. 1898, p. 740, § 72, cannot be asserted where there is no proof of a judicial settlement of the decedent's estate by the administrator.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 129.*]

9. EXECUTORS AND ADMINISTRATORS (§ 227*)—CLAIM FOR EXONERATION—STATUTORY PROVISIONS—EFFECT OF PRESENTATION.

Under 2 Gen. St. 1895, p. 2112, § 47, which provides that where a bond and mortgage have been given for the same debt the first proceeding shall be to foreclose the mortgage, and that if, at the sale of the mortgaged premises, there is a deficiency, the mortgagee may proceed on the bond for such deficiency, a timely presentation by the heirs of a claim against an administrator for exoneration from the burden of a mortgage, made by the deceased, or by themselves as assignees of the mortgage or as parties subrogated thereto by payment of the mortgage debt, does not amount to a claim for the whole debt, but is merely a claim for the payment of any deficiency which may thereafter be declared due to the claimant after his primary security, the land, has been exhausted.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*]

Suit by Helen J. Smith and another against Frederick F. Wilson, administrator of Frances M. G. Wilson, deceased. Heard on pleadings and proofs in open court. Bill dismissed.

Gilbert Collins, for complainants. David Harvey, Jr., for defendant.

STEVENSON, V. C. [1] This is a suit by heirs at law of a deceased married woman to compel her administrator, her surviving husband, to exonerate their land from the burden of a bond and mortgage made by the married woman to secure her own debt shortly before her decease in December, 1903. Under the common law the right to exonerate in such a case was well settled. *Keene v. Munn*, 16 N. J. Eq. 398; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, 653; *Cumberland v. Codrington*, 3 Johns. Ch. 229, 251 8 Am. Dec. 492 (Kent, Ch., 1817); *Creesy v. Willis*, 159 Mass. 249, 251, 34 N. E. 265; 2 Jarm. on Wills, 631; 1 Robbins on Mtgs. pp. 750-757; *Fisher on Mtgs.* (1910) §§ 1318-1346.

It is established beyond doubt that the husband as administrator has received mon-

ey and securities after all other debts have been paid, far in excess of the mortgage debt. In April, 1904, the mortgagee, one Van Cleef, assigned his bond and mortgage to William Applegate, and a few days later Applegate assigned to a party who holds for the benefit of the complainants. In fact, the complainants procured the assignment from the original mortgagee, Van Cleef, by giving to Van Cleef a mortgage upon other property which they owned for the amount of the mortgage debt. The mortgage debt was thus in fact paid by the complainants while they procured the bond and mortgage to be transferred through Applegate to their appointees who hold entirely subject to their control. The bill therefore may be regarded as a bill by heirs to obtain exoneration from a mortgage debt from the personal estate of their ancestor who executed the mortgage and owed the debt, or perhaps as a bill to enforce the rights of the original owner of the mortgage debt against the personal estate of the intestate on the ground that the complainants have been subrogated to those rights by reason of their having been obliged for their own protection to pay the mortgage debt for which they claim they stood secondarily liable. The arguments and the briefs submitted to the court have, I think, dealt with the case in the aspect first mentioned. The holders of the bond and mortgage by assignment from Van Cleef, who are mere agents or trustees for the complainants, are not made parties to this suit.

[2] No objection has been made to the non-joinder of these parties. If the bill is to be treated strictly as a bill *quia timet* to establish the complainants' right to be exonerated in case their land should be applied to the payment of the mortgage debt, for which the personal estate in the defendant's hands is primarily liable, the holders of the mortgage debt are not necessary parties. *Woolmershausen v. Gullick* [1893] 2 Ch. 514.

The bill in this aspect is not filed to compel the defendant to pay the mortgage debt. The complainants have no concern with the payment of the debt if their land can be relieved therefrom. Payment of the debt may never be demanded from anybody. If the complainants see fit to do so, they may take up the mortgage debt, claim subrogation, and enforce collection against the fund primarily liable. We are now of course assuming that the complainants have a right to be exonerated according to the ancient well-settled rule.

If the bill must be also regarded in its second possible aspect as above stated, *viz.*, as a bill filed by complainants as the holders of the mortgage debt by subrogation or assignment, to collect the same from the defendant administrator, the absence of the parties who hold the mortgage debt as trustees

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for the complainants is certainly a serious matter, although it may be that it is not sufficiently serious or embarrassing to make it necessary that the court of its own motion should stay the suit until these parties are brought in. *McLaughlin v. Van Kueren*, 21 N. J. Eq. 379.

The answer sets up two defenses: First, that on January 11, 1904, a rule to bar creditors was made by the orphans' court of Monmouth county and duly advertised, etc., pursuant to the statute (Laws of 1898, p. 738, § 67 et seq.), and that on October 14, 1904, the rule to bar creditors was made absolute, that no claim for payment of the mortgage debt was made to or filed with the defendant as administrator by the holders of the mortgage or by any person for them or on their behalf, and that no claim was ever made that the mortgage was a burden from which the lands in question should be exonerated, so that if the complainants ever had any claim the same is barred by the decree of the orphans' court.

Besides the bar of the decree, the answer denies that it became the duty of the defendant as administrator to pay the mortgage debt out of the personal estate in his possession and to exonerate the complainants' land from the burden thereof.

[3] The decree barring creditors above mentioned, entered October 14, 1904, excluded every creditor of the decedent who had neglected "to bring in and exhibit his or her debt, demand, or claim" within nine months from the date of the prior order, to wit, January 11, 1904. *Young v. Young*, 45 N. J. Law, 197.

My conclusion is that the bill of complaint should be dismissed for the following reasons:

[4] (1) No proof of the complainants' claim to exoneration was exhibited under oath within nine months from January 11, 1904, or at any time thereafter. Counsel for the complainants argues that this claim for exoneration is not such a debt as comes within the terms of this special statute of limitations. I cannot adopt this view. The statutory words are "debts, demands and claims." Laws of 1898, pp. 738, 740, §§ 67, 70.

It is true that the statute provides only for calling in and barring "creditors" of the estate, but in my judgment a party holding a right to exoneration against the estate from a debt held by a third party is a creditor within the meaning of this statute. Whether the word "creditor" is used in a statute in a narrow or a wide sense must be determined by the object and nature of the statute. In *Ryan v. Flannagan*, 38 N. J. Law, 161, 164, Mr. Justice Van Syckle, speaking for the Supreme Court of the statute in question, says: "The object of the statute is to inform the personal representatives of the claims which may be outstanding against the estate of the decedent, that

he may know how to administer it, and not be subjected to suits after he has disbursed all the assets." See, also, *Newbold v. Fenimore*, 53 N. J. Law, 307, 309, 21 Atl. 939; *Emsen v. Allen*, 62 N. J. Law, 491, 493, 41 Atl. 703.

The opinion of Chief Justice Beasley in *New Jersey Insurance Co. v. Meeker*, 37 N. J. Law, 282, exhibits the wide range of meaning of the word "creditor" according to the nature and object of the statute in which the same is used. In that case the remedial statute entitled "An act for the relief of creditors against heirs and devisees" was held to use the word "creditor" in a broad sense so as to give the benefit of the act to a party holding a right of action on account of the breach of a covenant against incumbrances. I am unable to perceive any reason why, in view of the object of the statute in question, all parties holding claims against the estate which may in the future be put in judgment against the executor or administrator, however contingent they may be, should not be deemed creditors within the meaning of this statute. This view is aided by the fact that the parties termed "creditors" or holders of obligations of some sort against the estate are not merely called upon to bring in their "debts," but their "demands" and their "claims."

[5] (2) If there never had been any statutory bar, I think that the defense that there was no duty resting upon the administrator to exonerate the land from the burden of the mortgage debt is sustained because the act of March 12, 1880 (2 Gen. Stat. p. 2112, § 47) and its supplements have abolished, in cases of this class, the right of the heir or devisee to be exonerated from a mortgage debt created and owed by the ancestor or testator out of the personal estate of such ancestor or testator. In such cases, the statute expressly makes the mortgage the primary fund out of which the debt secured thereby is to be paid, and permits the personal remedy on the bond only after the remedy against the land has been exhausted.

The ancient rule, which is invoked in favor of the complainants in this case, is based upon the theory that the personal estate of the testator or intestate is the primary fund out of which his debts are to be paid. *Fisher on Mtgs.* (1910) § 1319.

[6] Exoneration was not allowed where the heir or devisee received his land incumbered by a mortgage which secured a debt which the ancestor or testator did not owe. *Campbell v. Campbell*, supra; *Mount v. Van Ness*, 33 N. J. Eq. 262.

The general rule under consideration accorded with the policy of the English law which protected the heir and had tender regard for landed estates by which families were sustained and family succession was promoted. In modern times, and especially in America, land occupies a very different position from that which it occupied under

the old English system. Men buy lands and put mortgages upon them, sell their equities, and often times deal with the lands which they have mortgaged as the primary fund out of which payment of the debt is to be made. Great fortunes which perpetuate families are perhaps handed down more frequently in the form of personal property than in the form of land. The authorities agree that the ancient rule was founded upon a presumption in regard to intention. The testator could very easily compel his devisee to take lands which he had mortgaged cum onere. Fisher on Mtgs. (1910) § 1322.

At an early period the state of New York abolished the right of the heir or devisee to exoneration in the class of cases under consideration. 1 R. S. (1829) p. 749, § 4. This statute provides that: "Whenever any real estate subject to a mortgage executed by any ancestor or testator shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, unless there be an express direction in the will of such testator that such mortgage be otherwise paid." The English Parliament in 1854 passed a statute similar in effect but much broader, providing that where a person dies seised of land, etc., *charged with any money by way of mortgage*, the heir or devisee shall not be entitled to have the mortgage discharged out of the personal estate or any other real estate of the ancestor or testator, but that such land so received by him shall be primarily liable unless the testator or intestate shall "by his will, deed or other document have signified any contrary or other intention." 17 and 18 Vict. c. 113. Subsequent supplementary English legislation was in the direction of extending and enforcing this new law. 30 and 31 Vict. c. 69; 40 and 41 Vict. c. 34.

I am unable to see the force of the argument for the complainants which has been made in this case, based upon the fact that the owner of lands who has mortgaged them to secure his debt may waive the benefit of this statute. Of course, the right under this statute was created for the benefit of the mortgagor, and therefore he may waive it. The difficulty is that in this case the intestate in 1903 when she made this mortgage, and in 1904 when she died, presumably knew the law of the state, and knew that her mortgage debt was primarily charged upon the mortgaged land. In this situation of law and fact she died without making any waiver, and allowed her land to descend to her heirs. Presumably she intended that her heirs should receive her lands just as she held them with this mortgage debt primarily charged upon them. Presumably she intended that her husband should have the residue of her personal estate after the payment of her debts which were not specially charged upon real estate or other property. Under the law of New Jersey as it had stood continuously from 1880, 23 years before this

mortgage was made, the mortgage debt from its inception was primarily charged upon the land which it covered, and the personal liability of the mortgagor could only be enforced after the exhaustion of the primary security. To hold now that the law should presume that the intestate (Mrs. Wilson) intended that the mortgage debt should be paid first out of her personal estate, it seems to me would not be in accordance with common sense. Of course, after the death of Mrs. Wilson, if any waiver of the benefit of this statute could be made, it would have to be made by the administrator.

Perhaps the change in our law as to exoneration of heirs in cases like this may be summed up in the statement that under the former law of this state and of England, when this rule of exoneration was first laid down, the personal estate was the primary fund out of which all debts of a decedent, including mortgage debts, were to be paid in the absence of any effectual declaration by the decedent of a different intention, whereas under the statutory law of New Jersey dating from 1890, where a bond and mortgage of land are given for the same debt, the land is the primary security, and any personal liability can be enforced only when the remedy against the land has been exhausted or become of no value, and therefore when an owner of mortgaged land dies, whether he owes the mortgage debt or not, the land remains the primary security for the debt, in the absence of any legally effectual declaration of intention on his part to the contrary.

(3) Until the bill was amended it could not possibly have been regarded as a bill to enforce the collection of the mortgage debt for the benefit of the complainants who stood subrogated to the rights of the original holders of that debt. By the amendment, however, we have the allegation, than which there is no broader proof in the case, that the assignment from Van Cleef was in consideration of the giving to him by the complainants of their bond for \$5,000, the amount of the mortgage debt, secured by their mortgage on other lands owned by them, and that the said Applegate and the said Elizabeth B. Smith and Harriet L. Smith, who were originally alleged in the bill to be the present owners of said mortgage, were "the nominees of the said heirs at law," and that the said mortgage was "held subject to the control" of the complainants. The original bill alleged that the mortgage had never been paid. There are difficulties in the way of regarding the amended bill as presenting the case of the acquisition of the mortgage debt by the complainant through payment and subrogation, or by purchase and assignment. While there was no argument on this possible aspect of the bill, the testimony was taken upon the question whether the debt on the bond was presented under oath to the administrator within the prescribed period

so as to escape the bar of the decree of the orphans' court. This we may note is a very different matter from the proposition that the "claim" and "demand" for exoneration was not presented under oath, and therefore was barred.

In view of the scope of the depositions and the argument that was made, it would seem to be proper to consider and decide the issue whether or not the collection of the mortgage debt from the defendant administrator stands barred by the above-mentioned decree. The question of fact is: Was this mortgage debt exhibited under oath to the administrator within the period which ended on October 11, 1904? It appears that a formal proof of the mortgage debt was delivered by Mr. James D. Carton, a practicing lawyer of Asbury Park, N. J., to Miss Bertha G. Stryker, a stenographer in his employ, to be served upon the administrator. Presumably the claim which is typewritten was prepared by Mr. Carton, and it was sworn to before him as a master in chancery. Miss Stryker did not obtain an opportunity to effect service for three or four days after she had received the paper, and she testifies that she then effected service upon Mr. Wilson personally, and that a few minutes later he returned the paper to her in Mr. Carton's office, stating that he would not have anything to do with it. Mr. Wilson denies that such service was made, or at least has no recollection of it. I shall not enter into the question whether the paper in fact was served or not; the important matter to determine being whether it was served on or before October 11, 1904. The jurat recites that the affidavit was taken before Mr. Carton on a day of October, 1904, which is left blank. A copy of the bond is attached to the proof which is made from a printed form of bond which bears upon it the printed name and address of Mr. Carton. Whether Miss Stryker did the typewriting she was not asked. The paper is evidently an accurate and lawyer-like document carefully prepared. The absence of a date in the jurat should, I think, be taken strongly against a finding in favor of service within the first 11 days of October, 1904. The date in a case like this may be intentionally omitted for a fraudulent purpose, and that possibility makes it proper, I think, that in all cases a paper like this should be regarded as under suspicion.

The significant facts, which I think with the other circumstances are fatal to the complainants in this case, relate to the failure of the complainants to produce evidence presumably within their control, which apparently would or at least might fix the date when this paper was served if in fact it was served at any time. The attention of counsel for the complainant was called to the absence of some of these witnesses, and time was given in order that their testimony might be produced.

The mortgage debt was held by appointees of the complainants and was wholly under their control. The inference is absolutely unavoidable, as the proofs stand, that the presentation or attempted presentation of this debt on the bond under oath to the administrator was business which the complainants attended to on their own behalf, as they were the only parties interested. Presumably the lawyer, Mr. Carton, was employed by the complainants. The proof of the debt presumably was drawn in Mr. Carton's office, and he undertook to instruct his employé to effect service. Accepting Miss Stryker's testimony as accurate, and disregarding the defendant's denial, it appears that some time in or near October, 1903, the proof of the debt was served personally upon the defendant, and that he promptly rejected the paper, throwing it down and leaving it in Mr. Carton's office. The paper was produced upon the trial of this cause by the complainants, and Miss Stryker in substance stated on the stand that a few days before she gave her testimony Mr. Carton asked her if she remembered seeing this paper before. Here we have the lawyer, who drew and undertook to effect service of this proof of debt, presumably notified promptly that acceptance of the paper had been refused by the administrator, and yet he does nothing but apparently submits to the rejection of the claim.

Neither Mr. Carton nor the complainants, nor the nominal holder of the mortgage debt who made the affidavit attached to the proof, are produced as witnesses in this cause. Is it possible that none of these persons can establish the date when this affidavit with its dateless jurat in fact was drawn or sworn to? Did the lawyer attend to this business for nothing? Did he make no charge in any book which would fix the date when he rendered this very considerable service to his client? Did not Miss Stryker report to her employer that the paper which she says she served upon the defendant had promptly been returned and rejected by him?

[7] Whatever may be the exact definition of the rule as to the burden of proof in this case, I feel compelled to draw the conclusion that this proof of the mortgage debt was not presented within the time required by law, and therefore the mortgage debt is barred by the statutory decree of the Monmouth orphans' court.

[8] (4) The bill, giving all possible force to the meager amendment, cannot in my judgment be deemed as presenting a case under section 72 of the Orphans' Court Act (Laws of 1898, p. 740). There is no allegation or proof of a judicial settlement of the decedent's estate by the administrator, the defendant. *Emson v. Allen*, 62 N. J. Law, 491, 41 Atl. 703. This is a fatal defect and makes any further discussion of other possible defects unnecessary. Whether upon a bill aptly framed a case of equitable cognizance

could be presented under section 72 of course will not be considered. Such a bill would have to be supported by the ancient right to exoneration which I have found to no longer exist in a case like this.

[9] (5) Assuming *arguendo* that the enforcement of the mortgage debt against the defendant has not been barred, it is important to see precisely what the presentation under oath to an executor or administrator of a claim on a bond and mortgage like this amounts to. The matter I think is made plain by the case of *Crater v. Smith*, 42 N. J. Eq. 348, 7 Atl. 575, and the same case on appeal, 43 N. J. Eq. 636, 12 Atl. 530.

The practice of presenting under oath the whole mortgage debt as due on the bond is sustained by this case; but what the claim amounts to is not a claim for the whole debt, but merely a claim for the payment of any deficiency which may thereafter be declared due to the claimant after his primary security (the land) has been exhausted. Mr. Justice Van Syckle (43 N. J. Eq. 639, 12 Atl. 531), speaking for the entire Court of Errors and Appeals, discusses the effect of the act of March 12, 1880, as amended in 1881, upon "bonds and mortgages given for the same indebtedness" by a decedent whose estate was before the court, and he says: "The act of 1881 prohibits suit upon the bond until sale is made under the decree of foreclosure, but does not prevent the creditor from presenting his claim to the administrator under the rule to bar. If not presented within the time so limited, it cannot be presented at all. The object of said act is to compel the mortgagee to look primarily to the mortgaged premises for payment, and to limit the time for suing for deficiency to six months from the date of sale."

In the light of this authoritative exposition of the relation of the mortgage debt in this case to the land covered by the mortgage and the personal estate of the mortgagor who signed the bond and contracted the debt, what possible ground can there be for holding that the complainants, as assignees of the mortgage or as parties subrogated by payment of the mortgage to the mortgagee's rights, can stand in any different position from that which the original mortgagee would occupy upon the death of the mortgagor? The complainants, if subrogated, merely succeed to certain fixed rights and remedies; they get no further or higher rights; they must therefore exhaust their remedy against the land first and their proof, if properly made in time, would only entitle them under the statute, within the time limited, to recover any deficiency in case such deficiency remained after the proceeds of the sale of the land had been exhausted.

Recurring also to the independent claim on the part of complainants to exoneration—the only claim, under the present pleadings,

which perhaps is fairly presented for consideration—the same question may be asked: What possible ground is there for holding that in a case like this the ancient right to exoneration, which was based upon the fact that the personal estate was primarily liable for the mortgage debt, now remains when by this statute the order of liability has been reversed and the land is declared to be primarily liable and the personal estate of the mortgagor only secondarily and contingently liable to satisfy a possible deficiency?

The authority last cited directly refutes the argument of counsel for complainants that the prior liability of the mortgaged land remains only during the lifetime of the mortgagor, if, indeed, there could be any support in reason for such a violent construction of the statute.

ONDIS' ADM'X v. GREAT ATLANTIC & PACIFIC TEA CO.

(Court of Errors and Appeals of New Jersey.
Nov. 22, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 185*)—INJURY TO EMPLOYÉ—DUTY TO WARN—IMPUTED NEGLIGENCE.

When the place, assigned by the employer to his employé to work, is safe for him while certain machinery, with which he is obliged to come in contact and over which he has no control, is at rest, but is liable to become a place of great peril to him the instant such machinery is started in motion, and a previous method of warning him of such starting had been uniformly pursued by the employer through the act of another employé, who was in control of the machinery and had undertaken the duty of giving such warning, the neglect of the latter to give the warning is legally imputable to the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 197*)—FELLOW SERVANTS.

Such employés are not to be regarded in law as fellow servants engaged in a common employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 489, 490; Dec. Dig. § 197.*]

Error to Circuit Court, Hudson County.

Action by Ondis' Administratrix against the Great Atlantic & Pacific Tea Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Griggs & Harding, for plaintiff in error. McDermott & Enright, for defendant in error.

VREDENBURGH, J. Ondis, the plaintiff's intestate, was at work for the defendant in an uncovered pit or trench, about five feet deep from the surface of the ground, under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the sidewalk curb adjacent to its warehouse premises, in Jersey City, and was killed by the sudden revolution of a powerful screw under his feet, which, in revolving, caught his legs and clothing, and almost instantly tore off his feet.

The deceased was engaged, in obedience to the orders of Mr. Parker, the superintendent of construction and machinery of the company, in bailing water from the bottom of the pit in which he stood, by reaching down and filling pails with water, which he then handed up to Mr. Parker, who was within his reach upon the adjoining bank. In order to retain his footing so as to accomplish this work, he stood within the pit, either upon, or very close to, this screw, which was then stationary, and partly inclosed in a U-shaped iron trough underneath the screw, and in which, when in motion, the screw turned.

The screw was revolved by electrical motors, operated and controlled from a switch-board by the engineer in his engine room, at a distance (not stated in the evidence) away from the pit, but completely out of the sight of any person, whether standing in the pit or on the bank adjoining it. Neither the engineer while in his engine room, nor the employé while in or at the pit, could see each other, nor was there any mechanical or other means of signaling between them.

The place in the pit where Ondis stood while bailing the water was entirely safe, so long as the electrical power was off, and the machinery and screw consequently were at rest; but the instant the power was turned on and the screw revolved his position became one of immediate peril to his life. It is clear from the engineer's testimony that he was fully aware this machinery could not be started without extreme danger of fatal consequences to the man in the pit. This knowledge that officer expressly admitted. By these admissions it appears that Ondis had, on occasions previous to the accident, worked in the pit. The engineer testified that on these occasions he would always find out where Ondis was before he would start the machine; that, if Ondis was bailing water, when he got through with his job he (Ondis) would either come from the pit and tell him (the engineer) that the water was all out, or, if not, that he himself would go out and see Ondis, and see that everything was all right, and then come in and start it; "that he would go out there *every time* and look if the work was done, because he knew what it was, and knew the piece of machinery it was, and *didn't want to see any man there*; * * * and that he *never turned on the power until he had ascertained in that way that everything was right.*"

[1] It is thus evident that on all previous occasions when Ondis had occupied the pit, except the fatal one, the engineer's universal practice before starting the machinery had

been to find out, either from his own view, or by the presence and statements of Ondis to him, that the latter had left the pit, and this course of practice Ondis must be presumed to have relied upon for his safety. But on the occasion of the accident the engineer, instead of first obtaining personal knowledge of the situation of Ondis, obeyed the order sent to him by Superintendent Parker to start the machinery.

The jury were warranted in finding from the testimony of three eyewitnesses of the occurrence, who were in close proximity to the pit, that Ondis was still standing in the pit, either upon, or in very close contact with, the screw, when it revolved after the machinery had been started. Not only so, but the very nature of the injuries inflicted upon the body of Ondis demonstrated this fact. The person who rescued him from the machinery after the accident said that he was obliged to cut intestate's flesh and clothing in disentangling him from the blades of the screw. These eyewitnesses also testified that no notice or warning of the starting of the machine was given by any one in their hearing to Ondis before the accident.

It is true that Superintendent Parker, in his testimony, says that before he sent the order to the engineer to turn on the power (which he admits he gave) he had "told Ondis to get out of the pit"; * * * that he "had given him a hand to pull him upon the bank, and saw him upon the bank"; but the jury were plainly justified in coming to a contrary conclusion.

It is but just to the superintendent, in view of his testimony, to add that when he sent the order to the engineer to start the machinery he probably supposed that Ondis had gotten fully out of the pit upon the bank. Nevertheless, the jury were justified in finding under the evidence that the former was guilty of negligence in ordering the power to be turned on too soon. And the question to be now determined is whether his negligence is legally imputable to his employer.

We think this negligent act of the superintendent, who assumed to act in the place of the engineer, is chargeable in law to the company. As has been fully shown above, the engineer had, in practice, on all previous occasions when Ondis had been at work in the pit, kept in personal touch with him, and had, with the knowledge of Ondis, adopted and acted upon this method or system, under which Ondis' safety was assured. This was the company's method of protecting its employes, and it follows that the failure of Parker, who assumed to act, and acted in this instance, in the place of the engineer, to give Ondis warning that he was about to order the machinery to be started was the failure of the company, and the former's negligence that of the company.

The case is thus brought within the prin-

ciples settled by a long line of adjudications of our courts, one of the earliest and most notable of which is that of *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834, followed by *Germanus v. Le-high Valley Co.*, 74 N. J. Law, 662, 67 Atl. 79, and a reference to the Digest Annotations will show how undeviatingly it has since been approved and followed by our courts.

The plaintiff in that case was injured by a piece of rock thrown out from a blast, because the foreman had through negligence failed to give timely warning, according to a system or method previously pursued; and it was held that the giving of warning was embraced in the duty owed by the employer to his employes that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty carefully was imputable to the defendant as employer; and that such failure was not one of the obvious dangers of which the plaintiff, as employé, assumed the risk.

The place where the intestate was put to work by the defendant was liable to become one of exceptional peril to the former, and he had the clear right, under the settled rules of a long line of authority, to assume that his employer would take reasonable care to warn him before the danger became imminent and actual, and to proceed with his work in reliance upon this assumption; and, since his employer had assigned to other servants the duty of giving such warning to him (the intestate), he had the right to depend upon its due and careful performance by them. *D'Agostino v. Pennsylvania R. R. Co.*, 72 N. J. Law, 358, 60 Atl. 1113; *Burns v. Del. & Atl. Tel. Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; *Albanese v. Central R. R.*, 70 N. J. Law, 241, 57 Atl. 447; and *Pakusewski v. Ringwood Co.*, 79 Atl. 319.

[2] These other servants were not fellow servants engaged in a common employment with him (the intestate), but are to be regarded as acting in this respect as the representatives of the master, and the only question is whether they in fact exercised due care. See page 754 of *Burns v. Del. & Atl. Tel. Co.*, supra; *Laragay v. East Jersey Pipe Co.*, 77 N. J. Law, 516, 72 Atl. 57; *Del. & W. R. R. Co. v. Hardy*, 59 N. J. Law, 40, 34 Atl. 986; *Polo v. Palisade Construction Co.*, 75 N. J. Law, 873, 70 Atl. 161.

The counsel of the plaintiff in error ably argue in their brief that the engineer's testimony brings the case at bar within the principle of the case decided by this court, of *Koneski v. Del., L. & W. R. R. Co.*, 77 N. J. Law, 645, 648, 74 Atl. 516, 26 L. R. A. (N. S.) 644.

In this case, as it was made by the plaintiff's evidence, it appeared that while he was at work for defendant at night, close to its tracks, shoveling ashes at an ashpit, one of

the company's engines, running upon its tracks, struck and injured him; no warning having been given by bell rung, or whistle blown, upon the engine striking him. This court held, in reversing the plaintiff's judgment below, that the railroad's engineer, who had failed to give such warning, was to be regarded as a fellow servant of the plaintiff, for the reason that the duty of giving the warning, under the facts there presented, was merely *incidental* to his *general* employment, and his failure to perform that duty was not imputable to the common employer.

But it will be observed by an examination of the reasoning at page 648, 77 N. J. Law, at page 517, 74 Atl. (26 L. R. A. [N. S.] 644) of the opinion, delivered by the Chief Justice, that after a careful analysis of many prior adjudications upon the subject he distinguishes that case from one like the case before us, and I think it important to quote his language, viz.: "In our opinion, the present case comes within the principle of the *Miller Case* [69 N. J. Law, 413, 55 Atl. 245], rather than within the *Belleville Stone Company* and *Germanus Cases*. If an employé of the defendant had been *delegated* by it to attend at the ash pit and warn those at work there of the approach of engines, and his failure to give warning had been the producing cause of the accident to the plaintiff, the case would *then*, in its legal aspect, have been parallel with those last mentioned." He adds: "But the duty of blowing a whistle, or ringing a bell, which rests upon the engineer in charge of an engine, is an *incident of the operation of the engine*, and failure to perform that duty, therefore, does not impose responsibility upon the master for injuries received by another employé in the common work."

This distinction, so pointedly drawn in the *Koneski Case*, is manifestly applicable to the present. The jury were warranted in concluding from the evidence relating to the practice of warning previously pursued and recognized by the defendant, that the engineer in charge of the motors had been *delegated* by it to personally ascertain whether or not Ondis was at work in the pit, and if in the pit to warn him, before he turned on the electric power. Under such method the intestate was justified in acting upon the belief that the company regarded it as a duty to adhere to that system of warning him to get out of the pit, before the engineer started the machinery. This duty, Superintendent Parker, acting for the company in the stead of the engineer, failed to perform. Neither the engineer nor Parker were engaged, therefore, in a common employment with the intestate, but must be regarded as acting, under the circumstances, as the representatives of the company.

The judgment below, which was for the plaintiff, should be affirmed.

HILL v. ADAMS EXPRESS CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 163*)—SHIPMENTS OF FREIGHT
—COMMON-LAW LIABILITY.

Where a common carrier undertakes to transport merchandise, the presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by proof of a special agreement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 722-725; Dec. Dig. § 163.*]

2. CARRIERS (§ 163*)—LIMITATION OF LIABILITY—BURDEN OF PROOF.

The burden of showing an agreement, limiting the common-law liability of a carrier, rests upon the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 722-725; Dec. Dig. § 163.*]

3. CARRIERS (§ 153*)—BILL OF LADING—LIMITATION OF LIABILITY—EFFECT ON SHIPPER.

The mere acceptance by a shipper, without objection, of a receipt or bill of lading tendered by the common carrier that contains a stipulation importing a limitation of the carrier's responsibility, based upon an assumed valuation of the goods that does not correspond with their real value, is not conclusive evidence of the shipper's assent to such limitation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 153.*]

4. CARRIERS (§ 153*)—SHIPMENT OF FREIGHT
—LIMITING LIABILITY—CONTRACT.

Where the shipper accepted in silence from an express company a shipping receipt containing an express limitation of the company's liability to \$50, and it appeared that the shipper did not assent to such a limitation, and did not know that the receipt contained such a limitation, *held*, that the trial judge, sitting as a jury, was justified in concluding, as matter of fact, that the limitation to \$50 was not a part of the contract between the parties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 687-690; Dec. Dig. § 153.*]

Error to Supreme Court.

Action by Frank Hill, to the use of Mary A. Ferris, against the Adams Express Company. Judgment for plaintiff was affirmed on certiorari (80 N. J. Law, 604, 77 Atl. 1073), and defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error.
Joseph Beck Tyler, for defendant in error.

PITNEY, Ch. The Supreme Court on certiorari affirmed a judgment rendered by the district court in favor of the plaintiff, a shipper of goods, and against the defendant express company, for the value of certain merchandise shipped, which was lost by fire without the fault of the express company; the trial court having overruled defendant's contention that its liability was limited by certain stipulations contained in the express receipt or bill of lading, delivered by the company to the agent of the shipper at the time it accepted the goods, which stipulations were as follows: "The company's charge is based upon the value of the property, which must be declared by

the shipper. * * * In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The case was tried in the district court without a jury, and the court's findings of fact are fully set forth in the opinion delivered by Mr. Justice Parker in the Supreme Court. These findings are fairly sustained by the evidence, and are therefore conclusive upon this review.

At the trial defendant's counsel requested the court, among other things, to specifically find that the limitation of liability to \$50 was taken by defendant's employé from an invoice handed to him by the shipper or his agent. The court refused this request, and, on the contrary, found "that neither Frank Hill nor Mary Ferris, nor any other person by their authority and with their knowledge, furnished an invoice to the defendant company; nor did they authorize any one else to do so; nor did they have any knowledge that any one else had done so at the time the shipment was made." This finding fairly deals with the defendant's request by negating it specifically, and we agree with the contention of counsel for the defendant in error that the evidence would support the inference that the supposed invoice, if such there was, had been prepared by the employés of the express company, and not by the shipper or his agent.

There was, however, undisputed evidence that Barnett, the driver of the wagon upon which the goods in question were conveyed to the express company for shipment, and who acted as agent of the plaintiff in respect of the shipment, accepted in silence from the agent of the express company a shipping receipt containing, as already mentioned, an express limitation of the company's liability to \$50.

In view of this evidence, defendant's counsel further requested the trial judge to limit the recovery accordingly. The refusal of this request raises the question that has several times been mooted in this court, but upon which it has not until now been necessary for us to pass, viz., whether the mere acceptance by the shipper, without objection, of a receipt or bill of lading tendered by the carrier that contains a stipulation importing a limitation of the carrier's responsibility, based upon an assumed or conventional valuation of the goods that does not agree with their real value, con-

clusively imports the assent of the shipper to such limitation of responsibility.

It should be mentioned that, as we read the state of the case, the trial judge in effect found as a fact that Barnett, the driver, had authority from the plaintiff to agree with the defendant respecting the terms of shipment, and rested his judgment in favor of the plaintiff upon the fact that neither Barnett nor his employer assented to the limitation of defendant's responsibility to \$50. Therefore the question of law respecting the driver's agency, upon which the Supreme Court on one occasion rested its decision in this case (*Hill v. Adams Express Co.*, 77 N. J. Law, 19, 71 Atl. 683), is not presented as the record now stands.

When the case came to this court upon review of the decision just referred to, we disposed of it on the ground that, since in receiving the box the defendant company dealt with Hill as the shipper, and since there was nothing to show that he or Barnett, the driver, was ignorant of the fact that the bill of lading contained provisions limiting the defendant's liability to \$50, it was to be presumed that they were informed of its contents and assented to the limitation. *Hill v. Adams Express Co.*, 78 N. J. Law, 333, 74 Atl. 674. The presumption referred to was, of course, a presumption of fact, rebuttable like other presumptions of that nature.

Upon the trial now under review, this presumption has been successfully rebutted; and in line with our former decision we hold that, since there was no assent by the plaintiff Hill, or by Barnett through whom he acted, to the limitation of the value of the goods, nor knowledge that the express company's receipt contained a contract limiting the liability of the company, the limitation is not binding upon the plaintiff.

It is unnecessary for us at this time to review the authorities in other jurisdictions. They are fully cited in the cyclopedias. 5 Am. & Eng. Encyc. Law (2d Ed.) 288-294; 6 Cyc. 404, 406. So far as they declare or decide that a shipper who accepts a receipt or bill of lading is conclusively presumed, in the absence of fraud, to have thereby assented to all the terms of the instrument, although he may have been unaware that the document contained any limitation of the carrier's common-law liability, and did not in fact assent thereto, we are not in accord with them. We give, as we think, all legitimate weight to the inference that arises out of the shipper's conduct, when he accepts in silence and without objection a paper tendered by the carrier, by holding, as we do, that acceptance of the paper, without objection, raises a presumption that the shipper knew of and assented to the stipulations contained in it; a presumption which, like other presumptions of fact, is subject to be rebutted.

[1, 2] In transactions of this sort, as in other matters, the assent of both parties is

required in order to make a contract. More than 50 years ago our Supreme Court declared that: "Where a common carrier undertakes to transport an article in his line of business, the legal presumption is that he does it subject to the common-law liability, and this presumption remains until it is overcome by positive proof of a special agreement." *Pennsylvania R. R. Co. v. N. J. R. R. Co.*, 27 N. J. Law, 100. For authority the court relied upon a decision of the Supreme Court of the United States: *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How. 377, 383, 12 L. Ed. 465. The doctrine thus announced entered into the reasoning of this court in *Russell v. Erie R. R. Co.*, 70 N. J. Law, 808, 811, 59 Atl. 150, 152 (67 L. R. A. 433), and Judge Vroom, in delivering the opinion of the court, declared: "The burden of proof of showing such a limitation of liability is on the defendant company, and being in derogation of common right is to be construed most strongly against the carrier. 5 Am. & Eng. Encyc. Law (2d Ed.) 336; *Ashmore v. Penna. Steam Towing & Transp. Co.* [28 N. J. Law] 190; *Hooper v. Wells Fargo & Co.*, 27 Cal. 11 [85 Am. Dec. 211]. No presumptions will be indulged in favor of exemptions from common-law liability."

[3] The doctrine referred to was the ground of the decision rendered by the Supreme Court, in *Hayes v. Adams Express Co.*, 73 N. J. Law, 106, 62 Atl. 234, where the case in 27 N. J. Law was cited, and the doctrine was not at all disapproved by this court on review. 74 N. J. Law, 537, 65 Atl. 1044. On the contrary, our decision there proceeded on the ground that the shipper's knowledge of a customary practice on the part of the carrier to base its charges upon the declared value of the merchandise did not of itself alone import the shipper's assent to a limitation of liability in the particular case.

In *Atkinson v. New York Transfer Co.*, 76 N. J. Law, 608, 71 Atl. 278, we held that if the shipper knew that the rate charged for the transportation of a trunk was based upon a valuation of \$100, and that the receipt tendered to her contained a stipulation limiting the carrier's liability to the amount thus stated, the acceptance of the receipt in silence estopped the shipper from afterwards asserting the value to be greater. Our decision was based upon the actual knowledge and assent of the shipper.

Finally, in our former disposition of the present case (78 N. J. Law, 333, 74 Atl. 674), we relied upon clear, and at that time uncontradicted, evidence of assent by the shipper to a modification of the common-law liability proposed by the carrier.

[4] It would be inconsistent with this long line of decisions, and also, as we think, inconsistent with the reason of the matter, to hold that the mere receipt by the shipper of a paper containing limitations of the common-law liability of the carrier conclusively

imports the shipper's assent to such limitations. We hold, on the contrary, that the facts found by the trial judge, that neither Hill nor the driver in fact assented to the limitation of liability to \$50, nor knew that the express receipt or bill of lading tendered by the company contained such a limitation, warranted his conclusion that the limitation was not a part of the contract between the parties.

The decisions of the Supreme Court, in *Saunders v. Adams Express Co.*, 76 N. J. Law, 228, 69 Atl. 206, and in *Florman v. Dodd & Childs Express Co.*, 79 N. J. Law, 63, 74 Atl. 446, so far (if at all) as they may be inconsistent with the result we have reached in the present case, must be considered as overruled.

The judgment under review should be affirmed.

DENNERY v. GREAT ATLANTIC & PACIFIC TEA CO.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 184*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—EVIDENCE.

The unexplained presence upon a public highway of a runaway horse harnessed to a wagon, unattended by the owner or other person, raises a prima facie presumption of negligence on the part of the owner.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 472; Dec. Dig. § 184.*]

2. HIGHWAYS (§ 184*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—EVIDENCE.

Evidence that the wagon which ran over the plaintiff was conspicuously marked with defendant's name was sufficient to justify the inference that defendant was the owner.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 184.*]

3. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—NONSUIT.

The refusal of a nonsuit for failure of proofs is not ground for reversal if said proofs were afterwards supplied by either party in the progress of the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

4. HIGHWAYS (§ 184*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Where there was proof that the driver of a young horse, which he was driving that day for the first time, drove it up to a railroad crossing where the gates were down and upon which a freight train was drilling at the time, and left it a little while with its head toward the gates and with the hitching weight attached, and then returned and took the hitching weight off, put it in the wagon, and, in order to see that all was right with the goods therein, went behind the rear end of the wagon, so that he may have been in such a position that he could not reach the reins in time to control the horse should it take fright at the sounds which might be expected to occur from the drilling train and which in fact did occur causing the horse to run away, it was a question for

the jury whether or not the driver was guilty of negligence.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 473; Dec. Dig. § 184.*]

Error to Circuit Court, Hudson County.

Action by Robert Dennery by John Dennery, his next friend, against the Great Atlantic & Pacific Tea Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The writ reviews a judgment on verdict in favor of the plaintiff, who was three years and two months old, for personal injuries received by him from being run over on the public highway or street in Jersey City by defendant's runaway horse attached to its delivery wagon. The errors assigned are to a refusal to nonsuit and to a refusal of a motion for the direction of a verdict in favor of the defendant. The plaintiff's case showed a driverless horse running away harnessed to a delivery wagon upon which defendant's name appeared, and coming around a corner (into the street where it ran over plaintiff) from the direction of a railroad crossing a short distance away, where trains were frequently drilling. Upon this evidence the court refused a motion for nonsuit. Defendant then called the driver (Wood), who testified that the team belonged to defendants, and that he as their employé was making deliveries for them with it when the accident happened; that this was the first day he had ever driven the horse in question (which was five years old); that he drove up to the railroad crossing where the gates were down and a freight train, consisting of small dirt cars on springs, was drilling at the time, and attaching the hitching weight to the horse's head left it with its head toward the gates while he made a delivery; that he then returned, removed the hitching weight, put it in the wagon, and went around back of the wagon to see that all was right, and had come up on the side next to where the reins were when the horse became frightened at the starting of the freight cars or the puffing of the engine, both of which the driver heard start up at that moment, and swerving sharply around started to run; that the driver grabbed at the reins, but missed them and fell down, and the horse ran around the corner, and up the street, where the plaintiff was injured.

Griggs & Harding, for plaintiff in error. Tumulty & Cutley, for defendant in error.

WHITE, J. (after stating the facts as above). [1] By reason of their nature and training, horses can be safely utilized to draw vehicles upon public streets only when controlled by reasonably competent driv-

ers. This fact is in such complete accord with universal experience that the legal duty to supply such a driver exists, and consequently it is *prima facie* evidence of negligence for a person to permit his horse attached to a wagon to go out upon a public street without any driver or other person in charge. If, therefore, a horse and wagon are found passing along a street with no one in charge, the absence of the driver gives rise to a *prima facie* presumption of negligence on the part of the owner. The fact that the horse is running does not negative this presumption. That a horse under such circumstances, finding itself without any one's guidance or control, should soon commence running, is the result both of its nature and of its training. Its nature is to frighten at unusual sights and sounds and to run away from them. It has been trained, however, to confide in and rely upon its driver's guidance and protection, instead of resorting to its natural instincts. When, therefore, it realizes the unaccustomed absence of this guidance and sense of protection, it becomes doubly confused and timid, and sights and sounds which seemed to it harmless in the presence of its driver now seem strange and terrifying, and to be avoided only by flight. We think, therefore, that, as stated by the Supreme Court in *Kokoll v. Brohm & Buhl Lumber Co.*, 77 N. J. Law, 169, 71 Atl. 120, and in *Francois v. Hanff*, 77 N. J. Law, 364, 71 Atl. 1128, the unexplained presence upon a public highway of a team of runaway horses harnessed to a wagon, unattended by the owner or other person, raises a *prima facie* presumption of negligence on the part of the owner.

[2, 3] The other point raised by the refusal of nonsuit assignment of error, *viz.*, that ownership in the defendant was not proved in the plaintiff's case, is without merit, for two reasons:

First. It was proved that the defendant's name appeared conspicuously on the wagon, and we approve the doctrine as laid down by the Supreme Court in *Edgeworth v. Wood*, 58 N. J. Law, 463, 33 Atl. 940, following Lord Denman's ruling in *Joyce v. Capel*, 8 Car. & P. 370, that "evidence that the wagon which ran over plaintiff was marked with defendant's name was sufficient to justify the inference that defendant was its owner, and that such inference established *prima facie* that defendant was in possession and control of the wagon by the driver its servant."

Second. The proof of defendant's ownership was clearly established in defendant's own case. This court has held that the refusal of a nonsuit for failure of proofs is not ground for reversal if the defect was afterward supplied by evidence taken in the progress of the trial. *Del., Lack. & West. R. R. Co. v. Dalley*, 37 N. J. Law, 526; *Hibernia*

Mutual Fire Ins. Co. v. Meyer, 39 N. J. Law, 432. The history of this practice is fully stated in the opinion of the Supreme Court in *Bostwick v. Willett*, 72 N. J. Law, 21, 60 Atl. 398.

[4] Coming now to the explanation, as offered by defendant's driver and its other witnesses, of how the runaway occurred, we do not think it presented such a clear negation of negligence on the part of the driver as to justify the court in directing a verdict for the defendant. The horse was young, and this driver was driving it that day for the first time. He drove it up to the gates at the railroad crossing where a dirt car freight train was drilling at the time immediately in front of the horse. When such a train started or stopped in the process of drilling, the attendant noises from the jerking link couplings and clashing bumpers are well calculated to frighten any ordinary horse standing with its head in close proximity to the track. The shifting or other engine itself with its puffing and escaping steam, running first one way and then the other in drilling the cars upon the different switches and sidings, may be even more startling than a locomotive pulling an ordinary train. When, then, with all these circumstances before him the driver removed the hitching weight from this strange young horse's head before going back to the rear end of the wagon to see if everything was all right instead of afterward, it was clearly a question for a jury to decide whether he was or was not negligent in taking a chance of the horse becoming frightened (as it did) by a sudden starting of the freight train or of its shifting engine or both, with their naturally attendant noises, at a time when he (the driver) neither had hold of the reins nor was in a position to catch them up in time to control the horse, and prevent an accident. It is true the driver said he was at the side of the wagon just ready to get in, and with the reins within reach, when the horse started. But the facts are that the horse took fright at the starting of the train or the puffing of the engine, that it turned and ran away, and that the driver did not get his hands upon the reins, although he tried to do so. The jury might well have concluded from these circumstances that the driver was not as near the reins when the horse started as he thought he was, and that the accident in reality happened by reason of his unhitching the horse and then going so far away from it that it was beyond his power of control in case it became frightened, as it did, at the noises which the driver had every reason to expect would occur, and also good reason to expect might scare the horse which he had thus placed in a position of such close proximity to the alarming sounds. Under all the circumstances, we think there

was no error in the refusal to direct a verdict.

The judgment of the Hudson circuit is affirmed.

SCHNEIDER v. MUELLER.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

(*Syllabus by the Court.*)

EVIDENCE (§ 423*)—PAROL EVIDENCE AFFECTING WRITINGS—NEGOTIABLE INSTRUMENTS.

The negotiable instruments act of 1902 (P. L. p. 596), making admissible parol testimony between several indorsers to show that they agreed to become liable otherwise than in the order in which they indorsed the instrument, applies to a note indorsed by several indorsers, which was a renewal of a note made and indorsed by the same parties before the passage of said act.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957–1965; Dec. Dig. § 423.*]

Error to Supreme Court.

Action by Frank Schneider against August Mueller. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Gilboly and Samuel Koestler, for plaintiff in error. Alfred A. Stein, for defendant in error.

KALISCH, J. August Mueller, the plaintiff in error, challenges the correctness of the rulings of the trial court in permitting Frank Schneider, the plaintiff below, to recover a judgment against him, Mueller, in an action upon a promissory note for \$640 payable three months after date, signed by Fred Klopheus and Ann Klopheus, and indorsed in the manner following: "Frank Schneider, August Mueller." The proofs in the case showed that the makers of the note in 1900 employed Mueller, the defendant, who was a contractor, to build a house for them in Elizabeth, N. J., and that Mueller made a subcontract with the plaintiff to do the mason work, and, when the structure was completed, there was due from the defendant to the plaintiff upon the subcontract \$1,000. The plaintiff demanded this sum from the defendant, who, in turn, met this demand with the statement that Klopheus was short of money, and could not pay then, and therefore requested the plaintiff to accept the note of Fred Klopheus and his wife, which the plaintiff refused to do unless the defendant would indorse the note, which the defendant did, and thereupon it was accepted by the plaintiff and was subsequently discounted for him by the Union Trust Company and was renewed from time to time, for less amounts, in the same form as the original one by the same parties thereto, until the note was reduced to the sum sued upon, and, when that became due, it was protested, and the plaintiff compelled to pay it.

The first ground relied upon by the defend-

ant for a reversal of the judgment is that the trial court should have ordered a nonsuit moved for by the defendant at the close of the plaintiff's case upon the basis that the declaration contained merely the common counts with a copy of the note annexed thereto; that the note, on its face, showed that the plaintiff was an indorser and subsequent to the defendant, and therefore the defendant was not liable thereon; that, in order to show a liability of the defendant to the plaintiff, the declaration should have contained a special count showing how that liability arose. There is no merit in this contention. The plaintiff's declaration is strictly in conformity with the requirements of section 30 of the practice act of 1903 (P. L. p. 542), which expressly authorizes a plaintiff in an action on a bill or note to declare on the money counts alone, annexing to his declaration a notice containing a copy of the bill or note, with the indorsements, etc.

The other ground unsuccessfully urged by the defendant for a nonsuit in the trial court, and now urged here as a reason for a reversal of the judgment, was and is that the note in its inception was made before the passage of the negotiable instruments act (P. L. 1902), and therefore it is not affected by the provisions of this statute, and consequently parol evidence was inadmissible to vary the contract between the indorsers as exhibited by the note itself, and that by the note no obligation to pay the plaintiff was assumed by the defendant when he indorsed it. This theory of the defendant is untenable. The action is on a note made in 1909, and for a valuable consideration. Although it was a renewal of a series of notes dating back to 1900, it was nevertheless in legal effect a new transaction, and comes clearly within the operation of the sixty-eighth section of the negotiable instruments act, which makes admissible parol testimony between several indorsers to show that they agreed to become liable otherwise than in the order in which they indorsed the instrument. *Wilson v. Hendee*, 74 N. J. Law, 640, 66 Atl. 413. The original note was given for an indebtedness from the defendant to the plaintiff. The form in which the note was made did not express the true nature of the transaction, but this much is clear, that no vested right of the defendant would have been impinged upon, even if the transaction were considered as one existing before the negotiable instruments act, in having permitted the plaintiff to prove, under the new rule of evidence, the true relation in which the indorsers stood to each other, and that the defendant was the real debtor. It would shock the sense of justice to permit a debtor to evade the payment of a just debt, because of the informality in the exhibit to which he is a party and which owed its origin to him. The testimony showing that notwithstanding that the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was apparently a subsequent indorser to the plaintiff he was in fact a prior one was therefore competent.

The judgment should be affirmed.

HOFFECKER v. AUSTIN.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

PARTNERSHIP (§ 53)—RELATION—EVIDENCE.

Where there is no evidence of an express contract of partnership between the parties, nor of any joint ownership of partnership property, nor an agreement for the sharing of profits as such, nor proof of the acting of any one of the alleged partners for the others, or authority for so acting, relative to partnership affairs, the indicia and criteria of the existence of a partnership *inter sese* are lacking.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.*]

Error to Supreme Court.

Action by James H. Hoffecker against Elwood R. Austin. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Fithian Tatem, for plaintiff in error.
Wescott & Wescott, for defendant in error.

VOORHEES, J. Mr. James H. Hoffecker, Jr., the defendant in error, a member of the Philadelphia bar, was retained in 1905 by Mr. Austin, the plaintiff in error, and one Charles R. Martin, to collect by suit, if necessary, against one Moore a claim for commissions on the sale of a railroad property which Austin and Martin and one Mellen had effected. As a result of his retainer, Hoffecker brought suit in 1907 in the Supreme Court of New Jersey for Austin and Martin against Moore for the recovery of these commissions. Austin and Martin had agreed with Hoffecker that he should have one-third of the amount thus recovered, and that "Austin would stand good for expenses incurred in working up and prosecuting the case to the amount of \$300." In July, 1906, Martin borrowed of Hoffecker \$1,000 on two promissory notes of \$500 each drawn by Martin, and, to secure the repayment thereof in writing, assigned to Hoffecker all his right, title, and interest in his share of the commissions due from Moore (such share being therein stated at \$12,500), "to be held by him as collateral security to the payment of said notes," etc. There was proof that Hoffecker had expended \$287.30 in the prosecution of the suit for commissions. Martin died during the pendency of the suit against Moore, which was revived in the name of Austin as surviving partner. Afterwards, and before judgment, Austin settled the suit against Moore for \$9,000, the distribution of which among all the parties entitled was in such settlement agreed upon by Austin; \$1,500 thereof being allotted to Martin. After the

money had been paid over to Austin in settlement, and which he admitted having received from Moore, and the fact of settlement and its terms and those of the distribution had been communicated to Hoffecker, he was asked formally to agree to such distribution, and he did so. Afterwards Austin refused to pay, and Hoffecker brought this suit to recover \$1,500, the share of Martin in the settlement which the plaintiff claimed under the assignment, and also \$287.30 expenses incurred, that Austin had agreed to pay. The court directed a verdict for the plaintiff for the full amount sued for.

The assignments of error pressed are to the refusal of the trial court to nonsuit, and to direct a verdict for the defendant, and to the direction of a verdict for the plaintiff. It was argued that because the assignment to the plaintiff was as collateral merely, and there was no proof that the plaintiff had ever reduced his collateral rights to absolute rights, the suit could not be sustained. The claim for expenses was clearly recoverable, and therefore a nonsuit or direction for the defendant would have been improper. Moreover, an assignment as collateral entitles the assignee to recover all the property covered by the assignment (Todd v. Meding, 56 N. J. Eq. 83, 38 Atl. 349), and, since the passage of the act permitting an assignee of a chose in action to sue therefor in his own name at law, such an assignment is ample to support a suit for the recovery by the assignee of the chose.

On argument against a direction for the plaintiff, it was admitted that the plaintiff was entitled to a direction in his favor for the amount of expenses, and the objection to such action was confined to the \$1,500 item, and was rested on the ground that "there was no proof of the receipt of it (the \$1,500) by Austin for the purpose set forth." There was uncontroverted proof that Austin not only admitted its receipt, but that he exacted from the plaintiff an assent to his agreed distribution of the proceeds of the settlement, among all the persons who were entitled to share in the money, which contemplated the allotment to Mr. Martin of \$1,500 and the retention by Austin of \$1,500. The remainder of the money was actually paid to the other persons interested, including Mr. Mellen, in the amounts which had thus been agreed upon. That there was a partnership existing was in no wise brought to the attention of the court as a reason why the direction in favor of the plaintiff should not be made. It is true that, upon the motions to nonsuit and to direct the jury to find for the defendant, it was urged that Martin and Austin were partners, and that the latter had received the money as surviving partner, and was not liable to a suit at law by his copartner until an accounting and a balance had been struck. Even importing this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reason from the former motions into the one now under consideration, there seems to have been no proof of a partnership in the case. There was no evidence of an express contract of partnership between the parties, nor of any joint ownership of partnership property, nor an agreement for the sharing of profits as such, nor proof of the acting of any one of the alleged partners for the others, or authority for so acting relative to partnership affairs. These are indicia and criteria of the existence of a partnership *inter sese*. *Hallenback v. Rogers*, 57 N. J. Eq. 199, 40 Atl. 576, affirmed 58 N. J. Eq. 580, 43 Atl. 1098. A partnership relation as between the alleged partners must be derived from and depend upon a contract. *Wild v. Davenport*, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552.

The order of revival of the suit above mentioned was neither proof of that fact nor binding upon the defendant in error. Moreover, the terms of settlement fail to indicate an existing partnership between Austin and Martin, and the pleadings in this case do not suggest the point, while the defined distribution purports a previous settlement of partnership affairs if that relation might have been assumed.

Finding no error, the judgment under review will be affirmed.

HARVEY v. DONNELL.

(Supreme Judicial Court of Maine. June 14, 1911.)

1. NEW TRIAL (§ 168*)—GROUNDS—PREPONDERANCE OF EVIDENCE.

That the record shows that a verdict is against the weight of the evidence does not warrant a new trial, it being necessary that the verdict be clearly wrong.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 168.*]

2. NEW TRIAL (§ 168*)—GROUNDS—WEIGHT OF EVIDENCE—BURDEN OF PROOF.

A defendant, in moving for a new trial for insufficiency of evidence to sustain a recovery, has the burden to show that the verdict is clearly wrong.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 168.*]

On Motion from Supreme Judicial Court, Androscoggin County.

Action by Eva E. Harvey against Charles K. Donnell. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Ralph W. Crockett, for plaintiff. Tascus Atwood, for defendant.

PER CURIAM. [1, 2] The defendant claims, and we think with reason, so far as the face of the record shows, that he produced a

greater weight of evidence in support of his contention than was produced against it. But that is not enough. To justify the setting aside of the verdict, it must be shown clearly that the verdict is wrong; and the burden of showing this is on the defendant. Here the defendant fails. There is nothing inherently improbable in the plaintiff's story, and the court, not seeing nor hearing the witnesses, as the jury did, cannot say that the jury were not warranted in believing her.

Motion overruled.

FALL v. FALL et al.

(Supreme Judicial Court of Maine. June 27, 1911.)

1. TRUSTS (§§ 91, 110*)—CONSTRUCTIVE TRUSTS—ESTABLISHMENT—PROOF REQUIRED.

Constructive trusts, or trusts *ex maleficio*, are based upon fraud or deceit, and can be sustained only upon full, clear, and convincing evidence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 139, 160; Dec. Dig. §§ 91, 110.*]

2. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Ordinarily findings of fact of a sitting justice, based on his seeing and hearing the witnesses, will not be reversed, unless clearly erroneous; but application of the rule depends upon surrounding circumstances and conditions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

Appeal from Supreme Judicial Court, York County.

Action by Charles W. Fall against Oscar E. Fall and others. Decree for plaintiff, and defendants appeal. Bill dismissed.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Mathews & Stevens and George C. Yeaton, for appellants. Orren R. Fairfield, Samuel W. Emery, and Greenleaf K. Bartlett, for appellee.

PER CURIAM. An appeal from a decree in equity. The bill prayed the declaration and enforcement of an alleged constructive trust in a parcel of land. The sitting justice, after hearing, made full findings of fact, supporting the allegations of the bill and decree accordingly.

[1] Constructive trusts, or trusts *ex maleficio*, are based upon fraud or deceit, and can be sustained only upon evidence that is full, clear, and convincing. We can conceive of no class of cases in which a higher kind of proof should be demanded than that which seeks to establish oral contracts to subvert the muniments of title.

"No class is more susceptible to the temptation of fraud, and none in which it can be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

more easily practiced." *Liberty v. Haines*, 103 Me. 182, 193, 68 Atl. 738, 743.

[2] Ordinarily the findings of fact of the sitting justice will not be reversed, unless it clearly appears that such decision is erroneous; and this upon the ground that he has seen and heard the witnesses.

In the application of the rule, circumstances and conditions are to be considered. *Leighton v. Leighton*, 91 Me. 593, 603, 40 Atl. 671. The complainant, to sustain the allegations of his bill, offered as witnesses himself, his wife, and his son, all interested, and, in alleged corroboration, four depositions.

Upon a careful reading of all the evidence, including the record in the action at law between the plaintiff and his brother (*Fall v. Fall*, 100 Me. 98, 60 Atl. 718), we are of the opinion that complainant does not support his bill of complaint by full, clear, and convincing evidence. The conscience of the court is not satisfied that its allegations are sustained, and the decree of the sitting justice must be reversed. A decree will be entered dismissing the bill, with costs.

ALDEN v. CAMDEN ANCHOR-ROCKLAND MACH. CO.

(Supreme Judicial Court of Maine. July 14, 1911.)

CORPORATIONS (§ 516*)—ACTIONS—PLEADING—AMENDMENT.

In an action on a corporate note payable one year after date, plaintiff was properly permitted to amend the declaration by setting forth a provision, indorsed on the back of the note, showing an agreement that the note would be renewed at maturity unless stock of the corporation should be sold to pay it, and by alleging that the time for payment was so extended for 12 months, that stock was not sold to pay it within the extended time, and that payment had been refused.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 516.*]

Exceptions from Supreme Judicial Court, Knox County.

Action by William G. Alden against the Camden Anchor-Rockland Machine Company. On defendant's exception to allowance of an amendment. Exception overruled.

See *Alden v. Camden Anchor-Rockland Machine Co.*, 107 Me. 508, 78 Atl. 977. In that case it was held (1) that the note declared on was not admissible under the declaration as drawn; and (2) that the declaration was amendable by filing a new count, "setting out the entire contract made by the parties." At a subsequent term of court, the plaintiff filed a new count to his writ as follows, and asked to have it allowed:

"Also for that the said defendant, at said Rockland, on the 13th day of July, A. D. 1904, for a valuable consideration, promised the plaintiff to pay him or his order the sum

of five thousand dollars (\$5,000), according to the terms of a written contract by it signed and delivered to the said plaintiff on said date, of the following tenor, to wit: [Here follows a copy of the note and indorsement, as the same appear in 107 Me. —, 78 Atl. 977, supra.] And the plaintiff avers that said preferred stock referred to in said contract was not sold within said 12 months to pay said note at its maturity, and that said note was not called for payment at its maturity, but that the time for payment thereof was extended for 12 months thereafter; and the plaintiff further says that said preferred stock was not sold to pay said note within said further time of 12 months after its maturity, and that said 12 months and said further time of 12 months after the maturity of said note have long since elapsed, yet the defendant, though requested, has not paid the same."

The amendment was allowed, and the defendant excepted.

Argued before EMERY, C. J., and SAVAGE, SPEAR, CORNISH, KING, BIRD, HALEY, and WHITEHOUSE, JJ.

White & Carter, for plaintiff. J. H. Montgomery, for defendant.

PER CURIAM. An examination of the new count indicates that it is drawn strictly in accordance with the opinion of this court already referred to. The action of this court in the premises was taken by reason of the express agreement of the parties submitting the question of amendment to its consideration. It is unnecessary for us to repeat that that amendment is allowable.

The amendment introduces no new parties, nor is there any other objection to the new count open upon these exceptions. In answer to defendant's criticism, we may add that if the note, as now declared on, was not transferable by indorsement, the signatures of the plaintiff and Georgianna Alden indorsed upon the note are mere surplusage. If, on the other hand, it could be so transferred, the indorsee has indorsed the note in blank, and presumably to the present holder, the plaintiff.

PEOPLE'S NAT. BANK v. KENNEBEC WATER DIST.

(Supreme Judicial Court of Maine. July 14, 1911.)

1. WATERS AND WATER COURSES (§ 209*)—REPAIR OF APPLIANCES—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to charge defendant with negligence in repairing a water pipe connected with plaintiff's automatic sprinkler system, as affecting defendant's liability for a fire loss, enhanced by failure of the system to work.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 209.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. WATERS AND WATER COURSES (§ 206*)—REPAIR OF APPLIANCES—MISTAKE.

Even if defendant's employes, in repairing plaintiff's automatic sprinkler system, reversed the valves in an indicator, so that the indicator showed that the water was on, instead of off, that does not make defendant liable for enhancement of plaintiff's fire loss, resulting from the system failing to work, where, after the repairs were made, plaintiff made a test, and in effect approved and accepted the work; any mistake being mutual.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 206.*]

Report from Supreme Judicial Court, Kennebec County.

Action by the People's National Bank against the Kennebec Water District. On report. Judgment for defendant.

Action on the case wherein the plaintiff claimed that, on April 28, 1910, its woolen mills, with their machinery and supplies, were damaged by fire to the extent of approximately \$10,000, through the negligence of the defendant in repairing the water pipe connected with the plaintiff's automatic sprinkler system. The plaintiff contended that the work was so negligently performed that, at the time of the fire, the automatic system failed to work, and the plaintiff's loss, or at least a part of it, was legally attributable to the defendant.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, KING, BIRD, CORNISH, and HALEY, JJ.

Heath & Andrews, for plaintiff. Harvey D. Eaton, for defendant.

PER CURIAM. [1, 2] The record shows that just prior to March 25, 1910, a leak was discovered in the pipe located on plaintiff's land and connecting one of the defendant's mills with the main in the street, and the plaintiff made arrangements with the defendant to repair the same. The leak was near an indicator post, that indicated, when in proper condition, whether the water was on or off by the sign "open" or "shut," and the plaintiff claims that the workmen of the defendant must have disarranged the mechanism of this post, so that the sign read "open" while in reality the water was off.

It further appears that the leak was repaired by defendant's workmen in a few hours, and, when the work was completed, the foreman of the crew notified the superintendent of the mill of the fact, and a test was made, either by the superintendent or in his presence, to ascertain whether the water was on, and they both were satisfied that it was, and the workmen left; in fact, the test was made by mistake on a faucet that was not connected with this repaired pipe, and the inference is therefore strong that the water was left shut off from that pipe. A month later a fire broke out underneath the office. The automatic sprinkler system lo-

cated in one of the mills, and not connected with the pipe last repaired, worked. That in the other mill, connected with this repaired line, did not work. Considerable loss was suffered, and this suit was brought.

Held: (1) That, considering all the evidence in the case, it is too meager to constitute the foundation of a claim for negligence, and falls far short of creating a liability for damages caused by the fire.

(2) That, if the valves in the indicator were in some way reversed, the defendant should not be held liable for that condition, as the test was made, and the work in effect approved and accepted, by the superintendent of the mill. The mistake, if any, was a mutual mistake.

The necessary elements of actionable negligence are lacking. Judgment for defendant.

LIGHT v. E. A. STROUT CO.

(Supreme Judicial Court of Maine. July 14, 1911.)

1. BROKERS (§ 37*)—EMPLOYMENT CONTRACTS—MISREPRESENTATIONS AS TO CONTENTS—BURDEN OF PROOF.

Plaintiff, in suing to recover an amount retained by defendant real estate broker in excess of his commission, had the burden of showing that the broker's agent misrepresented the contents of a written employment contract, which plaintiff signed and which authorized the broker to retain the money sued for.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 37.*]

2. BROKERS (§ 37*)—EMPLOYMENT CONTRACT—MISREPRESENTATIONS AS TO CONTENTS—EVIDENCE—SUFFICIENCY.

In an action to recover money retained by defendant in excess of his commission for obtaining a purchaser for plaintiff's land, evidence held to sustain a finding that defendant misrepresented the contents of a written contract, which plaintiff signed and which purported to entitle defendant to the money sued for.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 37.*]

On Motion from Supreme Judicial Court, Lincoln County.

Action by Lizena Light against the E. A. Strout Company. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, KING, BIRD, and HALEY, JJ.

Lindley Murray Staples, for plaintiff. Williamson & Burleigh, for defendant.

PER CURIAM. [1, 2] The plaintiff, in June, 1904, listed her farm in defendant's agency for \$500. On December 13, 1904, the plaintiff signed another contract with the defendant in terms reducing the amount which she was to receive to \$400, and allowing the defendant to retain as commission all he might receive in excess of that amount.

Subsequently the defendant sold the property for \$700, and notified the plaintiff that it had been sold, but did not state at what price. The plaintiff executed a deed to the purchaser and received her \$400. Later, on learning that the purchase price was \$700, and that the defendant had retained \$300 as commission, instead of \$100, she brought this action to recover the additional \$200. The jury found in the plaintiff's favor, and the defendant asks to have the verdict set aside as against the evidence.

The issue was one of fact, and was sharply drawn. The defendant relied upon the written contract, bearing the plaintiff's signature, allowing him as commission all in excess of \$400. The plaintiff asserted that she never herself read the contract, but relied upon the defendant's agent as to its contents; and she understood that, while the listing price was reduced to \$400, the defendant was to receive as commission only \$100, whatever the sum realized. It was incumbent upon the plaintiff, attacking, as she did, an instrument bearing her signature, to maintain her position by clear and convincing proof. The jury have found that she did, and a careful study of the evidence does not induce us to disturb the verdict as manifestly wrong. The language of the contract itself is somewhat misleading; for, while it states, "I will pay to you or your order forthwith a commission of all you get in excess of \$400, clear to me," it adds these unnecessary and possibly misleading words, "And it is mutually agreed that this property in no event shall be sold to your customer for less than \$100 in excess of above price." A woman like the plaintiff, unintelligent and unaccustomed to business, might still have thought that this \$100 was to be the defendant's commission.

The conduct of defendant's agent when the deed was made, in apparently endeavoring to keep from her the knowledge of the purchase price, and when asked by her the direct question of how much he got for the place, his reply, "I have got \$400 clear to you, just as your contract calls for," may properly have influenced the jury in coming to their conclusion. Taking the case in its entirety, the evidence, the situation of the parties, the surroundings, and the subsequent conduct, we are not convinced that the plaintiff did not maintain her burden of proof, heavy as it was.

Motion overruled.

SMITH v. SAWYER et al.

(Supreme Judicial Court of Maine. Dec. 4, 1911.)

1. ADVERSE POSSESSION (§ 24*)—ACTUAL POSSESSION—OCCASIONAL USE OR OCCUPATION. Occasional cutting of hay or firewood on unimproved land or burning over part for blue-

berries or gathering berries is insufficient to establish adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 114, 115; Dec. Dig. § 24.*]

2. TRESPASS (§ 19*)—ACTION—TITLE.

Record title arising from a quitclaim deed from one who received a warranty deed in 1856 prima facie shows ownership of the land, permitting recovery against a mere trespasser or one who cannot show better title, though the original grantor had no title.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

3. TRESPASS (§ 19*)—ACTION—TITLE.

A deed from the commonwealth of Massachusetts, executed in 1788, is not defective as a basis for record title for want of showing of authority of the legislative committee to execute it, where the deed recites authority under legislative resolves which are a matter of public record.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 19.*]

Exceptions from Supreme Judicial Court, Washington County.

Action by Enoch R. Smith against John V. Sawyer and others. Verdict for defendants, and plaintiff brings exceptions. Exceptions overruled.

Action of trespass *quare clausum fregit*, in which the plaintiff alleged that the defendants broke and entered a certain lot of land and took and carried away therefrom certain wood which had been cut thereon by the plaintiff. Plea, the general issue, with a brief statement claiming title to the land. At the conclusion of the evidence, the presiding justice ordered a verdict for the defendants, and the plaintiff excepted.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, BIRD, and HALEY, JJ.

A. D. McFaul, John F. Lynch, and William R. Pattengall, for plaintiff. O. H. Dunbar and H. H. Gray, for defendants.

CORNISH, J. [1] This is an action of trespass to recover damages from the defendants for entry upon a certain lot of unimproved land, and carrying away a quantity of cordwood that had been cut by the plaintiff.

At the conclusion of the evidence the presiding justice ordered a verdict for the defendants "upon the agreement and stipulation on the part of the defendants that, if this order is overruled by the law court, the law court are authorized to render judgment for the plaintiff in the sum of \$30." The case is before this court on plaintiff's exceptions to this order.

The plaintiff bases his right of recovery upon both adverse possession and record title. A painstaking examination and study of the evidence fails to prove such an open, continuous, exclusive, and adverse occupation on the part of the plaintiff and his predecessors for 20 years or more as ripened

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

into title by prescription. This lot of 100 acres was uninclosed and part of a larger tract of 400 or 500 acres known as the "Mitchell Block," all of which was unimproved, except a small portion of meadow which produced hay. It had a small quantity of wood or lumber growing upon it, and has also produced blueberries in considerable quantities. It has never been personally and exclusively possessed by any one, and the acts of the plaintiff in occasionally cutting a little hay or firewood or burning a portion for berries or gathering berries are insufficient to meet the law's demand on adverse possession. *Chandler v. Wilson*, 77 Me. 76; *Hudson v. Coe*, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288.

[2] The plaintiff's record title begins with a warranty deed of this and other land from Benjamin Mitchell to William P. J. Cummings, Aaron Kelley, and Darius D. Kelley dated April 26, 1856. Aaron Kelley and Darius D. Kelley conveyed their two-thirds interest undivided to George E. Watts by warranty deed, dated February 2, 1882; and George E. Watts conveyed to the plaintiff his right, title, and interest in the lot in question by quitclaim deed dated January 16, 1883.

It is not shown that Benjamin Mitchell, the original grantor in this chain, ever had any title whatever to the premises. But a warranty deed to one from whom the plaintiff has a quitclaim is sufficient prima facie evidence of ownership to permit recovery against a mere trespasser or against one who cannot prove a better title. *Rand v. Skillin*, 63 Me. 103; *Ripley v. Trask*, 106 Me. 547, 76 Atl. 951. Under the evidence in this case the plaintiff's prima facie claim is made out.

[3] But the defendant sets up in himself what he claims to be an older and a better record title than the plaintiff's. This begins with a warranty deed dated March 22, 1788, from the commonwealth of Massachusetts through a committee of the General Court appointed under resolves dated October 24, 1783, and November 6, 1783, to John C. Jones and others, followed by a warranty deed from Rufus K. Porter, agent for proprietors John C. Jones and others to William Mitchell, dated September 19, 1843, both deeds conveying the tract in question and much more, and by a deed from Corris Leighton, purporting to be one of the children and heirs at law of William Mitchell, to John V. Sawyer and Oscar W. Look, dated December 19, 1903. The description in this last deed reads as follows:

"A certain tract of land (if any such title should exist at this time) situated in town of Jonesport, and formerly known as the 'Mitch-

ell Block,' being a surplus or gore piece, lying westerly and at the rear of the settlers' and shore lots, and sometimes known as the 'heater piece.'"

If there are no defects in this chain, the defendants Sawyer and Look have an undivided interest in the premises, and that interest is older and better than the plaintiff's.

The plaintiff attacks this record title on two points.

First. He says there is no evidence that the legislative committee executing the deed in behalf of the commonwealth of Massachusetts had in fact any power or authority to make the conveyance. True, no extraneous evidence was offered to prove such authority, but the deed itself recites that the authority was given by two legislative resolves, dated, respectively, October 24, 1783, and November 6, 1783. Those resolves are a matter of public record, and at the time of their passage the land in question was within the jurisdiction of Massachusetts, as it was 37 years before the separation and organization of the state of Maine. The deed executed by the committee covered a large part of the unappropriated lands in the then county of Lincoln; its consideration was about \$25,000; it was at once recorded in the county of Suffolk, and later, upon the incorporation of the county of Washington, was recorded in the first volume of deeds recorded in that county. Moreover, not a little weight is to be attached to the fact that the parties who executed the deed were public officers, and the official act of itself has some force. A presumption of correctness attaches to official proceedings, and, when those proceedings have stood unimpeached for over a century and have been recorded in the public archives of two states, we do not think they should be set aside without positive proof of their invalidity. *Chandler v. Wilson*, 77 Me. 76, 81.

Second. The plaintiff contends that there is no evidence that Corris Leighton was one of the children and heirs at law of William Mitchell, except the recital in the deed, but in answer to questions put by plaintiff's counsel on cross-examination the defendant Look testified that, after discovering from the records that one Cummings from whom he had taken a deed had no title, he obtained a deed from the Mitchell heirs, and that Corris Leighton was one of those heirs.

It therefore follows that the question of adverse possession being eliminated and only that of the better record title remaining, on this issue the defendant prevails, and the ruling of the presiding justice was without error.

Exceptions overruled.

BARD v. FIREMAN'S INS. CO.

(Supreme Judicial Court of Maine. Dec. 5, 1911.)

1. INSURANCE (§ 233*)—CANCELLATION OF POLICY—AUTHORITY OF AGENT.

In the absence of consent of insured or waiver upon her part, an agent had no power to cancel a policy of insurance, except in the manner provided therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 505; Dec. Dig. § 233.*]

2. INSURANCE (§ 229*)—CANCELLATION—NOTICE.

Where a policy provided for cancellation by the company after 10 days from written notice, a verbal request by the agent for immediate cancellation and surrender is of no effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.*]

3. INSURANCE (§ 230*)—FIRE POLICIES—CANCELLATION—RETURN OF UNEARNED PREMIUM.

Tender of return of unearned premium under a fire policy after a loss cannot be relied upon under a provision entitling the insurer to cancel the policy on written notice and return of unearned premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-512; Dec. Dig. § 230.*]

4. WORDS AND PHRASES—"WAIVER."

A "waiver in pais" is the voluntary relinquishment of a known right.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7831-7832.]

5. INSURANCE (§ 229*)—CANCELLATION—WAIVER OF CONDITIONS BY INSURED.

Insured did not waive provision requiring insurer to give notice and tender return of unearned premium before canceling the policy through having surrendered the policy where she did not know of such provision, and made the surrender on insured's agent's assurance that the insurance was already canceled, and that other insurance would be substituted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.*]

6. INSURANCE (§ 539*)—PROOF OF LOSS—TIME FOR MAKING.

Under Pub. Laws 1905, c. 158, requiring proof of a fire loss to be made within a reasonable time, in determining whether a delay from November 24th to December 28th was reasonable, the conditions surrounding insured could be considered, including the facts that she had been led to believe by insurer's agent that the insurance had been validly canceled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

Exceptions from Supreme Judicial Court, Arrostook County.

Action by Hattie F. Bard against the Fireman's Insurance Company. Verdict for plaintiff, and defendant brings exceptions, and moves for a new trial. Motion and exceptions overruled.

Assumpsit on a policy of fire insurance issued to the plaintiff for a term of two months on certain starch owned by the plaintiff, and which was destroyed by fire within the two months. Plea, the general issue, with a brief statement alleging that "the insurance policy described and declared upon in the plain-

tiff's writ was canceled and surrendered by mutual agreement long before the fire mentioned in said writ and causing the loss complained occurred." Verdict for plaintiff for \$628.18. The defendant filed a general motion for a new trial, and also excepted to several rulings made during the trial.

Argued before WHITEHOUSE, C. J., and SAVAGE, CORNISH, BIRD, and HALEY, JJ.

Powers & Guild, for plaintiff. Madigan & Madigan and Leonard A. Pierce, for defendant.

CORNISH, J. This is an action of assumpsit on a policy of insurance dated October 4, 1909, and issued to the plaintiff for a term of two months. The premium was paid on October 26, 1909. The property insured was destroyed by fire November 24, 1909, and proof of loss, dated December 20, 1909, was filed with the defendant December 28, 1909. The plea was the general issue, with a brief statement that the policy was canceled before the fire.

The presiding justice ruled as a matter of law upon the evidence that the policy had not been canceled, and he submitted to the jury the determination of the single issue whether under all the circumstances of the case the plaintiff had furnished to the defendant a proof of loss within a reasonable time after the fire. The case is before this court on defendant's exceptions to the ruling of the presiding justice on the question of cancellation, to certain instructions in regard to the proof of loss, and also on a general motion for new trial on the ground that the verdict is against the evidence.

The evidence on cancellation is briefly this: The plaintiff testified that not long after receiving the policy Mr. Perry, the defendant's agent through whom she had placed the insurance, telephoned her that he had received instructions to cancel the policy immediately, and requested her to forward it to him. She replied that it did not seem to her that he had a right to do this, and, after some argument, she refused to comply with his request. This conversation Perry does not deny.

On October 26th Perry called at the plaintiff's home, and asked to see four other policies that had been issued, and then took the policy in question, and said that the plaintiff might as well sign it, as he had canceled it. She demurred, and expressed a doubt as to his right to do this, and asked, "Can you cancel that if I do not sign it?" to which he replied, "I certainly can. It is already canceled. It is merely a matter between you and the company about this paper. I have done my duty. I have canceled it." He then took the policy into his possession, and the plaintiff asked if he

could procure other insurance for her and he said he saw no reason why he could not, but that he was unable to write any policy that day because he had no blanks. It is admitted that he procured no other insurance.

Perry's version of the interview of October 26th, differs somewhat, though not on vital points, from the plaintiffs'. He says that she was not willing to have this policy canceled unless he gave her another, but he told her that he was obliged to cancel it, and she finally said, "Well, if you have got to cancel it, why I don't suppose I can help it." He admits that he said nothing to her about her right to have 10 days written notice of cancellation, that she did not mention it, and that so far as he knew she had no actual knowledge of that right, although he himself was aware of it, and she positively and as we think truthfully asserts that this was her first experience in matters of insurance, as her husband prior to his death had always attended to it, and that she did not know that Perry did not have the power that he claimed to exercise. This brief summary gives a fair picture of the situation.

1. Cancellation.

[1, 2] The burden of proving a legal cancellation in one of three ways rested upon the defendant.

First. It could be effected by mutual agreement, like the rescission of any other contract. That is not this case.

Second. It could be brought about at any time at the request of the insured (R. S. c. 49, § 4). That was not done here.

Third. It could be effected by the company against the wish of the insured, and that was the action taken here, by only one method, and that is the method prescribed in the policy itself. "The company also reserves the right after giving written notice to the assured, * * * and tendering to the insured a ratable proportion of the premium, to cancel the policy as to all risks subsequent to the expiration of ten days from such notice."

Two conditions precedent must be complied with—10 days notice in writing and payment or tender of the unearned premium. The reason of these conditions is self-evident. The former is designed to give the assured a reasonable time in which to procure other insurance, and the latter to place the parties in statu quo as in all other cases of rescission of contract. Neither of these requirements was met here. The only request by the agent was verbal, and that for immediate cancellation and surrender; and, although the assured protested against the proposition and begged the agent to procure other insurance, the protest and the request were both ignored, and the agent arbitrarily canceled the policy on the next day after he received it. The failure to

comply with this condition is fatal. *Clark v. Insurance Co.*, 89 Me. 28, 32, 35 Atl. 1008, 35 L. R. A. 276.

So far as repayment or tender of the unearned premium was concerned, that was not even mentioned by the agent when the attempted cancellation took place. After the fire, however, in settling a loss under another policy the company added \$12 for return premium on the policy in question, which amount the insured subsequently tendered back to the agent, but he refused to accept it. This return of premium by the company in itself less than was due came too late. The fire had already occurred, and, as this condition had not been complied with, the policy was still in force. The tender is precedent to the right of cancellation. *Insurance Co. v. Botto*, 47 Ill. 516; *Insurance Co. v. Cameron*, 18 Tex. Civ. App. 237, 45 S. W. 158; *Mohr Distilling Co. v. Insurance Co. (C. C.)* 13 Fed. 74; *White v. Insurance Co.*, 120 Mass. 330.

2. Waiver.

[3, 4] The defense of waiver of these conditions by the plaintiff is not available to the defendant.

It is familiar law that a waiver in pais is the voluntary relinquishment of a known right. This was the involuntary surrender of an unknown right. Even from the agent's own testimony the policy was returned to him under protest, a protest that began when the subject was first broached by telephone, and continued until the very end of the personal interview. It was in effect an enforced surrender. The agent gave the plaintiff to understand that he had already canceled the policy, and that she was obliged to turn it over. To permit this would be to allow what the standard policy of Maine and the statute positively forbid, viz., to arbitrarily and immediately put an end to the protection which the assured has against loss by fire. The agent was familiar with the requirements of the statute, but he studiously avoided mentioning to the assured either her right to a 10-day written notice or the return of the premium; and that she was ignorant of these rights is apparent. It is true that she had the policy of insurance in her possession for about three weeks, and parties may ordinarily be presumptively held to know the contents of a written contract into which they have entered. But this is not a conclusive presumption. If it were, the requirement as to 10 days notice would be nugatory in a large majority of cases. The presumption is merely one of fact, and the evidence here is overwhelming that the assured was in fact ignorant of the provision. It must be remembered that, as the issue arises in this case, the plaintiff is not basing a right of action upon her want of knowledge, but the the defendant is basing its defense upon her knowledge, and that knowledge it has

utterly failed to prove. The mere possession of the policy cannot overcome the positive testimony and the surrounding circumstances.

On the question of waiver, the case of *Rosen v. Insurance Co.*, 106 Me. 229, 76 Atl. 688, is decisive of the case at bar. The legal principles there announced are equally applicable here.

3. Instructions upon Furnishing the Proof of Loss.

[5, 6] As originally enacted, the Maine standard policy required the assured to render his proof of loss "forthwith." R. S. c. 49, § 4, par. 7.

By chapter 158 of the Public Laws of 1905, "within a reasonable time," was substituted for "forthwith." Evidently the Legislature intended that somewhat greater latitude should be allowed to the assured than would be naturally inferred from the more restricted word "forthwith," and that a reasonable time, considering all the circumstances of the case, should constitute the true rule. The reason given here by the plaintiff for not furnishing the proof until December 20th was the fact that she had been led by the defendant's agent to suppose that the policy was canceled and void at the time of the fire, and that she had no other idea until, on December 19th, she read in some newspaper the rescript of this court in the case of *Rosen v. Insurance Co.*, supra, that she at once consulted counsel, and on the next day her proof of loss was made and executed. The presiding justice instructed the jury that they might take these circumstances into consideration, together with all the other circumstances of the case in reaching their conclusion. In this there was no error. It was a question of fact for the jury to determine, and in deciding it they were at liberty to consider all the conditions surrounding the assured at the time when she was bound to act.

It is the opinion of the court that both the instructions and the verdict were correct.

Motion and exceptions overruled.

RICHARDS et al. v. NAUDAIN et al.

(Superior Court of Delaware. New Castle.
Nov. 20, 1911.)

PLEADING (§ 111*)—PLEA TO THE JURISDICTION—ISSUES.

The court, in a suit against an owner and a contractor to obtain a mechanic's lien, will not try an issue of fact presented by a plea to the jurisdiction, interposed by the owner, alleging that the contract with the contractor was made by a third person, who was not the owner, which may be tried under the general issue.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 111.*]

Action by Isaac Richards and others, late trading as J. H. Richards & Co., for the use of John Howard Richards, trading as J. H. Richards & Co., against Arnold Naudain, contractor, and Charles Franklin McVaugh, owner or reputed owner, to obtain a mechanic's lien. Motion to strike out plea to the jurisdiction granted.

Argued before BOYCE and RICE, JJ.

W. T. Lynam and Frank L. Speakman, for plaintiffs. Philip L. Garrett, for defendants.

BOYCE, J. (delivering the opinion of the court). This is an action to obtain a mechanic's lien. After the filing of the statement by the plaintiffs, as required by the statute, and the issuance of the writ, and the service and return thereof, Charles Franklin McVaugh, in his own proper person, filed a plea to the jurisdiction duly verified, based upon the allegation that the plaintiffs "furnished materials * * * in pursuance of a contract made with Arnold Naudain, the contractor for the said Charles Franklin McVaugh, owner or reputed owner."

It is admitted in said plea that the said McVaugh was, and still is, the owner in fee of the lands, etc., described in said statement, upon a part or portion whereof the house, etc., was and is erected, but it is averred that the said McVaugh hath not, and did not at any time make any contract whatsoever with the said Arnold Naudain, the other defendant, etc., or with any other person or persons, for, concerning, or in any way relating to the erection of the said house, etc., or for, concerning, or in any way or manner relating to the furnishing of any materials whatever therefor, etc., but that such alleged contract, if any there be, was made by one Henry R. McVaugh, who was not, at any time, and is not now the owner of the said lands, etc.; that, by reason thereof, the court here hath not, and cannot ever acquire or obtain jurisdiction of, etc., for want of any owner, or any reputed owner, who made the alleged contract, etc.

No objection is made to the sufficiency of the plaintiffs' statement filed except as we have shown. Whether the said allegation, contained in the plaintiffs' statement, is, as a matter of fact, true, may be controverted at the trial under the general issue of non-assumpsit, which, in the case of *Volgtmann v. Wilmington Trust Company*, 7 Pennewill, 265, 78 Atl. 920, was held to be an appropriate plea in an action to obtain a mechanic's lien. We do not think the denial of the said allegation in the plaintiffs' statement is properly the subject of a plea to the jurisdiction. We decline to try the issue of fact presented by the plea before a jury drawn for that purpose.

Let the motion be sustained, and the plea stricken out.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

UNION TRUST CO. OF MARYLAND v. STATE.

(Court of Appeals of Maryland. June 24, 1911.)

1. STATUTES (§ 245*)—CONSTRUCTION—TAX LAWS.

The courts construe laws for the assessment and collection of general taxes with the utmost liberality with a view of upholding them, if possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. § 245.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

It is presumed that public officers, in the discharge of their duties, properly performed them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. TAXATION (§ 384*)—ASSESSMENT AND LEVY OF TAXES—STATUTES—"LEVY."

The power of the state tax commissioner conferred by Code Pub. Gen. Laws 1904, art. 81, § 150, requiring the commissioner to levy taxes on shares of corporate stock and to place a valuation on corporate stock for purposes of assessment, is not affected by Laws 1906, c. 404, amending article 81, § 22, and fixing a tax for each \$100 for a specified purpose, and directing the Comptroller to levy the taxes on corporate stock, since the function of the Comptroller, under the act of 1906, is a purely ministerial act fully performed when he enters on his books the number of shares of stock liable to taxation, the corporation the stock of which is taxed, the rate of taxation, and extends the amount of the tax, and since the word "levy" as applied to taxes means in some cases to raise and exact by authority of government the amount of a tax to be raised, and in other cases the word is used with reference to the mere ministerial act of entering the taxes on the tax book and collecting them (quoting Words and Phrases, vol. 5, p. 4101).

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 384.*]

4. TAXATION (§ 298*)—LEVY OF TAXES—LEGISLATIVE POWER.

The Legislature has power to levy a tax as is done by Laws 1906, c. 404, levying a tax of a specified amount on each \$100 for a specified purpose.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 471; Dec. Dig. § 298.*]

5. TAXATION (§ 384*)—CORPORATE STOCK—STATUTES.

The tax on corporate stock, imposed by Code Pub. Gen. Laws 1904, art. 81, § 150, requiring corporations to report annually to the state tax commissioner the number of shares of stock and the par value thereof, with such information as may be required by the commissioner, and requiring the commissioner to assess the shares as of January 1st and levy the state taxes prescribed by law thereon, is a tax against the owners of the stock, within the requirement that it shall be assessed to the owner in the county or city in this state where he resides; the corporation being the medium through which the tax is collected.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 384.*]

6. TAXATION (§ 384*)—SHARES OF CORPORATE STOCK—ASSESSMENT—VALIDITY.

Under Code Pub. Gen. Laws 1904, art. 81, § 150, providing that the state tax commis-

sioner shall annually by the 15th day of May assess corporate stock as of the 1st day of January preceding, and under the statute requiring the commissioner to certify on May 15th the valuation placed on corporate stock, without imposing any penalty for a failure to complete the certification within the time designated, an assessment of corporate stock is not void merely because it was not certified until May 17th; the statute being directory merely.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 384.*]

7. TAXATION (§ 384*)—CORPORATIONS—LIABILITY.

Code Pub. Gen. Laws 1904, art. 81, § 150, requiring corporations to report annually to the state tax commissioner the par value of the corporate stock, and requiring the commissioner to assess the stock as of January 1st, fixes January 1st of each year as the time at which the valuation of stock shall be determined, and a bona fide reduction of corporate stock on February 25th does not prevent a tax, levied in May, on the valuation of the stock as it existed on January 1st, and the corporation, after making such reduction of stock and paying to the stockholders the amount of the reduction, may not complain of the tax on the stock as it existed before reduction because it should have retained a sufficient amount to pay the tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 384.*]

Appeal from Superior Court of Baltimore City; James P. Gorter, Judge.

Action by the State of Maryland against the Union Trust Company of Maryland. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

J. Wallace Bryan and Charles E. Fink, for appellant. James M. Munroe, for the State.

STOCKBRIDGE, J. This is a suit brought in the name of the state of Maryland, in accordance with the provisions of section 152 of article 81 of the Code of Public General Laws of 1904, against the Union Trust Company of Maryland to recover the amount of the state tax on 20,000 shares of the capital stock of that corporation for the year 1907.

The material facts are as follows: On January 11, 1907, the Union Trust Company of Maryland, by Richard D. Sellman, its treasurer, filed with the state tax commissioner the report required to be made by section 150 of article 81, and on January 22d of the same year the tax commissioner placed the valuation upon the stock of \$49.50 per share, gross, or with the deduction claimed by the company and allowed by the tax commissioner, of \$17.06 per share net, as the valuation of the stock of the company for the purposes of taxation. On some date between January 11th and 22d entries were made in a book in the state tax commissioner's office, known as the "book of division of stock," and in this was set out the number

of shares liable to taxation in Baltimore City and in each of the counties. And on or about the same date the appeal tax court of Baltimore City and the county commissioners in the several counties were notified of the valuation placed upon the shares of the stock of this corporation. In a letter from the tax commissioner to one of the counsel of the company appears the statement that the levy of the tax was made by him (the state tax commissioner) and certified to the Comptroller on the 17th of May, 1907, and by the certificate of the state tax commissioner it appears that on the 17th of May, 1907, the tax commissioner certified to the Comptroller the assessment of this stock. From the valuation of the state tax commissioner an appeal was taken under the provisions of section 162 of article 81, and the valuation of the state tax commissioner confirmed. On February 25, 1907, the Union Trust Company reduced its outstanding stock from 20,000 to 10,000 shares, and paid off, liquidated, and retired 10,000 shares, at a valuation of \$66 per share, and on the 16th of April, 1907, notified the state tax commissioner of such reduction in its capital stock.

The record in this case shows several demurrers, and at the trial the plaintiff offered 6, and the defendant 22, prayers, of which the court granted the plaintiff's first, second, fifth, and sixth, and refused all of the other prayers. The questions raised by the demurrers were all substantially raised under one or another of the prayers.

In the view which the court takes of this case, it is unnecessary to consider in detail the several rulings on the demurrers and upon the prayers, as they all involve one or another of four propositions of law, viz.: (1) That the taxes upon this stock were levied by the state tax commissioner, and not by the Comptroller of the State, and the levy was therefore void; (2) that the assessment is void because it was an assessment made against the company and not against the owners of the stock; (3) because it was not certified by the state tax commissioner to the Comptroller until May 17, 1907, two days after the date named in the statute; and (4) because at most the state can recover taxes upon only 10,000 of the 20,000 shares of stock which were issued by the company.

[1] It is proper to say in limine that laws for the assessment and collection of general taxes are construed with the utmost liberality (*Turpin v. Lemmon*, 187 U. S. 58, 23 Sup. Ct. 20, 47 L. Ed. 70); that the construction is not to be a critical one with a view to defeat the enactment, but a liberal interpretation so as to uphold it, if possible (*McSherry, C. J.*, in *Monticello Co. v. Baltimore City*, 90 Md. 416, 45 Atl. 210; *Am. Coal Co. v. Co. Com'rs*, 59 Md. 185).

[2] And no authority is needed for the proposition that the acts of a public officer in the discharge of his duties are entitled to

the presumption of having been correctly performed.

[3] 1. By the provisions of section 150 of article 81 it is made the duty of the state tax commissioner to make the levy upon shares of stock of corporations as of the 1st day of January preceding, and the contention of the trust company in the present case is that that was what was done with regard to this stock, although by chapter 404 of the Acts of 1906, the duty of levying the state taxes was imposed upon the Comptroller.

In passing it is to be observed that the act of 1906 was not in terms an amendment of section 150, but of section 22 of article 81, and therefore it may be claimed that there were two sections of the Code, each of which gave the authority to levy the tax but gave it to different officials. To this objection the answer is clear and complete. In the first place some confusion arises out of the use of the word "levy." "The word levy has different meanings according to the object to which it is applied. As applied to taxes it sometimes means to raise and exact by authority of government or to determine by vote the amount of tax to be raised. It is in this sense that towns and cities levy taxes; in other cases it is used with reference to the mere ministerial or executive act of entering them on the tax book and collecting them." 5 Words & Phrases, p. 4101, citing *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970. See, also, *So. R. W. v. Kay*, 62 S. C. 28, 39 S. E. 785.

The act of 1906 in terms fixed the amount per hundred dollars to be imposed by way of tax. This of itself constituted a legislative levy of the tax, but that levy needed to complete it the entry upon the book of the State Comptroller. The act of 1906 vested no power in the Comptroller to determine the amount or rate of the tax, neither did it give him any function to perform in the way of valuing the stock, that in assessing or determining the value of it for purposes of taxation. The function of the Comptroller under the act of 1906 was therefore a purely ministerial act, and was fully performed when he entered upon his books the number of shares of stock liable to taxation, the corporation the stock of which was taxed, the rate of taxation, and extended the amount of the tax. This apparently was also done by the state tax commissioner under the authority of section 150, but it was none the less done by the State Comptroller when he made his entries, and the fact that similar action was taken by two separate officials, identical in its nature, and each acting under express provisions of law, though one or the other of them may have been superfluous, cannot be regarded as invalidating the tax. *Clark Dist. Co. v. Cumberland*, 95 Md. 476, 52 Atl. 681.

[4] Nor can the fact, as in this case, that the Legislature has made the levy itself be

a ground of objection. Such a power is distinctly within the province of the Legislature, and the fact that it may be delegated, either in whole or in part, does not destroy the validity of the act, but such delegation may be, and sometimes is, made because the power can in such manner be more conveniently exercised. *State v. Mayhew*, 2 Gill 490.

[6] 2. The second ground of objection is the assumption that the tax sought to be collected in this suit is a tax levied upon the company, and not one where the stock was valued and assessed to the owners thereof in the county or city in which the owners respectively resided. Upon this branch of the case it is to be noted, first, that there is no requirement exacted by section 150 of article 81 that the official of the corporation shall return to the state tax commissioner a list of the stockholders therein, only of the number of shares of capital stock. The requirement of the list of stockholders appears in section 156, and such list is to be made in an entirely separate return, required from the officers of a corporation, to the appeal tax court of Baltimore City, the county commissioners of a county, or the city clerk of an incorporated town or village. Most of the cases which have heretofore been before this court have been cases where it was sought to recover county or municipal taxes, and, in one or two of them, with the state taxes added. In the present case there is no attempt to require payment by the trust company of any local or municipal taxes, only of the taxes due to the state of Maryland, and for that reason, the corporation being created by law the agent of the state for the collection of taxes upon the shares of its capital stock, it was sufficient, as between the state's officers and those from whom the tax was due, for the state to look solely to the corporation; but this is very far from being a tax upon the corporation. It has been repeatedly held by this court that the tax upon the capital stock is not a tax upon the corporation, but upon the owners of that stock; the corporation being made the medium through which the tax is collected. This is in strict accord and analogy with the case of *Monticello Co. v. Baltimore City*, 90 Md. 416, 45 Atl. 210, in which *McSherry, C. J.*, in speaking of the distilled spirits there sought to be taxed in the hands of the warehouseman, says: "Though the language employed, like that used in many other assessment laws, if read literally would indicate an intention to impose the tax on the property and not on the owner of it, that is not its meaning when considered in connection with the settled policy of Maryland, as announced in the Declaration of Rights. We hold then that the tax is upon the owner of the spirits and not specifically upon the spirits." See, also, *Am. Coal v. Co. Com'rs Allegany Co.*, 59 Md. 185.

[6] 3. By section 150 of article 81 it is provided that "the commissioners shall annually by the fifteenth day of May in each year, assess the shares as hereinafter provided, as of the first day of January preceding," and this valuation he certifies to the Comptroller. The objection now made is that the assessment is void, not because it was not made before the 15th day of May, but because it was not certified to the Comptroller until the 17th of May. But the statute nowhere says that the certification shall be in all respects completed by the date named, nor is any penalty imposed for a failure to complete within the time. So far as anything appears from the record, the valuation or assessment of this stock for the purposes of taxation was made not later than the 22d of January, and if it be assumed that the certification to the Comptroller was required to be before the 15th of May, and that it was not in fact done until two days later, in view of the language of the statute it would come directly within the ruling as announced by Judge Alvey, in *State v. Co. Commissioners of Balto. Co.*, 29 Md. 522, that "in the construction of statutes they are, in respect to time, to be regarded as directory merely, unless from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power of the officer." And such does not appear in this case.

[7] 4. The fourth ground of objection is that, even if the tax be not void in toto for any of the reasons already mentioned, nevertheless, inasmuch as the capital stock of the trust company had been reduced from 20,000 to 10,000 shares in the month of February, and before the time when the levy was or might be supposed to have been completed, the tax can now be collected from the trust company only upon the 10,000 shares of reduced capital stock. By the agreed statement of facts the outstanding capital stock on the 1st day of January, 1907, was 20,000 shares. The reduction took place on February 25th, and the shareholders of the stock so retired were paid \$66 per share out of the capital and accumulated surplus of the company. There is no question of the bona fides of this reduction, and that it was not done for any purpose of evading taxation. The sole question is whether the company is to pay as collector for the state upon the number of shares as they were at the beginning of the year, or as they were after the action of February 25th had been taken. As the law formerly stood, there was quite a range of time within which a corporation might select such date as it saw fit for making up the statement and its return to the state tax commissioner for the purpose of the valuation of its capital stock. That fact invited and resulted in considerable juggling of figures, and tended to produce inequality in

the administration of the law. Accordingly, the present statute was passed, by which the 1st day of January of each calendar year was fixed as the time as of which all such returns were to be made, and the valuation of the stock determined, and such legislation has been repeatedly sustained in this court. *Hopkins v. Van Wyck*, 80 Md. 15, 30 Atl. 556; *Skinner Dry Dock Co. v. M. & C. C. of Baltimore*, 96 Md. 43, 53 Atl. 416. It must be regarded therefore as settled in this state that, for the purpose of the taxation of the capital stock of a corporation, January 1st is to be taken as the date with regard to which all elements are to be reported, considered, and established, conclusive alike upon the state and the corporation. The same rule has been upheld in this court with regard to local taxation in the city of Baltimore, both in the *Skinner Case*, supra, and in the case of *Hamburger v. M. & C. C. of Baltimore*, 106 Md. 479, 68 Atl. 23. But the suggestion is now made that, while conclusive in some respects, it is not conclusive as to the quantum of stock. This is a distinction in which the court cannot agree; any other rule than some fixed, definite date could only result in endless confusion, and no case better illustrates this than the case at bar. Since taxation upon the capital stock of a corporation is a taxation upon the owner, and not upon the corporation, it then becomes necessary, in order to make a proper apportionment of the tax between the city and the several counties, to show the residence of each stockholder. When a reduction of stock takes place, it may be a uniform, proportional reduction of each stockholder, or it may be a surrender of all the shares of one stockholder, and none by another, or any variation between these two extremes. This then becomes as important an element as does the fact of reduction itself, and any departure from the date fixed by the statute would result in a virtual setting aside of the statute by the court, and the creation of confusion. The statute, as it stands, operates impartially. If at the meeting of the stockholders of the trust company on February 25th there had been an increase instead of a reduction of the capital stock, the amount of that increase, since it was not in existence on January 1st, would not and could not have been liable to taxation during the year of 1907.

It was urged in argument and upon the brief that this stock should be treated as if it had never been issued. If that had been the case, it would not have been liable to taxation. This company as originally incorporated was authorized to issue 40,000 shares of stock. It did in fact issue but 20,000, and 20,000 was the total number upon which it had paid taxes, and that action was right and proper. *Consumers' Ice Co. v. State*, 82 Md. 132, 33 Atl. 427. By the report of the treasurer of the company there was

issued and outstanding on the 1st day of January, 1907, 20,000 shares of its capital stock. The duty of the state tax commissioner with regards to it was perfectly plain. He was to value the 20,000 shares, not a portion of them; that necessarily follows from the language of this court in *Skinner Case*, supra, and also *M. & C. C. of Balto. v. Chester S. S. Co.*, 103 Md. 400, 63 Atl. 810, where this court in effect said that the only information which the tax commissioner could have in an authentic way is as of January 1st, and that his certification must necessarily have reference to that date. But it is further objected that since the company has paid off 10,000 shares of its stock, if the tax be now collected, it will amount either to levying the tax upon the present holders of the stock, or levying it directly upon the company. The answer to this is perfectly simple. The trust company knew on February 25th that it had made a return to the state tax commissioner of 20,000 shares of stock. It further knew that that stock was subject to taxation, and that the company was the agent of the state for collecting that tax. It was therefore its plain duty when it paid off the stockholders and retired 10,000 shares to have retained from each one a sufficient amount to have paid the tax, and it cannot now set up its own voluntary act of the payment-out of the money, as a ground to defeat a suit upon the part of the state, brought in accordance with the statute, and based upon the sworn return of the corporation. Much reliance was placed by the appellant upon the case of *State v. Safe Deposit Co.*, 86 Md. 581, 39 Atl. 523; but it is difficult to discover any analogy between that case and the present. There the suit was not against the corporation which was by operation of law the agent of the state for the collection of the tax due by the stockholders, but was against the trustee of an insolvent corporation for a preference in the distribution of the assets of the insolvent corporation, and the question there presented was not the liability of the state's agent to the state, but *when* did the taxes on the stock of the insolvent corporation become due, so that the claim of the state might properly be considered a lien against the fund arising from the assets of the insolvent, and as such entitled to preference; and this was substantially the same question which was involved in the cases of *Boston v. Beal* (C. C.) 51 Fed. 306, and *Stapylton v. Thaggard*, 91 Fed. 83, 33 C. C. A. 353, and in both of which the determination of the court was in line with the decision of this court in the case of the city against the *Safe Deposit Company*, supra.

No prejudicial error is therefore perceived in the rulings of the lower court, and the judgment appealed from will be affirmed.

Judgment affirmed; costs to be paid by the appellant.

TURNER v. EGAN.

(Court of Appeals of Maryland. June 22, 1911.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW OF EVIDENCE—ACTION TRIED TO COURT.

Where a case has been submitted to the court without a jury, the court on appeal will only review the decision on questions of law and will not examine the facts to ascertain whether the findings are correct or whether the facts found are sufficient to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. CONTRACTS (§ 305*)—HEATING MACHINERY—INSTALLATION—ACCEPTANCE.

Where, after the installation of a heating plant was completed, defendant accepted it, plaintiff was then entitled to recover therefor, though the work was not done in strict conformity to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1467-1475; Dec. Dig. § 305.*]

3. TRIAL (§ 386*)—INSTRUCTION—APPLICABILITY TO EVIDENCE.

In an action for the value of a heating plant which defendant claimed was not installed in conformity to contract, a prayer, limiting the court in passing on the question of its performance to a consideration of defendant's evidence therein, and assuming facts unsupported by the evidence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

4. WORK AND LABOR (§ 12*)—SPECIAL CONTRACT—NONPERFORMANCE.

In an action for work done and materials furnished under special contract to do the work in a special manner, a prayer that plaintiff could not recover unless he showed that the special contract had been fully executed and completed, and, as it appeared by plaintiff's own testimony that the contract had not been fully executed through no fault of defendant, he could not recover, was properly refused.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 27; Dec. Dig. § 12.*]

5. TRIAL (§ 386*)—REQUEST TO CHARGE—INDEBTEDNESS—STATEMENT OF PREMISES.

In an action for work, labor, and materials in installing a heating plant under a special contract which defendant claimed plaintiff had not fully performed, a prayer, that the court in arriving at a verdict should allow defendant an amount equal to the amount necessary to put the plant in the condition called for by the contract, was properly refused as assuming that defendant was entitled to recover such an amount without hypothesizing the facts on which it was based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

6. TRIAL (§ 386*)—REQUEST TO CHARGE—FORM.

In an action for work, labor, and materials in installing a heating plant which defendant claimed did not comply with the contract, defendant prayed that the court in arriving at a verdict should consider damages caused defendant by plaintiff's delay, damages due to plaintiff's failure to complete the contract, and should allow defendant the cost necessary to make the plant "first class" as called for in the contract, and if the court found further that defendant had made himself responsible for \$400 to a materialman who supplied the materials to be used by plaintiff in

performing the contract with plaintiff's consent, then plaintiff had no claim for such amount, and the court's verdict must be for the defendant unless plaintiff proved an excess of work and labor over and above the loss and injury suffered by defendant from plaintiff's acts. *Held* properly refused as too general and as assuming facts instead of submitting them to the court sitting as a jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

7. TRIAL (§ 386*)—REQUEST FOR INSTRUCTIONS—FORM.

A request for prayer that from the evidence in the case the contract price was not to be paid until the plant contracted for was completed in accordance with the contract, and therefore the verdict must be for defendant, was properly refused as too general.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

8. APPEAL AND ERROR (§ 633*)—DISMISSAL—GROUNDS—PRINTING RECORD—PAYMENT.

An appeal would not be dismissed for appellant's failure to pay the cost of printing the record within 10 days from the receipt of the statement of costs from the clerk as required by rule 34 (80 Atl. xii), where the record was in fact printed and ready when the cause was called for argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2772-2774; Dec. Dig. § 633.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Action by Edgar P. Egan, trading as St. Paul Plumbing & Heating Company, against Dr. John Turner. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the appellant's five prayers referred to in the opinion:

"(1) If the court finds from the evidence that the defendant contracted with the plaintiff for a heating plant to be installed in his house at 1814 North Charles street, 'The job as a whole is to be put up in a first-class manner free from leaks or defects of any kind, tested with fire in same and left in first-class working order ready for use,' for \$700, and further find that said work was never completed and that work done by the plaintiffs was not done in a first-class and skilled manner, and that said plant is not now in first-class condition as called for by the contract, thereby causing the defendant greater loss and injury than the amount of work so done, then the verdict must be for the defendant, in such amount as said damages exceed the contract price. (Refused.)

"(2) That under the pleadings in this case it is incumbent on the plaintiff to prove that the special contract mentioned in evidence has been fully executed and completed by the plaintiff, and that it appears by the plaintiff's testimony that said contract is not fully executed and complete, but through no fault of the defendant, and therefore the verdict must be for the defendant. (Refused.)

"(3) The court in arriving at its verdict is to allow the defendant an amount equal

the amount necessary to put said heating plant in the condition called for by the contract. (Refused.)

"(4) That in arriving at its verdict the court must take into consideration: First, damages caused the defendant due to the delay on the part of the plaintiff; second, damages occasioned the defendant due to the failure of the plaintiff to complete said contract; third, allow the defendant the cost necessary to make said plant 'first class' as called for in the said contract. And then if the court further find that the defendant has made himself responsible for \$400 to Glore Supply Company, who supplied the materials to be used on this contract, at the suggestion and the consent of the plaintiffs, then said plaintiffs have no claim against this defendant for said amount so assigned, and its verdict must be for the defendant unless the plaintiffs prove an excess of work and labor over and above the loss and injury suffered by the defendant by the acts of the plaintiff. (Refused.)

"(5) That from the evidence in the case the contract price was not to be paid until the plant was completed in accordance with the contract, and therefore the verdict must be for the defendant. (Refused.)"

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, URNER, and STOCK-BRIDGE, JJ.

J. Marsh Matthews, for appellant. Frank Driscoll, for appellee.

BRISCOE, J. This is an action of assumpsit, brought by the appellee against the appellant, in the Baltimore City court, to recover for the installing and furnishing of a low-pressure steam heating plant, on the premises of the appellant, No. 1814 North Charles street, Baltimore, according to an agreement between the parties. The declaration contains the common counts, and with it was filed and attached thereto an agreement in writing, and an account, showing the contract price, for the work to be done at the sum of \$700. The case was submitted to the court without a jury, and was tried upon issues joined, on the pleas of never indebted and never promised as alleged, and from a judgment in favor of the plaintiff the defendant has appealed.

At the close of the testimony, the case was submitted, on the part of the plaintiff, without argument or instructions. The defendant at the trial presented five prayers, to the rejection of which, an exception was taken. The rulings of the court, upon these prayers, present the questions of law open for review on this appeal.

The evidence, upon the part of the plaintiff as set out in the record, tended to prove that the work contracted for was in fact completed and performed according to the special contract and was accepted by the defendant, that upon the completion of the work the defendant admitted it was a sat-

isfactory job, accepted it, and accepted an order from the plaintiff to the Glore Supply Company for \$400 payable on the 3d day of January, 1910, for the boiler and radiators supplied for the plant, and in part payment of the contract price, for installing the heating plant.

The defendant offered evidence to show that the work was not done in a skillful manner, as agreed upon, and was never completed in accordance with the contract, and that the plant did not answer the purpose for which it was installed.

[1] So far as the judgment in this case rests upon the facts as deduced from the evidence presented in the court below, there is no question before us to be reviewed. The weight and conclusiveness of the evidence was the province of the court below, under the submission of the parties, to decide. We cannot examine the facts in evidence, in the bill of exception, to ascertain whether the finding by the court was or was not correct, or to determine whether the facts found were sufficient to support the judgment. It is well settled that where a case has been submitted to the decision of the court upon law and fact, without the aid of a jury, this court, on appeal, will only review the decision upon questions of law, if the record plainly discloses the points or questions of law raised and decided by the court below. *Tinges v. Moale*, 25 Md. 486, 90 Am. Dec. 73; *Thomas v. Hunter*, 29 Md. 406; *New & Son v. Taylor*, 82 Md. 40, 33 Atl. 435.

We will now proceed to examine the questions of law raised and presented by the appellant's five prayers, which the reporter is requested to set out in the report of the case.

[2] The defendant's first prayer was defective and was properly rejected, because it was based upon the theory that the plaintiff could not recover unless he could show that the work had been done in strict conformity with the contract, even though the work as performed and the material as supplied had been accepted by the defendant. In *Watchman v. Crook*, 5 Gill & J. 263, it is said: "If after the work is done, though not pursuant to the contract, the party for whom it was done accepted it, it would seem right and proper that he should pay for it what it was worth. This we think justice would require, and the principles of law do not forbid it." *Walsh v. Jenvey*, 85 Md. 244, 36 Atl. 817, 38 Atl. 938; *Burn v. Miller*, 4 Taunt. Rep. 745; *Jewell v. Schroepfel*, 4 Cow. (N. Y.) 564.

In this case the contract had confessedly been performed, but the contest was over the manner of its performance. The work it was conceded had been done, but the question was whether it had been skillfully done. The defendant in this case accepted the work, and used the heating plant during the fall and winter of 1910. The law applicable to this state of facts is well established and needs no discussion. *Ridgeway v. Tor-*

am, 2 Md. Ch. 309; Coates v. Sangston, 5 Md. 133; Fresh v. Gibson, 16 Pet. 334, 10 L. Ed. 982; Dermott v. Jones, 23 How. 234, 16 L. Ed. 442.

[3] The prayer is also open to the objection that it limited the court in passing upon the performance of the contract, to a consideration of the defendant's evidence alone, and it assumed facts that were unsupported by the evidence. Cropper v. Pittman, 13 Md. 190; Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088.

[4] The second prayer was properly rejected for reasons stated by this court in Walsh v. Jenvey, 85 Md. 248, 36 Atl. 817, 38 Atl. 938, and will not be reviewed here.

[5] The third prayer is as follows: "The court in arriving at its verdict is to allow the defendant an amount equal the amount necessary to put said heating plant in the condition called for by the contract"—and was properly rejected. It assumes that the defendant is entitled to recover "an amount equal the amount necessary to put the heating plant in the condition called for by the contract," without stating the facts upon which the instruction is asked. A prayer in this form is too vague and indefinite to form the basis of a legal proposition.

[6] The defendant's fourth prayer is entirely too general and assumes facts, instead of submitting them to the court sitting as a jury to find. It is obviously defective and was properly refused. Such a prayer has often been decided by this court to be defective. Cooke v. Kell, 13 Md. 494; Roberts v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Schillinger v. Kratt, 25 Md. 49.

[7] The defendant's fifth prayer is not insisted upon and was properly rejected. It is in these words: "That from the evidence in the case the contract price was not to be paid until the plant was completed in accordance with the contract, and therefore, the verdict must be for the defendant." The objection to such a prayer is that it is too general and is not a proper prayer. As stated by Mr. Poe, in his Work on Pleading and Practice (volume 2, § 297), a prayer of this kind does not point out any particular ground upon which the right to recover is asserted or denied, nor does it direct attention to any particular error or omission of proof, nor raise any definite question as to its sufficiency. Augusta Ins. Co. v. Abbott, 12 Md. 348; Bullock v. Hunter, 46 Md. 270; Shipley v. Shilling, 66 Md. 560, 8 Atl. 355; Robey v. State, 94 Md. 68, 50 Atl. 411, 89 Am. St. Rep. 405; Hobbs v. Batory, 86 Md. 68, 37 Atl. 713.

[8] As regards the motion to dismiss the appeal, for the reason that the appellant has failed to comply with rule No. 34 (80 Atl. xli), by not paying the costs of printing the record, within 10 days from the receipt

from the clerk of the court of the statement of costs, we need only say that it appears the record was in fact printed and ready when the cause was called for argument, and under such circumstances we held, in Havre de Grace v. Fletcher, 112 Md. 562, 77 Atl. 114, an appeal would not be dismissed. The motion to dismiss therefore, in this case, will be overruled.

We have found no reversible error in the rulings of the court below, and the judgment will be affirmed.

Judgment affirmed, with costs.

WILKIN MFG. CO.-v. MELVIN et al.

(Court of Appeals of Maryland. June 22, 1911.)

1. APPEAL AND ERROR (§ 76*)—JUDGMENTS APPEALABLE—FINALITY.

Docket entries, showing submission of the cause to a jury, verdict and judgment for defendant, and appeal by plaintiff, shows a final, and hence appealable, judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426-443; Dec. Dig. § 76.*]

2. PLEADING (§ 85*)—RULE SECURITY FOR COSTS—EFFECT.

A rule security for costs or a motion therefor does not extend the time in which to plead.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172-178; Dec. Dig. § 85.*]

3. PLEADING (§ 83*)—RULE TO PLEAD—TIME FOR FILING.

Defendant was not in default for failing to plead until rule was laid against him to plead as provided by rules of the trial court; the court having treated defendant as not under rule plea until disposition of a rule security for costs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 165; Dec. Dig. § 83.*]

4. PLEADING (§ 409*)—WAIVER OF OBJECTIONS TO PLEA.

A replication to a plea of limitations, filed after rule day, waives objection to the plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1375-1383; Dec. Dig. § 409.*]

5. EXCEPTIONS, BILL OF (§ 9*)—FACTS NOT OF RECORD—NECESSITY.

Facts, not appearing of record, can only be presented on appeal by bill of exceptions or some equivalent.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 11; Dec. Dig. § 9.*]

6. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.

On appeal, a ruling of the trial court on a motion is presumed to have been proper, in the absence of a showing to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 907.*]

7. JUDGMENT (§ 870*)—PROCEEDINGS AGAINST SEVERAL JUDGMENT DEBTORS.

When three of several judgment debtors are returned summoned under scire facias, if a fiat is asked against two only, the record should show why the third is left out.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 870.*]

Appeal from Circuit Court, Worcester County; E. Stanley Toadvin, Judge.

Scire facias on a judgment in favor of

the Wilkin Manufacturing Company, for the use of the Oldmar Investment Company, against Charles O. Melvin and others. Judgment for defendants, and plaintiff appeals, and defendants move to dismiss the appeal. Motion overruled, and judgment affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, and STOCKBRIDGE, JJ.

A. P. Barnes, for appellant. George M. Upshur and John H. Handy, for appellees.

BOYD, C. J. On the 3d day of May, 1892, the Wilkin Manufacturing Company, for the use of the Wisconsin Marine & Fire Insurance Company Bank, recovered a judgment in the circuit court for Worcester county against James T. Young, Charles H. Colbourn, L. Fuller Hall, Lewis Thompson, Charles O. Melvin, and William B. Allwine, partners, trading as Young, Colburn & Co. On April 9, 1904, that judgment was entered to the use of the Oldmar Investment Company. On the 5th day of May, 1906, a scire facias was issued on it, and the sheriff made the following return: "Charles H. Colbourn, non est; Lewis Thompson, mortuus est; L. Fuller Hall, non est; residue, summoned severally."

There are two exceptions in the record; the first being on a ruling as to the admissibility of evidence, and the second is to the granting of a prayer, at the conclusion of the plaintiff's case, "that there is no legally sufficient evidence under the pleadings in this case to entitle the plaintiff to recover, and that the verdict must be for the defendant."

[1] A motion to dismiss the appeal was made, on the ground that there was no final judgment, but the docket entries not only show "verdict for defendant, motion and judgment on verdict nisi, and for defendant's costs," but, immediately following the second bill of exceptions, this entry appears on the record: "Case was then submitted to the jury without any further testimony, and, the verdict and judgment being for the defendant, the plaintiff appealed." There would seem, therefore, to be no question about there having been a final judgment, and the motion to dismiss the appeal will be overruled.

A number of motions were filed, as were also demurrers to the pleas. The scire facias was returnable the third Monday of May, 1906, which was May 21st. The record is by no means clear, and it is not easy to understand by whom some of the motions were made. It will be observed that three of the defendants were returned "summoned," two "non est," and one "mortuus est." The three returned "summoned" were Messrs. Young, Melvin, and Allwine. As we understand, when the case was tried (October 26, 1910), Charles O. Melvin was the only defendant then resisting a fiat.

On May 21, 1906, there was a motion for rule security costs. That was the return day, but the record does not show which of the defendants made the motion. On July 20, 1906, which was apparently during the first week of the second term of court, there was a motion in writing for a judgment of fiat against Young and Melvin.

On October 22, 1906, there was a motion to strike out the latter motion, and on October 27th a rule was laid on the plaintiff to give security for costs by the second day of the next term. There was a motion by the plaintiff at the next term to strike out the rule security for costs, and a motion by defendants for judgment of nonsuit for non-compliance with that rule, and then a motion to strike out that motion.

On February 1, 1907, the motion to strike out the rule security for costs was overruled, and the case continued. On May 8th a bond for security for costs was filed, and a motion ne recipiat filed as to that. On May 24, 1907, the motion of October 22, 1906, to strike out the motion for fiat was granted, and the motion for nonsuit for non-compliance with the rule security for costs was overruled. Then, for the first time, appears an entry of rule plea, which is: "Rule plea by second Monday in June, 1907." On June 10th pleas were filed.

Then on July 8, 1907, there was another motion, filed by plaintiff, to strike out the rule security for costs, to rescind the order of court laying the defendants under rule plea, to strike out all pleas filed thereunder, and for judgment of fiat for want of plea by the first rule day after return of the writ. On August 15, 1907, "rule plea as to Young appearing to have been laid improvidently." plaintiff's motion of July 8th to strike out pleas and for fiat granted as to Young, but overruled as to Melvin.

On September 5, 1907, a demurrer to the pleas was filed, and on October 29th the demurrer was overruled as to the first and second pleas, and sustained as to the third and fourth, with leave to plead, and case continued. On November 9th, there was a joinder of issue on defendant's first plea (nul tiel record) and replication to defendant's second plea (limitations), and on December 9th joinder of defendant on plaintiff's replication. After some other motions and rulings the case was finally tried against Melvin, as we understand, although there is nothing in the record to show what became of Allwine. There was apparently a fiat against Young, at least the motion for one was granted, although the docket entries do not show it was entered.

[2] We find a number of written motions in the record as to the pleadings, which the appeal on the judgment brings before us, and some of them we will speak of. The important question in the case is whether the plea of the statute of limitations should

have been received or afterwards stricken out.

At the argument it was said that it had been decided by one or more of the judges of the circuit from which this appeal came that a rule security for costs extends the time for filing pleas until after the rule is complied with. Without deeming it necessary to determine whether such a rule can be made on a nonresident judgment creditor, in a proceeding to revive the judgment by scire facias, we have no doubt that a rule security for costs, and a fortiori a motion for such a rule, does not have the effect of extending the time in which to plead. Security for costs is in no manner connected with the pleadings, and a defendant can plead just as well before as after the security is given. It is true that section 9 of article 24 of the Code provides that, "On such rule being laid, the plaintiff or plaintiffs shall have until the second day of the next term of the court to comply therewith, and on his or their failure to do so he or they shall be nonsuited," but that is in order to give the nonresident ample time to enable him to arrange for the security, although he may give it the very day the rule is laid. It may be laid at the appearance term and must be complied with by the second day of the next term, and there could be no possible reason why the pleadings should not in the meantime be filed. If it extends the time for filing pleas, why does it not extend the time for filing a declaration? It is wholly unlike a rule bill of particulars, as the defendant may not know what to plead until the bill of particulars is filed; and if he pleads before one is filed he waives the right to require it; but that is not the case with a rule security for costs, for the reason that it has nothing whatever to do with the pleadings. It is said in 19 Ency. of Pl. and Pr. 375, that: "Where it is incumbent upon a party to give security for costs, and he does not do so, the other party must make objection by plea in abatement or in some other appropriate manner, and is not excused from pleading or preparing for trial in proper time." The reference to "plea in abatement" we suppose is made to cases where the security must be given before suit, or something of the kind. Under the old practice in equity, if the defendant had knowledge of the plaintiff's nonresidence when he answered, or took any proceeding recognizing the plaintiff's right to sue, the right to lay the rule was waived; but that has long since been changed in this state, and under the statute the rule can be laid at any time before final decree. *Watson v. Glassie*, 95 Md. 658, 53 Atl. 428. We were not aware, until stated at the argument, that it had ever been held in any part of this state that the rule extended the time for pleading at law, but as the lower court apparently acted on that theory, we deemed it proper to express our views on the subject.

[3] Although we do not agree with that court as to the effect of the motion just considered, the record shows that it treated the defendant as not under rule plea until that question was finally disposed of. Rule 20 of the lower court provides that the second Monday of each month shall be rule day for pleading. Rule 21 provides that: "Whenever a rule is laid to declare or plead, or leave granted to amend, unless otherwise specially provided for, such declarations and pleadings shall be filed and amendments made on or before the rule day next thereafter. * * * And if either party shall neglect to file his pleadings at the time prescribed, judgment of non pros. or by default as the case may require, shall, on motion, be entered up against him when the case is called upon the first calling over of the trial docket, *unless the court, for good cause shown, shall enlarge the rule.*" Rule 22 provides that: "In every case upon the appearance docket, where the defendant has been returned 'summoned' or 'notified,' the plaintiff shall be considered as lying under a rule to declare by the rule day next succeeding the return day in the summons or notice; and in every such case the clerk shall enter, as of course, a rule to declare by the next rule day; but if a declaration be filed on or before the return day in the summons or notice, the defendant shall be considered as lying under a rule to plead by the rule day next succeeding the return day in the summons or notice, and in every such case the clerk shall enter, as of course, a rule to plead by the next rule day."

There is nothing in the record to show that a rule to plead was laid before May 24, 1907. That rule was complied with, the pleas were filed on June 10th, and a rule replication laid. It is true that the record does not show any entry by which the court had by order enlarged the rule; but it is manifest that the court, and at least the defendant, understood that it was extended until after the rule security for costs was complied with; and when it was given on May 8, 1907, the motion for a judgment of fiat, filed July 20, 1906, was still pending. The clerk was probably also under the impression that the motion for rule security for costs extended the time to plead; for, as we have said, there is nothing to show that he laid the rule to plead. Rule 21 certainly contemplates a rule to declare or plead, as the case may be, in order to put a party in default; and rule 22 does also. There was no declaration in this case, but, as the writ of scire facias is, for the purposes of pleas, treated as a declaration, the latter part of rule 22 is the part applicable, if any of those rules are, to this case.

The rule to plead, laid on May 24, 1907, was apparently laid by order of the court, at least the motion of the appellant, of July 8, 1907, so states. Rules to plead surely must have some purpose, and if the defend-

ant is to be held to account for not pleading by the first rule day; and the same rule of court which fixes the day of pleading requires a rule to plead to be entered, if it is not done, the defendant ought not to lose his right to plead, especially when the court is of the opinion that under its rules he is not required to plead under the facts then existing. The plaintiff might have applied to the court to lay the defendant under rule to plead, and then have had that question reviewed, if it refused, and the case finally reached this court; but, as the court had the power to enlarge the rule for good cause shown, and concluded that there was good cause shown, by reason of the pending motion for rule security for costs, as its action conclusively shows, it would be a great hardship to hold that, merely because there was no formal order passed, enlarging the rule, it could not be considered as enlarged.

In *Newcomer v. Keedy*, 9 Gill, 263, the plaintiff's counsel carried the narrs., in several cases instituted by the plaintiff against the defendant, to the clerk's office, and handed them to the deputy clerk, who indorsed them, "Filed the 25th September, 1848." The counsel then offered to deposit them in the usual receptacle for such papers, and they were handed to him for that purpose, without any entry on the docket of having been filed. The defendant and his counsel called at different times to know if any narr. had been filed, and, the docket and box of deposit both being examined by the clerk and his deputies, no indication of such narr. being in the office could be found. The pleas were, under those circumstances, filed after rule day, and upon a rule to show cause why the plea of the statute of limitations should not be struck out the rule was made absolute. Upon appeal our predecessors reversed the judgment entered, and said: "To deprive a defendant of a defense thus, which the law of the land says shall be a legal defense, the defendant should first be in default; and a party whose business it is to plead can never be in default, until the rule is laid, or at least supposed to be laid." It is true that the court intimated that if the defendant had had knowledge of the narr. it might have been notice to the defendant that he was under a rule to plead, but, under such circumstances as we have in this case, there was no reason for the defendant to suppose he was under such a rule. There was no such rule on the docket, as the rules of court provided for, and the court, construing its own rules, did not regard the defendant as under rule to plead, until it was laid on June 10th.

In *Acklen v. Fink*, 95 Md. 655, 53 Atl. 423, there was a motion to strike out a judgment by default. One of the grounds relied on was that the defendant was not laid under rule plea. The court said: "Nor do we find the failure of the clerk to make 'the entry of rule plea' upon the docket after the filing

of the narr. a sufficient ground, under the facts of this case, to strike out the judgment. *There was no rule of court requiring this to be done*, and the defendant had ample opportunity after the filing of the narr. to appear and plead to the declaration."

In *Marsh v. Johns*, 49 Md. 569, the defendant filed his plea, and a rule was laid upon the plaintiff to reply to the plea, and upon failure a judgment of non pros. was entered against him. Passing on it, the court said: "If the case is not at issue when it ought to be, and does not stand under a rule, the court will discontinue it for want of prosecution, as it is always the duty of the plaintiff, or his attorney, to take care that his case is put at issue by laying the proper rule."

Courts will not permit parties to suffer because of the omission of the clerk to file pleadings left by them with him, if they are not in default (*May v. Wolvington*, 69 Md. 122, 14 Atl. 706); and when there is a rule of court, requiring a rule to plead to be laid, that ought to be done, in order to put the party in default. In this case, as we have seen, under the view of the lower court, the defendant was not required to plead until the plaintiff gave the security for costs; and, while we think that was error, in point of fact, the rule to plead was not entered, and the defendant should not be deprived of his right to file his pleas. It is true that the plea of the statute of limitations is not regarded favorably by the courts; but when a judgment is above 12 years standing the defendant is authorized by law to plead the statute, and he should not be deprived of his right, excepting according to law. In *Newcomer v. Keedy*, supra, *Hutton v. Marx*, 69 Md. 253, 14 Atl. 684, and other cases which might be cited, this court has protected defendant's right to plead, notwithstanding pleas of statute of limitations would be filed as a result of the rulings. As an illustration of how far this court has gone to save a party from default, see *Heinekamp v. Beaty*, 74 Md. 388, 21 Atl. 1098, 22 Atl. 67.

[4] There is another question of practice of importance in this case. It is well settled that a replication to a plea of limitations, filed after rule day, waives the right to object to the plea. *Stockett v. Sasscer*, 8 Md. 374; *Hutton v. Marx*, supra; 1 Poe. §§ 616, 668. In *Stockett v. Sasscer*, the leading case on the subject, the replication was filed before the motion of *ne recipiatur* was filed. In this case the pleas were filed on June 10, 1907, and on July 8th a paper was filed, which contained a motion to strike out the rule security for costs (although that had already been overruled), to rescind the order of May 24, 1907, laying defendants under a rule plea, and to strike out all pleas thereunder, and for a judgment of fiat for the plaintiff for want of plea. On August 15, 1907, that was overruled as to *Melvin*. On

September 5th, the plaintiff demurred to the four pleas, and the demurrer was sustained as to the third and fourth, and overruled as to the first and second. On November 9th, there was a joinder of issue on defendant's first plea, and replication to his plea of limitations, and on December 9th there was a joinder of defendant on plaintiff's replication.

[5] No exception was taken to any of the rulings of the court on the motions. Assuming that, under *Cushwa v. Cushwa*, 9 Gill, 242, and cases which have followed it, no bill of exceptions would ordinarily be required to bring up such a motion as one to strike out pleas, when the record shows the motion and ruling of the court, the motion of July 8, 1907, was unquestionably, for the most part, based on alleged facts which are not a part of the record. Such facts could only have been brought before us by a bill of exceptions, or something equivalent to one; but, if we treat the end of the sixth paragraph of the motion as sufficient to give a reason for striking out the pleas, independent of those not appearing in the record, the question still remains, Can we now entertain that motion, inasmuch as the replication was filed?

That may seem a technical question, but upon what principle can we review that motion? Prior to the Act of 1867, c. 388, if a demurrer was overruled, and the party demurring then pleaded, he waived his rights under the demurrer. 1 Poe, § 591. Under that act (now section 8 of article 75 of the Code), when a demurrer is overruled, the party demurring has the right to plead over, without withdrawing his demurrer, and upon appeal is entitled, by virtue of the terms of the statute, to have the question at law arising upon the demurrer decided and determined, as if he had not pleaded over. But that section does not include motions; and if a plaintiff makes a motion to strike out a plea, and upon it being overruled replies to the plea, there is no statute reserving his right to still have his motion reviewed. If there was, it ought to require him to except to the ruling on the motion, in order to bring that before this court. An exception would at least be some notice that he did not intend to waive his motion to strike out by pleading.

We have not found any case precisely in point, but in *Stockett v. Sasscer*, supra, the replication to the plea of limitations and the ne recipiatur were filed the same day, but the court held that there was a waiver of the time for filing the plea. In that case an exception was noted, and a bill of exceptions in the record. In this case the plaintiff made the motion to strike out the pleas (treating the paper of July 8, 1907, to be such), then demurred to the pleas, and then replied. Its demurrer is still entitled to be reviewed on appeal by reason of the statute,

although the ruling on it was undoubtedly correct; but, how can the motion be now considered, especially, as we have said, when the ruling on it was not even excepted to, or in some way reserved? There are cases in this state which are very analogous. In *Smith v. Woman's Medical College*, 110 Md. 441, 72 Atl. 1107, the plaintiff moved for a judgment by default, for want of sufficient pleas and affidavit of defense, but the court overruled the motion, and, as the plaintiff refused to join issue upon the defendant's pleas, judgment for the defendant for costs was entered. From that judgment the plaintiff appealed. It was there said: "The plaintiff pursued the course heretofore approved by this court to test the sufficiency of the defendant's pleas; for, had he joined issue thereon, he would thereby have withdrawn the case from the operation of the practice act, and placed it upon the footing of a suit at common law." In *Traber v. Traber*, 50 Md. 1, also under the practice act (Laws 1864, c. 6), the court said: "The course pursued by the appellant in joining issue upon the pleas, and the result of the trial upon the merits, preclude him from now raising the question of the regularity or sufficiency of the affidavit, or asking a reversal of the judgment on account of any defects therein. *If the appellant desired to raise that question on appeal, his proper course was to refuse to join issue on the pleas, and suffer judgment by default.* After the verdict against him on the merits, he cannot be heard to say there was no sufficient plea."

So, when a defendant offers a prayer at the conclusion of the plaintiff's evidence to take the case from the jury, and it is rejected, if he proceeds with the case and offers evidence himself, the error, if any, in rejecting the prayer is waived, and cannot be reviewed on appeal. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337. That decision was made, notwithstanding the act of 1894 (chapter 516) provided that "the defendant shall not be precluded from offering evidence of defense, but any defendant in any such action may offer evidence of defense as fully and to the same extent as though such prayer had not been offered." But, inasmuch as it did not provide, as the act of 1867 did, in reference to demurrers, reserving the right of appeal, we held that the appeal did not bring up for review the ruling on a prayer so offered.

Now, if a plaintiff who has the absolute right to a judgment under the practice act, unless pleas and affidavits be filed as required, will waive his right to such judgment by filing a replication to the pleas, upon what principle should a plaintiff be permitted to reply to a plea of limitations, and then, if he loses his case, rely on a motion made to strike it out? How does an appeal from the judgment bring up his motion when he has thus waived it? Surely it cannot be said

that this plaintiff was placed in a position in which he had to reply to the plea. The replication to the plea of the statute of limitations alleged that the scire facias was issued before the 5th day of May, 1906, and that the judgment was not of 12 years' standing, etc. The record spoke for itself on those questions, and there could be but one result on that plea, which, if validly in, was a bar to the proceeding. The proper practice would have been to decline to reply, and then, upon judgment being entered for the defendant, an appeal could have been taken, and the question regularly determined, whether the plea was filed in time. After all, that is the whole case—whether that plea should have been allowed to stand. With it in, the prayer granted by the court was proper, and there was no error in granting it. There can be no difficulty about the ruling in the first bill of exceptions. We do not understand what the jury had to do with the docket entries in the case being tried, and, at any rate, the plaintiff got the benefit of those entries.

[6, 7] There was not only no rule plea, as we have heretofore said, on July 20, 1906, the time the motion was made for fiat for the want of a plea against James T. Young and Charles O. Melvin, but we find nothing in the record which would have justified the court in granting the fiat against two of the judgment debtors. Three of them had been returned "summoned," and there is nothing to show why the third was left out of the motion. In the absence of something to the contrary, it must be presumed that the court acted properly, and it may have overruled that motion by reason of the third party not being included. When three of a number of judgment debtors are returned "summoned" (treating that as a sufficient return to a scire facias), if a fiat is asked against only two of them, there ought to be some reason shown by the record for leaving out the third. There may have been some reason why the motion for a fiat did not include Allwine; but if there was it nowhere appears in the record, and the presumption is that the court acted rightly. We do not base our judgment on this, but, as the record stands, it is an additional reason for not holding that the motion of July 20, 1906, should have been granted. Without further discussing other questions in the case, the judgment will be affirmed.

Judgment affirmed; the appellant to pay the costs.

PITTSBURG CONST. CO. v. WEST SIDE BELT R. CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. JUDGMENT (§ 725*)—CONCLUSIVENESS—MATTERS CONCLUDED—"CONTRACTOR."

Where defendant railroad company contracted with an individual for the construction

of an extension of the railroad, and the contractor in turn made a contract with plaintiff, a foreign corporation, for the same work, which contract was guaranteed by the railroad company, and after completion of the work an arbitration followed and an award was made, a judgment for plaintiff on the award against the railroad company was conclusive in an action on a scire facias sur judgment, that the plaintiff in its relation to the railroad company was a contractor within the Resolutions of January 21, 1843 (P. L. 367), and April 4, 1862 (P. L. 235), giving contractors building railroads prior liens.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 725.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1534-1537; vol. 8, p. 7616.]

2. RAILROADS (§ 171*) — MORTGAGES AND LIENS—PRIORITIES.

Where a mortgage lien on a railroad attached more than 13 months after work under a construction contract was commenced, the lien of the mortgage will not be given priority over that of the contract on the ground of want of notice of the contractor's claim of lien; the prosecution of the work itself being notice of such lien.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554-576; Dec. Dig. § 171.*]

3. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—GROUNDS—POSITION IN JUDICIAL PROCEEDING.

Where a railroad company entered into a contract for the construction of an extension, and the contractor made a contract with plaintiff, a foreign corporation, for the same work, which contract was guaranteed by the railroad, plaintiff is not estopped, by asserting in an action in the federal court against the railroad company on the contract of guaranty that it was a subcontractor, from subsequently asserting direct contractual relations with defendant to maintain a claim of lien under Resolutions of January 21, 1843 (P. L. 367), and April 4, 1862 (P. L. 235).

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

4. CONSTITUTIONAL LAW (§ 194*)—RETROSPECTIVE ACTS—VALIDITY.

Act May 23, 1907 (P. L. 205), making enforceable contracts theretofore made by unregistered foreign corporations which were unenforceable under Act April 22, 1874 (P. L. 108), is not unconstitutional, though retrospective in its operation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 194.*]

5. CONSTITUTIONAL LAW (§ 154*)—OBLIGATION OF CONTRACTS—CURATIVE ACT.

Act May 23, 1907 (P. L. 205), making enforceable contracts theretofore made by unregistered foreign corporations which under Act April 22, 1874 (P. L. 108), were unenforceable, is not unconstitutional as an impairment of the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 154.*]

6. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—CURATIVE ACT.

Act May 23, 1907 (P. L. 205), making enforceable contracts theretofore made by unregistered foreign corporations which were unenforceable by Act April 22, 1874 (P. L. 108), does not constitute the taking of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 851-869; Dec. Dig. § 299.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Pittsburg Construction Company against the West Side Belt Railroad Company, with notice to Francis H. Skelding and others, on a scire facias sur judgment. From an order making absolute a rule for judgment for want of sufficient affidavit of defense, Skelding and others appeal. Affirmed.

Action on a scire facias sur judgment. The facts appear by the opinion of Swearingen, P. J., making absolute rule for judgment, as follows:

"By this proceeding the plaintiff seeks to secure to itself the benefits of the resolutions of the General Assembly of Pennsylvania, approved January 21, 1843 (P. L. 367), and approved April 4, 1862 (P. L. 235), whereby contractors, in the building of railroads, are given prior liens.

"The Pittsburg Construction Company, the plaintiff, is a corporation duly incorporated and organized under the laws of the state of West Virginia. The West Side Belt Railroad Company, the defendant, is also a corporation duly incorporated and organized under the act of Legislature of Pennsylvania approved April 4, 1868 (P. L. 62). On April 25, 1901, the West Side Belt Railroad Company entered into a contract with A. S. Petrie for the construction of an extension of its railroad. Petrie, in turn, made a contract with the plaintiff, May 24, 1901, for the construction of the said extension, which contract was guaranteed by the West Side Belt Railroad Company, John S. Scully, and T. N. Barnsdall. The work was commenced by the plaintiff on May 20, 1901, and it prosecuted the same continuously until completion, June 11, 1903. An arbitration followed, and an award was made by the arbiter, to whom all disputes were referred by the terms of the contract. At No. 30, May term, 1906, of the Circuit Court of the United States for the Western District of Pennsylvania, the plaintiff brought an action against the West Side Belt Railroad Company, John S. Scully, and T. N. Barnsdall, to recover upon the said guaranty. 151 Fed. 125. That litigation resulted in a decision that the plaintiff could not recover, because it was a foreign corporation and had not established a place of business and designated agents for the transaction of its business in Pennsylvania, at or prior to the time of the contract with the said A. S. Petrie, and therefore it was precluded from maintaining the action by the provisions of the act of the Legislature of Pennsylvania approved April 22, 1874 (P. L. 108). The plaintiff was, in fact, duly registered in Pennsylvania on June 15, 1901, 22 days after said contract was signed.

"By an act of the Legislature of Pennsylvania, approved May 23, 1907 (P. L. 205), it was enacted: 'That whenever any corporation organized and existing under the laws of any other state, and doing business within this commonwealth, shall have heretofore

entered into any contract, bond, or obligation with any person, firm, or corporation, without having first established a known place or places of business and designated an authorized agent or agents for the transaction of its business in this commonwealth, the said contract, bond, or obligation shall be binding upon the parties thereto, and such corporations may enforce the same in the courts of the commonwealth.' Then follow provisos naming certain requirements with which such a corporation must comply before it can avail itself of the provisions of said act.

"It is not disputed that the Pittsburg Construction Company did properly comply with all of the said requirements prescribed. Thereupon it brought an action against the West Side Belt Railroad Company at No. 398, Fourth term, 1907, of this court. It declared both upon the award of the arbiter aforesaid and upon a quantum meruit. After trial, a judgment was entered in favor of the plaintiff and against the said defendant in the sum of \$398,471.78, which was upon the said award, and was not upon the quantum meruit. The said judgment was affirmed upon an appeal to the Supreme Court. 227 Pa. 90, 75 Atl. 1029; and 219 U. S. 92, 31 Sup. Ct. 196, 55 L. Ed. 107. The plaintiff then issued this writ of scire facias, with notice to the receivers of the West Side Belt Railroad Company, having first obtained leave to join them, and with notice to the Union Trust Company of Pittsburg, trustee in a mortgage given by the West Side Belt Railroad Company to secure an issue of bonds, and also with notice to the Colonial Trust Company, trustee in another mortgage given by the West Side Belt Railroad Company to secure its guaranty of an issue of bonds of the Pittsburg Terminal Railroad & Coal Company. All of said parties have appeared and have answered the writ.

"The Union Trust Company of Pittsburg averred that the mortgage, in which it appears as trustee, was dated September 1, 1897, and was recorded in the recorder's office of said county of Allegheny on February 1, 1898, in Mortgage Book, vol. 837, p. 1; that said mortgage was given to secure an issue of bonds aggregating \$1,000,000 which were issued, certified, and delivered, prior to the date of the plaintiff's contract, and of which issue \$383,000 are now outstanding; and that the plaintiff is therefore not entitled to a lien prior to said mortgage.

"The Colonial Trust Company denied that the plaintiff was a contractor within the meaning of the said resolutions of 1843 and 1862. It averred that the plaintiff had defined its position as a subcontractor, in the said suit in the United States Circuit Court, and cannot now claim as a contractor. It also averred that its said mortgage was executed prior to the time the plaintiff performed the labor and furnished the material,

for which it claims a lien, to wit, from May 20, 1901, to June 11, 1903.

"In its amended answer, the West Side Belt Railroad Company, by its receivers, averred that the plaintiff was not a contractor, but was only a subcontractor, and that therefore it was not within the provisions of the said resolutions of 1843 and 1862. It further averred that the plaintiff had no claim against it, prior to the passage of said act of May 23, 1907; and it submitted that, in so far as the said act attempted to create a lien prior to said mortgage, it was unconstitutional, as being a taking of property without due process of law, and impairing the obligation of contracts.

"The Colonial Trust Company adopted said amended answer of the West Side Belt Railroad Company.

"The plaintiff then took this rule for judgment for want of sufficient affidavit of defense, and the case was argued and submitted.

"It cannot be seriously disputed that the plaintiff is entitled to a judgment upon this record. Whether or not it is entitled to the priority of lien, which it claims, is a different question. It was admitted upon argument that this question can be determined upon this motion, and that the parties are not obliged to await a contest over the proceeds of a sale of the property.

"The plaintiff claims a lien upon the railroad of the defendant from the date of its said contract, to wit, May 24, 1901, under and pursuant to the said resolutions of 1843 and 1862, which are as follows:

"1843.

"That from and after the passage of this resolution, it shall not be lawful for any company incorporated by the laws of this commonwealth, and empowered to construct, make and manage any railroad, canal, or other public internal improvement, while the debts and liabilities or any part thereof incurred by the said company to contractors, laborers and workmen employed in the construction or repair of said improvement remain unpaid, to execute a general or partial assignment, conveyance, mortgage or other transfer, of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay their said creditors, without the written assent of the said creditors first had and obtained; and any such assignment, conveyance, mortgage or transfer, shall be deemed fraudulent, null and void, as against any such contractors, laborers and workmen, creditors as aforesaid."

"1862.

"Whereas, It frequently happens that incorporated companies, by assignment, conveyance, mortgage or other transfer, divest themselves of their real and personal estate, in contravention of the provisions of the resolution of January 21st, 1843; therefore,

"Section 1. That whenever any incorporated company, subject to the provisions of the above resolution, shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any incorporated company claiming to hold or own said real or personal estate, to be served in the same manner as a summons upon the defendant, if it can be found in the county, and upon the person or persons, or incorporated company claiming to hold or own such real estate; and if the defendant cannot be found, then upon the return of one nihil and service as aforesaid, on the person or persons, or company claiming to hold or own as aforesaid, the case to proceed as in other cases of scire facias on judgment against terre tenants."

"If it be held that the plaintiff is entitled to a lien from May 24, 1901, as it claims, this lien will have priority over the mortgage in which the Colonial Trust Company is trustee. The proposition of the plaintiff is therefore attacked by the defendant upon these grounds:

"(1) The plaintiff is not a contractor within the meaning of said resolutions, and it is estopped from asserting that it is.

"(2) The said act of May 23, 1907, in so far as it attempts to create a lien prior to the date of its passage, is unconstitutional.

[1] "It was decided in the case of Pittsburgh Construction Company v. West Side Belt Railroad Company, 227 Pa. 90, 75 Atl. 1029, that the plaintiff could recover against the defendant as upon a primary liability. Judgment was there entered in favor of the plaintiff and against the defendant directly. Such recovery could not have been obtained unless it were held that the plaintiff and defendant had in effect direct contractual relations. That decision seems to be conclusive that the plaintiff was, in its relation to the West Side Belt Railroad Company, a contractor within the terms of said resolutions of 1843 and 1862.

[2] "The argument was made that, as against the mortgage of the Colonial Trust Company, there was no notice of any claim of lien upon the part of the plaintiff, and that there were no facts from which a purchaser of the bonds secured thereby could infer the existence of such a claim. And it was urged, besides, that the plaintiff is estopped from now asserting, as against said mortgage, that its relation with the defendant was that of contractor, because it had asserted, in said action brought by it in the United States Circuit Court, that its relation was that of subcontractor.

"The lien of the mortgage of the Colonial

Trust Company attached, if at all, July 1, 1902, more than 13 months after the work of the plaintiff was commenced.

"The work itself imposed upon a purchaser of said bonds the duty of making an inquiry. If he had done so, he would have been bound to inquire fully. He could not have stopped merely with the two contracts, that of Petrie with the defendant and that of the plaintiff with Petrie, for in the latter the defendant expressly undertook to pay the plaintiff and also assumed other contractual relations with it. But, upon inquiry, he would have learned that the defendant's railroad was being constructed by the plaintiff, and he would have been bound to inquire concerning all the facts and circumstances relative thereto. Then he would have learned the very facts and circumstances, which were afterwards determined to be sufficient to constitute the relation between the plaintiff and the defendant as in fact contractual, and which justified the Supreme Court in saying, when rendering its decision as aforesaid: 'We conclude on both grounds that the written contract between Petrie and the construction company is the law governing the present case, quite as much as though the appellant's name appeared therein as a contracting party.'

"There is no allegation that the Colonial Trust Company, or any purchaser of said bonds, ever made any inquiry; nor is it alleged that any one was actually misled. The basis of the contention is that a party must have been misled to his injury by want of notice. But if he was not misled, or if he could have obtained information by inquiry and he did not inquire, how can he be heard to complain of want of notice? It seems to us that this is the situation of the Colonial Trust Company and of the holders of the bonds, secured by its mortgage, with respect to the contention there was no notice of the plaintiff's claim. The lien claimed by the plaintiff is not a secret one. It is a right given by the Legislature of the state. The work of construction was commenced long before the lien of said mortgage attached, and, as we have seen, inquiry would have disclosed the relations of the parties.

[3] "Is the plaintiff estopped from asserting that it was a contractor, by reason of the position it is alleged to have taken in the United States Circuit Court? This inquiry has for its basis the principle that a party is precluded from making an allegation, whereof he has previously alleged the contrary, or where the two positions taken are so antagonistic that one or the other must be untenable. Usually, though not always, some element of bad faith is involved.

"The suit in the United States Circuit Court was brought against the West Side Belt Railroad Company, John S. Scully, and T. M. Barnsdall upon a contract of guaranty; the said three defendants having originally guaranteed the contract, which the plaintiff

made with A. S. Petrie. This contract of guaranty was joint, not several. Consequently, when the plaintiff sought to hold Scully and Barnsdall liable, the action had to be brought against them upon the guaranty, which was the only contract the plaintiff had with them. But, in order to maintain the action against Scully and Barnsdall, the plaintiff was obliged to join the West Side Belt Railroad Company, because it also was one of the joint guarantors. It is apparent why the plaintiff brought the action as it did in the United States Circuit Court. That action was upon the contract of guaranty, and all the other allegations and contracts pleaded were incidental thereto. But, when the plaintiff brought its action in this court, it brought it upon the original contract, alleging a primary and not a secondary liability. If the defendant now finds itself in this dual situation, it has no one except itself to blame, because it voluntarily placed itself in both situations. Aside from this, however, we think the question of estoppel was involved in the case of *Pittsburg Construction Company v. West Side Belt Railroad Company*, 227 Pa. 90, 75 Atl. 1029. If that be true, this is no longer an open question.

"We are therefore obliged to conclude that the plaintiff was a contractor within the meaning of the resolutions of 1843 and 1862, and that it is not estopped from asserting the existence of that relation, as against either the defendant, its receivers, or the Colonial Trust Company.

[4] "Upon the second ground of defense, the counsel for defendant contends that, prior to the passage of the aforesaid act of May 23, 1907, the plaintiff had no claim whatever under its contract, either with Petrie or with the defendant; that said statute can only speak from the date of its passage, as against the mortgage of the Colonial Trust Company; and that to construe it so as to give effect to the defendant's contract, as of the date of the latter, would render the statute obnoxious to the constitutional provisions, which prohibit the taking of property without due process of law and the impairing of the obligation of contracts. These propositions were urged with great force and ability.

"It is not accurate to say that no contract between the plaintiff and the defendant existed, prior to the passage of the said act of 1907. Both parties had the power to make such a contract; they did make it; and the plaintiff performed all, and the defendant the greater part, of the obligations respectively undertaken. That both parties were under a moral obligation to fully perform it cannot be seriously disputed. That the plaintiff was likewise morally entitled to all the incidents of said contract, including the lien given by law, is equally indisputable. And, if both parties had fully performed the contract, no one, certainly not

the Colonial Trust Company, could have questioned their action. But the plaintiff could not invoke the aid of the courts to enforce performance, not because the contract was illegal or void, but solely because of the provisions of said act of 1874. This was a legislative inhibition, which the Legislature had the power to remove at any time. When the Legislature did remove the inhibition, as it did by the act of May 23, 1907, it placed the said contract in precisely the same condition in which it would have been, had the statute of 1874 never been enacted. It likewise made the contract an obligation, legally enforceable, with all its incidents, which was exactly what the parties intended it should be, when they signed the instrument on May 24, 1901. The act of 1907 does not say that it speaks only from its date. On the contrary, it validates and makes enforceable contracts theretofore made, but which were not enforceable because of the act of 1874. The date, to which the liability of the defendant is to be referred, is the date of the contract. *Reed's App.*, 122 Pa. 585, 16 Atl. 100. Therefore, by force of said act of 1907, the agreement between the plaintiff and the defendant became a valid and binding contract, as of the date of its execution and as to all its provisions and stipulations; and in consequence the award of the arbiter became a legal finding of the extent of the defendant's liability thereunder. Upon said contract and upon said award the plaintiff was enabled to sustain a recovery, and upon no other ground.

[5] "Does the construction herein given to said act of 1907 in any way impair the obligation of the contract between the Colonial Trust Company and the West Side Belt Railroad Company?

"It is undoubtedly true that said act is retrospective. But the act does not offend against the Constitution, for that reason. It is only when such an act impairs the obligation of contracts, or authorizes the taking of property without due process of law, that it is held unconstitutional. In this respect there is no distinction between retrospective and prospective acts. It must be borne in mind that it is the obligation of a contract, which the state is prevented from impairing. What is that obligation?

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.' *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

"The said act of 1907 in no way interfered with the rights and remedies of the Colonial Trust Company. Every right which it secured, when its mortgage was given, still exists unimpaired; and so does every remedy which the law or the contract then provided. In other words, the obligation of the contract between it and the defendant remained precisely the same after the pas-

sage of said act as it did before. If the said act relates back to the date of the plaintiff's contract, as the plaintiff contends, the Colonial Trust Company and the holders of bonds secured by its mortgage will have exactly the same security they obtained, when the mortgage was given and the bonds purchased. The act does not take away one iota of their security. If, on the other hand, the said act speaks only from its date, as the Colonial Trust Company contends, it and the holders of said bonds will have a greater security than that for which they bargained and paid. For it must not be forgotten that every dollar's worth of labor and material, which the plaintiff put into said railroad, increased the security of said bonds to the same or even greater extent. So that the equity of the contention of the Colonial Trust Company and of the said bondholders is not quite apparent. If, therefore, the Colonial Trust Company and the said bondholders have not been deprived of any right or of any remedy by the passage of the act of 1907—and we have seen they have not—and if they had notice of, or could with reasonable diligence have ascertained, the relation between the plaintiff and the defendant, upon what possible ground can it be said that the act of 1907 impaired the obligation of their contract with the defendant? It seems to us there is none whatever, and that we must hold the act did not have that effect.

[6] "Equally untenable is the position that said construction of the act will result in the taking of property without due process of law. By no possible reasoning can it be shown that any property, in which the Colonial Trust Company has an interest, will be taken by said construction of the act. It has its lien; and it is the same lien which it had at the inception of its mortgage. Not a particle of the property, upon which it secured a lien, has been taken away. Therefore it will not be deprived of any property at all, much less 'without due process of law.'

"At the argument, it was conceded, and indeed upon this motion it must have been, that the plaintiff was not entitled to a lien prior to that of the mortgage, in which the Union Trust Company of Pittsburg is trustee. The mortgage was executed and recorded, and the bonds secured thereby were issued, certified, and delivered, long before the plaintiff made its contract with, or performed any work for, the West Side Belt Railroad Company. Consequently that mortgage was a subsisting lien at the date of the plaintiff's contract, and that lien, to the extent of the bonds of that issue still outstanding, cannot be displaced by the said resolutions of 1843 and 1862.

"Other questions have been raised in the briefs submitted; but in the view we have taken we do not think it necessary to prolong this opinion by their discussion.

"We think the rule for judgment should be made absolute. Let a formal order for judgment in accordance with this opinion be drawn by counsel and submitted."

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Thomas Patterson, for appellants. Samuel McClay, Edwin W. Smith, Robert J. Dodds, and Reed, Smith & Beal, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Swearingen.

STERNER v. S. MORGAN SMITH CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Under Act June 10, 1907 (P. L. 523), providing that, in an action for injuries to a servant, the negligence of a fellow servant shall not be a defense when the injury was caused by the act of any fellow servant, done in obedience to orders by the employer, or any other person who has authority to direct the act, the negligence of a fellow servant in performing an act in obedience to instructions of a foreman cannot be interposed in defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 369, 370; Dec. Dig. § 182.*]

2. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Plaintiff was engaged in painting the inside of a heavy square iron frame, consisting of plates 1 inch thick, 30 inches wide, and 10 feet long set on edge, so as to form a square box, and temporarily bolted together. The foreman of the employer ordered two workmen to remove the bolts when the plates had been painted and smoothed with a cold chisel. The foreman was not present when the bolts were removed. It took the men about 15 minutes to remove them, and the plaintiff remained within the frame without protest while the work was done immediately before his eyes and with much noise, when he was injured by the fall of one of the plates. *Held*, that the injury did not result from the order of the foreman, and there was no negligence on the part of the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

3. MASTER AND SERVANT (§ 234*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In such case, plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684, 687; Dec. Dig. § 234.*]

Appeal from Court of Common Pleas, York County.

Action of trespass for personal injuries by Wesley Sterner against the S. Morgan Smith Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

The facts are stated in the opinion of the Supreme Court.

The defendant presented the following points:

"(2) If the jury find from the evidence that the plaintiff saw and heard the defendant's employes, Slonaker and Smith, removing the bolts from the frame, and, notwithstanding what he saw and heard, remained where he was inside the frame without any protest to Slonaker and Smith, or to their foreman, in charge of this work, he took the risk of any injury which might ensue, and therefore is not entitled to recover in this cause. Answer: This point is refused. There are other facts to be considered by the jury in addition to those mentioned in this point.

"(3) If the jury find from the evidence that the plaintiff saw and heard the defendant's employes, Slonaker and Smith, removing the bolts from the frame, and, notwithstanding what he saw and heard, remained where he was inside the frame without any protest to Slonaker and Smith, or to their foreman, in charge of the work, he did not exercise such care as an ordinarily prudent man would have exercised under the circumstances, and was guilty of negligence which contributed to the accident, and therefore is not entitled to recover in this suit. Answer: This point is refused. The jury must determine from all the facts of the case, including those referred to in the point, whether the plaintiff was guilty of any negligence which contributed directly to the happening of the accident which caused plaintiff's injuries.

"(4) The plaintiff's witnesses, Slonaker and Smith, having testified that Schlaanstine, the foreman, ordered them to take out the bolts 'when the job' was finished, and that they went to the frame and saw that the job was not done and went away, and later returned and took the bolts out, the act of Slonaker and Smith in taking out the bolts before the plaintiff had finished painting was the negligence of coemployes, for which the defendant cannot be held liable, and the plaintiff cannot recover in this case. Answer: This point is refused as written. It is for the jury to determine from all the evidence in the case what the 'job' was, which is referred to, and whether or not the acts which contributed to the accident resulted from the negligence of the plaintiff's fellow workmen, for which defendant would not be responsible, or from the negligence of a vice principal of the defendants for which they would be liable in damages, if it was the proximate cause of plaintiff's injury."

Verdict and judgment for plaintiff for \$1,750. Defendant appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Richard E. Cochran and Smyser Williams, for appellant. Michael S. Niles, Charles A. May, George E. Neff, and Henry C. Niles, for appellee.

POTTER, J. [1] The only thing disclosed by this record, upon which a charge of negligence against the defendant can be based is the fact that the foreman of the machine shop directed two of the workmen to remove the bolts which held together the sides and ends of an iron frame, which was being prepared for shipment. The frame was composed of 4 pieces, each about 1 inch thick, 30 inches wide, and 10 feet long. These pieces were set on edge, so as to form a square box, and were bolted together at the corners. The frames were set up temporarily in the shop, and were to be smoothed off with a cold chisel and hammer, and painted, as part of the process of preparation for shipment. The plaintiff in this case was engaged in doing the painting upon the inside of the frame just before the accident occurred, and another workman had just finished the chipping or smoothing of the frame with a cold chisel. Two other workmen were directed to take the frame apart and prepare it for shipping. The point upon which this case turns, in so far as any negligence is concerned which may be attributed to the defendant, is in the form of the order given by the foreman, and the effect naturally to be given to it. The evidence for plaintiff tends to show that the workmen withdrew the bolts before plaintiff had quite finished his work of painting, and as a result one of the pieces of the frame, being deprived of support, fell over upon plaintiff and injured him.

[2] The question is whether this injury was caused by the action of fellow servants in obedience to instructions given by the foreman. If so, the negligence of the fellow servants may not be interposed in defense, because, under the terms of the act of June 10, 1907 (P. L. 523), such a defense is prohibited. We must therefore examine the testimony to see if the natural and reasonable effect of the order given by the foreman was to bring about the injury. According to the testimony of Slonaker, one of the workmen who removed the bolts, the foreman said he wanted them to take out the bolts when the job was finished, meaning thereby, as the evidence shows, when the painting and the smoothing was done. The witness goes on to say: "We couldn't work at it then, and went back on the floor, and went back afterwards and took the bolts out. He said we should watch the job up, and when it was ready take it apart." So much for the instructions. What was actually done under them was thus detailed by the same witness: "We went down there after we thought the job was ready, and took the bolts out of the

opposite end, and then came up to this end, and there were four turned bolts in there that you have to drive out with a hammer." There was other testimony corroborative of what this witness said, as to the order given by the foreman, and as to the fact that it was not immediately executed. It further appears that the operation of removing the bolts occupied some time, perhaps half an hour, and the foreman was not there when it was completed. Manifestly the pieces would not be separated until the bolts were out, nor could the piece which upset fall over until then. It is evident that the order given by the foreman to take the bolts out when the job was ready, involved no danger to the plaintiff. It is apparent that the workmen properly understood the order as not calling for instant action upon their part, for they waited until, as they said, they thought the job was ready. If the workmen took out the bolts before the job was ready—that is, before the painting was finished—they acted, not in obedience to the order, but in violation of it. If the injury resulted from such a violation of orders, the employer was not responsible. If the foreman had ordered the men to proceed at once with the work, without regard to the presence of the plaintiff, then engaged in painting, and injury had resulted as a plain consequence of what was done in direct obedience to the order, the employer would have been liable, and the negligence of the fellow servants, no matter how gross, would, under the terms of the act of 1907, not have been admissible as a defense. But the testimony makes it clear that no such thing was done, and the injury cannot by any reasonable inference be regarded as resulting from the order of the foreman to the fellow servants of the plaintiff. If not, then there is nothing in the case to sustain the charge of negligence against the defendant.

[3] It is not necessary to go further and consider the evidence showing contributory negligence by the plaintiff; but, if it were, it would appear that the workmen were engaged for more than 15 minutes in removing the bolts right under the eyes of plaintiff, and almost within arm's reach. Some of the bolts had to be driven out with a hammer, which made a noise. It is incredible that plaintiff should not have seen or heard what was going on. If he did, and remained so close to the unsupported piece of iron as to be injured by it when it turned over, he must have contributed thereby to the injury which he received. The third, fourth, and eighth assignments of error are sustained.

The judgment is reversed, and is here entered for the defendant.

Appeal of DRAKE.

(Supreme Court of Pennsylvania. July 6, 1911.)

TAXATION (§ 305*)—CLASSIFICATION OF TERRITORY—APPEAL.

Under Act March 24, 1868 (P. L. 443), relating to the taxation of real estate in Philadelphia county, while an appeal lies from an assessment of valuation, none lies from the action of the board of revision, classifying the territory or district in which the real estate is located.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 305.*]

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the application of Marian W. Drake for revision of taxes. From an order dismissing an appeal from the board of revision, Drake appeals. Quashed.

Argued before BROWN, MESTREZAT, POTTER, and MOSCHZISKER, JJ.

John Weaver, John G. Johnson, Joseph R. Rhoads, and John S. Gerhard, for appellant. James Alcorn, City Sol., and Mayne R. Longstreth, Asst. City Sol., for appellee.

PER CURIAM. The appeal heard in the court below was not from the assessment or valuation of the appellant's real estate, but from the classification of the territory or district in which it is located. By the act of March 24, 1868 (P. L. 443), it is made the duty of the board of revision of taxes of the county of Philadelphia, "immediately after the annual assessment in each year, to classify the real estate so assessed in such a manner and upon testimony adduced before them, as to discriminate between the rural and built up portions" of the city of Philadelphia. The classification required by the act divides real estate in the city of Philadelphia into built-up portions, rural or suburban property, and agricultural and farm land, and this leads to three rates of taxation. The tax upon the rural or suburban portion of the city is not to exceed two-thirds of the highest rate of tax required to be assessed, and that upon agricultural and farm land is to be one-half of the highest rate. The act of 1868 has conferred upon the board of revision of taxes the authority to classify real estate within the city of Philadelphia for the purpose of determining what proportion of the general tax rate is to be paid by two of the classes, and no statute allows an appeal from the decision of that tribunal. If the authority conferred upon it, should be abused, the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong. *Erie v. Reed*, 113 Pa. 468, 6 Atl. 679. Under the act of April 19, 1889 (P. L. 37), an appeal lies to the common pleas from an assessment or valuation by county commissioners or a board of revision of taxes, but this is very different from classification. Of the as-

essment or valuation of his property the appellant is not complaining.

Appeal quashed.

RUCH et al. v. YORK CITY.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CONTRACTS (§ 127*)—VALIDITY—ARBITRATION CLAUSE.

Provision may legally be made in a building or construction contract that disputes shall be submitted for decision to the architect or engineer, and that his conclusion or judgment shall be a final adjudication of the questions submitted, and the architect or engineer may be given the power to determine the right to liquidated damages under the terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

2. CONTRACTS (§ 285*)—CONSTRUCTION—ARBITRATION CLAUSE.

To oust the jurisdiction of courts by a provision in a contract for the submission of disputes to the architect or engineer, it must clearly appear that the subject-matter of the controversy was within the prospective submission, and a provision therein to submit questions arising as to the fulfillment of the contract does not give a right to pass on a claim for damages for nonfulfillment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1303; Dec. Dig. § 285.*]

3. MUNICIPAL CORPORATIONS (§ 360*)—PUBLIC IMPROVEMENTS—CONTRACTS—ARBITRATION CLAUSE—EXTRA WORK.

Where a contract for the construction of a sewer gives the engineer authority to determine the amount, quality, acceptability, and fitness of the several amounts of work and material, and to decide all questions as to the measurement of quantities and fulfillment of the contract, and to determine questions respecting the true construction or meaning of the plans and specifications and the contract contemplates extra work, it is for the engineer to decide whether additional sewers, and removing and relaying paving on the streets where they were laid, and excavations for house connections to a greater depth than that specified in the contract were "work not otherwise provided for" which was to be paid for as extra work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

4. MUNICIPAL CORPORATIONS (§ 358*)—PUBLIC IMPROVEMENTS—CONTRACTS—ARBITRATION CLAUSE.

Error in the decision of an engineer as to the fulfillment of a contract for construction of a sewer, does not invalidate the decision except in case of fraud or misconduct to which the city was a party.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. § 358.*]

5. MUNICIPAL CORPORATIONS (§ 360*)—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.

Where a city's contract for the construction of a sewer states a unit price, and it is stipulated that the quantities of work shown on the plans are only approximate, the contractors can recover only unit prices, and not for extra work for additional sewers, extra excavations of house trenches to a greater depth than that specified in the contract, and for the removal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and replacing of pavements involved in laying the additional sewers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.*]

6. MUNICIPAL CORPORATIONS (§ 358*)—PUBLIC IMPROVEMENTS—CONTRACTS—ARBITRATION CLAUSE.

Under a contract for the construction of sewers, authorizing the engineer to construe the plans and specifications and to determine what is and what is not extra work, but not giving him power to construe the contract as a whole, he exceeds his jurisdiction where he passes on a claim for damages for failure of the city to provide an outlet for sewers, since such a decision involves a construction of the whole contract, and not merely of the plans and specifications.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 358.*]

7. MUNICIPAL CORPORATIONS (§ 362*)—PUBLIC IMPROVEMENTS—CONTRACTS—ARBITRATION CLAUSE—DELAY.

An engineer is not authorized to pass on a claim for damages for delay in performance of a contract for the construction of sewers where the contract contains no provision conferring such authority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 894, 895; Dec. Dig. § 362.*]

Appeal from Court of Common Pleas, York County.

Assumpsit by George W. Ruch and another, trading as George W. Ruch & Co., against York City to recover a balance on a contract for the construction of a sewer system. From a judgment for defendant on demurrer to the statement, plaintiffs appeal. Reversed, with procedendo.

The following is the opinion of Bittenger, P. J., in the court below:

"The items of the plaintiffs' claim were as follows: (a) \$12,406.40, for work on so-called 'dotted line' and 'no line' streets; (b) \$2,704.76, for extra excavations for house connections below the average depth of six feet; (c) \$1,610.11, for removing and relaying paving on streets over trenches dug by plaintiffs; (d) \$47,688.69, alleged damage by reason of the failure of the city to provide an outlet for the sewers laid by plaintiffs; (e) \$5,388.15, for cost of cleaning sewers to enable the city to inspect the same before acceptance; and (f) \$10,863.98, for amount deducted by the city as liquidated damages suffered by it for failure to complete work on or before January 1, 1906, as provided in the contract.

"Notice by advertisement was given by the city that sealed proposals would be received for the construction of a system of sewers in the city of York. Intending contractors were invited to inspect the plans, specifications, and form of contract at the office of the resident engineer of the board of public works. The letting of the work was to be in three separate contracts, denominated contract 'A,' contract 'B,' and contract 'C,' the latter of which was to be a discharge sewer with overflow chamber and all ap-

purtenances. Contract 'A' and contract 'B' were let, the latter to the plaintiffs on March 28, 1904; contract 'C,' was not let, and the sewer therein provided has not been constructed. Contract 'B' was let at unit prices. Work was provided for and was to be paid for at the cost thereof plus 15 per cent. On April 23, 1904, the plaintiffs began work under the contract and proceeded with it until December 22, 1906, when, the engineer having certified that the plaintiffs had not made the progress required by the contract and had unreasonably and unnecessarily delayed the work, the city under article 7 of the contract took charge of and completed the work. On October 1, 1907, the engineer in accordance with article 12 of the contract, made a final estimate of the amount of work done and certified that the work was completed according to the terms of the contract on September 6, 1907.

"The statement avers that the contract was entered into by the plaintiffs upon the faith of the plans, specifications, and form of contract shown to them prior to their bid at the office of the resident engineer, and upon the faith of the statements, explanations, and directions of the engineer at the said time and place, and that plaintiffs made their bid and executed said contract in reliance thereon. It is further averred that the plans indicated by certain marks the location of the streets where the sewerage system was to be constructed, that 'solid lines' were explained to represent sewers to be constructed at the present time, and 'dotted lines' extensions to be made in the future; that the plans and specifications failed to show the depth of the house connections of the sewerage system and the paving and the character thereof required to be removed and replaced by the contractor; that the engineer instructed the plaintiffs to bid only on the 'solid lines' streets as the location of the sewer; that the engineer represented that the house connections would be at the depth of six feet, and that if the contractor was required to go any deeper he would be paid therefor as extra work under the contract; that the plans exhibited to the plaintiffs showed the paving on streets and alleys and the character thereof which was to be removed and replaced as provided in the contract; that the engineer represented that an outlet system would be provided by the defendant for the sewers to be constructed under contract 'B' and that defendant would provide temporary outlets for the work covered by contract 'B' in case the outfall part of the sewerage system, covered by contract 'C' should not be complete until it should be completed or progress sufficiently made to furnish ample outlets for the sewers to be constructed under the contract.

"The several items of the plaintiffs' claim.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

except the one for failure to provide an outlet, were submitted to and disallowed by the engineer acting as an arbitrator under the third clause of the contract. The contract, specifications, and notice to contractors provide, *inter alia*, as follows:

"Article 3 of contract. 'All the work under this contract shall be done to the satisfaction of the engineer, who shall in all cases determine the amount, quality, acceptability and fitness of the several amounts of work and materials which are to be paid for hereunder, and shall decide all questions which may arise as to the measurement of quantities and the fulfillment of this contract on the part of the contractor, and shall determine all questions respecting the true construction or meaning of the plans and specifications, and his determination and decision thereon shall be final and conclusive; and such determination and decision in case any question shall arise shall be a condition precedent to the right of the contractor to receive any money hereunder.'

"Art. 4. 'The construction of the work shall be in all respects according to the notice and proposal hereto annexed, the specifications hereinafter set forth and the plans exhibited, which notice, proposal, plans, and specifications are made part of this contract.'

"Art. 5. 'The contractor agrees that the quantities stated in the notice to bidders, or at other times, are only for the purpose of comparing, on a uniform basis, the bids offered for the work under this contract.'

"Art. 7. 'If the work to be done under this contract shall be abandoned * * * or if at any time the engineer shall be of the opinion, and shall so certify in writing to the board, that the conditions herein specified as to the rate of progress are not fulfilled, or that the work, or any part thereof, is unnecessarily or unreasonably delayed * * * the board may notify the contractor to discontinue all work * * * and the board may thereupon * * * complete the work * * * and charge the expense thereof to the contractor.'

"Art. 11. 'The engineer shall make an approximate monthly estimate of the value of the work done and materials incorporated into the work, whenever said monthly work exceeds \$500 in value, and 80 per cent. of such estimated value will be paid to the contractor when approved by the board.'

"Art. 12. 'The engineer shall, as soon as practicable after the completion of the work of this contract, make a final estimate of the amount of work done under this contract, and the value thereof, and the city shall, within thirty days after such final estimate is so made and is approved by the board, pay the entire sum so found to be due hereunder, after deducting therefrom all previous payments, and also all percentages and amounts to be kept and retained under the provisions of this contract. All prior estimates and pay-

ments shall be subject to correction in the final estimate and payment.'

"Art. 14. 'The contractor shall do any work not herein otherwise provided for when so ordered in writing by the engineer, and shall, when requested to do so, furnish itemized statements of the cost of the work ordered, and give the engineer access to accounts, bills and vouchers relating thereto.'

"Art. 15. 'If the contractor claims compensation for extra work not ordered as aforesaid, but nevertheless approved by the engineer, he shall, within one week after the beginning of such work, make a written statement of the nature of the work performed, to the engineer, and shall, on or before the fifteenth day of the month succeeding that in which any extra work shall have been done, file with the engineer an itemized statement of the details and amount of such work; and unless such statements shall be made as so required, his claim for compensation shall be forfeited and invalid, and he shall not be entitled to payment on account of any such work.'

"Art. 16. 'If the contractor is obstructed or delayed in the prosecution or completion of the work by * * * any delay on the part of the city in doing the work or furnishing the materials to be done and furnished by it, the contractor shall have no claim for damages for any such cause or delay, but he shall in such cases be entitled to such extension of the time hereinafter specified for the completion of the work as the engineer shall in writing certify to be just and proper, provided, however, that claim for such extension of time is made by the contractor in writing within a week from the time when any such alleged cause for delay shall occur.'

"Art. 17. 'It is agreed that the contractor shall complete all of the work under this contract on or before the 1st day of January, 1906, and it is further expressly agreed that time is of the essence of this contract, and the contractor agrees that the city is authorized to deduct and retain out of moneys that may be due or become due to him under this agreement the sum of fifty (\$50.00) dollars per day as liquidated damages for each and every day that the work is not completed beyond the time herein stipulated therefor.'

"Sec. A, clause 5 of Specifications. 'All work during its progress and on its completion shall conform to the lines and grades given by the engineer, and shall be built in accordance with contract plans and directions given by him from time to time, subject to such modifications and additions as shall be deemed necessary by him during its execution.'

"Clause 6. 'The quantities of work shown on the plans and herein stated are only approximate, and are given for the purpose of balancing the bids. As the work progresses it is expected that some of the sewers shown

may be omitted, due to the embodiment of existing sewers within the new system, the desirability of which can be determined only after the work has been opened up; and that some sewers may be added to the plans during the progress of the work, due to the building up of additional streets or to other causes. It is distinctly understood that the board reserves the right to add to or take from the total amount of work anticipated under each contract up to the limit of twenty per cent. thereof, in accordance with the distinct stipulation specified in article 5 of this contract.'

"Sec. C, clause 39. 'All work done on excavation as above specified or as may be required, shall be included in the prices bid per running foot of sewer construction, according to the notice to contractors and the proposal annexed.'

"Sec. E, clause 64. 'The surface of streets, where paved or macadamized, shall have the same materials replaced and deficiencies supplied, and shall in all cases be left in as good a condition as it was previous to the commencement of the work.'

"Clause 22 of the Proposal. 'For extra work, if any, performed under art. 14 of the annexed contract, the reasonable cost of the work, as determined by the engineer, plus fifteen per cent. of such cost. The prices bid per running foot for furnishing and laying sewers include excavation * * * re-filling trenches, replacing all structures interfered with, resurfacing of streets, and all other work and materials, except that to be paid for separately, as stated in the contract and specifications.'

"Notice to Contractors. 'The quantities stated in this proposal are approximate only, and subject to change without liability by the board.'

"The court entered judgment for defendant on the demurrer."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

H. C. Niles, V. K. Keeseey, and J. S. Black, for appellants. John L. Rouse, City Sol., and James St. Clair McCall, for appellee.

MESTREZAT, J. This is an action of assumpsit brought to recover a balance alleged to be due on a contract to construct part of a sewerage system in the city of York, and damages arising out of the contract. The statement claims for work which is alleged to be extra and payable for as such and not regular work payable for at unit prices; for the cost of cleaning the sewers for inspection; for damages by reason of the city's failure to provide an outlet for the sewers laid by plaintiffs; and for the amount deducted by the city as liquidated damages for failure to complete the work within the time required by the contract. The defendant filed a demurrer to the statement and alleged as causes therefor that the statement disclosed the several items of the

claim to be within the scope of the arbitration article of the contract and the decision by the arbitrator was final and conclusive, and that some of the items were lumped charges and not sufficiently specific. The demurrer was sustained by the court and judgment was entered for the defendant. The plaintiffs have appealed.

[1] It is settled in this state that the parties to a building or construction contract may legally provide therein that disputes arising out of the contract shall be submitted for decision to the architect or engineer, and that his conclusion or judgment shall be a final adjudication of the questions submitted. Such submission may include the power to determine the right of the parties to liquidated damages under the terms of the contract. *Clark & Sons Co. v. Pittsburg*, 217 Pa. 46, 66 Atl. 154; *Conneaut Lake Agricultural Association v. Surety Company*, 225 Pa. 592, 74 Atl. 620.

[2] The right of trial by jury, however, is not to be taken away by implication, and in order to oust the jurisdiction of the courts it must clearly appear that the subject-matter of the controversy was within the prospective submission. *Lauman v. Young*, 31 Pa. 306. An agreement of submission is not to be extended by implication beyond its plain words, and a provision therein to submit questions that may arise as to the fulfillment of a contract does not give the right to pass on a claim for damages for nonfulfillment. *Somerset Borough v. Ott*, 207 Pa. 539, 56 Atl. 1079.

[3] Article 3 of the contract between the parties to this litigation provides as follows: "All the work * * * shall be done to the satisfaction of the engineer, who shall in all cases determine the amount, quality, acceptability and fitness of the several amounts of work and materials, * * * and shall decide all questions which may arise as to the measurement of quantities and the fulfillment of this contract, * * * and shall determine all questions respecting the true construction or meaning of the plans and specifications, and his determination and decision thereon shall be final and conclusive; and such determination and decision in case any question shall arise shall be a condition precedent to the right of the contractor to receive any money hereunder." We think it clear that the items of the plaintiffs' claim for work on the so-called "dotted line" and "no line" streets, for excavations for house connections at a greater depth than six feet, and for removing and relaying paving on streets over trenches dug by the plaintiffs are within the jurisdiction of the engineer under the arbitration article of the contract and that his adjudication was final. The parties submitted all the items of the claim, except the item for failure to provide an outlet for the sewers laid by the plaintiffs, and, after presenting their contentions pro and con, the arbitrator

rendered a decision which disposed of every item of the claim with the one exception. Whether these items were extra work or were to be compensated for at unit prices was for the engineer to decide under the arbitration article of the agreement. It specifically provides that, "the engineer shall decide all questions which may arise as to the measurement of quantities and the fulfillment of the contract, * * * and shall determine all questions respecting the true construction or meaning of the plans and specifications." It was the duty of the engineer to make the measurements for the original as well as for the extra work, and it necessarily required him to determine what was extra work and what was the regular work to be paid for at unit prices. This is one of the questions which he especially would be competent to determine and which arose as to the "measurement of quantities." The location, extent, and character of the work, the character and quantity of materials, etc., are shown by the plans and specifications, and hence whether additional sewers and removing and relaying paving on the streets in which they were laid, and the depth of excavations for house connections were "work not herein otherwise provided for," and to be paid for as extra work, depended upon "the true construction or meaning of the plans and specifications," and hence were questions for the arbitrator to determine.

[4] There is no sufficient allegation in the statement that the decision of the engineer or his final estimate was made fraudulently or collusively, neither is there any corruption or misbehavior on the part of the engineer sufficiently averred. There is no allegation that the city used any fraudulent means to procure the decision or estimate of the engineer. His action as arbitrator, therefore, cannot be set aside or invalidated on the ground of fraud, collusion or misbehavior in the performance of the duties imposed by the contract. It is true the statement avers that "the engineer erroneously, wrongfully, contrary to the terms of said contract, and as the plaintiffs believe and expect to prove, at the direction of the board of public works, calculated the amount due the plaintiffs for said work in the manner provided in the said contract for work on sewers indicated on the said plans by solid lines." But this is not sufficient to charge the arbitrator with fraud, collusion, or misbehavior. There are no facts stated which would warrant the conclusion that the arbitrator acted other than as his best judgment dictated. The decision may be erroneous and not in accord with the true intent of the contract, but that does not invalidate it unless it is tainted with fraud or misconduct to which the city was a party. It may be assumed that the board of public works as well as the plaintiffs urged on the arbitrator as forcibly as they could their construc-

tion of the contract, but that would not justify setting aside his decision. Prior to making the decision, the engineer heard both parties orally and in writing, and gave "full deliberation to the arguments of counsel thereon."

[5] The arbitrator was right in deciding that under the terms of the contract the plaintiffs were not entitled to pay for extra work embraced in the first three items of the plaintiffs' claim. The first item is for work done on the so-called "dotted line" and "no line" streets. The basis of the claim is the alleged statements and representations made by the engineer at the time the plaintiffs inspected the plan of the streets and before they made their bid and entered into the contract. It is a sufficient answer to the claim that the parties must stand upon their contract, and that the engineer had no authority to change the terms of the agreement which the city made. "Notice to Contractors" conferred no such authority. The plans, specifications, and form of contract were at the office of the engineer of the board of public works for inspection by any intending contractor, but no authority was given the engineer to alter or change them in any particular by any agreement, statement, or representation, written or oral. It is clear, we think, that the contract itself gives no ground for the plaintiffs' contention in this respect. The agreement for the work to be done under contract "B" was at unit prices, and did not provide for the laying of sewers on any certain or definite number of streets. It is true that the "solid line" streets upon the plans were supposed to represent sewers to be constructed at the time of the contract, and that "dotted line" streets represented the extension to be made in the future, but this part of the plans must be construed in the light of the provision of clause 6 of section A of the specifications which provides that the sewers to be constructed on the plans may be omitted from or added to the plans during the progress of the work within a limit of 20 per cent. of the work originally contemplated. It was, therefore, anticipated that some of the sewers provided for in the contract and shown on the plans should be omitted, and that others should be added to the plans during the progress of the work. The limit of departure from the amount of work stipulated in the agreement was 20 per cent. of the work originally provided for, and it is not averred in the statement that the limit was exceeded. It is clear, therefore, that the construction of additional sewers was not extra work for which the contractor was entitled to pay as such, but was work for which the contractor was entitled to receive compensation at unit prices. Again, we think the extra work contemplated by the parties was such as was not specifically provided for in the agreement. Article 14 of the contract

provides that "the contractor shall do any work not herein otherwise provided for when so ordered in writing by the engineer," and clause 22 of the proposal provides compensation for such work as follows: "For extra work, if any, performed under article 14 of annexed contract, the reasonable cost of the work, as determined by the engineer plus 15 per cent. of such cost." The laying of the sewers was to be paid for at unit prices, and any additional work of that character was to be paid for at such prices and not as extra work as provided in clause 22 of the proposal. It is distinctly stipulated in the contract and specifications that the quantities of work shown on the plans were only approximate, clearly disclosing that, as provided in clause 6 of section A, of the specifications, the city had the right to require the contractor to lay additional sewers for which they should be compensated at unit prices.

The second item of the claim is for extra excavation for house lateral trenches of a greater depth than six feet. The arbitrator allowed the contractor for this work at unit prices, which was clearly right. The depth of the house connections was not fixed by the contract and hence the excavations for making such connections were to be paid for under section 39 of his specifications, which provides that: "All work done on excavations as above specified or as may be required shall be included in the prices bid per running foot of sewer construction." This claim, like the one just considered, is based on the alleged representations of the engineer, which, as we have seen, were not sufficient to modify or change the stipulations of the contract. The contractor was dealing with the municipality, and the latter is bound by its contract and not by the unauthorized representations or declarations of its officers which would change the written stipulations of that agreement. *Martin v. Berens*, 67 Pa. 459; *Phillips v. Melly*, 106 Pa. 536.

The third item of the claim is for removing and replacing pavements on streets in which trenches were dug and additional sewers were laid by the plaintiffs. The arbitrator allowed compensation for this work at unit prices, and declined to allow for it at the rate at which extra work was to be paid for. This work comes within the provisions of section 22, providing for payment at the prices per running foot for resurfacing streets, and of section 64 of the specifications, and the arbitrator was right in holding that it was not extra work within contemplation of the contract which entitled the contractor to additional pay for the work. The engineer was authorized to require additional sewers to be laid at unit prices, and it follows that the additional repaving necessary to complete such work should be paid for at the prices fixed for original work of the same character.

[6] We do not agree with the learned court below that the arbitration clause confers jurisdiction upon the engineer to determine the plaintiffs' right to or the amount of damages alleged to be due by reason of the failure of the city to provide an outlet for the sewers constructed under contract "B," or to determine the right of the plaintiffs to recover the liquidated damages withheld by the city for failure to complete the work within the time specified in the contract. Unless clearly conferred by the arbitration article, the arbitrator had no authority to pass upon these questions and thereby deprive the plaintiffs of their right to trial by jury. The burden is upon the defendant to point out the provision in article 3 of the contract which empowers the arbitrator to pass upon these questions, and failing to do so the plaintiffs have the right to maintain this action and have their rights adjudicated by the court. Turning to the article in question, we see that it authorizes the engineer to determine the amount, quality, acceptability and fitness of the work and materials, to decide all questions which may arise as to the measurement of quantities and the fulfillment of the contract on the part of the contractor, and to determine all questions respecting the true construction or meaning of the plans and specifications. His decision on these questions is made final and conclusive.

It will be observed that the article does not confer upon the engineer generally the power to construe the contract, and thereby deprive the plaintiffs of the right to submit that question to the court. The extent of the authority of the engineer in that respect is his power to determine the "true construction or meaning of the plans and specifications." As suggested above, he may determine what is extra work within the meaning of the plans and specifications. The contract was let at unit prices, but provision was made for extra work to be paid for at the prices therein specified. The plans and specifications provide what is regular work and what is extra work, and in case of dispute it is the duty of the engineer to interpret the plans and specifications and determine the character of the work. Having done so, he then ascertains the amount, quality, and acceptability of the work.

The question presented in the claim for damages for failure to provide an outlet for the sewers requires the construction of the whole contract; and not simply of the plans and specifications. It is a question which must be determined by the construction of all of the several parts of the agreement which is made up of the notice to bidders, the contract proper, the plans and specifications and all other matter relating thereto. It cannot be seriously contended that the engineer, as arbitrator, would have jurisdiction to determine whether the parties had entered into a contract for the construction of the sewers, or what damages the plaintiffs

had sustained if the defendant had refused to permit the plaintiffs to furnish the materials and do the work, or to determine what damages the city had sustained if the plaintiffs had declined to furnish the materials and construct the sewers. With equal reason, it seems to us, that the arbitrator is without jurisdiction to determine whether the contract, as contained in the several parts thereof, contemplated that the city should, by the construction of a sewer under contract "C" or by other means, furnish an outlet for the sewers constructed by the plaintiffs under contract "B," and if such an outlet was contemplated by the parties and provided for in the contract, what damages the plaintiffs sustained by the failure of the defendant to keep its covenant. Keeping in view the settled rule that the court is not to be deprived of its jurisdiction without clear and plain terms in the arbitration clause, we think this is the proper interpretation of the article in contract "B," conferring arbitral powers on the engineer. There is no express provision in any part of the agreement requiring the plaintiffs to cleanse the sewers, and the question does not depend simply upon the construction of the plans and specifications, but upon an interpretation of the whole agreement. The statement avers that the plaintiffs were not obliged under the contract to clean the sewers, and that if the city had provided an outlet, as required by the agreement, the expense of such cleaning would have been trivial. This claim, we think, should go to a court and jury.

[7] By article 17 of the agreement the contractor was required to complete the work by January 1, 1906, and the city was authorized to deduct out of moneys due the contractor \$50 per day as liquidated damages for every day the work was not completed beyond the time specified. The arbitrator decided that the city had the right to retain a certain amount under this provision of the agreement. How the arbitrator arrived at the amount for which he allowed a credit does not appear, nor is it material, as we do not think he had the authority to adjudicate the question. It is argued by the defendant that the plaintiffs could only be relieved from their default under this article of the contract by an application to the engineer for an extension of time under article 16, and, failing to make such application, the city had the right to retain the per diem sum as liquidated damages for any time the contract was not completed beyond January 1, 1906. It is not averred in the statement that the plaintiffs made an application and were refused an extension of time in which to complete the work, but it is averred that the failure to complete the contract "was not due to any fault or neglect on their part, but was the result of the acts, omissions, and requirements of the engineers, the board of public works and the defendant as herein-

before set forth." These "acts, omissions, and requirements" did not consist in obstructing or delaying the contractor "in doing the work or furnishing the materials to be done and furnished by the city" which prevented the contractor from claiming damages, and hence the plaintiffs were relieved from making an application for an extension of time as required by article 16 of the contract. That article of the agreement provides that if the contractor is obstructed or delayed in the prosecution or completion of the work by any delay on the part of the city in doing the work or furnishing the materials he can have no claim for damages for such delay, but is required to make an application to the engineer for an extension of time. The averment in the statement, therefore, takes it out of the provision of this part of the agreement, and alleges that the failure to complete the work was the "acts, omissions, and requirements" of the defendant, of a character other than those named in article 16 of the contract. If the failure to complete the work as required in the agreement consisted in such neglect or default of the city as is not relieved against in the contract, the responsibility must rest with the city and not with the plaintiffs, and it would deprive the defendant of the right to retain for such delay any sum as liquidated damages under clause 17 of the contract. There is no provision in the arbitral clause conferring jurisdiction upon the engineer to determine this question. We have distinctly ruled that a provision in a building contract to submit questions that may arise as to the fulfillment of a contract does not give the right to pass on a claim for damages for nonfulfillment. *Somerset Borough v. Ott*, 207 Pa. 359, 56 Atl. 1079. It is equally apparent that such authority is not given by the clause which confers authority upon the arbitrator "respecting the true construction or meaning of the plans and specifications." This is the only part of the clause under which it can be pretended that the arbitrator has jurisdiction to determine the right of the defendant to retain liquidated damages, and as this right is conferred by the contract proper and not by the plans or specifications it is manifest that the clause does not confer authority to determine the question.

We do not think the omission to itemize the claim for damages for failure to construct an outlet or the claim for liquidated damages retained by the defendant defeats the plaintiffs' right of action for either of these items. If the defendant city desires a more detailed statement of either item of the claim, and such can be given, it may be obtained by an application for a bill of particulars.

For the reasons stated, the judgment of the court below sustaining the demurrer is reversed, with a procedendo.

MITCHELL v. COLUMBIA & P. D. RY. CO.
(Supreme Court of Pennsylvania. July 6, 1911.)

1. EMINENT DOMAIN (§ 271*)—REMEDIES OF OWNER OF PROPERTY—NONSUIT.

A proceeding for the assessment of damages from an entry on land for railroad purposes is not an action for trespass for illegal entry entitling plaintiff to a verdict on mere proof of the entry, but is an action for damages from the lawful entry under the power of eminent domain, so that plaintiff can recover only the difference in the market value of his property immediately before and after the construction of the railroad, and, if he fails to prove that, a nonsuit is proper.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 271.*]

2. EVIDENCE (§ 474*)—OPINION EVIDENCE—COMPETENCY.

On appeal from an award in railroad condemnation proceedings, a witness, who never lived in Pennsylvania, was not acquainted with the value of the property in the vicinity, and only professed knowledge of similar property 30 miles away in another state, and another witness, who had been on the tract in question 40 years before, but could not say when he last saw it and did not pretend to be acquainted with the value of property in the neighborhood, were not competent to express an opinion on the value of the land condemned.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 474.*]

Appeal from Court of Common Pleas, Lancaster County.

Appeal by Mary A. Mitchell from an award of viewlers in condemnation proceedings to the Columbia & Port Deposit Railway Company. From an order refusing to take off nonsuit, the plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

B. F. Davis, for appellant. W. U. Hensel, for appellee.

PER CURIAM. [1] The appellant presented her petition to the court below for the appointment of viewlers to assess the damages which she alleged she had sustained by the entry of the appellee upon her land for railroad purposes. On appeal from the report of the viewlers an issue was framed for the purpose of having a jury pass upon the question of what damages, if any, she had sustained. The action was not, as her counsel contends, one of trespass for an illegal entry, entitling her to a verdict upon mere proof of the entry. It was for damages alleged to have been sustained by the lawful entry of the railroad company under the right of eminent domain, and before the plaintiff could recover she was required to prove the difference in the market value of her property immediately before and after the construction of the railroad. *Hope v. Philadelphia & Western R. R. Co.*, 211 Pa. 401, 60 Atl. 996; *Moudy Manufacturing Co. v. Penna. R. R. Co.*, 212 Pa. 156, 61 Atl. 906. No competent testimony as to this was offer-

ed, and the judgment of nonsuit necessarily followed when asked for.

[2] Mitchell and Bowman, the exclusion of whose testimony is complained of by the fourth, fifth, and sixth assignments, were clearly incompetent witnesses for the purpose for which they were called. Mitchell never even lived in Pennsylvania and stated frankly to the court that he was not acquainted with the value of property in the vicinity of the plaintiff's before the railroad went through it. All the knowledge he professed to have was of property of the same character in the state of Maryland—30 miles away from appellant's. Bowman had been on the tract 40 years before, but could not say when he last saw it and did not pretend that he was acquainted with the value of property in the neighborhood.

Judgment affirmed.

In re SINGER'S ESTATE.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. HUSBAND AND WIFE (§ 278*)—SEPARATION AGREEMENTS—VALIDITY.

Deeds and postnuptial agreements for the actual and immediate separation of husband and wife, when based on a good consideration and reasonable in terms, are valid, both at law and in equity.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.*]

2. HUSBAND AND WIFE (§ 279*)—SEPARATION AGREEMENTS—REVOCATION—EFFECT.

Where a husband and wife, by written agreement for separation, adjust their respective property rights, but later enter into a new agreement, reciting the former one, and reciting that the parties have become reconciled and desire to live together, but providing that the former agreement shall in no other respect be modified, and there is no separation thereafter, the husband cannot, after his wife's death, demand that he be relieved from the performance of his part of the contract and claim a share in her estate under the intestate laws.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 279.*]

Appeal from Orphans' Court, York County.

In the matter of the estate of Adelaide V. Singer, deceased. From a decree dismissing exceptions to an auditor's report, John A. Singer appeals. Affirmed.

Bittenger, P. J., filed the following opinion in the court below:

"The following exceptions were filed by John A. Singer, surviving husband of the decedent:

"(1) The auditor erred in holding: 'Your auditor, upon the authority of Burkholder's Appeal and Fennel's Estate, holds that John A. Singer is precluded by the above-mentioned agreement of January 6, 1902, and of March 24, 1902, from taking any part in his deceased wife's estate, notwithstanding he

and his wife became reconciled after January 6, 1902, and cohabited for a considerable period of time after March 24th of the same year; and therefore he is not entitled to any part of the balance on the account of Richard E. Cochran, executor of the will of Adelaide V. Singer, deceased, as shown by said account or as modified by your auditor; and his claim for \$5,000 and for one-half of the remainder of said balance, after deducting the costs of audit, is therefore disallowed, and said balance is distributed in accordance with the provisions of the aforesaid will of Adelaide V. Singer.'

"(2) The auditor erred in not awarding to John A. Singer absolutely, surviving husband of Adelaide V. Singer, the one-half of the estate of said Adelaide V. Singer remaining after paying debts and legal necessary costs of administration.

"(3) The auditor erred in not awarding John A. Singer the sum of \$5,000 in addition to the one-half of the said estate.

"(4) The auditor erred in finding 'the act of April 1, 1900 (P. L. 87) does not apply to a case where the decedent dies testate and the husband elects to take against the will.'

"(5) The auditor erred in not finding that from 1904 up to February, 1907, John A. Singer and Adelaide V. Singer did not live together as husband and wife.

"(6) The auditor erred in not finding that from February, 1907, to May 25, 1907, the said John A. Singer and Adelaide V. Singer did live and cohabit together as husband and wife continuously with the exception of one day, at Asheville, N. C., the Hotel Edvard, Philadelphia, and at Clifton Springs, and at the residence of John A. Singer in the city of New York; these facts having been embraced in the admission of facts agreed upon by counsel, and established by uncontradicted evidence.

"(7) The auditor erred in distributing the balance on the account as provided in the last will and testament of said decedent.

"(8) The auditor erred upon all the facts admitted, agreed upon, and proven in not awarding to John A. Singer one-half of the estate of his deceased wife after deducting the debts and necessary legal expenses out of the estate and the further sum of \$5,000 under the act of assembly giving surviving husband the same right in his wife's estate as she could take of his under the intestate law.

"Margaret S. H. Porter filed the following exception: The auditor erred in holding that the failure of John A. Singer to pay to or for his wife anything for her support after May 24, 1907, under the facts found by the auditor 'especially showing that she received of him and returned 300 shares of the capital stock of the Singer Manufacturing Company which yielded a substantial income, does not bring him within the provisions of the act of assembly of May 4, 1855

(P. L. 430), and that this act does not bar his claim to participate in this distribution.'

"The only exceptions of John A. Singer to the finding of facts by the auditor is the fifth and sixth. These exceptions cannot be sustained. We find no competent evidence of any agreement to separate at or about the time stated in the fifth exception, or that they lived separate and apart during the said time mentioned in the exception. It is true that Mrs. Charlotte Donnelly testifies that she entered into the employment of John A. Singer in superintending his house in the city of New York in October, 1904, and remained in that capacity to serve him in three different houses for seven years; that she saw Mrs. Adelaide V. Singer there only one time, in May, 1907; that she cohabited with her husband from Wednesday to Saturday, when she refused, on his request, to remain there with him, and left, and did not return. It is thus shown that he maintained for seven years a residence and home in New York City from 1904 which was not occupied or visited but for a few days by his wife, but it does not appear from her testimony that John A. Singer was residing in said homes habitually or that the house was regularly occupied by any person or persons except herself and the servant. On the occasion named, John A. Singer had come there from Clifton Springs, N. Y., where he and his wife had been cohabiting, to which place he stated to Mrs. Singer on her coming, the next day, he intended to return to her on Saturday following. The maintenance of a residence in the manner stated by the witness, without evidence of the proprietor of the same occupying it regularly and habitually without the presence of his wife at his home, does not prove, or tend to prove, a living separate and apart from his wife, and especially when it is shown that at the time or immediately before they were cohabiting at another place and his expression of his intention to return to her at Clifton Springs within a few days. The evidence falls short of even raising an inference that John A. Singer and his wife were living separate during the time named; that they had separated subsequent to March 24, 1902; and that unconditional reconciliation had taken place between them. No error has been found by the court in the auditor's finding of facts covered by this exception, and therefore his findings of facts must be sustained.

"All the other exceptions filed by John A. Singer are to the conclusions of law and its application by the auditor.

"From the admissions filed and the evidence in the case, the auditor has found the following facts:

"It has thus been established and your auditor finds that:

"John A. Singer and the testatrix were married on June 11, 1885. In July, 1901,

Mr. Singer, at the urgent demand of his wife, transferred and delivered to her absolutely 125 shares of the capital stock of the Singer Manufacturing Company, worth \$30,250, subject to the payment of the debt of Mr. Singer of \$16,500, for which the stock had been pledged, and 275 shares of the same stock worth \$66,550, upon the oral stipulation that she shall receive the dividends on said 275 shares of stock during her lifetime, and if she survived her husband the same shall become hers absolutely, but in case of her decease before the death of her husband said 275 shares of stock 'shall revert' to him.

"On December 31, 1901, John A. Singer filed in the court of common pleas of York county, Pa., a bill in equity against his wife, the above-mentioned testatrix, in which he averred, among other things, the transfer of the aforesaid 275 shares of the capital stock of the Singer Manufacturing Company to his wife, upon the aforesaid stipulation in relation thereto, and that he had reason to believe that she intends to wrongfully transfer said stock in violation of said stipulation, and prayed the court for an injunction restraining her from selling said stock, and for a decree requiring her to give security for the faithful performance of her duty in relation to the trust growing out of the transfer of said 275 shares of stock to her as aforesaid. On the same day a preliminary injunction was granted in accordance with the prayer in the plaintiff's bill.

"On January 6, 1902, Mr. Singer and his wife entered into a written agreement which was duly acknowledged by them and entered of record in the office of the recorder of deeds of said county on March 8, 1902, in which they recite the pending of the above-mentioned bill in equity and the intention of Mr. Singer to institute other proceedings against her; that 'divers disputes and unhappy differences have arisen between' them 'for which reason they have consented and agreed to live separate and apart from each other during their natural lives,' and that 'after due consideration and full and separate consultation with their respective legal counsel and advisers' they 'have agreed upon the adjustment of their respective claims, rights, equities, trusts and reversions in and to all property, real, personal or mixed, now in the possession of or standing in the name of or to the use of them or either of them.'

"The agreement stipulates, among other things, in the usual form, that they shall live separate and apart from each other, and that neither shall interfere with the other; that Mr. Singer shall in no measure be liable for his wife's support; and that Mrs. Singer shall surrender to Mr. Singer his promissory note for \$2,000 payable to Mrs. Singer, and his two promissory notes, one for \$1,000 and one for \$400, payable to Anna M. Small. By this same agreement Mrs. Singer transferred to her husband her interest in two life insurance policies, issued by the New

York Life Insurance Company, upon her husband's life, each for \$25,000 in which she was beneficiary, also 100 shares of the capital stock of the Singer Manufacturing Company. Mr. Singer relinquished all claims to all other property in her possession including the remainder of said stock and their dwelling house which he had previously conveyed to her. Mr. Singer also released, acquitted, and discharged his wife, 'her representatives, heirs and assigns, from all and every claim, demand, suit, action, or accounting for or on account of any matter or thing either during her lifetime or after her death,' and released and surrendered 'all right, title and interest as husband, tenant by the curtesy or otherwise howsoever, in any property, real or personal, which she now has or may be in any wise entitled to, or may hereafter acquire, to the end that she may acquire, possess, enjoy, convey, devise and bequeath the same with the same effect as if she were a feme sole.' And Mrs. Singer as fully released her husband and his estate of all claim and demands during his lifetime and of all that she might have as his surviving widow. The above-mentioned insurance policies and 100 shares of stock and notes were duly delivered to Mr. Singer in accordance with the terms of said agreement. Upon the execution of this agreement on January 6, 1902, Mr. and Mrs. Singer separated and continued to live separate and apart until March 24, 1902.

"On January 14, 1902, after leave granted by the court, on motion of counsel for plaintiff and defendant, the above-mentioned suit in equity was withdrawn, and the preliminary injunction issued upon said bill was dissolved.

"On March 24, 1902, Mr. Singer and his wife entered into another written agreement which was duly acknowledged by them and entered of record in said recorder's office on November 18, 1902, in which they recite, among other things, the execution of the above-mentioned agreement of January 6, 1902; that said agreement 'provided that the said parties thereto should thereafter live separate and apart from one another as part of the consideration of said agreement,' and that 'said parties hereto have now become reconciled and desire to again live together as husband and wife, but in no other respect to modify any of the terms of said agreement.' By this agreement Mrs. Singer agreed 'to resume the family relations with her husband.' The agreement contains various stipulations relative to the conduct of the household affairs and the behavior of the parties toward one another. It provides that each shall pay one-half 'of the domestic household expenses,' and that Mrs. Singer shall pay her own personal expenses, including wearing apparel. It also contains these two paragraphs, which refer to the above-mentioned agreement of January 6, 1902:

"The said parties hereto do republish,

ratify and confirm all of the various stipulations and agreement contained in said contract of January 6, A. D. 1902, except the stipulation that the said parties shall live separate and apart.

"And it is hereby further expressly agreed and understood by and between the parties hereto that in case they shall fail to agree and shall again separate that this agreement and all its provisions shall immediately become null and void and that the said contract of January 6, 1902, shall be in all respects revived and reinstated as fully and completely as if this contract had never been made or entered into."

"Subsequently Mr. and Mrs. Singer cohabited together for at least part of the time until May 24, 1907. The admitted facts are that they cohabited at intervals, but there is nothing before the auditor to show that they did not also cohabit between these intervals.

"Mr. Singer maintained a residence in New York City between October, 1904, and May 25, 1907. During this time Mrs. Charlotte Donnelly lived with him at his New York residence, 'superintending his house.' About May 22, 1907, in addition to Mrs. Donnelly, 'a maid' was also in this residence. Mrs. Singer in this time visited this residence of Mr. Singer but once for a period of four days. During part of this time Mr. and Mrs. Singer cohabited at intervals at different hotels and at a sanitarium. He paid the bills for both, but in a number of cases she refunded to him one-half of the charges for room and board and other common expenses and all of her personal expenses.

"About May 18, 1907, after they had been cohabiting at Clifton Springs, N. Y., for about 18 days, Mr. Singer went to his above-mentioned New York residence. Mrs. Singer followed him a day later, arriving at his residence on May 21st or May 22d. She remained there until May 25th, during which time she occupied the same room and bed with her husband. She left on May 25th, after Mr. Singer requested her to stay and had offered to go with her wherever she wished to go, if she did not like it at his residence. About 15 minutes before she left she said 'she would not live with him.' After this they never cohabited and 'from and after this date Mr. Singer never made any payments of money to her, or for her account.'

"Mrs. Singer died on July 19, 1910, without surviving issue. Her above-mentioned will was duly probated.

"A very complete brief of authorities has been submitted by the learned counsel of John A. Singer in which a multitude of English decisions and decisions of other states are cited to establish the contention of this exceptant that the agreement in evidence of January 6, 1902, was completely abrogated by the reconciliation of the parties and their resumption of the marriage relation.

"The law is to the effect that a subsequent

resumption of the marital relations by the parties to a separation agreement in the several jurisdictions terminates the articles of separation, but in one of the cases, *Smith v. King*, 107 N. C. 273, on page 276, 12 S. E. 57, cited by the exceptant, it is said: 'When she (the wife) returned to his roof, cohabited with him, and is supported by him, this annuls all agreements for a separation and for the support rendered necessary thereby. The law, if it recognizes, does not favor, articles of separation, and will not construe them as to be valid after the parties have themselves canceled the agreement to separate, by cohabiting together, unless it appears by the deed, plainly, that such separate support is to be continued notwithstanding any future reconciliation and cohabitation.'

"In the case under consideration, the estate for distribution was created by John A. Singer in his will, by the transfer to her of the stock mentioned in the agreement unequivocally providing that he would not interfere with his wife's estate before or after her death, by claiming any part of the same. At the time of the second agreement of March 24, 1902, it was positively declared and agreed in the reconciliation of the parties that the terms and conditions upon which they resumed the relation of husband and wife were that their intention in such resumption of the marriage relation was 'not to modify any of the terms of the agreement of January 6, 1902, excepting those which provided that they shall live together'; and expressly republished, ratified and confirmed 'all the various stipulations and agreements contained in said contract of January 6, A. D. 1902, except the stipulation that the said parties shall live separate and apart.'

"This agreement was mutually binding on the parties. The wife had full power to contract under the Pennsylvania acts of assembly, notably the act entitled 'An act relating to husband and wife enlarging their capacity to acquire and dispose of property, to sue and be sued and to make a last will, etc.,' approved June 8, 1893 (P. L. 344).

"As we have seen, there is no evidence to establish separation between John A. Singer and his wife, after March 24, 1902, and a subsequent reconciliation without conditions, as contended by exceptant's counsel. No separation after said period being proven, there could not be a subsequent unconditional reconciliation.

"The terms of the original agreement of separation as it was reaffirmed by the parties in their agreement of March 24, 1902, therefore continued, at the death of the decedent, Adelaide V. Singer. Even if the subsequent separation in December, 1904, and the unconditional reconciliation as contended for by exceptant's counsel, were proven, in the absence of proof to the con-

trary, the law would have presumed such reconciliation to have been upon the terms of their previous written agreements.

"The case of Burkholder's App., 105 Pa. 31, decides: 'A postnuptial contract, the main object of which was the settlement of differences between husband and wife which had caused a temporary separation is founded upon sufficient consideration; and after it has been fully executed by husband and wife during their lives, a provision therein in favor of the wife's issue by a former marriage, contingent upon the husband surviving his wife, and dying, will, after the happening of said contingency, be enforced in the settlement of the husband's estate in the orphan's court.'

"The auditor decided against the claim of the exceptant upon the authority of the last-cited case and Fennell's Est., 207 Pa. 309, 56 Atl. 875, with other cases, which in our opinion on the facts admitted and the evidence, and found by the auditor, is clearly right and his decision must be sustained.

"We have had no case cited to us like this, where the husband has created an estate in his wife, and executed separation papers in which he absolutely releases all property rights in his wife's estate during her life or after her death, where a like reconciliation took place under an agreement providing that the original separation agreement should remain stable in its provisions, as to property rights defined therein, where after the death of the wife the husband claimed against her will and was allowed to recover any share out of her estate, where the powers and liabilities of the parties to the contract are defined, as existing by law as in this commonwealth.

"We are of the opinion that the auditor's finding of both law and fact are correct for the reasons stated in his report, and that his report should be confirmed.

"We need not consider the exception filed by Margaret S. H. Porter.

"The exceptions are dismissed at the cost of the exceptant, John A. Singer, and the report is confirmed."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

W. F. Bay Stewart, W. R. Beach, Edward Chapin, and Frederick B. Gerber, for appellant. Richard E. Cochran and Smyser Williams, for appellee.

MESTREZAT, J. In an elaborate report, the auditor found the facts and stated his conclusions of law. The learned court approved the findings of fact and sustained the conclusions of law in an opinion which correctly disposes of the questions raised on this appeal. The appellant has failed to convince us of error in the findings of fact or of law, and hence the decree must be affirmed.

Owing to "divers disputes and unhappy differences having arisen between" John A. Singer and his wife, Adelaide V. Singer, they entered into the agreement of January 6, 1902, by which they "agreed to live separate and apart from each other during their natural lives," and "agreed upon the adjustment of their respective claims, rights, equities, trusts and reversions in and to all property, real, personal or mixed, now in the possession of or standing in the name of or to the use of them or either of them." Having executed the agreement, the parties separated, and lived apart until March 24, 1902, when they entered into another agreement, in which they recite the execution of the former agreement, and that the parties had become reconciled and desire to again live together as husband and wife. "but in no other respect to modify any of the terms of the said (former) agreement." The later agreement republished, ratified, and confirmed all of the several stipulations contained in the contract of January 6, 1902, except the stipulation that the parties "shall live separate and apart." The parties again resumed their marital relations. The appellant, who is the husband, contends that the parties separated again in 1904 and did not live together as husband and wife from that time until May, 1907, and requested the auditor and the court to so find. The request was declined, and it was held that there was no competent evidence of any agreement to separate in 1904, or that the parties lived separate and apart from that date until 1907. The learned court says: "As we have seen, there is no evidence to establish separation between John A. Singer and his wife after March 24, 1902, and a subsequent reconciliation without conditions, as contended by exceptant's counsel. No separation after said period being proven, there could not be a subsequent unconditional reconciliation. The terms of the original agreement of separation as it was reaffirmed by the parties in their agreement of March 24, 1902, therefore, continued at the death of the decedent, Adelaide V. Singer." Regarding this as an established fact, the contract of March 24, 1902, must be sustained and enforced.

[1] Deeds and postnuptial agreements for the actual and immediate separation of husband and wife, based upon a good consideration and reasonable in terms, are valid and effectual both at law and in equity in this state. They may be legally entered into by the parties without the intervention of a trustee. *Com. v. Richards*, 131 Pa. 209. 18 Atl. 1007. It must be conceded that the separation agreement of January, 1902, was valid, and that its several covenants were binding on the parties. Had Mr. and Mrs. Singer continued to live separate and apart in conformity with its stipulations, neither could have successfully invoked the assist-

ance of the court to annul or set it aside after the death of the other party.

[2] It is equally true and is the settled law of the state that a subsequent reconciliation and resumption of marital duties by the parties, not affected by any agreement, would abrogate or invalidate the contract of separation made in January, 1902. *Hitner's App.*, 54 Pa. 110. So much was conceded by the auditor and the court below. But the reconciliation of March 24, 1902, was in pursuance of the agreement of that date which set forth the terms on which the parties were to resume their relations as husband and wife and, as we have seen, republished, ratified, and confirmed all the stipulations in the contract of January 6, 1902, except the stipulation that the parties should live apart. Save in this one particular, the separation agreement of January, 1902, was the reconciliation agreement of March, 1902. The earlier agreement drops out of the case as effectively as if the stipulations therein had been inserted in terms in the later agreement. The rights of the parties depend entirely upon the last agreement which they unquestionably had authority to make. *Fennell's Est.*, 207 Pa. 309, 56 Atl. 875. It was not a deed of separation but of reconciliation, defining the rights of each in the property of the other. The "divers disputes and unhappy differences" which had existed between the husband and wife and which had caused their separation three months prior thereto were satisfactorily adjusted, and thereafter the marital relations of the parties were resumed under the March agreement. Under the findings of fact, there was no subsequent separation and reconciliation between the parties. The March contract was fully executed on the part of Mrs. Singer. She gave and did all she agreed to give and do. Her covenants were sacredly kept, and after her death it is too late for her husband to demand that he be relieved from the performance of his part of the contract. Equity will not permit him to retain the "claims, rights, equities, trusts and reversions in and to all her property" which she gave him, and, after the contract had been fully executed by her and she is dead, allow him to rescind the agreement and, in violation of its stipulations, participate in the distribution of her estate. Equity neither sanctions nor enforces a fraud. The parties having the power to enter into the contract of March, 1902, and no fraud, overreaching, or unfairness being alleged, and the wife having fully complied with her covenants, equity will compel the husband to observe his part of the agreement.

We agree with the auditor and orphans' court that the case is ruled by *Burkholder's App.*, 105 Pa. 31, and *Fennell's Est.*, 207 Pa.

309, 56 Atl. 875, and, the court having exhaustively reviewed the facts and law in its opinion, we regard any further discussion of the case as unnecessary.

Decree affirmed.

LAND TITLE & TRUST CO. et al. v. CONNOLLY et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

CORPORATIONS (§ 331*)—BONDING INSURANCE—ACTION BY CREDITORS—LIABILITY OF DIRECTORS.

A creditor of a bonding insurance company cannot maintain a bill for himself and others to enforce a liability against the officers of the company because they permitted it to begin business without having 10 per cent. of its stock paid in cash when the certificate was sworn to, and without having \$125,000 of the capital paid in when it started business, as required by law of such companies, when there is no averment that the acts caused loss to the corporation or brought about its insolvency, and the claim is for moneys due by defendants to plaintiffs directly, and not through the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1448, 1449; Dec. Dig. § 331.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Land Title & Trust Company for itself and others against Paul V. Connolly and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The sixteenth and seventeenth paragraphs of plaintiff's bill were as follows:

"That said Keystone Bonding Company never had a legal and valid existence as a corporation, but the pretended incorporation thereof was a fraud upon the law of the commonwealth of Pennsylvania in that 10 per cent. of the capital stock was not paid in cash to the treasurer at the time application was made for its charter, or at any time subsequent thereto.

"That defendants unlawfully engaged in the bonding business under the title of Keystone Bonding Company for the reason that \$125,000, the minimum amount of capital stock required by law to be paid up before such company could become authorized to engage in business, was never so paid. The total amount of cash received for the stock of the said Keystone Bonding Company during the entire period it was in existence was only \$21,500, which said sum included the sum of \$7,500 paid by the purchasers of 150 shares of stock on account of surplus at the rate of \$50 per share."

On demurrer to the bill, Audenried, J., filed the following opinion:

"Our reasons for sustaining the demurrers to the bill in this case may be put quite briefly. The bill avers that the plaintiff is a creditor of a corporation, whose officers and directors, the defendants herein, embarked in business without first complying

certain prerequisites therefor established by law, and upon false representations to the officials of the commonwealth that such prerequisites had in fact been complied with. It avers also that the corporation's business has been discontinued, that steps looking to the settlement of its affairs have been taken, and that certain of its assets have been so disposed of as to work a preference in favor of another of its creditors. Upon these averments the plaintiff, on behalf of itself and all other creditors of the corporation, prays the court to decree that the defendants are liable as partners for all losses caused to it and others through the business transactions carried on by the corporation in violation of law, and to appoint a referee before whom its claims and the claims of all others damaged by such unlawful transactions may be proved. The bill contains no averment that the acts of the defendants caused loss to the corporation, or brought about its insolvency.

"If the corporation had sustained a loss at the defendants' hands, its claims against them might have been enforced by the corporation itself. So long as it was solvent, no right on the part of its creditors to move in the matter would be recognized. If the corporation has become insolvent, its creditors may ask for the appointment of a receiver to collect for distribution among those entitled to participate therein all the assets that it owns, including whatever claims it may have against its directors, and this is the usual and more orderly method of procedure, although, under certain circumstances, proceedings may be instituted directly against the directors by a corporate creditor acting on behalf of all concerned to compel the payment of debts or damages demandable from the former by the corporation. The present cause, however, is not one in which the plaintiff is endeavoring to enforce the payment of anything due by the defendants to the corporation. The claim advanced in the bill is for moneys due by the defendants to the plaintiff directly, and not through the corporation.

"If it be conceded that because, under the guise of a corporation, the defendants engaged jointly in a business which the corporation had no legal right to carry on, they have become personally responsible as partners for the debts incurred in the name of the corporation, there is no reason why the plaintiff should not proceed against them at law. The legal remedy for the collection of a debt is ample, even when the debt is owed by several partners.

"The allegation that the plaintiff's debt was fraudulently contracted in the name of the corporation through false representations that the corporation had a lawful right to engage in business does not serve to justify

the intervention of a court of equity, since the redress afforded by law in such a case is as efficacious as any relief that equity can grant.

"The fact that the plaintiff's bill is filed on behalf of all other creditors of the corporation, as well as its own, far from strengthening the case in equity, may open it to objection on the ground of multifariousness. The claim of each party who gave credit to the corporation stands on its own bottom. Whether any particular creditor of the corporation may enforce a claim for damages against all or any of these defendants depends not only on the making of false statements touching the finances of the corporation, but also on whether the creditor was actually deceived thereby and on other conditions, not all of which were necessarily present in the case of every debt contracted by the corporation.

"Prior to the enactment of the national bankrupt law and the insolvency act of Pennsylvania, the preference of one of its creditors by an insolvent corporation, if there was no fraud in the contracting of the debt or in the transfer of the corporation's assets in payment of it, was entirely lawful, and neither at law nor in equity gave rise to a liability on the part of the corporation's directors in favor of the remaining creditors. While the legislation referred to has declared that all preferences given by an insolvent corporation shall, under certain circumstances, inure to the benefit of its creditors generally, it imposes no new liability to the corporate creditors upon the directors or officers concerned in a preferential disposition of the corporate assets. The bill, therefore, cannot be sustained upon the theory that the reinsurance of its risk on its surety bond held by the United States government was a breach of trust by those of the defendants concerned therein for which equity will hold them to account."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHISZKER, JJ.

John G. Johnson, Guy H. Davies, and J. Claude Bedford, for appellants. Ira Jewell Williams, for appellee Charles G. Rapp. J. B. Colahan, 3d, for appellee Charles H. Wolf. Frank R. Savidge, for appellee William G. Halkett. Edwin O. Michener, for appellee W. L. D'Olier. Roy M. Livingstone, for appellee Wm. H. McCormick. Ormond Rambo and William B. S. Ferguson, for appellees Joseph M. Smith, Alfred V. D. Waterson, John L. Burns, Thomas E. Brehony, and John V. McCann.

PER CURIAM. The decree is affirmed, at the cost of the appellants, on the opinion of Judge Audenried.

KINTER v. CONNOLLY et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CORPORATIONS (§ 563*)—RECEIVERS—ENFORCING LIABILITY OF OFFICERS.

The personal liability of officers and directors of a bonding company resulting from false representations by them and permission by them to begin business without having 10 per cent. of the corporate stock paid in cash when the certificate was sworn to, and without having \$125,000 of the capital paid in as required by law in case of title insurance companies, cannot be enforced by bill in equity by a receiver of the company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 563.*]

2. CORPORATIONS (§ 333*)—RECEIVERS—ENFORCING LIABILITY OF OFFICERS.

Though the national bankrupt law and the state insolvency act make any preference by an insolvent corporation under certain conditions inure to the benefit of all its creditors, generally no personal liability is imposed on the directors or officers of the company concerned in the preferential disposition of its assets.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 333.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by William L. Kinter, receiver of the Keystone Bonding Company, against Paul V. Connolly and others to impose personal liability on defendants as officers and directors of a corporation. From a decree dismissing the bill, plaintiff appeals. Affirmed.

See Land Title & Trust Co. v. Connolly, 81 Atl. 903.

On demurrer to the bill, Audenried, J., filed the following opinion:

"There are several reasons why the bill filed in this case cannot be sustained; but these are all embodied in the objection that the plaintiff has shown no right to invoke the equitable relief for which he prays.

[1] "The plaintiff is the receiver of the Keystone Bonding Company. As such it is his sole duty to hold and administer for the benefit of its stockholders and creditors any property or rights of action that belong to that corporation. He has authority to assert in appropriate proceedings whatever rights of action the corporation had or has against its directors or officers, who are the defendants herein. In the bill before us, however, there is no averment that any act or omission of those of the defendants who demur caused loss or injury to the Keystone Bonding Company. No claim is asserted against them on behalf of the corporation. If the defendants published statements which they knew, or ought to have known, to be false, with the result that their company gained a fictitious credit at the expense of those thus encouraged to do business with it, the wrong was suffered by the latter, and not by the corporation, and gave rise to no liability on the part of the defendants that the corporation or its receiver can enforce. Each person deceived by the statements referred

to in the bill, or involved in loss through being induced to deal with a corporation which may have failed to comply with the requirements of the corporation laws, sustained an injury entirely distinct from that suffered by every one else in other transactions. Those deceived by the false statements referred to in the bill have no joint action against even such of the defendants as may have been involved in the frauds perpetrated upon them, and they cannot combine their claims against the defendants in the hands of a trustee, and enforce them in the same proceeding, either in law or in equity. The receiver, who figures as the plaintiff in this case, was not appointed by the court to act as the representative of a syndicate composed of all those who, by reason of false representations made or authorized or negligently permitted by the company's directors, or some of them, sustained losses, and he has no standing in equity to maintain a bill against the latter as partners to enforce, as a collective liability, all claims for damages in respect of the separate and distinct wrongs which the several parties, who have had dealings with the corporation, have sustained.

[2] "The averment that the reinsurance by the Keystone Bonding Company of its risk on its surety bonds to the United States government was a breach of trust for which the defendants are answerable to that corporation establishes no right to relief against them on the part of its receiver. Prior to the enactment of the national bankrupt law and insolvency act of Pennsylvania, the preference of one of its creditors by an insolvent corporation, provided there was no fraud in the contracting of the debt, or in the transfer of the company's assets in payment of it, was entirely lawful, and did not create a liability on the part of the corporation's directors to answer to it as for a breach of trust. While the legislation referred to has declared that under certain conditions any preference given by an insolvent corporation shall inure to the benefit of all its creditors generally, it imposes no new liability upon the directors or officers concerned in the preferential disposition of the corporate assets."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZIS-KER, JJ.

John G. Johnson, Guy H. Davies, and J. Claude Bedford, for appellant. Ira Jewell Williams, for appellee Charles G. Rapp. J. B. Colahan, 3d, for appellee Charles H. Wolf. Frank R. Savidge, for appellee William G. Halkett. Edwin O. Michener, for appellee W. L. D'Oller. Roy M. Livingston, for appellee Wm. H. McCormick. Ormond Rambo, for appellees Joseph M. Smith and Alfred V. D. Watterson.

PER CURIAM. The decree is affirmed at the cost of the appellant on the opinion of Judge Audenried.

COMMONWEALTH v. COMPORTO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CRIMINAL LAW (§ 517*)—EVIDENCE—CONFESSION.

In a trial for murder, a confession of a defendant, which fairly justifies an inference that he and another were jointly concerned in the commission of or attempt to commit a robbery, and that, though the killing was done by the other man inside the building while defendant was outside, the defendant had knowledge of the plan beforehand, is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1148, 1156; Dec. Dig. § 517.*]

2. CRIMINAL LAW (§ 1137*)—APPEAL—REVIEW—INVITED ERROR.

Where, at the request of defendant, the court strikes out a portion of his confession relating to his criminal record, he cannot afterwards demand that the entire confession be stricken out on the ground that it must go in as a whole, since he cannot complain on appeal of the action of the court at his own request in excluding a portion of the confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

3. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

In a trial for murder, evidence that the defendant and a confederate went to a house in the nighttime for the purpose of robbery, and that, according to the defendant's confession, the confederate went inside and did the killing while defendant remained outside, was sufficient to sustain a conviction of murder in the first degree, though the proof of the commonwealth apart from the confession did not indicate which of the two did the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

Appeal from Court of Oyer and Terminer, Philadelphia County.

Michael Comporto was convicted of murder in the first degree, and appeals. Affirmed.

Errors assigned were in the following form:

"(1) That the learned court erred in overruling the objection of counsel for the defendant in the admission of the confession in evidence.

"(2) The learned court erred in overruling the motion of counsel for defendant to strike out the portion of the confession that has been admitted in evidence.

"(3) The learned court erred in charging the jury as follows: 'Now, therefore, we pass to the next questions of fact. There are two involved, whether the defendant did the shooting, or whether he was there, aiding and abetting; either one thing or the other. Either he did the shooting, if you find that fact, or he was there, aiding and abetting.'

"(4) The learned court erred in refusing to charge the jury, as requested in the second point presented by counsel for the defendant, as follows: 'It is incumbent upon the commonwealth to prove beyond a reasonable doubt that the deceased was killed by De

Massi in the perpetration or attempt to perpetrate a robbery, and also that Comporto was a party to said robbery before it can ask for a verdict of guilty of murder in the first degree.'

"(5) The learned court erred in refusing to charge the jury in the sixth point as presented by counsel for the defendant as follows: 'If the jury is not convinced beyond a reasonable doubt that De Massi killed deceased in the perpetration or attempt to perpetrate a robbery, then they cannot find this defendant guilty as indicted.'

"(6) The learned court erred in refusing to charge the jury, as requested in the tenth point presented by counsel for defendant, as follows: 'Under all the evidence in this case the jury cannot find a verdict of guilty of murder in the first degree.'

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and MOSCHZISKER, JJ.

Charles J. Roney, Jr., and C. Stuart Patterson, Jr., for appellant. Wm. A. Gray, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

POTTER, J. [1] The appellant, Michael Comporto, was charged with the murder of James F. Quinn during the perpetration of a robbery. He was convicted of murder of the first degree and sentenced therefor. In this appeal his counsel allege, in the first assignment of error, that the court below erred in admitting in evidence against their objection a confession made by defendant. They contend that the confession does not show such knowledge of the criminal design as to make it inculpatory. But with this suggestion we cannot agree. Our examination of the confession shows that defendant stated that, early on the day of the murder, he met the man Frank, otherwise known as De Massi, who said he was going out to do something and get some money; that they were drifting around and drinking together all day; that together they entered Quinn's saloon in the afternoon and saw a man there counting money; that in the evening they went together to the vicinity of Quinn's saloon, and hid under cover of a stone wall until about 10:30; that then defendant's companion went into the saloon; that shots were heard almost immediately, and his companion came out with a pistol in his hand and told defendant that he had killed one man, and probably two; that he had shot one with a revolver in each hand, and had stolen \$30; and that they went away together in a Germantown car, the murderer saying, "I have money to ride on the car now; come on." It is plain that the defendant sought to put the blame upon his companion, but the statement was properly admitted as evidence for the consideration of the jury. It fairly justified

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an inference that the two men were jointly concerned in the perpetration of the robbery, and that defendant had knowledge beforehand of the plan. It also explained his presence at the place of the robbery at the time, and gives his version of the part which he took in the affair.

[2] From the notes of testimony it appears that the commonwealth offered the confession in evidence, and it was admitted against objection. Then defendant's counsel moved to strike out a portion of the confession, which recited the criminal record of defendant. The commonwealth did not object to this motion, and it was granted. The defendant's counsel then moved to strike out the remainder of the confession, on the ground that, after a portion had been omitted, even though it was at defendant's request, the remainder was not admissible, as it did not include the whole of the statement. The refusal of this motion is made the ground of the second assignment of error. The portion of the confession, which was excluded, admitted defendant's previous conviction of crime on two different occasions, and his service in prison. On his last sentence he had been released from the penitentiary less than three weeks before the murder for which he was being tried. This would certainly have tended to prejudice the jury against the defendant, and its exclusion was of course to his advantage. It would be mere trifling to accede to his request to exclude a portion of the confession, and then permit him to make the favor a ground of objection against the admission of the remainder of the confession, because it no longer contained the whole of it. When he was permitted to object successfully to the admission of a portion, he must be regarded as having waived his right to the application of the general rule which requires the whole of a confession to go in. We do not say that there was any error in excluding a portion of the confession at the instance of the defendant; but, if there was, the defendant's counsel cannot complain of it. *Pantall v. Coal & Iron Co.*, 204 Pa. 158, 53 Atl. 751; *Bigham's App.*, 123 Pa. 262, 16 Atl. 613, 10 Am. St. Rep. 522.

In the third assignment, counsel for appellant argue that the trial judge, in submitting the facts, practically instructed the jury to find that defendant did the shooting, or was there, aiding and abetting, thus excluding the possibility of his presence at the time with an innocent purpose. But the context shows that, immediately after using the language complained of, the trial judge charged at length upon the evidence on these points, reminding the jury several times that the conclusions to be drawn from the testimony were entirely for them. Finally he said: "Now, I say those are the questions of fact for you to pass upon. I express no opinion on them whatever. They are for you

and for you distinctly." The sentence of which complaint is made is not as clear in itself as it should have been; but when taken in connection with the context, and with the charge as a whole, we see no room for any misunderstanding on the part of the jury.

[3] In the fourth and fifth assignments complaint is made of the refusal of defendant's second and sixth points for charge. These points required the jury to find, as an essential to the conviction of defendant, that the shooting was done by De Massi, in the attempt to perpetrate a robbery, and that defendant was a party to the robbery. But the evidence upon the part of the commonwealth, aside from the confession, did not indicate which man did the shooting. It indicated that it was done by one or the other. Defendant by his own statement accused De Massi of doing it. The trial judge submitted to the jury the question whether the defendant had done the shooting, or was present, aiding and abetting. This was a proper submission under the evidence.

In the general charge the jury were expressly instructed that in order to convict defendant they "must find that there was a robbery committed, or an attempt to commit a robbery." The judge further said that whether a robbery was committed was one of the first facts for the jury to settle and determine. "You will determine whether or not the shooting was with intent and in the attempt to commit a robbery, because, if you find that the shooting was done in the perpetration of a robbery, or in the attempt to perpetrate a robbery, then you would be warranted in finding the contention of the commonwealth to be correct that there was a murder committed here by some one in the attempt to perpetrate a robbery."

The judge also affirmed, without qualification, the first point submitted by defendant, which was: "The mere presence of the defendant at the scene of the crime is not sufficient to charge him with a guilty knowledge of the alleged robbery, and the jury must be satisfied beyond a reasonable doubt that he actually participated in some manner in the said robbery before they would be justified in rendering a verdict of murder in the first degree."

There was evidence, sufficient if believed by the jury, to warrant the finding that the defendant and De Massi went together to Quinn's saloon on the evening of the murder, for the purpose of robbing it, and that, when De Massi went inside, defendant remained on the outside. It was not material who fired the fatal shot, if the men were united in the common purpose of robbery.

We find no merit in any of the assignments of error, and they are all dismissed.

It is ordered that the judgment be affirmed, and the record remitted to the court below, that the sentence may be executed.

DUFFY et al. v. YORK HAVEN WATER & POWER CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. JUDGMENT (§ 199*)—TRIAL OF ISSUES—JUDGMENT NOTWITHSTANDING VERDICT.

Under Act April 22, 1905 (P. L. 286), authorizing the trial court to enter judgment non obstante verdicto where a request for binding instructions has been refused, the court is authorized, where binding instructions have been declined, to enter such judgment as should have been entered on the evidence; but, where there is a conflict of evidence on a material fact, there can be no judgment entered against the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. JUDGMENT (§ 199*)—INJURIES FROM FLOWAGE—ACTIONS—JUDGMENT NOTWITHSTANDING VERDICT.

Where the evidence for the plaintiff, though contradicted by that of defendant, tended to show that a dam erected by the defendant water and power company contributed materially to the injury of plaintiff's buildings and crops by diverting the currents of the river so as to flood the land when the ice broke up, the entry of a judgment for defendant non obstante verdicto is reversible error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by James Duffy and others against the York Haven Water & Power Company. From a judgment for defendant non obstante verdicto, plaintiffs appeal. Reversed, with procedendo.

At the trial the jury returned a verdict for plaintiffs for \$13,785.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

John R. Geyer, Bernard J. Myers, John E. Malone, and John E. Fox, for appellants. Charles L. Bailey, for appellee.

MESTREZAT, J. The plaintiffs are the owners of an island in the Susquehanna river, known as "Three Mile Island" or "Duffy's Island," which is about 1,800 feet wide at its greatest width, and about 3 miles in length. It is in Dauphin county, and its upper point is about 2 miles south of Middletown, and its lowest point is about the beginning of the Conewago Falls. The line between Dauphin county and York county at this place is, at low-water mark, on the western side of the river. At Middletown the river bends sharply, and flows thence almost due south to the falls. Between Middletown and the falls there are several islands, the largest of which is Duffy's Island. Shelly's Island lies to the west of Duffy's Island. At the head of Duffy's Island, the current divides; part flowing straight between Duffy's Island and Shelly's Island; part flowing west of Shelly's Island and between it and the

York county shore; and part flowing in a narrower and shallower channel, with two curves, east of Duffy's Island, and between it and the Dauphin county shore. The eastern channel varies in width from 700 to 1,000 feet. Duffy's Island is separated from the York county shore by a channel about 2,000 feet wide. The river narrows very much at the southern end of Duffy's Island, and passes over Conewago Falls at a descent of more than 20 feet in a mile.

At York Haven, just below the falls and about a mile below the foot of the island, the defendant erected, in 1902 and 1903, a power house and a dam. The dam in 1904, consisted of a wall about 300 feet long at right angles to the shore at York Haven, a similar wall, some 3,100 feet long, extending eastwardly and diagonally across the river at the falls, with its northern end about 500 feet from the west shore, and cribwork of logs and stones, extending beyond the end of the wall to a point about 1,000 feet west of Duffy's Island. The wall was of solid masonry, about 25 feet high, about 6 feet wide at the top, and about 16 or 18 feet wide at the bottom.

The winter of 1903-1904 was very severe in that vicinity, and the ice in the river was very heavy. It formed, broke, and went out several times, but the river was never entirely clear at any one time. In March, 1904, the island was flooded with ice and water, destroying the plaintiffs' buildings, farming implements, fences, and other personal property, damaging the crops in the ground, and removing the surface soil from the island. This action was brought to recover damages for the injuries thus resulting to the plaintiffs' premises. The plaintiffs claim that the construction of the dam materially diverted the currents of the river and the ice and debris carried by these currents, and modified the quantity and character of the water surrounding the plaintiffs' island, so that when the ice which formed in the river in 1904 broke, instead of moving off as it ordinarily had done through the unobstructed bed of the river, it was diverted and gorged to such an extent as to cause a rapid rise in the water, completely flooding the plaintiffs' premises with water and large quantities of ice, and that when the gorge finally broke, about March 8, 1904, the accumulated water and ice swept over the plaintiffs' island, and did the injury above stated. The defendant contends that the whole river was gorged with ice from a point four or five miles below the Conewago Falls up to and including the falls; that there was no gorge at the dam; that when the break-up came the ice in the western channel gave way first; and that the injury to the island was due to the fact that the falls themselves and the eastern channel were gorged. The learned court submitted the case to the jury, and they returned a ver-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dict for the plaintiffs. The defendant moved the court for judgment non obstante veredicto, under the act of April 22, 1905 (P. L. 286). The motion was granted, and judgment was entered for the defendant. The plaintiffs have taken this appeal. The single question is whether there was sufficient evidence to warrant the court in submitting the case to the jury.

[1] The act of 1905 authorizes the court to enter judgment non obstante veredicto where a request for binding instruction has been declined on the trial. As we have time and again said, this act makes no radical change in the law or the relative functions of the court and jury, but broadens the power of the court, and authorizes it, where binding instructions have been declined at the trial, to enter such judgment as should have been entered upon the evidence. If it appear that there is a conflict of evidence on a material fact, or any reason why there cannot be a binding direction, then there can be no judgment entered against the verdict. *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559. However indisputable may be the proof, when it depends upon oral testimony, it is nevertheless the province of the jury to decide. *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414.

[2] We think the learned court erred in entering judgment for the defendant. As said in the charge, the question for determination by the court and the jury was whether or not the acts done by the defendant in the construction of its wing dam and the crib wall extending therefrom resulted in or contributed to the injury to the plaintiffs' property. The issue was a very narrow one. The plaintiffs contend that the dam obstructed the natural currents of the river, and that the ice accumulated until it extended up the river beyond the head of Duffy's Island, and when the thaw came and the ice broke it was thrown into the eastern channel, and by reason of the size and character of that channel it was diverted westwardly across the plaintiffs' premises. The defendant, on the other hand, contends that the river was filled with ice from shore to shore from a point below the falls up beyond the island, and that the dam was not the cause of the ice being diverted from the main channel into the eastern channel. It is further claimed that the Conewago Falls and the eastern channel were, like the other parts of the river, entirely filled with ice.

Under the evidence, the jury would have been justified in finding for either party. But, in considering the motion for judgment for the defendant non obstante veredicto, the defendant's contradictory testimony is eliminated, and the question is whether the evidence submitted, if believed, was sufficient to warrant the jury in finding a verdict for the plaintiffs. The plaintiffs' witness testified that before the construction of the dam the main channel of the river was west of

off through that channel; and that the effect of the dam was to change the current, making the water west of the island dead, and throwing the main current to the east. Several witnesses testified that there was a gorge of ice at the dam many feet high, and completely blocking the openings in the dam and between it and the island; that the gorge extended from the dam several miles up the river; that the eastern channel was filled with ice and closed, there being little or no water in it, but that it was not gorged, as was the western channel; that the falls were partly clear of ice; some of the witnesses saying that they were practically open and clear of ice. The result of this testimony, if believed, would be to sustain the contention of the plaintiffs that the dam obstructed the natural flow of the water and caused the ice to gorge from the dam up the river above Duffy's Island; and that when the break came the ice which had accumulated above the island was diverted into the eastern channel which, while frozen to the bottom, was not gorged with ice; and that the falls were open. An expert witness was called, and he, having heard the plaintiffs' testimony as to the conditions existing at the time the premises were injured, testified that in his opinion the dam materially contributed to the gorge and damage done the plaintiffs.

Several witnesses for the plaintiffs saw the occurrences from different points on the river from March 4th to March 8th, and they described the movement of the ice which began with the breaking away of the ice jam at Swatara Riffles, which was between the mouth of Swatara creek and the head of Duffy's Island. They say that the ice first moved in a southwesterly direction toward Goldsborough, then came back and passed down the channel to the east of Duffy's Island, and, finding no outlet through that channel, passed across the island in the same southwesterly direction, doing the damage complained of. While the opportunity of some of these witnesses for observing what they testified to may have been more or less limited, yet this affected the weight and not the competency of the testimony, and was for the jury. In addition to this, several witnesses testified that there had never been a gorge at the falls before the dam was built. While the flood may have been unprecedented, yet this was some evidence for the jury to consider in determining whether the dam contributed to the gorge which resulted in the plaintiffs' injury. It was also testified that for some distance above the dam the flood levels before the gorge broke were above the highest on record, increasing as the points were nearer the dam, and that below the dam the highest levels were after the gorge broke. This testimony would assist the jury in determining the question whether the point of stoppage of the ice was at the dam, or below, as contended by the defendant.

Without referring further to the testimony, we think the learned judge was right in submitting it to the jury on the question at issue between the parties. If believed, it tended to show that the dam erected by the defendant company in the river contributed materially to the plaintiffs' injuries. In his opinion, the learned judge apparently thought it was his duty, on the motion for judgment non obstante veredicto, to determine the question on the preponderance of evidence, and to draw inferences from the testimony produced on the trial. In one part of the opinion he says, arguendo: "It certainly can be said that this proposition was sustained by the weight of the evidence;" and in another part of the opinion: "It might naturally be inferred that this condition diverted the water and ice from the channel and caused the injury. Such inference would be much more probable than that the crib dam of the defendant, 2,800 feet distant, was the producing cause." Neither of these matters was a question of law, but both were exclusively for the jury, to whom they had been submitted, and had been found in favor of the plaintiffs. It is exclusively the province of the jury to determine the weight of the evidence, as well as to draw inferences from facts shown by the evidence. The court can consider neither on a motion for judgment non obstante.

It was contended by the defendant that there was a large open space between the end of the wall and the beginning of the crib dam; that there was an opening near the beginning of the stone wall; and that these openings, in addition to the opening of 1,000 feet between the end of the crib dam and Duffy's Island, were sufficient to permit the water and ice to pass through, if the gorge had not begun below the falls and extended up to the dam. Many witnesses were introduced on the part of the defendant to sustain this contention, and, as has been said, the jury would have been justified in finding that the dam did not contribute to the plaintiffs' injuries by causing the gorge and the overflow of the island; but that was not the question which the learned judge had before him on a motion for judgment non obstante. He could consider all those matters in passing upon the defendant's application for a new trial, but not on a motion for judgment notwithstanding the verdict.

It appears from the record that the motion for a new trial, made by the defendant, has not been disposed of. We will therefore not direct judgment to be entered on the verdict, but reverse the court in granting the judgment notwithstanding the verdict, and award a procedendo, so that the court may consider and dispose of the pending motion for a new trial.

The judgment is reversed, with a procedendo.

COMMONWEALTH ex rel. CARSON, Atty. Gen., v. UNION SURETY & GUARANTY CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

APPEAL AND ERROR (§ 1022*)—REVIEW—QUESTIONS OF FACT—FINDINGS BY AUDITOR.

Findings of fact by an auditor on sufficient evidence confirmed by the trial court will not be reversed by the Supreme Court, except in case of manifest error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from Court of Common Pleas, Dauphin County.

Proceedings by the Commonwealth, on the relation of Hampton L. Carson, Attorney General, against the Union Surety & Guaranty Company. From a decree dismissing exceptions to a report of auditors, the Tweedie Trading Company appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Louis B. Runk, John R. Read, and H. B. Gill, for appellant. David J. Myers, for appellee.

ELKIN, J. Appellant, a trading corporation of the state of New York, presented a claim in the court below against the insolvent estate of the Union Surety & Guaranty Company, and now complains because it was disallowed. The claim is for damages, and is based upon an alleged breach of contract to guarantee bonds of the Carolina Steamship Company.

The record is voluminous and the facts somewhat complicated. The claim in the first instance was fully considered by the auditors appointed by the court to make distribution of the fund in the hands of the receiver, and afterwards carefully reviewed by the court in passing upon the exceptions to the auditors' report. The auditors and the learned court below agree that, under the facts, no valid claim for damages exists against the insolvent estate. The learned court finds that the claim is without merit, and among other things says: "There was no breach of contract because there never was any compliance with the conditions precedent to the performance of any act or duty by the surety company. In this view of the case, it is entirely unnecessary to discuss the proper measure of damages. For these reasons, we have no hesitation in concluding that this claim was properly disallowed by the learned auditors." The negotiations and contractual relations relied on to sustain this claim for damages were between the steamship company, the surety company, and the Tweedie Trading Company of New Jersey, which latter company has long since been dissolved, and is not a claimant here. The learned court below has found as a fact that

the evidence is not sufficient to show that the Tweedle Trading Company of New York, the present claimant, had acquired the rights of the Tweedle Trading Company of New Jersey, upon which the claim must depend, if indeed it ever did exist. This the court gives as an additional reason why the claim cannot be sustained. The report of the auditors and the opinion of the court in dismissing the exceptions as well as the evidence introduced at the hearings have been examined with care to discover whether any reversible error was committed in the findings made or in the conclusions reached. The case depends upon the facts, and cannot be reversed unless for manifest error. We fail to find any such error. The whole question was most carefully and intelligently considered by the learned court below, and we cannot do better than express our approval of the findings, reasons, and conclusions set forth in the opinion dismissing the exceptions to the auditors' report.

Decree affirmed; at the cost of appellant.

DOTSON v. FOUST, State Dairy and Food Com'r.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. FOOD (§ 3*)—LICENSE—POWERS OF OFFICERS.

Act May 29, 1901 (P. L. 327), regulating the sale of oleomargarine, butterine, and similar products, and providing that the application for a license to manufacture or sell such products shall contain a description of the place where the business is to be carried on, the name and style under which it will be conducted, and such other matters as may be required by the dairy and food commissioner, does not authorize the commissioner to require anything to be inserted, except matters calculated to advertise the character of the product to be manufactured or sold, so that the imposition of a counterfeit resemblance may be prevented.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 3.*]

2. FOOD (§ 3*)—LICENSE—POWERS OF OFFICERS.

The dairy and food commissioner is not authorized to refuse a license to sell oleomargarine, on the ground that the applicant is engaged in business under an existing license, and is selling oleomargarine containing coloration and ingredients causing it to resemble and imitate yellow butter.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 3.*]

Appeal from Court of Common Pleas, Danphin County.

Petition by R. C. Dotson, president of the Eastern Provision Company, for mandamus to James Foust, State Dairy and Food Commissioner. From a judgment awarding peremptory mandamus, defendant appeals. Affirmed.

The petition averred that the Eastern Provision Company was engaged in selling oleomargarine and butterine, and had made a proper application to the dairy and food commissioner for a license to sell oleomargarine, and that the dairy and food commissioner had refused the license without giving any reason therefor. The petitioner prayed for a mandamus, commanding the issuance of a license. The dairy and food commissioner filed an answer which, after admitting the material averments of the petition, and reciting the provision of the act of May 29, 1901 continued as follows:

"By virtue of said provisions the discretion is lodged in the said dairy and food commissioner to determine that the name and style under which the proposed business is intended to be carried on shall not be calculated to deceive or mislead the public as to the real nature of the business so proposed to be carried on; and by virtue of said provisions the said dairy and food commissioner is lodged with the discretion of determining that the business shall not deceive the public, in that the applicant shall not sell oleomargarine, butterine, or any similar substance which has not been made and kept free from all coloration or ingredient, causing it to look like or resemble yellow butter; and in the exercise of such discretion the said dairy and food commissioner has the power to refuse a license to any applicant who intends thus to deceive the public; and the said dairy and food commissioner is vested with the further discretion of refusing to grant a license to an applicant who has heretofore deceived the public by selling oleomargarine or butterine, which has not been made and kept free from all coloration and ingredients, causing it to look like and resemble yellow butter.

"In the exercise of the discretion thus vested in him, the said dairy and food commissioner obtained samples of the kind of oleomargarine or butterine which the said plaintiff was selling immediately before and at the time of filing the application for said licenses, and which the said dairy and food commissioner believes the said plaintiff intends to sell under the licenses applied for, which said samples of oleomargarine and butterine do contain coloration and ingredients that cause the said product to resemble and be in imitation of yellow butter, and the said license was refused, and the said plaintiff advised of the refusal of the same by a telegram to the said plaintiff from the said dairy and food commissioner, for the reasons herein stated."

The plaintiff demurred to the answer. The court awarded a peremptory mandamus.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

William M. Hargest, Asst. Deputy Atty. Gen., Edward E. Beidleman, and John C. Bell, Atty. Gen., for appellant. W. H. Wilson, Lyman D. Gilbert, C. H. Backenstoe, and U. P. Rossiter, for appellee.

STEWART, J. [1] The act of May 29, 1901 (P. L. 327), regulating the sale of oleomargarine, butterine, and similar products, provides that the application for a license to manufacture or sell such products shall contain an accurate description of the place where the proposed business is to be carried on, and the name and style under which it is proposed to conduct such business, in addition to such other matters as may be required to be stated therein by the dairy and food commissioner, to whom the application is to be made. Giving this latter provision, relating to the power of the commissioner, its widest signification, it cannot be so extended as to allow the commissioner to require anything to be inserted in the application, except such matters as are calculated to effect the one single purpose of the act, namely, to advertise to the public the true nature and character of the product to be manufactured or sold, so that the imposition of a counterfeit resemblance may be prevented, and incidentally to facilitate discovery and detection when an attempt is made to evade the law. If the commissioner may go beyond this in his requirements, what limits can be assigned to his authority? The act requires that the application shall "be satisfactory to the dairy and food commissioner," with this further provision, that, if so found, "and the said name and style shall not, in the judgment of the dairy and food commissioner, be calculated to deceive or mislead the public as to the real nature of the business so proposed to be carried on, he shall issue to the applicant or applicants a license," etc. A plain intendment here is that the application must conform to such reasonable rules and regulations as the commissioner may make with respect to form, and substance as well, so far as the rules and regulations, with respect to the latter have for their object publicity, identification, and discovery. There is not a suggestion in the act that the character of the applicant is to be a subject of inquiry; and, were the commissioner to require an averment of good moral character in the applicant, with affidavits in support, he would be imposing a condition which, however salutary and protective it might be, would yet be without warrant in law. It is not the applicant who is to be satisfactory

to the commissioner, but his application; and, this latter being satisfactory, the act is mandatory; the commissioner shall issue the license. Independently of this, whatever may be the extent of the commissioner's authority, under the provision of the act which empowers him to require other matters than those specified in the act to appear in the application, the return to the writ in this case does not show that the licenses applied for were refused on the ground that they omitted anything that was required, either by the act or by any order or regulation of the commissioner. It is nowhere averred that the applications were in any respect defective or unsatisfactory. It is the applicant, not the application, that is here adjudged unsatisfactory. The insufficiency of such return is obvious in view of the mandate that if the application be satisfactory the commissioner shall issue the license applied for.

[2] The commissioner seeks to justify his refusal of the licenses, on the ground that at the time the applications were made the applicant, who was then engaged in the business under an existing license, was selling oleomargarine, or butterine, which upon examination was found to contain coloration and ingredients which causes it to resemble and imitate yellow butter. Assuming it to be true, what then? The act nowhere allows the commissioner to withhold a license because of abuse by the applicant of a former license; it does not even provide for a forfeiture of the license in case of conviction or violation of any of its provisions; and, showing conclusively that no forfeiture was contemplated, it provides increased penalties by fine and imprisonment for a second offense committed by the licensee. The dairy and food commissioner is charged in express terms with the enforcements of all the provisions of the act. While thus charged with large responsibilities, he is invested with an authority entirely commensurate; the constabulary of the state is placed at his command, and upon his own initiation, or through the constabulary, he may discharge this responsibility by bringing all offenders against the law to justice. This is the only way to make the act effective, and the only way that is contemplated in the act itself. The course pursued in this case by the dairy and food commissioner to give efficiency to the law was without warrant.

The assignments of error are overruled, and the appeal is dismissed.

SKEELS v. BLANCHARD et al.

(Supreme Court of Vermont. Windsor. Dec. 8, 1911.)

1. MORTGAGES (§ 37*)—ABSOLUTE DEEDS AS MORTGAGES—PAROL EVIDENCE.

A deed absolute on its face may be shown by parol to be a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—EVIDENCE—SUFFICIENCY.

More than a mere preponderance of evidence is required to secure the reformation of a deed.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

3. MORTGAGES (§ 38*)—ABSOLUTE DEEDS AS MORTGAGES—EVIDENCE—SUFFICIENCY.

The evidence required to show that a deed absolute in form is a mortgage, where the deed is the first conveyance and there is no further writing evidencing the transaction, must be more than a mere preponderance of the evidence, and the evidence must exclude reasonable doubt on the question.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

4. MORTGAGES (§ 591*) — REDEMPTION — AGREEMENTS AFFECTING.

Where a mortgage exists, an equitable right of redemption attaches, and no contemporaneous understanding will deprive the debtor of the right, and it can be defeated only by a subsequent agreement on a further consideration.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1701; Dec. Dig. § 591.*]

5. MORTGAGES (§ 296*)—PURCHASE OF EQUITY OF REDEMPTION BY MORTGAGEE—VALIDITY.

A mortgagee may by purchase extinguish the equity of redemption; but, in view of the relation of the parties, the transaction will be carefully scrutinized.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 816; Dec. Dig. § 296.*]

6. MORTGAGES (§ 296*) — CONVEYANCE BY MORTGAGOR TO MORTGAGEE.

A conveyance of mortgaged premises by the mortgagor to the mortgagee will be deemed a mere change in the form of a security, unless it clearly appears that both parties intended that the conveyance should bar the equity of redemption, and, when premises have been mortgaged, subsequent transfers on account of the debt are but prima facie securities subject to the right of redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 816; Dec. Dig. § 296.*]

7. MORTGAGES (§ 297*) — DEEDS AS MORTGAGES.

Where a mortgagor under a past-due mortgage gave to the mortgagee a warranty deed of the premises, a finding by a preponderance of evidence alone that the deed was intended as a mortgage is justified.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 832-835; Dec. Dig. § 297.*]

8. MORTGAGES (§ 297*)—ABSOLUTE DEEDS AS MORTGAGES—EVIDENCE—ADMISSIBILITY.

Where a mortgagor in a past-due mortgage conveyed by warranty deed the premises to the mortgagee, and asserted that the conveyance was mere security, and that the mortgagee would reconvey the premises on the payment of a specified sum with specified interest,

payment of interest called for by the agreement was competent to show that the subsequent action of the parties corresponded with the claimed agreement.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 832-835; Dec. Dig. § 297.*]

9. TENDER (§ 24*) — REQUISITES — PAYMENT INTO COURT.

A tender by a party to a contract calling for a conveyance from the adverse party on the payment of a specified sum with interest is a tender of performance as a condition precedent to performance by the adverse party, and the tender may be accompanied with a demand of performance by the adverse party, and it is not necessary to bring the money into court to keep the tender good.

[Ed. Note.—For other cases, see *Tender*, Cent. Dig. §§ 79-81; Dec. Dig. § 24.*]

10. APPEAL AND ERROR (§ 935*)—REVIEW—PRESUMPTIONS.

Where the facts justify an inference that the solicitor of a mortgagee waived any objection to the form of the payment needed to redeem the property from the mortgage in accordance with a decree permitting redemption, the court will presume in affirmance of the decree that the payment was sufficient, and that such inference was drawn by the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3783-3787; Dec. Dig. § 935.*]

Appeal in Chancery, Windsor County; Eleazer L. Waterman, Chancellor.

Suit by Homer L. Skeels, administrator, against Harriet M. Blanchard and another. From a decree giving the orator the right to redeem, defendants appeal. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Davis & Davis, for appellants. William W. Stickney, John G. Sargent, and Homer L. Skeels, for appellee.

MUNSON, J. [1] It is the settled law of this state that a deed absolute upon its face may be shown by parol evidence to be a mortgage. Rob. Vt. Dig. 1855, pl. 33.

[2] It is equally well settled in this state that more than a mere preponderance of evidence is required to secure the reformation of a deed. Rob. Vt. Dig. 2363, pl. 12. The decree establishing the conveyance of the orator's intestate as a mortgage rests upon a finding made on a fair balance of evidence; and the orator cites in support of the sufficiency of the finding the following cases: *Campbell v. Worthington*, 6 Vt. 448; *Baxter v. Willey*, 9 Vt. 276, 31 Am. Dec. 623; *Wright v. Bates*, 13 Vt. 341; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Hills v. Loomis*, 42 Vt. 562; *Howard v. Scott*, 50 Vt. 48. The defendants contend that the measure of proof required is the same as in cases of reformation.

In *Campbell v. Worthington* the court considered that the facts disclosed by the depositions read in evidence were entirely irreconcilable with any other view than that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the land was held as security for a debt. In *Baxter v. Willey* the question whether the transaction was a mortgage was submitted on an agreed statement of facts; so there can have been no question as to the degree of certainty with which the case was made out. In *Wright v. Bates* the court reviewed the testimony, and said there could be no reasonable doubt that the land was conveyed as security for money advanced. In *Hyndman v. Hyndman* there was at first an absolute deed and a writing of defeasance. Subsequently the evidences of indebtedness and the writing of defeasance were mutually surrendered upon a parol agreement that the defendant should have the property for a certain sum, free from the equity of redemption, and should sell it and pay the orator whatever he should receive above that sum and an allowance for his trouble. Later the parties executed an indenture, which recited that the defendant held a warranty deed of the premises in consideration of his having paid the orator a certain sum, and fixed a time for repayment, and provided that, on default thereof, the defendant should sell the property at auction and account for the avails as above stated. The orator failed to pay, and the defendant had the property sold at auction; himself becoming the purchaser. In disposing of this case, the court expressed itself as inclined to the opinion that the orator ought to be permitted to redeem. In *Hills v. Loomis*, upon a consideration of the testimony taken and filed, the court thought it was clear that the parties fully understood that the deed was to be merely security for the money paid, and that the contrary conclusion could not be arrived at without disregarding the most obvious inferences to be drawn from undisputed circumstances. In *Howard v. Scott* the orators excepted to the report, for that the finding that the deed was in effect a mortgage was against the weight of evidence, and because that was a question for the court, and not for the master. There was no exception to the report on the ground that it did not appear that the master had reached his ultimate finding with the requisite degree of certainty. In sustaining the decree overruling the exceptions, the court said that, when there is evidence tending to establish the facts found, the court will not review the findings as regards the weight to be given to the testimony, and that the party attacking the report on this ground must satisfy the court that the master has acted corruptly, "or has been led astray by having entertained a mistaken view of the law applicable to the testimony." The court nevertheless proceeded to express its opinion that the testimony fully warranted the master in finding the facts reported in regard to the deed. It is clear that, if the evidence fully satisfied the mind of the master, it was not for the court to reverse his finding on its own view as to the weight of the evi-

dence; and there is nothing in the opinion that necessarily implies more than this.

[3] It appears from this review of the cases cited by the orator that our court has generally placed itself upon ground which satisfies the rule contended for by the defendants, but without the existence of such a rule being brought in issue or referred to.

The case of *Herrick's Adm'r v. Teachout*, 74 Vt. 196, 52 Atl. 432, should be considered in this connection. There it appeared from the master's report that the orator's intestate took the title to the farm in question upon a parol agreement that he would relieve the estate from certain claims and pay the incumbrances resting on the farm, and deed the farm to the defendant when reimbursed for these expenditures, and that in default of such reimbursement the farm might be sold, and the proceeds be applied in satisfaction of the sums so expended, and the balance, if any, be paid to the defendant. No question was raised as to the degree of certainty with which the facts reported were found. The case turned upon the effect to be given to certain terms and findings of the report deemed capable of two constructions, and with reference to this it was said that in all doubtful cases the law will construe the contract to be a mortgage, because such a construction is most likely to attain the ends of justice.

The orator cites in support of his contention certain language used by Judge Poland in *Rich v. Doane*, 35 Vt. 124. In this case there was an unconditional deed and a bond for reconveyance, with parol evidence of what the parties said and intended. The opinion says that upon the face of the papers the transaction was clearly an absolute conveyance with a right of repurchase, but nevertheless prefaces an examination of the evidence with the statement that, when enough is proved to render it fairly doubtful whether the conveyance was a mere security or an absolute conveyance with a right of repurchase, the premises will be held redeemable. This assertion was entirely unnecessary, for the transaction was held to be an absolute conveyance upon a final statement that certain stipulations about which there was no question were wholly inconsistent and incompatible with the claim that the deed was a mortgage.

It is definitely held in about half the jurisdictions of this country that more than a mere preponderance of evidence is required to show that a deed absolute in form is a mortgage. 1 Jones, Mort. §§ 286-320. Various terms are used to indicate the degree of proof required. No middle ground between mere preponderance and the exclusion of reasonable doubt has been recognized in this state. *Bradish v. Bliss*, 35 Vt. 327. Some authorities distinctly state that the rule in cases of this class is the same as in cases of reformation on the ground of mistake. *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027. The

rule regarding certainty is sometimes stated in apparently contradictory terms by the same court. It is said that the claim that an unconditional deed is, in fact, a mortgage must be established with certainty, and yet it is said that in doubtful cases the court will treat the transaction as a mortgage rather than a sale. It is evident that these statements are not regarded as inconsistent, and the explanation of the apparent discrepancy will doubtless be found in some classification of the cases.

The authorities cited upon this subject embrace cases where there was an unconditional first conveyance, without any further writing evidencing the transaction; cases where an unconditional conveyance was accompanied by a separate writing of defeasance, or other writings more or less indicative of its purpose; cases where a conveyance, manifestly or concededly a mortgage, was followed by some written or parol agreement relating to the original transaction; cases where this further arrangement consisted of or included an unconditional conveyance of the mortgaged premises to the mortgagee. It appears from this that the courts have dealt with two classes of deeds, the same in form, but sustaining different relations to the mortgage transaction. In the first, the inquiry is whether the deed was given as security for some obligation of the grantor, pre-existing or then incurred. In the second, the inquiry is whether the relation of mortgagor and mortgagee was terminated by a valid transfer of the mortgagor's interest in the premises; and here the rules regarding a mortgagor's equity of redemption become important.

[4] When it is once established that a mortgage exists, the equitable right of redemption attaches to the transaction as an inseparable incident. No contemporaneous understanding, however formally expressed or artfully concealed, will be permitted to deprive the debtor of this right. It can be defeated only by a subsequent agreement upon a further consideration.

[5] The right of a mortgagee to become the purchaser of the equity is unquestioned, but the relations of the parties are such that the transaction will be carefully scrutinized. *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *Pengh v. Davis*, 96 U. S. 332, 24 L. Ed. 775. The rule in such a case is said to be substantially the same as that prevailing when the deed of a beneficiary to his trustee is questioned. *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406.

[6] A conveyance of mortgaged premises by the mortgagor to the mortgagee will be regarded as a mere change in the form of the security, unless it clearly and unequivocally appears that both parties intended that it should operate as a bar to the equity of redemption. *Ennor v. Thompson*, 46 Ill. 214. See, also, *Bradbury v. Davenport*, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92; *Hall*

v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696. When premises have been mortgaged to secure a debt, subsequent transfers of property on account of the debt are to be regarded *prima facie* as securities, and subject to the right of redemption. 3 Lead. Cas. Eq. 444. It is evident from these authorities that the rule which requires more than a preponderance of evidence to establish an absolute deed as a mortgage cannot be applied to a deed covering premises already mortgaged by the grantor to the grantee without overruling a long-established rule pertaining to the equity of redemption.

[7] In July, 1884, Mrs. Earle, the orator's intestate, gave a mortgage of her farm to James S. Brown, the father of the defendants, to secure a loan of \$2,000. On the 30th day of March, 1901, the mortgage being then long overdue, Mrs. Earle gave Brown a warranty deed of the premises, and the mortgage was discharged of record. There was evidence tending to show that this was done on Brown's suggestion to save double taxation. The master says he is most inclined to the orator's version of the transaction, and finds accordingly by a fair balance of testimony. The full finding is that Brown agreed at the time he took the deed of 1901 that he would reconvey the premises to Mrs. Earle on her payment of the \$2,000, with 3½ per cent. interest, in the form of rent or otherwise, and the taxes.

The existence of a debt and of a mortgage to secure it is not the subject of this inquiry. The case starts with these facts established. The original deeds of the parties left nothing to be ascertained by parol. The question is whether there was a subsequent sale of the mortgagor's equity to the mortgagee; and the attitude of the courts towards this inquiry has been indicated. Our own reports contain similar expressions. It is said in *Hyndman v. Hyndman*, before cited, that "in all transactions between the mortgagor and mortgagee the conduct of the mortgagee will be watched very narrowly." A holding that the effect of an absolute deed from the mortgagor to the mortgagee can be controlled only by proof beyond a reasonable doubt would be inconsistent with the whole tenor of the law regarding equities of redemption. The orator has procured a finding by a preponderance of evidence, and we hold that this is sufficient. The *Hyndman* Case is full authority for this holding.

[8] It was proper to receive evidence that interest at six per cent. was paid Brown until March 30, 1901, the day when the mortgage was discharged and the warranty deed given, and that 3½ per cent., amounting to \$70 a year, was paid from that time until October 1, 1906. This was evidence that the subsequent action of the parties corresponded with the claimed agreement.

[9] The defendants admitted in their answer that in April, 1907, the orators tendered them \$2,070, and demanded a quitclaim

deed of the premises, and that they declined to receive the money and give the deed, and admitted, further, that they were then informed that they could have the amount tendered at the Ludlow Savings Bank & Trust Company at any time by calling for it and conveying their interest. No evidence regarding this tender was introduced at the hearing. The decree includes nothing for interest after the tender. The defendants claim that the tender was of no effect because clogged with a condition, and because not kept good by bringing the money into court. But this was not a simple tender. It was a tender of performance by one contracting party as a condition precedent to performance by the other. So it was proper to accompany the offer with a demand of performance by the other party, and was not necessary to bring the money into court. *Washburn v. Dewey*, 17 Vt. 93; *Hepburn v. Auld*, 1 Cranch 321, 2 L. Ed. 122; *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Cheney v. Libbey*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818.

The decree permitting the orator to redeem upon payment of the sum due was correct.

[10] The orator sent the clerk a certificate of deposit on the Ludlow Savings Bank & Trust Company for the amount of the decree; and the clerk treated this as cash, and entered a receipt of the amount on the docket, but did not collect the certificate. Soon after this, defendants' solicitor inquired of the clerk if the money had been received, and the clerk showed him the certificate and offered to indorse it to him if he wished to avail himself of the money. The solicitor "did not ask for the money under the decree, but asked that the clerk get the money on the certificate and deposit (it) in some other savings bank where it would draw interest, and objected to the certificate as not being money." The solicitor of the orator, on being informed of this, offered to send the clerk the full amount in gold or currency, and was informed by the clerk that he did not wish either sent. As we understand the findings, this was all within the time limited for making the payment. The clerk held the certificate until April tenth, which was after the time limited, and then deposited it in the Woodstock National Bank, receiving at the same time credit for the full amount; and the amount has since remained on deposit in that bank. The defendants claim that this was no payment, and that the bill should stand dismissed for want thereof. This claim of the defendants was presented to the chancellor by petition soon after the expiration of the time limited for payment; and their petition was subsequently dismissed, and a finding of the facts above stated placed on file. It is not necessary to consider what the law may now require as

between legal tender and current money, nor what effect should be given to the entry made by the clerk on receiving the certificate of deposit, nor what the rights or remedies of the defendants or the orator would have been if the time limited had expired without anything having been done by the defendants' solicitor. A majority of the court are satisfied that it may fairly be inferred from the facts found as to what took place between the clerk and the defendants' solicitor, that the latter waived any objection to the form of the payment, and this court will presume in affirmance of the decree that such inference was drawn by the chancellor.

Decree dismissing defendants' petition affirmed, decree for the orator affirmed, and cause remanded.

WILLIAMS MFG. CO. et al. v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Vermont. Caledonia. Dec. 8, 1911.)

1. APPEAL AND ERROR (§ 192*)—QUESTIONS REVIEWABLE—MATTERS NOT RAISED BELOW.

A demurrant will, on appeal, be confined to the grounds of demurrer assigned below, when it does not appear that other grounds were argued.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1221-1246; Dec. Dig. § 192.*]

2. PLEADING (§ 204*)—DECLARATIONS—SUFFICIENCY.

A declaration consisting of more than one count will stand, as against demurrer, if any count is good.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

3. INSURANCE (§ 115*)—"INSURABLE INTEREST"—"INTEREST" OF MORTGAGEE.

A mortgagee of real property has an "insurable interest," for any title or interest, legal or equitable, will support a contract of insurance against loss by fire, though the term "interest" does not necessarily imply property in the subject of insurance; and hence a declaration alleging a promise by an insurance company to both the mortgagor and mortgagee shows sufficient consideration to entitle both to sue jointly.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3670-3674; vol. 8, p. 7690; vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

Exceptions from Caledonia County Court; Eleazer L. Waterman, Judge.

Action by the Williams Manufacturing Company and another against the Insurance Company of North America. To a judgment sustaining a demurrer pro forma, plaintiffs excepted. Judgment reversed, demurrer overruled, and cause remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Howe & Hovey, for plaintiffs. Dunnett & Slack, for defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MUNSON, J. The declaration is in general assumpsit, and contains four counts. The first and second allege in substance that the indebtedness was for the loss or damage by fire of certain property of the plaintiff Manufacturing Company. The third alleges that the indebtedness was by reason of the defendant having insured the plaintiff Manufacturing Company against loss of its property by fire, and made the loss payable to the plaintiff Savings Bank, mortgagee. The fourth alleges that the indebtedness was on a policy issued to the plaintiff Manufacturing Company, in which the loss was made payable to the plaintiff Savings Bank, mortgagee. By general allegations applicable to all the counts, the indebtedness arising from the loss is set up as accruing to both plaintiffs, and the promise in consideration thereof as having been made to both plaintiffs.

The defendant demurs generally, and assigns as causes of demurrer that the plaintiffs are misjoined; that the suit can be maintained only in the name of the Williams Manufacturing Company; that, if suit can be maintained in the name of the Citizens' Savings Bank & Trust Company, the other plaintiff is improperly joined as such; and that the allegations of the declaration disclose no cause of action in favor of the Citizens' Savings Bank & Trust Company, or upon which that corporation can maintain a suit. It appears affirmatively that no other ground of demurrer was presented in the court below.

[1, 2] The defendant insists that a declaration in indebitatus assumpsit must show the ground of the indebtedness which is the consideration of the promise, and that the first and second counts are defective for want of a sufficient allegation of this nature. The sufficiency of the counts in this respect will not be considered, as a demurrant will be confined to the assigned grounds of demurrer, when it does not appear that other grounds were argued below. *Marshall v. Hardwick Village*, 83 Vt. 495, 78 Atl. 411. The declaration will stand, if any count is good; and, in view of the situation regarding the first two, our attention will be confined to the third and fourth. The suggestion that these are defective, in that they fail to show any consideration whatever, need not be considered; for the assignment points only to the want of allegations necessary to sustain the joinder of plaintiffs.

[3] The question is whether the allegations of consideration and promise are sufficient to entitle the plaintiffs to sue jointly. Any title or interest in property, legal or equitable, will support a contract of insurance against loss by fire. 19 Cyc. 584; *Swift v. Vt. Mutual Fire Ins. Co.*, 18 Vt. 305. A mortgagee of real property has an insurable interest in the premises. 2 Am.

Lead. Cas. (4th Ed.) 565; *Bell v. Western, etc., Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542. The term "interest," as used with reference to the right to insure, does not necessarily imply property in the subject of insurance. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 163, 7 L. Ed. 90, 95. The mortgagee's interest is an interest in the preservation of the property, rather than an ownership. *Excelsior, etc., Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271. A mortgagee's insurance is a contract of indemnity against the loss which he may sustain through the destruction of his mortgagor's property. The counts in question allege a promise to both plaintiffs, in consideration of an indebtedness to both plaintiffs, and an injury to the property of one plaintiff as the ground of the indebtedness. Inasmuch as mortgagor and mortgagee each have an insurable interest in the property, we cannot say but that there may be a policy so written as to make the insurer liable to the two jointly, although the ownership of the property is in one. Whether the plaintiffs have such a policy will appear on trial.

Judgment reversed, demurrer overruled, third and fourth counts adjudged sufficient, and cause remanded.

ROWLEY et ux. v. SHEPARDSON.

(Supreme Court of Vermont. Windham. Dec. 8, 1911.)

1. FRAUD (§ 57*)—MISREPRESENTATION IN SALE—EVIDENCE—DAMAGE.

Where, in an action for fraud inducing the purchase of a sugar orchard represented to have not less than 1,000 trees for use in the making of maple syrup, the evidence showed a shortage in the number of trees, evidence that the trees were worth from 50 cents to 75 cents per tree more for the purpose of making maple syrup than they were for timber was properly received as against the objection that it was irrelevant, immaterial, and not a proper element of damage.

[Ed. Note.—For other cases, see *Fraud*, Dec. Dig. § 57.*]

2. APPEAL AND ERROR (§ 1048*)—EXAMINATION OF WITNESS—QUESTIONS—CURE BY ANSWER.

Any error in admitting a question to a witness over objection that it called for a comparison as to quality was cured by an answer which merely stated that the quality was very fine.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1048.*]

3. EVIDENCE (§ 500*)—OPINION—EXAMINATION.

In an action for deceit by the purchaser of a farm based on misrepresentations by the seller that there would be 1,100 or 1,200 sugar maples left after taking out 500, which were reserved with license to cut for 10 years, a question to a witness on the issue of the value of the farm, as to the quality of sugar made on the farm, was not objectionable as including sugar made from the reserved trees; the reservation being merely of a number of trees not specifically designated in any way.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. FRAUD (§ 49*)—PLEADING—EVIDENCE.

A general allegation of damages for fraud, inducing the purchase of a farm for a sugar orchard represented to have not less than a specified number of trees for use in the making of maple syrup justifies the admission of evidence of the location and soil of the orchard, and that it was favorably situated, because it pitched to the southeast, to show the extent of the general damages.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. § 49.*]

5. FRAUD (§ 57*)—EVIDENCE—DAMAGES.

Where, in an action for fraud inducing the purchase of a sugar orchard represented to have not less than 1,000 trees for use in the making of maple syrup, the evidence showed that the soil and location of a sugar orchard were material to the quality of its product, and that the orchard in question was favorably situated, a merchant who had purchased maple sugar and syrup in his business, and who had purchased the product of the orchard at various times, was properly permitted to testify that the sugar raised on the orchard had a higher market value than the ordinary product.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 57.*]

6. EVIDENCE (§ 502*)—OPINIONS—CROSS-EXAMINATION.

Where, in an action for fraud inducing the purchase of a sugar orchard, a witness of defendant testified to his acquaintance with the orchard and gave his opinion of its value, questions on cross-examination as to the valuation of maple considered as lumber and as available for sugar making were proper to test the valuation of the orchard.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2306; Dec. Dig. § 502.*]

7. PROCESS (§ 167*)—VALIDITY—WITHDRAWAL OF COUNT.

Where process was issued against and served by attaching the property of defendant, and nothing was done in the inception of the suit to present a jurisdictional question, the process was not void because the original declaration contained counts *ex contractu* and *ex delicto*, where the defect in the joinder was seasonably cured by striking out the count *ex contractu*.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 167.*]

8. EXECUTION (§ 425*)—ARREST OF DEBTOR—JAIL LIMITS.

A close jail certificate may be granted against defendant on a judgment against him for deceit while property is held under attachment pursuant to process issued against, and served by attaching, defendant's property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1224-1228; Dec. Dig. § 425.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action for deceit by Edson E. Rowley and wife against George W. Shepardson. There was a judgment for plaintiffs, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Chase & Daley, for plaintiffs. Cudworth & Pierce, H. G. Barber, and F. E. Barber, for defendant.

MUNSON, J. The suit is for deceit in the sale of a farm. The deed contained a

reservation of 500 sugar maples from the maple trees standing west of the highway running through the farm. The trees reserved were not otherwise designated or described in the deed, and were not marked. The reservation clause is given in full in the report of a former trial. 83 Vt. 167, 74 Atl. 1002, 138 Am. St. Rep. 1078. Subsequent to the conveyance to the plaintiffs, and before the bringing of this suit, all the reserved timber was conveyed, and 402 of the maple trees standing west of the highway were cut and removed by the purchaser. The plaintiffs claimed, and their evidence tended to show, that they negotiated for the farm with special reference to securing a sugar orchard of not less than 1,000 trees for use in the making of maple syrup, and that the defendant represented that there were from 1,600 to 1,700 sugar maples standing west of the highway more than one foot in diameter at the stump, and that they made the purchase and agreed to the reservation in reliance upon this statement.

[1] The plaintiff was permitted to testify that these trees were worth from 50 to 75 cents per tree more for the purpose of making maple syrup than they were for timber. This was objected to as irrelevant, immaterial, and not a proper element of damage. As against this objection, the evidence would have been admissible in connection with evidence of the value of the trees for lumber; and evidence of this character was offered by the plaintiffs, and excluded on defendant's objection.

A witness, who testified that he was acquainted with the farm and familiar with real estate values in the vicinity, was permitted to give his judgment as to the value of the farm with from 230 to 300 sugar maples left standing on the west side of the highway, and its value on the assumption that from 1,100 to 1,200 were left standing there. It is objected that the questions were improper because of their failure to include the fact that 500 of these trees were reserved to the defendant. But the questions took proper cognizance of this fact. They were framed with reference to the condition which would exist with all the reserved timber, including the 500 maples, taken off, and the condition that would have existed after this cutting if there had been the number of maples represented by the defendant.

[2] This witness, after testifying that he had made maple sugar and syrup, and had seen the product of this farm, was asked what the quality of this product was as compared with the quality of sugar he had known of that came from other localities. The question was objected to as calling for a comparison; but no improper comparison was made, for the witness answered: "It was a very fine quality." [3] It was also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

objected to as covering the sugar made from the 500 trees reserved to the defendant; but no error can be claimed in this respect, for the trees reserved were a part of the same orchard, and were not set apart by any designation. This sufficiently disposes of like objections made to testimony of the same character received from other witnesses.

[4] The same witness was permitted to testify that the location and soil of a sugar orchard have to do with the quality of the product, and that the one on this farm was "situated extra good" for this purpose because it pitched to the southeast. Other witnesses were permitted to testify in general terms that the location was good. The only objection urged against this class of evidence is that there was no special allegation in the declaration to justify its admission. No special allegation was needed, for the evidence tended to show the extent of the general damage sustained by the plaintiffs.

[5] A witness who stated that he was a merchant, and purchased maple sugar and syrup in the carrying on of his business, and had purchased the product of this farm at various times, was permitted to testify that the syrup made on this place had a higher market value than the ordinary product. This was objected to as irrelevant, immaterial, and too speculative. It is now argued that the superior quality of this syrup may have been due to the superior skill of the maker, and to the difference in the apparatus used. There being evidence tending to show that the soil and location of a sugar orchard are material factors in determining the quality of its product, the fact that the product commanded a superior price in the general market, if not otherwise accounted for, would be an important corroborative circumstance. If an inquiry as to the skill of the sugar makers were considered essential to the admissibility of the evidence, practical considerations would probably require its exclusion. If the inference of a superior location were to be drawn from a comparison of results with a single orchard, it would probably be necessary to accompany the evidence with proof that the appliances used were substantially alike. But, when the evidence is of sales in the general market in the regular course of business, we think it may properly be assumed that the seller is in competition with others who have the usual improved appliances of the trade. Such a case does not call for an application of the rule which governs when the comparison is with a single instance selected by the party. This view is somewhat supported by *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938. There it was claimed that an article called "naboli" prevented the pain incident to filling

teeth, and it was said of the evidence received in support of the claim: "The objections made to it are that it introduces the trial of collateral issues, and that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases, at least, it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skillfulness of the defendant's hand. But * * * when the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it."

[6] A witness for the defendant testified to his acquaintance with the farm, and gave his opinion as to its value. In cross-examination he was asked to place a valuation on these trees, assuming them to be of different sizes, considered both as lumber and as available for sugar making. This line of inquiry was calculated to test the correctness of his valuation of the farm, and was allowable cross-examination.

At the close of all the evidence, and also after verdict, the defendant moved that the suit be dismissed on the ground that the process was void, in that the original declaration contained counts both *ex contractu* and *ex delicto*. *Roy v. Phelps*, 83 Vt. 174, 75 Atl. 13, is relied upon in support of this contention. In that case the writ issued as a *capias*, and was served by arresting the defendant's body.

[7] In this case the writ issued against, and was served by attaching, the property of the defendant. Nothing was done in the inception of this suit to present a jurisdictional question, and the defect in the joinder could be and was seasonably cured by striking out the counts *ex contractu*. See *Downing v. Burnham*, 84 Vt. 149, 78 Atl. 789.

[8] The defendant excepted to the allowance of a close jail certificate, and now urges that a certificate cannot lawfully be granted while property is held under attachment. It was held otherwise in *Parker v. Parker*, 71 Vt. 387, 45 Atl. 756.

Judgment affirmed.

MANLEY v. JOHNSON.

(Supreme Court of Vermont. Windham.
Dec. 8, 1911.)

1. JUDGMENT (§ 72*)—ORAL STIPULATIONS IN COURT—EFFECT.

Where the impanelling of the jury was deferred at the request of defendant, and a settlement was then agreed on, and the cause was entered with the court for judgment as per stipulation, with the understanding that the agreement should be reduced to writing and

signed by the parties, the subsequent failure of defendant to sign the stipulation did not affect the validity of the judgment entered, in the absence of mistake, fraud, or undue advantage.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 130; Dec. Dig. § 72.*]

2. JUDGMENT (§ 90*)—ORAL STIPULATIONS IN COURT—EFFECT—SETTING ASIDE.

Where the court made a docket entry which provided for the judgment afterwards rendered, pursuant to an oral stipulation of the parties, the stipulation could not be disregarded, so as to necessitate the setting aside of the judgment, under the rule of court that, where parties differ as to an oral agreement, the court will disregard it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 148, 149; Dec. Dig. § 90.*]

3. JUDGMENT (§ 72*)—CONSENT TO ENTRY—CONSIDERATION.

Where the impaneling of a jury was deferred at the request of defendant, and a settlement was agreed on by the parties in court, and the cause was entered with the court for judgment as per stipulation, the agreement was supported by a sufficient consideration, and defendant could not subsequently withdraw from it; plaintiff's waiver of his right to a trial by jury at the time constituting a consideration for defendant's consent to a docket entry which entitled plaintiff to a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 130; Dec. Dig. § 72.*]

4. EXECUTION (§ 433*)—CONSENT JUDGMENT—OPERATION—EVIDENCE.

Where the court, in an action for deceit, rendered judgment for plaintiff for a specified amount, pursuant to a settlement of the parties, and then heard a motion for a certified execution, evidence offered by defendant to limit the amount for which certified execution could be granted was properly excluded; since the agreed amount for which judgment was rendered was only the damage for the deceit.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 433.*]

5. FRAUD (§ 23*)—FALSE REPRESENTATIONS—RELIANCE.

A party to a contract may rely on the representations of the adverse party as to his ownership of a specific piece of property without examining the records, and may recover damages on proof that the representations are false.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.*]

6. EXECUTION (§ 448*)—CONSENT JUDGMENT—OPERATION—CERTIFIED EXECUTION.

A judgment for plaintiff in an action for deceit, rendered pursuant to a stipulation of the parties, carries with it the rights incident to a judgment on a verdict, and plaintiff is entitled to a certified execution, though the stipulation did not provide for it.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 448.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action for deceit by John B. Manley against Peter Johnson. There was a judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Herbert G. Barber and Frank E. Barber, for plaintiff. Gibson & Waterman, for defendant.

MUNSON, J. The declaration charges that the defendant induced the plaintiff to give him credit on an exchange of automobiles, by falsely and fraudulently representing that certain real estate owned by him was free from incumbrance, when said real estate was in fact mortgaged for its full value, as the defendant well knew.

It appears that while the case was pending before the jury, and as the jury was about to be called, the impaneling of the jury was deferred at the request of the defendant, and that negotiations for settlement were thereupon had, and the terms of settlement agreed upon, and that the case was entered with the court for judgment as per stipulation, with the understanding that the agreement should be reduced to writing, and be signed by the parties. Later the defendant refused to sign the stipulation. The agreement was that the defendant should pay \$300 before the 15th of December, or there should be a judgment for the plaintiff in that amount.

At a sitting of the court in January, upon the request of defendant's counsel, the matter was allowed to stand over until the reassembling of the court in February, and judgment was then entered for the plaintiff for \$300 damages, and costs. The defendant excepted to the judgment, on the ground that he had not had his day in court, and that no such proceedings had been had as would entitle the plaintiff to a judgment.

[1] It is argued for the defendant that the understanding that the agreement should be put in writing and signed was a part of the oral agreement, and that the failure to sign the stipulation left the agreement incomplete and of no effect. We think, however, that this understanding must be treated as supplemental to the agreement. The agreement itself was at once carried into effect by counsel by having the docket entry made.

[2] It is argued, further, that there was evidently some disagreement as to what should be included in the stipulation, and that a rule of court provides that when parties differ as to an oral agreement the court will disregard it. But there was no disagreement for the court to consider when it made the entry which provided for the judgment afterwards rendered.

[3] It is said that the agreement was without consideration; that the defendant had a right to withdraw from it, if it could be done without prejudice to the plaintiff; that his refusal to sign the stipulation was a complete withdrawal; and that the plaintiff's rights could have been saved by a continuance. This argument entirely ignores the main feature of the transaction. The plaintiff was en-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

titled to a trial by jury at that time, and he waived this right in consideration of the defendant's consent to a docket entry, which entitled him to a judgment in accordance with an agreement which, it was understood, should be evidenced by a writing. We think the defendant's subsequent refusal to sign the writing did not deprive the court of its power to enter up a judgment in accordance with the agreement.

It does not appear that the court was asked to strike off or disregard the first entry on any claim of mistake, fraud, or undue advantage. It does not appear that any question was raised as to the manner in which the agreement was ascertained, nor as to the correctness of the finding. The only claim presented by the exception taken to the judgment was that no proceedings had been had that entitled the plaintiff to a judgment. In fact, nothing appears, in addition to the matters above stated, until we come to the report of the proceedings on the motion for a certified execution.

[4] Defendant's only claim touching the agreement was that the amount agreed upon was to cover certain contract obligations; and this claim was made in the hearing on the motion for a certificate, had after the judgment was entered, and was advanced solely in opposition to the motion. In the hearing on the motion for a certified execution, the court excluded an offer of defendant to show that certain matters of contract were taken into consideration in determining the amount for which judgment should be entered. The evidence was offered as limiting the amount for which a certified execution could be granted. The ruling was correct. The court could not properly treat the agreed amount for which judgment had been entered as anything other than damages for the deceit alleged.

[5] Defendant proposed to inquire of the plaintiff whether he did not understand that all real estate mortgages were recorded in the town clerk's office, claiming that it was the duty of the plaintiff to examine the records, and not rely on what the defendant told him. The question was properly excluded. The plaintiff was entitled to rely on the defendant's representations concerning his ownership of a specific piece of property. *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264.

[6] At the close of the evidence received on this hearing, defendant moved that the writ be dismissed, because issued and served as a capias on a wrong growing out of contractual relations. The court overruled the motion, and granted a certified execution, and defendant excepted to the granting of the certificate. The case is unmistakably an action for deceit. The questions argued as to the plaintiff's right to this remedy were

disposed of by agreeing to the judgment. It is not claimed but that the facts which the evidence tended to establish were sufficient to justify the granting of a certificate. But it is said there was no agreement that the plaintiff should have a certified execution. Plaintiff's right to one did not depend on there being an express agreement. A judgment taken by consent carries with it all the rights incident to a judgment rendered on a verdict. See *Grand Isle v. Milton*, 68 Vt. 234, 35 Atl. 71; *Harris v. Harris' Estate*, 82 Vt. 190, 215, 72 Atl. 912.

Judgment affirmed.

MILLER v. POWELL.

(Supreme Court of Vermont. Chittenden.
Dec. 8, 1911.)

1. CONTRACTS (§ 230*) — CONSTRUCTION — RENDITION OF SERVICES—COMPENSATION.

That a contract for services is silent on the subject of compensation is not conclusive against a right to a reasonable compensation for the services performed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1058; Dec. Dig. § 230.*]

2. PRINCIPAL AND AGENT (§ 81*)—COMPENSATION—PERFORMANCE OF SERVICES CONTEMPLATED.

Plaintiff, employed by a trustee in a deed of trust to act as agent in the purchase at public auction of the property conveyed by the deed, pursuant to an agreement binding the trustee to save the agent harmless for any bid, and binding the agent to turn over the property on his bidding it in, need not, to recover compensation for bidding in the property, convey it to the trustee and his wife; the agent being only required to turn over the property to the trustee.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 81.*]

Exceptions from Chittenden County Court; Fred M. Butler, Judge.

Action by Samuel H. Miller against Max L. Powell. There was a judgment for plaintiff, and defendant excepts. Affirmed.

Plaintiff seeks to recover for services rendered defendant on June 4, 1910, in bidding off for him at public auction the Hotel Burlington property in the city of Burlington. The buildings on that property were destroyed by fire in January, 1910. For some time before that, and continuously during all the time here material, defendant was in possession of the Hotel Burlington property under a trust deed thereof to him from the owner, George M. Delaney. After the fire, defendant, as such trustee, advertised the property to be sold at public auction to the highest bidder on June 4, 1910, and the auction was had accordingly. A few hours before the auction, plaintiff and defendant executed a written agreement, the body of which is: "That said Miller hereby agrees to act as agent of Max L. Powell in the purchase at auction of the Hotel Burlington

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property on Saturday, June 4, 1910, at 2 p. m. And said Powell hereby agrees to protect him in any bid he may make, and to take the property from him, and to save him harmless in every way by reason of his bid; and on his part the said Miller agrees to turn over the property, if it is bid in by him, on request. And it is mutually understood and agreed that in bidding at said auction said Miller is to act simply as the agent of said Powell." When this agreement was made, nothing was said about pay for plaintiff's agreed services. Defendant gave plaintiff instructions as to the manner of bidding on the property, and it was understood that the agency should not be disclosed. Plaintiff attended the auction, in good faith followed defendant's instructions to his satisfaction, and bid in the property at \$17,000. Later conveyances of the property from defendant, as such trustee, to plaintiff, and from plaintiff to defendant and his wife, were prepared, and plaintiff was asked to execute the latter deed, but refused, unless he were paid \$500 for his services. That defendant declined to do, and no deed of the property was ever executed by plaintiff. It is found that his services at the auction were worth \$35, for which sum, with his costs, plaintiff had judgment.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

H. S. Peck, for plaintiff. Max L. Powell, for defendant.

WATSON, J. Defendant excepted to the judgment on two grounds: (1) That the written contract is silent as to compensation; and (2) that the plaintiff is not entitled to recover compensation until he has performed his entire part of the contract.

[1] The first ground is untenable; for the fact that the written contract says nothing regarding compensation is not conclusive in law against the plaintiff's right to reasonable compensation for the services performed.

[2] On the second ground, it is said that plaintiff refused to execute the deed presented him by the defendant for that purpose to convey the property to the defendant and his wife, without the payment to plaintiff of the sum of \$500 for his services, which sum the defendant refused to pay. If it be true, as claimed, that it was necessary for the plaintiff to "turn over the property" bid off by him, to constitute full performance of the contract on his part, entitling him to compensation, it was no part of his contract to convey the property to the defendant and his wife. The contract was one of agency, and by it the defendant agreed to protect the plaintiff in any bid he might make, and to take the property from him, etc., and the

plaintiff agreed "to turn over the property. if it is bid in by him, on request." Construing the latter provision in the light of the context, its fair meaning at most obligated the plaintiff to turn over the property to the defendant on request, not to any one else. And this even he could not do, since the property was never conveyed to him by the defendant as trustee.

Judgment affirmed.

STATE v. CARRUTH.

(Supreme Court of Vermont. Dec. 8, 1911.)

1. INDICTMENT AND INFORMATION (§ 111*)—NEGATIVING EXCEPTIONS.

The mere fact that an exception is contained in a section of a criminal statute subsequent to that defining the offense, or in a later statute, is not conclusive that it need not be negatived in an indictment; the true test being whether the exception is so incorporated with the enactment as to be a material part of the definition or description of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

2. INDICTMENT AND INFORMATION (§ 111*)—GAME—MISDEMEANORS—COMPLAINT—NEGATIVING EXCEPTIONS.

Acts 1910, No. 208, which provides that "any person may pursue, on land owned or occupied by him, wound or kill any deer which he can prove was in the act of destroying or injuring any fruit tree or crop," etc., provides a defense only for the act of killing; and a complaint framed under P. S. 5320, which provides that "no person shall pursue, take or kill a wild deer or have in his possession," etc., is not defective, because it does not negative the killing of the deer in the protection of property.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

3. INDICTMENT AND INFORMATION (§ 111*)—GAME—COMPLAINT—NEGATIVING EXCEPTED CLASS.

As the rights protected by the Bill of Rights are not absolute in all respects, but are in many respects subject to legislative control and regulation, and are declared rather as guides to the Legislature than as marking an absolute limitation of power, it is not necessary, in prosecutions for statutory offenses, that the state in its complaint negative the various generalities of the Bill of Rights attaching to personal or property rights; and a complaint framed under P. S. 5320, providing against the killing of deer, is not defective for failing to allege that the deer was not killed in a defense of the property right guaranteed by article 1 of the Bill of Rights.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

4. INDICTMENT AND INFORMATION (§ 111*)—GAME—COMPLAINT—NEGATIVING EXCEPTED CLASS.

The mere fact that an exception to a penal statute is created by the Constitution, rather than by a clause of a statute, does not determine that the exception must be negatived, in a complaint charging a violation thereof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Exceptions from Brattleboro Municipal Court; William R. Daley, Judge.

George Carruth was convicted of killing a wild deer, and brings exceptions. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Clarke C. Fitts, for plaintiff. Frank E. Barber, State's Atty., for the State.

MUNSON, J. Section 5320 of the Public Statutes provides as follows: "No person, except in the open season, as hereinafter provided, shall pursue, take or kill a wild deer, or have in his possession a wild deer, or part thereof, so taken or killed. * * * " No. 208, Acts of 1910, provides that: "Any person may pursue, on land owned or occupied by him, wound or kill, any deer which he can prove was in the act of destroying or injuring any fruit tree or crop, except grass growing on uncultivated land. * * * " Article 1 of our Bill of Rights includes in its enumeration of the natural, inherent, and unalienable rights of all men the right of "acquiring, possessing and protecting property."

The complaint is that the respondent, on a day named, it not being the open season therefor, did pursue, take, and kill a wild deer, with other counts, not necessary to be stated. It is claimed that the complaint is defective, because it does not negative that the deer was killed in the necessary protection of the property of the respondent or of his employer, under the right secured to him by the Constitution, and because it does not negative that the deer was killed while destroying or injuring trees or crops of the respondent or of his employer, as authorized by the act of 1910.

[1] The rule is generally stated to be that an exception in the enacting clause of a statute must be negatived, and that one, not in the enacting clause, need not be negatived. But the fact that the provision is contained in a separate section or a subsequent statute does not necessarily determine that it is not a part of the enacting clause, within the true meaning of that expression. *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538; *Commonwealth v. Jennings*, 121 Mass. 47, 23 Am. Rep. 249; *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655; *Keifer v. State*, 87 Md. 562, 40 Atl. 377; *Mayer v. State*, 64 N. J. Law, 323, 45 Atl. 624. The test is whether the exception is so incorporated with the enactment as to constitute a material part of the definition or description of the offense. *State v. Paige*, 78 Vt. 286, 62 Atl. 1017; *State v. Bevins*, 70 Vt. 574, 41 Atl. 655.

[2] As regards the objection based on the act of 1910, no special examination of the cases need be had. The nature of the provision is unmistakably characterized by its

language. The owner or occupier of the land may kill any deer which he can prove was in the act of injuring a fruit tree or crop. If he kills a deer, and is unable to prove the fact which excuses the killing, his defense fails, and he is guilty of the crime which the statute describes.

[3] As regards the further objection, it is insisted that the provision relied upon is a constitutional guaranty of the right claimed, and so constitutes an exception which necessarily enters into the description of the offense. We think this claim is too broad. Many things contained in the Bill of Rights found in our state Constitutions "are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment than as marking an absolute limitation of power." *Cool. Con. Lim.* 210. The general rights named are protected by these provisions, but this protection does not make the rights absolute in all respects; for in many respects they remain subject to legislative control and regulation. *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 383, 67 Atl. 1091, 15 L. R. A. (N. S.) 350; *St. Johnsbury v. Board of Health*, 82 Vt. 276, 284, 73 Atl. 581, 23 L. R. A. (N. S.) 766. We find no justification for holding that in prosecutions for statutory offenses the state must negative the various generalities of the Bill of Rights touching personal or property rights.

[4] The mere fact that an exception is created by the Constitution, instead of by statute, does not determine that the exception must be negatived. Section 40 of chapter 2 of the Constitution secures to the inhabitants of the state the right to fish in all boatable and other waters (not private property), under proper legislative regulations. An information for illegal fishing was challenged for the failure to allege that the waters in question were not boatable waters, nor that they were private property; and the court held that it was not necessary to negative these exceptions. *State v. Eldredge*, 71 Vt. 374, 45 Atl. 753.

Judgment affirmed, and cause remanded.

STATE v. STREETER.

(Supreme Court of Vermont. Dec. 8, 1911.)

Exceptions from Brattleboro Municipal Court; William R. Daley, Judge.

Harland Streeter was convicted of killing a wild deer, and brings exceptions. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Clarke C. Fitts, for plaintiff. Frank E. Barber, State's Atty., for the State.

MUNSON, J. The questions presented in this case are disposed of by the holdings in *State v. Carruth*, 81 Atl. 922.

Judgment affirmed, and cause remanded.

CLAUSEN v. DE MEDINA, Recorder of North Bergen Tp., et al.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

HIGHWAYS (§ 166*)—USE FOR TRAVEL—VALIDITY OF REGULATIONS.

The Hudson county boulevard was constructed pursuant to "An act to authorize the board of chosen freeholders of any of the several counties of this state to lay out, construct, improve and maintain a public road therein" (P. L. 1888, p. 397; Gen. Stat. p. 2882), and a supplement thereto of 1891 (P. L. 1891, p. 79), by the board of freeholders of that county. A board of boulevard commissioners, controlling said road under P. L. 1893, p. 173, enacted the following rule 9: "In addition to the accepted and common rules of the road governing public travel in this state, the following regulations must be observed; No automobile, locomobile, truck, cart or other vehicle used for business purposes will be allowed upon the road, except to deliver and receive its loading, and in that case must leave the boulevard east and west at the nearest traveled cross street. Neither will a steam roller be allowed upon the road at any time, unless a permit has first been obtained from the boulevard commissioners. Penalty for each offense \$5.00. And provided, however, that nothing herein shall prevent the use of said road to business wagons weighing, loaded, not more than 500 lbs. on each wheel, at all times when used solely for pleasure driving." *Held*, that this rule was beyond the powers conferred upon the board by the above legislation.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 166.*]

Error to Supreme Court.

Certiorari by John Clausen, Jr., against George de Medina, recorder of the township of North Bergen, Hudson county, and others to review a rule of the Boulevard Commissioners of Hudson county. From a judgment of the Supreme Court (80 N. J. Law, 634, 77 Atl. 1045), dismissing the writ and affirming a conviction for violation of the rule, the prosecutor brings error. Reversed.

Collins & Corbin, for plaintiff in error.
John Griffin, for defendants in error.

VOORHEES, J. The Supreme Court (80 N. J. Law, 634, 77 Atl. 1045) sustained the conviction of the plaintiff in error, had before the recorder of Bergen township, Hudson county, upon a complaint made that, "being the driver of a heavy farm wagon, and driving for business and not for pleasure on the Hudson county boulevard, and not being on said boulevard to deliver or receive its loading, and being ordered to leave and drive off said boulevard at the nearest cross street, he refused" to do so, contrary to section 9 of the rules adopted by the boulevard commission.

The proof was that, when arrested, he was driving a one-horse farm wagon, loaded with 20 empty barrels, returning to his home near Hackensack, whence he had, in the earlier

part of the day, taken lettuce in the barrels, and delivered it at the market.

The rule alleged to have been violated reads as follows: "In addition to the accepted and common rules of the road governing public travel in this state, the following regulations must be observed: No automobile, locomobile, truck, cart or other vehicle used for business purposes will be allowed upon the road, except to deliver and receive its loading, and in that case must leave the boulevard east and west at the nearest traveled cross street. Neither will a steam roller be allowed upon the road at any time, unless a permit has first been obtained from the boulevard commissioners. Penalty for each offense, \$5.00. And provided, however, that nothing herein shall prevent the use of said road to business wagons weighing, loaded, not more than 500 lbs. on each wheel, at all times when used solely for pleasure driving."

Two reasons are put forth for the reversal of the conviction; the first, that rule 9 is not authorized by law; and, secondly that the rule is unreasonable. We must look to the legislative sanction for the power of the commissioners to promulgate rule 9.

In 1888, an act, entitled "An act to authorize the board of chosen freeholders of any of the several counties of this state to lay out, construct, improve and maintain a public road therein" (P. L. 1888, p. 397; Gen. St. 2882), was passed. It authorized the construction and maintenance of a public road, investing the board of chosen freeholders "with all the rights and powers necessary and expedient to lay out, open, construct, improve and maintain such public road."

The road thus authorized, when constructed, was to be a public highway, having included therein any road or street already laid out (section 3), and by a supplement to this act (P. L. 1891, p. 81, § 3) it was further enacted that: "Said roads when constructed and open for travel thereon shall from one end to the other thereof, be deemed and taken to be public roads and shall always be and remain open as such, and the travel thereon shall be subject to such rules and regulations in relation thereto, and to limit and prevent the driving or travel thereon of loaded or heavy trucks, wagons or carts, as the said board may have adopted or shall adopt from time to time, and for the violation of which such board may make or prescribe reasonable penalties, not exceeding ten dollars in any case."

In these enactments, we have no difficulty in recognizing a right of control, conferred upon the county, of the entire road, and the wresting of that control from the several municipalities through which the parts of old roads ran which were incorporated in the new boulevard. But this control was intend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed to be control, as contradistinguished from impairment, of the ordinary use by the public of a highway. Now rule 9 deals generally with regulation as commonly understood, and also with the limiting and preventing of travel. Justification for the latter is indeed found in the act of 1891; but the limitation and prevention of travel are confined to "driving or travel thereon of loaded or heavy trucks, wagons or carts." The road is a common highway, presumably for all people of the state. The statute is in derogation of this common right, and hence will be construed strictly, and clear authority for the enactment of the rule must be found. *State, Breninger, Pros., v. Belvidere*, 44 N. J. Law, 350.

The by-law, however, forbade the use of the road by any vehicles used for business purposes, except "business wagons weighing loaded, not more than 500 lbs. on each wheel, * * * when used solely for pleasure driving." The test for exclusion required by this rule is the use in which the vehicle is employed, while the test prescribed by the statute is weight. The evident legislative intent is that those vehicles which, by reason of their weight, tend to injure the roadway may be interdicted. There appears no purpose in the statute to discriminate between conveyances when used for business purposes and when for pleasure driving, yet such is the effect of the rule, which must be justified by the statute.

It excludes all vehicles used for business purposes, whether light or heavy, loaded or unloaded, but permits a loaded wagon, within a certain weight, if driven for pleasure only. The criterion is not that furnished by the act, but one arbitrarily adopted by the board, and hence beyond the powers conferred.

The judgment of the Supreme Court will be reversed.

GILSON et al. v. APPLEBY.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

1. CONSTITUTIONAL LAW (§§ 249, 309*)—CORPORATIONS (§ 217*)—STOCKHOLDER'S LIABILITY—ENFORCEMENT—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS.

Under Corporation Act (2 Comp. St. 1910, p. 1610) § 21, making stockholders liable on their unpaid subscriptions, vesting in the receiver of an insolvent corporation the right to collect unpaid subscriptions, and empowering the Court of Chancery to ascertain the amount of the unpaid subscriptions necessary to satisfy the corporate debts, and under the chancery act, permitting the bringing into court of nonresident stockholders by notice mailed to them at their post office addresses, a decree against a nonresident stockholder for his unpaid subscription, rendered in a suit by the receiver on notice mailed to the nonresident, who neither appeared nor was served within the state, does not deny to him due

process of law or the equal protection of the law, since the state, on creating a corporation, may provide a mode in which the obligations of stockholders may be enforced, without personal service within the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 710, 929, 930; Dec. Dig. §§ 249, 309; Corporations, Cent. Dig. §§ 835-844; Dec. Dig. § 217.*]

2. CORPORATIONS (§ 274*)—STOCKHOLDER'S LIABILITY—ENFORCEMENT—CONCLUSIVE-NESS.

A decree, enforcing the liability of stockholders of an insolvent corporation on their stock subscriptions, rendered in a suit by the receiver, is conclusive on the stockholders as to the necessity of an assessment, the amount required by the assessment to pay corporate debts, and the pro rata of each share of stock on which the assessment is made; but a non-resident may, on the receiver attempting to enforce the assessment against him, show that he was not a stockholder, or that he had paid his subscription in full, or that he had a valid set-off against the assessment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1162-1164; Dec. Dig. § 274.*]

Appeal from Court of Chancery; Garrison, Vice Chancellor.

Suit by Herbert Clark Gilson and others, receivers, against J. Charles Appleby and others. From an order of the Court of Chancery (78 Atl. 668), overruling a plea filed by defendant named, denying the jurisdiction of the court, he appeals. Affirmed.

Hartshorne, Insley & Leake, for appellant. J. Merritt Lane, for respondents.

GUMMERE, C. J. The appeal in the present case challenges the validity of an order of the Court of Chancery (78 Atl. 668), overruling a plea filed by the defendant, denying the jurisdiction of the court to afford the relief sought against him by the receiver in his bill. The ground upon which jurisdiction was denied was that the defendant had not been served with process; that he was not a resident of this state, and was not subject to service of process within it; and that any order or decree made against him would therefore be in violation of the fourteenth amendment of the federal Constitution. The basis of the decision holding the plea bad was that it failed to disclose any attempt made by the court to obtain jurisdiction over the defendant, either by the issuance of subpoena against him, or by any other method.

We incline to think that the averment of an attempt on the part of the court to obtain jurisdiction over the person of the defendant is not essential to the validity of a plea, such as is now under consideration. In the case of *Wilson v. American Palace Car Co. et al.*, 65 N. J. Eq. 730, 55 Atl. 997, in which a plea to the jurisdiction had been overruled by the Court of Chancery, the view expressed by this court was that the only question for determination was whether the matters set out in the plea showed the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendants to be beyond the compulsory jurisdiction of the court; and we held that if it was so shown it was the duty of the court to dismiss the defendants from a controversy in which they declared themselves unwilling to participate. But, although we are not prepared to approve the ground upon which the learned vice chancellor based his decision, overruling the plea, we nevertheless agree with him in his conclusion that it was bad.

[1] The bill in the cause was filed by the receivers of the J. C. Appleby Sand & Clay Company, setting up a deficiency of assets available to pay the debts of the corporation amounting to at least \$20,000, and praying that an ascertainment should be made by the court of how much, if anything, remained unpaid by the several stockholders of the corporation upon the stock held by them, respectively, and what amount, if anything, should be collected from and paid by them for the purpose of meeting such deficiency, and for the payment of the expenses of the receivership; and, further, that those of the stockholders who had not paid par for their stock should be ordered and directed to pay the balance due upon their respective shares, or so much thereof as might be necessary to satisfy creditors, and meet the expense of the winding-up proceedings. All the stockholders, including the appellant, were made parties defendant.

The twenty-first section of our corporation act (2 Comp. St. 1910, p. 1610) provides that, where the whole capital of a corporation has not been paid in, and what has been paid in shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay, on each share held by him, such proportion of the sum necessary to complete the amount of such share as shall be required to satisfy such debts and obligations. The collection of such unpaid subscriptions, in case of insolvency, and of an insufficiency of assets to pay debts, is vested, by the sixty-sixth section of the act, in the receiver. As a prerequisite to such collection, an ascertainment must be made of the proportionate amount of the unpaid subscriptions thus required in order to satisfy the debts of the company, and the expenses of winding up; and this ascertainment is to be made by the Court of Chancery under our system of jurisprudence. The present proceeding, consequently, is in conformity to the scheme of our statute. Our chancery act permits nonresident stockholders, who are made defendants in proceedings of this character, to be brought into court by notice mailed to them at their respective post office addresses. So entirely are these matters settled that none of them are controverted by the defendant.

The sole contention upon which his plea is rested is that the Court of Chancery is without power to make such a decree as is asked for by the receiver against him, unless he is brought into court by the service of process upon him within the state, or volun-

tarily submits himself to the jurisdiction. The contention is based upon the idea that such a decree, rendered against him under the circumstances indicated, would be in violation of the right guaranteed to him by the fourteenth amendment of the federal Constitution, as construed in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. But the doctrine of that case does not go to the extent claimed for it. Although it was there held that a personal judgment obtained against a defendant who was not a resident of the jurisdiction in which it was rendered, and who had not been served with process in that jurisdiction, and had not appeared, was void, the court was careful at the end of its opinion, in order "to prevent any misapplication of the views expressed" in it, to make the following statement: "We do not doubt that a state, on creating corporations for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, *their obligations enforced*, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law." That a proceeding like that now before us, when it results in an adjudication against a nonresident stockholder, not served with process, such as is prayed for by the receiver, neither deprives a stockholder of his property without due process of law, nor denies him the equal protection of the law, is settled, as we read its opinion, by the United States Supreme Court, in the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

In that case a corporation of Minnesota became insolvent, and a receiver was appointed for it by the District Court of Washington county, in that state. On the petition of the receiver to that court, for the purpose of enforcing the liability of stockholders on their stock subscriptions, in order to provide funds for the payment of the indebtedness of the corporation and the expenses of the receivership, an order was made, requiring notice of a hearing on the petition to be given to the defendant company and to each stockholder. On the hearing, it having been shown that notice thereof had been published, and also mailed to each of the stockholders, an order was made for an assessment of 36 per cent. of the par value of each share of the capital stock of the company, to be assessed upon each and every share of such stock, and against each and every person liable as such stockholder; and each such person was directed to pay to the receiver, within 30 days after the date of the order, the sum assessed against his stock; and the receiver was authorized, upon failure to pay such sums, to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the state of Minnesota or elsewhere. The defendants not having

paid, suit was brought against them by the receiver in the United States Circuit Court for the Southern District of New York to collect the amount assessed against them. In that suit they contended that the statute of Minnesota, which permitted an assessment to be made against them without service of process upon them, deprived them of their property without due process of law, and that the Minnesota court was therefore without jurisdiction to make the order of assessment against them. This contention was overruled by the court, and judgment went against the defendant. The United States Supreme Court, upon a review of that judgment, declared that it was not necessary that a stockholder should be served with process in the action wherein the assessment was made, for the reason that no personal judgment was rendered against him in that proceeding; that it had reference to a corporation of which he was a member by virtue of his holding stock therein, and had for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets to be administered for the benefit of creditors; that in such case it had been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to; and that it had already been decided by the court, in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, and *Great Western Tel. Co. v. Purdy*, 162 U. S. 336, 16 Sup. Ct. 810, 40 L. Ed. 986, that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders.

[2] A decree of the character sought by the receiver in the present proceeding is conclusive upon the stockholders as to the fact that an assessment is necessary, as to the amount of money required to be raised by the assessment, and as to the pro rata of each share of stock upon which the assessment is made; but it is open to a nonresident, against whom an assessment has been made as a stockholder, and who has not been served with process, or submitted himself to the jurisdiction of the court, when the receiver attempts to enforce the assessment against him, to show that he was not a stockholder, or that he had paid his stock subscription in full, or that he had a valid set-off against the assessment. *Swing v. Consolidated Fruit Jar Co.*, 74 N. J. Law, 145, 63 Atl. 899.

It follows from what has been said that the Court of Chancery has jurisdiction to render the decree asked for against the defendant, notwithstanding the fact that he has not been served with process, and the order overruling his plea must therefore be affirmed.

GILSON et al. v. APPLEBY.

(Court of Errors and Appeals of New Jersey. Nov. 21, 1911.)

Appeal from Court of Chancery; Garrison, Vice Chancellor.

Action by Herbert C. Gilson and others, receivers, against William R. Appleby. From an order overruling a plea to the jurisdiction, defendant appeals. Affirmed.

Hartshorne, Insley & Leake, for appellant. J. Merritt Lane, for respondents.

PER CURIAM. The appeal in this case presents for consideration and determination the same questions discussed and decided in our opinion, delivered on the appeal, in the case of *Gilson et al. Receivers, v. J. Charles Appleby*, 81 Atl. 925; and the order now before us will be affirmed for the reasons stated in that opinion.

GILSON et al. v. APPLEBY.

(Court of Errors and Appeals of New Jersey. Nov. 21, 1911.)

Error to Supreme Court.

Action by Herbert C. Gilson and others, receivers, against William R. Appleby. There was a judgment, and the parties aggrieved bring error. Affirmed.

J. Merritt Lane, for plaintiffs in error. Hartshorne, Insley & Leake, for defendant in error.

PER CURIAM. Our opinion, in *Gilson et al. Receivers, v. J. Charles Appleby*, 81 Atl. 925, delivered at the present term, expresses our view upon the questions involved in the case now under consideration; and that view leads to an affirmance of the judgment now before us.

CASLOW et al. v. STRAUSBAUGH.

(Supreme Court of Pennsylvania. July 6, 1911.)

WILLS (§ 600*)—CONSTRUCTION—ESTATE CONVEYED—FEE SIMPLE.

Where a will gives to testator's wife all his real estate and personal property, to have and to hold or to sell and convey at her own will and accord, and to pass title and have the use of the proceeds during her natural life, and there is no gift to any other person, and no disposition of the remainder, she takes an absolute fee in the real estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

Appeal from Court of Common Pleas, York County.

Action by Jacob Caslow and another, as executor and executrix of Margaret Caslow, deceased, against Isaac Strausbaugh. Submitted on case stated. From a judgment for plaintiffs, defendant appeals. Affirmed.

Samuel Caslow, husband of Margaret Caslow, died on March 11, 1888, seised in fee of the land in question. By his will he gave his real and personal property to his wife. Margaret Caslow died on March 15, 1910, leaving a will by which she authorized her

executors to sell her real estate at public or private sale. The executors contracted to sell the land in question to the defendant, who refused to pay the purchase money, alleging that the title was not marketable.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

James St. Clair McCall, for appellant.
Jos. R. Strawbridge, for appellees.

PER CURIAM. The question presented by this appeal is whether the widow of the testator took a fee under the following clause of his will: "And lastly, I give and bequeath unto my beloved wife Margaret all real estate, and all personal property of whatever kind and nature they may be to have and to hold or sell and convey the same at her own will and accord and to pass titles for the same and have the use of the proceeds thereof during her natural life. And further I do appoint my son Jacob T. Caslow as agent for my wife to act in her place and under her instructions, as he may be requested by her, and no further if he shall live that long, if he should be called away she my wife is at liberty to select a suitable person in his place." This part of the will was preceded by a direction in relation to the payment of his debts and followed by the attestation clause. There was no gift to any other person and no disposition of a remainder.

It is evident that the testator's intention was to provide for his wife alone. She was the sole beneficiary under his will, and the estate he gave her had all the attributes of absolute ownership. Unless he gave her a fee, he died intestate as to the remainder after the expiration of a life estate. Every presumption is against such an intention. "It detracts nothing from a fee for a testator to say that his devisee shall have the sole control of the property during her lifetime." *Snyder v. Baer*, 144 Pa. 278, 22 Atl. 897, 13 L. R. A. 359. And "a devise, generally or indefinitely, with power of disposition carries a fee." *Witmer v. Delone*, 225 Pa. 450, 74 Atl. 347.

The judgment is affirmed.

COMMONWEALTH v. INDEPENDENCE TRUST CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. CONSTITUTIONAL LAW (§ 137*)—OBLIGATION OF CONTRACT—CONTRACTS OF STATE—BONUS OF CORPORATIONS.

Act April 29, 1874 (P. L. 107) § 44, fixing the rate of bonus payable by a corporation on its organization or on an increase in its stock, does not constitute a continuing contract with corporations organized thereunder, which is beyond the power of the Legislature to disturb, but the Legislature may increase the rate of

bonus and make the new rate applicable to an increase of stock of corporations previously organized.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. § 137.*]

2. CORPORATIONS (§ 19*)—ORGANIZATION—BONUS—AMOUNT.

Act April 29, 1874 (P. L. 79) § 11, authorized the formation of corporations with a capital stock of \$1,000,000, and fixed the rate of bonus at one-fourth of 1 per cent. Act May 3, 1899 (P. L. 189), and Act Feb. 9, 1901 (P. L. 3), made applicable by their terms to "companies heretofore incorporated upon any increase of their capital stock hereafter authorized," fixed the rate of bonus at one-third of 1 per cent. Act June 8, 1891 (P. L. 223), authorized the increase of the capital stock of corporations to \$10,000,000. Subsequent acts removed the limitation as to the amount of stock. *Held*, that a corporation, organized in 1889 with a capital stock of \$1,000,000, on increase of its stock in 1909 to \$2,000,000, will be required to pay a bonus of one-third of 1 per cent. on the increase, the time of the actual increase and not the time of the legislative authorization for the increase controlling the rate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 65; Dec. Dig. § 19.*]

3. CORPORATIONS (§ 19*)—ORGANIZATION—BONUS—AMOUNT.

A corporation organized in 1889 with a capital of \$1,000,000, which in 1903 decreases its stock to \$75,000, and in 1909 increases it to \$2,000,000, is only required to pay a bonus on the additional capital stock of \$1,000,000 on which no bonus has been paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 65; Dec. Dig. § 19.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by the Commonwealth against the Independence Trust Company. From a judgment for the Commonwealth, both parties appeal. Reversed and remanded, with instructions.

Appeal from tax settlement. From the record it appeared that the defendant was incorporated on July 29, 1889, under the general incorporation act of 1874 (P. L. 73), with an authorized capital of \$1,000,000. On this amount it paid the bonus of one-fourth of 1 per centum, the rate then established by law. In 1903 it decreased its capital stock to \$75,000, but in 1909 increased it again to \$2,000,000. It paid into the state treasury the sum of \$2,500, being a bonus of one-fourth of 1 per centum upon the second \$1,000,000 of its capital stock, and claimed to be exempt from any further payment of bonus. A tax was, however, settled against it for bonus at the rate of one-third of 1 per centum upon \$1,925,000. On appeal from the settlement the court in an opinion by Kunkel, J., entered judgment for the commonwealth for \$2,312.50, which was a bonus on \$1,925,000 at the rate of one-quarter of 1 per centum. Both the commonwealth and the trust company appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wm. M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for the Commonwealth. W. S. Snyder, M. E. Olmsted, and A. C. Stamm, for Independence Trust Co.

ELKIN, J. [1] These are cross-appeals from the same judgment, and will be disposed of in one opinion. In one case the commonwealth contends that the bonus should have been computed at the rate of one-third of 1 per centum upon the actual increase of the capital stock, while the learned court below sustained the contention of appellee by holding that the bonus rate applicable under the facts presented is one-fourth of 1 per centum. A brief reference to the legislation requiring the payment of a bonus to the commonwealth for the privilege of incorporation under our laws, or of increasing capital stock, will be necessary to a proper understanding of the question here involved. The general incorporation act of April 29, 1874 (P. L. 73), provides for the payment of a bonus of one-quarter of 1 per centum upon the amount of capital stock authorized to be issued, in two equal installments, and a like bonus upon any subsequent increase thereof, the first installment to be paid when the company is incorporated, and the second one year thereafter. It was further provided that no company shall have or exercise any corporate powers until the first installment of bonus is paid, and that letters patent shall not issue until the Governor is satisfied that the first installment has been paid to the State Treasurer. This remained the law until 1897, when the Legislature thought proper to increase the rate of bonus, from one-fourth to one-third of 1 per centum. The act of June 15, 1897 (P. L. 155), was an amendment to the forty-fourth section of the act of 1874. It not only increased the rate, but required the entire bonus to be paid in advance. While in terms it applied to every company incorporated under the act of 1874, with certain exceptions named in the act, some confusion arose in its application because all companies incorporated prior to its approval paid at a different rate, and it was contended that the new rate could not be made applicable to old companies, or even to increases in the capital stock of old companies made after the new law became operative. It is true, of course, that all companies incorporated prior to the act of 1897 paid a bonus at the rate of one-fourth of 1 per centum as fixed by the act of 1874, and, when the bonus was paid at the rate then fixed by law, the commonwealth had no further claim on this account. But this does not mean that a contract was entered into between the commonwealth and the corporation that the bonus rate should always remain the same, and that the Legislature could not, if deemed wise or expedient, increase the rate without violating a contractual relation. We see nothing in the law pro-

viding for the payment of a bonus upon capital stock to require us to hold that the rate is in the nature of a continuing contract, protected by the Constitution, and beyond the power of the Legislature to disturb. The rate of bonus to be charged for the privilege of incorporating or for increasing capital stock is a legislative question, and the Legislature has been attempting to cover every phase of it. In 1899 an act was passed more comprehensive in terms than the former acts and intended to include all corporations, and all increases of capital stock, except such as are specifically exempted. This is an original act, and is not in the nature of an amendment to or supplement of any former statute. It applies to corporations hereafter created and to "companies heretofore incorporated upon any increase of their capital stock hereafter authorized." It seems perfectly plain that the Legislature intended to make the provisions of this act broad enough to cover the whole situation. The bonus of one-third of 1 per centum is to be paid by all corporations created after its passage and by all companies incorporated prior to that time upon such increases of capital stock as shall be subsequently authorized. In the present case the corporation was created prior to the passage of the acts of 1897 and May 8, 1899 (P. L. 189), and therefore the bonus on the original capitalization was one-fourth of one per centum and this was paid. It increased its capital stock in 1900 and the question to be determined on this appeal is whether the bonus on the increase shall be paid at the rate of one-fourth or one-third of 1 per centum.

[2] It is argued for appellee that the act of 1899 does not apply because the increase was not authorized after the passage of the act. In other words, that the Legislature authorized the increase by the act of June 8, 1891 (P. L. 223), and that the legislative authorization to increase capital stock determines the rate of bonus to be paid and not the act of the corporators in voting for such increase. This raises an interesting question. The act of 1874 limited the amount of capital stock to be issued by a corporation to \$1,000,000. The act of 1891 permitted \$10,000,000 to be issued, while the act of June 10, 1893 (P. L. 417), authorized an issuance of \$30,000,000. This was followed by the act of 1901, which permitted corporations to have an unlimited amount of capital stock to carry out the corporate purpose.

It is now contended that the bonus acts of 1897 and 1899 had reference to this general authorization to increase the capital stock of all corporations. The acts do not say so, and such a construction would do violence to their spirit and purpose. These are revenue acts, and should be construed so as to effectuate the purpose of their enactment. Their provisions should not be frittered away by technical refinements not intended

to be controlling in the administration of revenue laws. The acts of 1874, 1891, 1893, and 1901, fixing limitations upon the amount of capital stock to be issued, are of general application and relate to all corporations. These acts prescribe the limits within which corporations may issue capital stock. The amount of capital stock to be issued by a corporation within these limits depends upon the act of the corporators. The corporators determine whether the capital stock shall be \$1,000,000, or \$2,000,000, or \$30,000,000, and, when they do so determine, the bonus is computed on this basis. If there be any doubt about this being the proper interpretation of the Acts of 1897 and 1899, the Legislature made clear its intention in the third section of the act of February 9, 1901 (P. L. 3). It is there expressly provided as follows: "Upon the actual increase of the capital stock or indebtedness of such corporation, made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make return to the Secretary of the commonwealth, under oath, of the amount of such actual increase made, and concurrently therewith such corporation shall pay to the State treasurer for the use of the commonwealth, such bonus on the actual increase shown by said return as shall then be prescribed by law." Here, then, is the clear expression of the legislative intention that the bonus shall be charged upon the amount of increase fixed by the corporators, and at the rate in force when the increase is actually made. This is the law as the Legislature has written it, and we are bound by it. But it is argued that *Com. v. R. R. Co.*, 207 Pa. 154, 56 Atl. 409, is authority for a different rule. The facts of that case differentiate it from the case at bar. It was there held that the railroad company had the authority under its charter to increase its capital stock to \$150,000 per mile without the payment of any bonus, and that the act of 1901 had no application to the facts of that particular case. In the present case it is not even contended that appellee had authority under its charter to increase its capital stock without paying a bonus. It is conceded that a bonus must be paid on the increase, and the only question is as to the rate. Clearly under the act of 1901 the rate is one-third of one per centum, and the amount is the actual increase shown by the return of the president or treasurer of the corporation after the corporate election authorizing the same.

[3] In the other case, the appellant company contends that the actual increase of capital stock upon which the bonus is to be paid is \$1,000,000, while the commonwealth asserts it is \$1,925,000. The company was originally incorporated for \$1,000,000, and upon this amount the bonus was fully paid. Subsequently the capital stock was either de-

creased or withdrawn so that only \$75,000 remained outstanding. At a still later date there was a reorganization and the capital stock was increased to \$2,000,000. As the situation stands the commonwealth has received a bonus on \$1,000,000, and, if now permitted to collect a bonus on an additional \$1,925,000, it will then have been paid a bonus on \$2,925,000, although in fact the corporation never issued more than \$2,000,000 of capital stock. The position of the commonwealth in this respect is technical, and entirely ignores the equities of the case. The evident intention of the Legislature was to impose a bonus charge upon the amount of capital stock, and not to exact more than the total capitalization warrants. When an incorporated company pays a bonus upon the amount of its original capital, and upon any subsequent increases thereof, the requirements of the law have been satisfied. The burden is always on the commonwealth to establish the necessary facts to sustain a claim for taxes or revenue. Upon the record here presented there is a total capitalization of \$2,000,000, with a bonus paid on \$1,000,000, and we see no occasion either in law or equity to require the payment of a bonus on \$2,925,000, which is \$925,000 more capital stock than the company ever issued. The record does not give any information as to the steps taken to reduce or increase the amount of capital stock, nor is it necessary for the purposes of this case that it should, but it does show the amount of stock now authorized to be issued and the amount of the original capital upon which a bonus was paid. The difference is the amount on which no bonus has been paid, or at least the full bonus of one-third of 1 per centum has not been paid. The company therefore owes the commonwealth what remains unpaid on the additional capital stock of \$1,000,000 at the rate of one-third of 1 per centum.

Judgment reversed and record remitted, with instructions to modify and enter judgment in favor of the commonwealth in accordance with the views herein expressed.

MOSEBY v. FLECK et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

FRAUDULENT CONVEYANCES (§ 192*)—SUBSEQUENT BONA FIDE PURCHASERS FROM GRANTOR—JUDICIAL SALE.

A purchaser of land at a sheriff's sale acquires, as against a prior purchaser under a voluntary conveyance in fraud of creditors, not only the right to contest the prior vendee's title, but all the rights of the fraudulent debtor, and, on being evicted from possession by the prior vendee, he may recover damages from him for the injuries sustained.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 589, 602-604; Dec. Dig. § 192.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Court of Common Pleas, Fulton County.

Action by William L. Moseby against Daniel C. Fleck and others. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed, and a venire facias de novo awarded.

From the record it appeared that prior to August 7, 1894, Abram G. Anderson was the owner of the farm from which the plaintiff was ejected. On that day Anderson and Emma, his wife, conveyed the land to Frank C. McClain, who on August 9, 1894, conveyed it to Emma Anderson, wife of Abram G. Anderson. On May 25, 1899, the administrator of Richard Ashman obtained judgment against Abram Anderson, and under this judgment the land was sold by the sheriff on March 16, 1901, to the plaintiff in the execution, who by deed dated December 18, 1901, conveyed the same to William L. Moseby, the plaintiff, who notified Abram Anderson to quit, which he did on January 25, 1902, and thereupon the plaintiff took possession. In the meantime Frank C. McClain had obtained a judgment against Emma Anderson on which he issued an execution and caused the farm to be sold by the sheriff, became the purchaser at such sale, and received a sheriff's deed therefor on October 12, 1901. On January 29, 1902, Frank C. McClain ousted Moseby from the farm, and Moseby thereupon brought an action of ejectment, by which he was restored to possession on July 9, 1906. Subsequently Moseby brought this action claiming damages for personal property injured, rental value of farm during the period of ouster, and depreciation of its value. There was evidence that the conveyance through McClain to Anderson's wife was in fraud of creditors, including Richard Ashman.

At the trial plaintiff made the following offer: It is proposed to be proved by this witness (Blaine Anderson being upon the stand) that Fleck, Frank C. McClain, Harry M. Edwards, William C. Cunningham, and George Wilds came to the house on the Anderson farm, then occupied by the plaintiff in this case, on January 27, 1902, and again on January 29, 1902, and on the latter occasion ejected the plaintiff and his wife from the premises, removed their household goods, damaged the latter, and the amount of such damage, and other items of damage arising from such ejection.

The counsel for the defendants object to the admission of the testimony offered to be proved by this witness, because it appears as part of the plaintiff's case that the farm from which the plaintiff was ousted was on August 7, 1894, conveyed in fee simple by A. G. Anderson, from whom the plaintiff received the possession of these premises, to one Frank C. McClain, and by McClain the same day conveyed to Emma Anderson, whose title to the property it appears from the rec-

ord in ejectment offered by the plaintiff passed to Frank C. McClain, one of the defendants.

It further appears from the record that the plaintiff claims under Richard Ashman, a creditor of Abram G. Anderson, prior to August 7, 1894, the date of the deed from Frank C. McClain, having by certain conveyances offered in evidence acquired, and by sheriff's sale acquired, the title of Abram Anderson. The only right which Ashman acquired being the right to contest and avoid the deed from Abram Anderson to McClain, it follows, therefore, that the plaintiff could not acquire any possession of the premises entitling him to sustain this action, except by pursuing the action of ejectment as he did, and therefore all evidence with respect to this eviction is irrelevant and immaterial, and incompetent and must be excluded. Objection sustained.

The court entered a compulsory nonsuit, which it subsequently refused to take off.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

William S. Hoerner, O. C. Bowers, and John P. Sipes, for appellant. Charles Walter, J. N. Sipes, Frank P. Lynch, S. W. Kirk, and J. H. Longenecker, for appellees.

STEWART, J. This case was tried on the theory that a purchaser of land at a sheriff's sale acquires, as against a prior vendee under a voluntary conveyance in fraud of creditors, simply a right to contest the latter's title, and nothing more. The authorities cited give no support to this view. Hoffman's Appeal, 44 Pa. 95, decided merely that where the owner of land incumbered with liens conveys in fraud of creditors, and the land is sold by the sheriff under a judgment subsequently obtained, the liens existing before the conveyance remain undivested, and are therefore not payable out of the proceeds of the sale. It is there distinctly said that the earlier cases—Byrod's Appeal, 31 Pa. 241, and Fisher's Appeal, 33 Pa. 294—where this doctrine was first announced, were so ruled in order to prevent the mischief of a divestiture of the liens by a sale under which the debtor's deed had rendered it uncertain whether the purchaser would obtain any title; that, because of this uncertainty, it was thought necessary to declare that such purchaser holds subject to liens prior to the conveyance. The case in no sense derogates anything from the estate that passes to the sheriff's vendee; but, on the other hand, contains a clear recognition that what does pass in such case is the debtor's entire estate in the land. "Still," says Strong, J., after accounting for the origin of the rule as to prior liens, "It is the estate of the debtor, whatever that may be, which is sold at the sheriff's sale." This case is followed by Zuver v. Clark, 104 Pa. 222, where the same

rule as to divestiture of liens is applied, and it is there said that a sheriff's deed, under such conditions, passes to the purchaser all that was conveyed to the fraudulent grantee; that, the deed being void as to the defrauded creditors, as regards them, it is still their debtor's estate which is sold in satisfaction of their debts. *Jacoby's Appeal*, 67 Pa. 434, is to the same effect, and it is there repeated in express terms that as to subsequent creditors a fraudulent conveyance is no conveyance.

The doctrine of all the cases is that, under the conditions we have here, a purchaser at sheriff's sale acquiesces all that he would have acquired had no fraudulent conveyance been made, except that he takes the estate incumbered by prior existing liens, if any; in other words, that he succeeds to every right that his fraudulent debtor had in the land, and this includes, of course, the right of possession. This being so, it is impossible to regard this plaintiff as an intruder. It is wholly immaterial how he obtained possession after he acquired the title that passed from the sheriff. It is enough to know that he obtained it peaceably in the assertion of a right. His forcible ejection was an unwarranted proceeding. It follows that for whatever injury resulted he is entitled to redress.

The assignments of error are sustained, the judgment is reversed, and a venire facias de novo awarded.

COMMONWEALTH v. BUFFALO & LAKE ERIE TRACTION CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

TAXATION (§ 98*)—PROPERTY SUBJECT—BONDS OF CORPORATION.

Where the bonds of a corporation formed by the merger of New York and Pennsylvania corporations, having its principal office in New York, are owned by residents of Pennsylvania, but pledged and physically held in New York as collateral security for debts of the Pennsylvania owners, the consolidated corporation must deduct from the interest on its bonds the four-mill tax, and pay it to the Treasurer of Pennsylvania.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 196-200; Dec. Dig. § 98.*]

Appeal from Court of Common Pleas, Dauphin County.

Suit by the Commonwealth against the Buffalo & Lake Erie Traction Company. From the judgment, defendant appeals. Affirmed.

From the record it appeared that the Buffalo & Lake Erie Traction Company is a corporation formed by the merger of a New York corporation and a Pennsylvania corporation, with its principal office in the state of New York. In its report for the year 1907 the company stated that \$215,000 of its

bonds were held during all the year 1907 in New York as collateral security for loans made by persons or corporations of the state of New York to individual residents of Pennsylvania. The coupons were paid for the year 1907, at the company's office in Buffalo, N. Y.

Kunkel, P. J., filed the following opinion in the court below:

"This is an appeal by the defendant from the settlement of an account against it for tax on its loans for the year 1907. Agreeably to the provisions of the act of April 22, 1874 (P. L. 109), it has been submitted to us for trial without a jury. The facts are not in controversy, having been agreed upon by the parties in a written statement, which has been filed in the case.

"Discussion.

"Part of the tax claimed in this settlement is charged upon \$215,000 of bonds issued by the defendant company to and owned by residents of this state, but delivered by them to and held during the year 1907 by corporations and individuals of the state of New York as collateral security for money borrowed by the former from the latter residents. It is contended by the defendant that these bonds are not taxable in this state under the act of June 8, 1891 (P. L. 229), which imposes a tax of four mills upon the nominal value of all bonds 'owned, held or possessed' by residents of the state, and that it is not, therefore, liable for the tax under section 4 of the act of June 30, 1835 (P. L. 194), for having failed to deduct it as directed by that act when it paid the interest on the bonds. The single question presented, as stated in the defendant's written brief, is: 'Are the bonds held in New York as collateral owned, held, or possessed by any person resident, located, or liable to taxation within this commonwealth?' The defendant claims that as the bonds were transferred and delivered as collateral security to residents of the state of New York, and there held during the year for which the tax is here charged, they were not owned by residents of this state. We are referred to numerous authorities in which are discussed the relative rights of the parties to a pledge or to the transfer of personal property for the purpose of collateral security and also to the definition of lexicographers of the word 'owner.' The authorities cited, however, can give us but little aid in determining the meaning of the word 'owned' in the present instance. The question here is: How is it to be interpreted in the statute? So far as we are advised, as so used it has received no judicial interpretation. It is a familiar doctrine that statutes are presumed to use words in their popular sense, and that, as between two meanings of a word, the ordinary or popular meaning is to be preferred. If the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

word 'owned' be interpreted in the sense in which it is commonly understood and used or even in its technical sense, can there be any doubt as to the ownership of the bonds in question? It is difficult to speak of the relation of the residents of this state to the bonds except as that of owners. It is true that the persons to whom they were pledged had a special property in them, as all bailees of property have in the articles held under the contract of bailment. But such special property neither in the legal nor in the ordinary acceptation of the term constituted them the owners. No one would think of speaking of the bailee of a horse for hire as the owner of the horse or of the pawnee of a watch as security for a loan as the owner of the watch or of any other bailee of property as the owner thereof. The bailee has only such dominion over the property bailed as is necessary to secure his rights and to accomplish the purpose of the bailment; and the delivery of property to another by the owner for a time and for specific purpose does not make the owner any the less the owner on that account in the ordinary use and understanding of the word. To hold that the residents of New York were the owners of the bonds in the present case would be just as contrary to the commonly understood meaning of the word as to hold that the mortgagee of real estate is the owner of the real estate mortgaged, or that the lessee of real estate is the owner of the real estate leased, and yet in each of these cases the title to the real estate is in the mortgagee and lessee to the extent of effectuating the intention of the parties. There can be no question but that the bonds upon which the tax is here charged, although delivered to nonresidents for a temporary purpose, were still owned by residents of the state within the meaning of the act of 1891. In *Stanford v. San Francisco*, 131 Cal. 34, 63 Pac. 145, where the question of the taxation of certain certificates of stocks and of certain bonds of foreign corporations pledged in New York for money borrowed by a decedent who was a resident of California was considered, it was held that such certificates of stocks and such bonds were taxable in the state of the decedent to him while living, and after his death to his estate, under the Code which provided that the assessor must assess taxable property to the person by whom it was owned or claimed. In that case it was said that the shares of stocks and bonds pledged as collaterals to secure advances made thereon were assessable in the name of the pledgor, and that under that provision of the Code the decedent was the owner of the shares and bonds by him pledged.

"The fact that the bonds were physically out of the state cannot affect the question of their taxability. The owners were domiciled

in this state and the bonds had their situs here also. *Cooley on Taxation* (3d Ed.) 86, 87, and notes.

"Nor do we think, as suggested by the defendant, that the New York holders of these bonds would be taxable on them under the laws of that state. No doubt they would be taxable on the loan made by them to the Pennsylvania owners of the bonds, but the bonds were held to secure and represented that indebtedness. To tax the bonds also would be to tax the same debt twice. This certainly could not be within the contemplation of the revenue laws of New York.

"We therefore conclude:

"(1) That the bonds in question were owned by residents of the state of Pennsylvania within the meaning of that term, as it is used in the act of June 8, 1891 (P. L. 229).

"(2) That the bonds were taxable in the state of Pennsylvania.

"(3) That the commonwealth is entitled to judgment.

"Wherefore, in accordance with the stipulation filed by the parties, judgment is directed to be entered in favor of the commonwealth and against the defendant for \$855.02, unless exceptions be filed within the time limited by law."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. S. Snyder, M. E. Olmsted, and A. C. Stamm, for appellant. William M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for the Commonwealth.

PER CURIAM. The judgment is affirmed on the opinion of Judge Kunkel.

COMMONWEALTH v. EXCELSIOR BRICK & STONE CO.

(Supreme Court of Pennsylvania. July 6, 1911.)

TAXATION (§§ 160, 378*)—PROPERTY SUBJECT—EXEMPTIONS—MANUFACTURING CORPORATION.

Where a manufacturing corporation has been compelled to stop business by the condemnation of most of its lands by a city, it is not thereafter exempt from taxation, but its stock may be taxed on a fair valuation of its assets, consisting of its claim against the city for damages and its remaining real property.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. §§ 160, 378.*]

Appeal from Court of Common Pleas, Dauphin County.

Suit by the Commonwealth against the Excelsior Brick & Stone Company. From a judgment for the Commonwealth, defendant appeals. Affirmed.

Kunkel, P. J., filed the following opinion:

"This is an appeal by the defendant from a settlement of an account against it for tax

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

on its capital stock for the year 1908. It has been submitted to the court for trial, without a jury, agreeably to the provisions of the act of April 22, 1874 (P. L. 109). The facts are not disputed, and we find them to be as follows:

"The defendant company is a corporation, organized for manufacturing purposes under the act of July 18, 1863 (P. L. 1864, p. 1102). Until September, 1903, it was exclusively engaged in the manufacture and sale of brick. Its paid-up capital stock is \$597,900, represented by its manufacturing plant, located in Philadelphia, and including 72 acres of land. In September, 1903, the city of Philadelphia, under its power of eminent domain, condemned and appropriated more than 50 acres of its land for street and park purposes. Thereupon the company suspended business, and from that time has transacted no business whatever, except to sell the accumulated brick which it had on hand at the time, but has been awaiting the payment of damages for the land taken, with the view of winding up its affairs and distributing its assets among its stockholders. It has no indebtedness. The viewers appointed by the court found the amount of damages suffered by the company because of the taking of its property to be \$171,500, but upon appeal and trial in court the jury fixed the damages at \$375,000. The assessed value of that part of the real estate taken and remaining to the company is \$134,000. The company duly made its annual report to the Auditor General, appraising its capital stock at \$2.25 a share, or at the total value of \$134,527.50. The accounting officers of the commonwealth, not being satisfied with this appraisement, assessed and valued the capital stock at \$375,000, and settled an account against the company for the tax of 5 mills on such valuation, which amounted to \$1,875, from which settlement this appeal was taken.

"Discussion.

"The commonwealth claims the tax under section 21 of the act of June 1, 1889 (P. L. 420), as further amended by the act of June 8, 1893 (P. L. 353), which imposes upon every corporation an annual tax of five mills upon each dollar of the actual value of its whole capital stock. The defendant denies its liability for the tax, contending that it is exempt therefrom under the proviso of the act, which declares "that the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the state, except companies engaged in the brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation shall pay the state tax of five mills, herein provided, upon such proportion of its capital stock, if any, as

may be invested in any property or business not strictly incident or appurtenant to its manufacturing business—it being the object of this proviso to relieve from state taxation only so much of the capital stock as is invested purely in the manufacturing plant and business." The right of the defendant company to the benefit of this exemption must be clear; otherwise it is liable with all other corporations for the tax provided for in the act. It is at once manifest that the defendant is not entitled to the exemption. It ceased to operate its plant in 1904, intending to go out of business. It has not engaged in manufacturing since that time. Therefore none of its capital has been actually employed in manufacturing since 1904. Instead, the greater part of its property representing its capital stock was then taken from it, and its capital stock has since been represented in part by that portion of its real estate remaining, and in part by its claim against the city of Philadelphia for the portion which was taken. It cannot be said, therefore, that any of such property is actually employed in carrying on manufacturing; nor can it be said that the claim which it holds against the city of Philadelphia is an investment in its manufacturing plant or business.

"Further, the company objects to the valuation placed upon its stock by the accounting officers. Ordinarily the valuation put upon capital stock by the officers of a company under oath is to be considered of no little weight, but it is not controlling. The officers of this company appraised the capital stock at the highest price for which it sold during the year 1908; but it does not appear under what circumstances the sale was made, whether it was a private or a public sale, or whether those between whom the sale was had really knew the value of the stock. The value of the property and assets of the company, as shown by the local assessment and the amount of damages fixed by the jury in the condemnation proceedings, is \$509,000, and the company has no indebtedness.

"Having regard to all the elements which properly enter into the value of capital stock, and which ought to be considered, we cannot differ from the accounting officers, and therefore find that their valuation of \$375,000 is the fair actual value in cash of the defendant company's capital stock, or of so much thereof, at least, as is not invested in its manufacturing plant or business.

"We therefore conclude:

"(1) That the capital stock of the defendant company is liable for and not wholly exempt from the capital stock tax imposed by the act of June 1, 1889, as further amended by the act of June 8, 1893 (P. L. 353).

"(2) That the defendant company is liable to the commonwealth for the capital stock tax of five mills on the valuation of \$375,000 for the year 1908.

"(3) Accordingly, judgment is directed to

be entered in favor of the commonwealth and against the defendant company for \$1,875, unless exceptions be filed within the time limited by law."

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISER, JJ.

Boyd Lee Spahr and Ellis Ames Ballard, for appellant. William M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for the Commonwealth.

PER CURIAM. The judgment is affirmed on the opinion of the learned president judge of the common pleas.

PITTSBURG, S. & N. R. CO. v. KEATING & S. R. CO. et al.

(Supreme Court of Pennsylvania. July 6, 1911.)

1. RAILROADS (§ 90*)—CONSTRUCTION—CROSSING OTHER RAILROADS—CONTRACT.

Where a grant by a railroad company to another railroad company to cross the former's tracks reserves to the grantor the right to lay additional tracks across the tracks of the grantee, the grantor may thereafter lay an additional track at the crossing so as to secure a standard gauge in addition to the narrow gauge of its original construction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 90.*]

2. RAILROADS (§ 14*)—COMPANIES—ORGANIZATION—COLLATERAL ATTACK.

In a suit between two railroad companies as to crossing at grade, one cannot attack the legal organization of the other on the ground of irregularities, where the state does not interfere.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 14.*]

3. RAILROADS (§ 14*)—COMPANIES—INCORPORATION—PRESUMPTION.

Where it appears from a railroad charter granted in 1880 that the road was only about 10 miles in length and that a subscription of \$2,000 per mile was made of which 10 per cent. was paid, it will be presumed that the company was organized under General Railroad Act April 4, 1868 (P. L. 62), as amended by Act May 13, 1876 (P. L. 157), and not under Act March 18, 1875 (P. L. 28), relating to narrow gauge railroads, although the railroad was actually built with a gauge of only three feet.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 14.*]

4. RAILROADS (§ 14*)—COMPANIES—INCORPORATION—CERTIFICATE.

General Railroad Act April 4, 1868 (P. L. 62), as amended by Act May 13, 1876 (P. L. 157), does not require the certificate of incorporation of a railroad to state its gauge, and, if a gauge is stated, it may be treated as surplusage.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 14.*]

Appeal from Court of Common Pleas, McKean County.

Bill in equity by the Pittsburg, Shawmut & Northern Railroad Company against the Keating & Smethport Railroad Company and

others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Ormerod, P. J., specially presiding, filed the following opinion in the court below:

"This is a bill in equity instituted by the plaintiff to restrain the defendant from laying additional rails across the plaintiff's road for the purpose of changing the said crossing from a narrow gauge to a standard gauge, and from operating the same as a standard gauge crossing. This bill was filed April 25, 1905. Proceedings were had thereon which resulted in the continuation of the preliminary injunction granted, until final hearing. No further steps were taken until the final hearing, which began in July, 1910. The rights of the plaintiff company were acquired through the merger and consolidation of the Mt. Jewett, Clermont & Northern Railroad Company, with other roads, by virtue of an agreement dated July 13, 1899, under the name of the Pittsburg, Shawmut & Northern Railroad Company. The rights of the defendant were acquired as follows: In the year 1880, the Bradford, Bordell & Smethport Railroad Company was incorporated under the general railroad laws of Pennsylvania as a railroad less than 15 miles in length, and constructed and operated through the borough of Smethport and along the point in controversy. Its railroad rights, etc., were leased to the Bradford, Bordell & Kinzua Railroad Company, a narrow gauge road, by lease dated January 1, 1881. Following the lease a mortgage was given which, by the corporate action of both the Bradford, Bordell & Smethport and the Bradford, Bordell & Kinzua, became a lien upon all the rights and franchises, property of both these railroads and upon all the property, etc., that might be thereafter acquired. Mortgage foreclosure proceedings were had upon this mortgage and George L. Roberts appointed receiver. In 1891, subject to the lease of the Bradford, Bordell & Smethport Railroad Company and the Bradford, Bordell & Kinzua Railroad Company, a sale was made on a *fi. fa.* of the railroad and property of the Bradford, Bordell & Smethport Railroad Company, subject, however, to a lien of the mortgage which was prior to the lien of judgment; the mortgage having been given in June, 1882, and the judgment obtained and entered in 1891. A few months afterwards in 1892, in consummation of the mortgage foreclosure proceedings, George Roberts sold all of the property, rights, franchises, etc., upon which the said mortgage was lien, to H. K. Pomeroy et al., who organized the company under the Bradford, Bordell & Kinzua Railroad Company. In 1903 a judicial sale of the Bradford, Bordell & Kinzua Railroad Company was had, and the purchasers thereof reorganized the same under the style of the Buffalo, Bradford & Kaue Railroad Company. Subsequently

the Buffalo, Bradford & Kane Railroad Company entered into a lease with the Keating & Smethport Railroad Company, whereby the Keating & Smethport Railroad Company, a standard gauge railroad company, has been and is now operating a railroad of the Buffalo, Bradford & Kane Railroad Company. In May, 1899, Mt. Jewett, Clermont & Northern Railroad Company, whose rights were afterwards conveyed to the Pittsburg, Shawmut & Northern Railroad Company, while constructing their railroad, attempted to cross the road of the Bradford, Bordell & Kinzua Railroad Company at grade, and the point in controversy. And by an agreement made May 25, 1899, between the Bradford, Bordell & Kinzua Railroad Company, as parties of the first part, and the Mt. Jewett, Clermont & Northern Railroad Company, as parties of the second part, marked as defendant's 'Exhibit No. 10,' the said Mt. Jewett, Clermont & Northern Railroad Company was permitted under certain conditions and reservations on the part of the Bradford, Bordell & Kinzua Railroad Company to cross said road at grade. Said agreement provides, *inter alia*, as follows: 'It is expressly understood and agreed that the party of the first part hereby reserves to itself, its successors and assigns, the right to lay additional rail or track or additional tracks from time to time and at any time at its pleasure across the track of the second party aforesaid, and the said second party agrees to pay from time to time and at all times all expenses incurred by the party of the first part in laying and maintaining such additional crossing or crossings, rail, track or tracks.'

"The defendant contends that this bill should be dismissed and the injunction dissolved for two reasons:

"(1) That by the terms of the contract of May 25, 1899, they have the right to place the additional rails desired.

"(2) That the Bradford, Bordell & Smethport Railroad Company was incorporated under the Act of April 4, 1868 (P. L. 62), and its supplement, the Act of May 13, 1876 (P. L. 157), and had a right to broaden its gauge.

"It is conceded that at the date of the contract of May 25, 1899, the Bradford, Bordell & Smethport Railroad Company was operating its road upon the location of the point in controversy, and that the Mt. Jewett, Clermont & Northern Railroad Company was constructing its railroad and was attempting to cross the Bradford, Bordell & Kinzua Railroad and said point at grade; that the Bradford, Bordell & Kinzua Railroad Company had the prior location. The plaintiff does not deny that the rights and franchises of the Bradford, Bordell & Kinzua Railroad Company are now vested in the Buffalo, Bradford & Kane Railroad Company, or the lease by the Buffalo, Bradford & Kane Railroad Company to the Keating & Smethport Railroad Company.

[1] "By the terms of the contract of May 25, 1899, the plaintiff obtained a right, which

it is doubtful it would have acquired from the court, to cross at grade. That right it acquired on certain conditions, and among them was a reservation of the right of the Bradford, Bordell & Kinzua Railroad Company to lay additional rail or tracks, 'from time to time, and at any time at its pleasure across the tracks of second party.'

"The language of this reservation is too plain, explicit, and comprehensive to leave any doubt as to what was understood by the contracting parties. To deny their liability under the terms of the contract is a violation of the principles of equity.

"It is contended by the plaintiff that it is not bound by the contract for the reason that it alleges that the Bradford, Bordell & Kinzua Railroad Company at the time of making the said contract had no right to the prior location, for the reason that it never had acquired the franchise of the Bradford, Bordell & Smethport Railroad Company; that after the purchase by George Roberts of the franchises of the Bradford, Bordell & Smethport Railroad Company no reorganization of said road was had as required by act of assembly; and that the title to said franchise, etc., is now in George Roberts as receiver of the Bradford, Bordell & Kinzua Railroad Company.

"While it does not appear that any proceedings to reorganize the said Bradford, Bordell & Smethport Railroad Company were taken by said George Roberts as receiver, it does appear that, by foreclosure proceedings upon a mortgage executed and recorded nine years prior to the date of the judgment upon which the sale of 1891 was effected, the properties, rights, franchises, etc., of the Bradford, Bordell & Kinzua Railroad Company, and the Bradford, Bordell & Smethport Railroad Company, were sold by George Roberts as special master to H. K. Pomeroy et al., who did proceed to reorganize said road as the Bradford, Bordell & Kinzua Railroad Company, and that in the deed to said Pomeroy et al. all rights acquired by the said George Roberts as receiver for the Bradford, Bordell & Kinzua Railroad Company at said sale in 1891 were conveyed.

[2] "It was in pursuance of this reorganization that the Bradford, Bordell & Kinzua Railroad Company was operating said road when the contract of May 25, 1899, was entered into. Whether there were any irregularities in the said reorganization is not a matter to concern the plaintiff. It cannot be permitted to prove in a collateral proceeding that a condition precedent to its full corporate existence had not been complied with. It was operating the road as a *de facto* corporation, and, when the state does not interfere, the plaintiff cannot question its ability to make the contract between them. *Com. v. Central Passenger Ry. Co.*, 52 Pa. 506; *Dyer v. Walker*, 40 Pa. 157; *Spahr v. Bank*, 94 Pa. 429.

[3] "It is also contended by the plaintiff that the Bradford, Bordell & Smethport Railroad Company, having been chartered to build a railroad with a gauge not exceeding three feet, and that having built and operated a railroad of a gauge of three feet, it has no power to widen the gauge, and cites the *Western N. Y. & Penna. Ry. Co. v. Ry. Co.*, 193 Pa. 127, 44 Atl. 242.

"It becomes material then to determine under which act said road is incorporated. An examination of the article of association shows that it was incorporated under the provisions of the act of April 4, 1868. There is nothing in the provisions of this act which requires the incorporators to set forth the width of the proposed road, but provides, *inter alia*, that the capital stock shall be at least \$10,000 per mile.

"As before stated, the articles of association set forth that it was chartered under the act of 1868. This act embraced all kinds of roads. It, however, permitted the incorporation of a road only upon a capital of \$10,000 per mile of which \$9,000 per mile must have been subscribed and 10 per cent. paid in cash as a condition precedent to incorporation. Without compliance with this condition precedent no road could be chartered. But these conditions were modified by two acts of assembly. One was the Act of May 13, 1876 (P. L. 157), by which a road not exceeding 15 miles in length could be chartered upon the subscription of \$2,000 per mile and payment of 10 per cent. thereof. As the Bradford, Bordell & Smethport Railroad was but 10 miles long and was chartered in 1880, it availed itself of this modification, and although there was a capital of \$10,000 per mile, there was a subscription of but \$2,000 per mile. The other modification of the conditions prescribed by the act of 1868 was by the provision of the Act of March 18, 1875 (P. L. 28), that modification applied only to a case where a road having a gauge not exceeding three feet should by its incorporation seek to avail itself of its provision. It provides: 'Whenever any number of citizens not less than nine may be desirous of forming a company for a road having a gauge not exceeding three feet, they may state in the article of association which they are required to make, and sign the capital stock of the company and \$6,000 per mile for every mile of road contemplated to be constructed and the said article may be filed and recorded when \$3,000 per mile is subscribed and ten per cent. paid,' etc. In order to establish the fact that the road in controversy was chartered under the act of 1875, it would be necessary to show that it availed itself of the provisions of that act, and this could only be shown by the articles of incorporation fixing the amount

of capital stock at \$6,000 per mile and \$3,000 per mile subscribed, under the provisions of the act.

[4] "There is nothing in the charter which would indicate that the incorporators were attempting to incorporate under the provisions of that act. But it clearly shows that they were incorporating under the provisions of the act of 1868, and its supplement of 1876. This being established, they then come under the provisions of the Act of April 11, 1853 (P. L. 306), which authorized railroad companies theretofore and thereafter to construct or change their gauge to such width as the directors may deem expedient. It is true that in the articles of association of the Bradford, Bordell & Smethport Railroad Company it is stated that the gauge should not exceed three feet; but, if incorporated under the act of 1868, it was not necessary to state the gauge of the road, and it may be treated as mere surplusage.

"The case of *Western N. Y. & Penna. Ry. Co. v. Ry. Co.*, 193 Pa. 127, 44 Atl. 242, does not rule this case as claimed by the plaintiff. In that case, the Olean, Bradford & Warren Railroad Company was a narrow gauge railroad incorporated under the act of 1875. The article of association shows that \$3,000 per mile has been subscribed and 10 per cent. thereof paid. And they also show that the length of the road was to be 50 miles and the capital stock to be \$6,000 per mile, which fully complies in every respect with the act of 1875.

"That the proposed construction of the crossing is practical and safe and the best known in railroading is substantially uncontradicted in this case. We do not think that the legislation or authorities bearing upon the question of overhead or undergrade crossing have any application in this case. There are no pleadings and no issue raised which in any way relates to this question and upon which any adjudication by this court could rest.

"We are of the opinion that under all the evidence in this case the plaintiff's bill should be dismissed and the injunction dissolved."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John G. Johnson, Edwin E. Tait, Edgar W. Tait, and Sheridan Gorton, for appellant. Fred D. Gallup, Thomas H. Murray, and Claude W. Shattuck, for appellees.

PER CURIAM. The decree dissolving the preliminary injunction and dismissing the bill is affirmed, with costs, for the reasons stated in the opinion of Judge Ormerod, specially presiding.

MAZAIKA et al. v. KRAUCZUNAS et al.
(Supreme Court of Pennsylvania. Oct. 9, 1911.)

1. RELIGIOUS SOCIETIES (§ 18*)—CONTROL OF PROPERTY—STATUTORY PROVISION.

A resolution by a Roman Catholic congregation, vesting in the bishop of the diocese, as such, all the property of the congregation, to hold as trustee in accordance with the laws, rules, and usages of the Roman Catholic Church, which laws are shown by the evidence to vest in the bishop the absolute control of the church property, will not be enforced by a court of equity, since such enforcement would violate Act April 26, 1855 (P. L. 330) § 7, providing that church property shall not be otherwise held than subject to the control and disposition of the lay members of the church; the trustee of the church property under such act holding simply the legal title, and having no control whatever over the property.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.*]

2. RELIGIOUS SOCIETIES (§ 18*)—PROPERTY—CONVEYANCE TO USE OF.

Under Act April 26, 1855 (P. L. 328), when property has been bequeathed, devised, or conveyed to any person or persons whomsoever for the use of any church, congregation, or religious worship, the person so acquiring the legal title is as to the property acquired but a dry trustee, without any power of control or management.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill in equity by Alex Mazaika and others against Andrew Krauczunas and others. From a decree for plaintiffs, defendants appeal. Reversed.

Newcomb, J., found the facts to be as follows:

"(1) The property in question consists of three contiguous lots at the northwesterly intersection of North Main avenue and Theodore street, in this city, designated as 11, 12, and 13, according to a map or plot of lots known as 'Electric City Park,' which is recorded in the proper office of this county. They are the same lots conveyed by Bishop Hoban to the defendants, as trustees, etc., by deed, dated May 29, 1908, and are particularly described in the fourth paragraph of the bill. They are improved with a church edifice, built in 1893.

"(2) As so improved, the property has from that time ever since been in the actual use and enjoyment of St. Joseph's Lithuanian Catholic Congregation of Scranton, except as hereinafter stated, as a place of religious worship in accordance with the purposes of its organization.

"(3) The congregation was organized about 1891 or 1892 as an unincorporated religious association for the support of public worship according to the laws, usages, faith, doctrine, and discipline of the Catholic Church. For that purpose the property was acquired and paid for with funds furnished and contributed by the members. It is not disputed that

the beneficial ownership is in the congregation, and that at all times since the purchase the legal title has been held by some person or persons in trust for its uses as such congregation.

"(4) The congregation has at all times been subject to the ecclesiastical jurisdiction of the Catholic bishop of the diocese of Scranton, and under the pastoral charge of a priest appointed to it by him, although during the pendency of this suit the use of the property for church purposes has been prohibited by Rt. Rev. Michael J. Hoban, who has been bishop of the diocese since 1899.

"(5) The trustees who have held the legal title have at all times been certain of the lay members of the congregation. In late years it has been held by the 10 defendants. That was objectionable to the bishop, as contrary to the prevailing rule of the church on the subject, and eventually brought on a factional controversy between the members. Litigation began in 1906 over a conveyance of the title which had that year been made to the bishop in pursuance of certain action had at a meeting of the congregation. The validity of the transfer was successfully attacked by the faction supporting the 10 lay trustees. The nature of that controversy appears by reference to the proceedings therein which have been put in evidence, and its result by official report of the case in 221 Pa. at page 213, 70 Atl. 740. It terminated in the reconveyance by the bishop to the defendants mentioned in the first conclusion, supra.

"(6) The outcome of the transfer was the congregational meeting of June 8, 1908—an attempt, no doubt, by the faction supporting the bishop to have the title put in his name in conformity with the statute governing the selection of an ecclesiastical trustee in such cases.

"(7) This meeting was called by the pastor for St. Mary's Hall, and announced from the altar at the last service held in the church, to wit, May 31, 1908, in connection with the reading of the bishop's interdict discontinuing the use of the church, which became effective at that date.

"(8) In the first instance, the meeting was called for Sunday evening, June 7th. Upon reflection the priest deemed it advisable to have it on a secular date, and so changed it to the 8th. Of this change he caused notice to be given (1) by advertisement during the week in several daily newspapers of general circulation published in this city, and (2) by handbills in the Lithuanian language generally distributed among the members of the congregation and posted in their business places. At the time of the interdict, the religious services of the congregation were by authority of the bishop transferred to the chapel of St. Thomas College in this city, where they have been held ever since. At the first service held there, viz., Sunday, June 7th, the change of date for the congregational

meeting was again announced by the priest. In addition to that, the defendants and a committee of the faction adhering to them issued handbills in effect joining in the call for the St. Mary's Hall meeting of June 8th. These were circulated during the week by the defendants in the same way as those issued by authority of the priest.

"(9) An attempt is made to charge the priest with changing the place as well as the date of meeting. The fact is that the notices in two of the newspapers specified the time and place as follows: 'In St. Mary's Hall, West Market street, on the 8th day of June, at 7 o'clock p. m., instead of the 7th as heretofore announced,' etc.; while in the third paper it read, 'Instead of Sunday the 7th and in the Auditorium as heretofore announced,' etc. This on its face implies an earlier notice of the meeting at the Auditorium. But it was the error of some person who prepared the notice for the printer. There had been no such announcement, and the priest was not aware of the error until long after the meeting had been held. It is not shown that any one ever understood the meeting to have been called for any place other than St. Mary's Hall. The action of the defendants and those adhering to them precludes the inference of any misunderstanding in the premises on their part.

"(10) By the law of the church and the regulations in force in this diocese, it is required (1) that congregational meetings shall be called by the pastor and due notice given from the pulpit; and (2) that the right to vote at such meetings shall be restricted to those who are practical Catholics, and have contributed regularly to the support of the congregation by the payment either of pew rent, a seat in its church, or annual dues.

"(11) In this congregation, the male members of full age have from the start been accustomed to pay as annual dues the sum of \$6, very generally in monthly installments of 50 cents. These payments were noted by the secretary in a dues book specially printed in their language for that purpose. Previous to 1906, the congregation had been in harmony, and the accounts seem to have been kept by a secretary, who turned the books over to the defendant trustees after the litigation started. To what extent payments since then have been made to the committee recognized by the trustees, as distinguished from that recognized by the priest, does not appear.

"(12) But, to avoid controversy on that ground, it was mutually agreed by the factions and announced by authority of the pastor that all male members of full age who had paid dues as late as 1905, the last year when the congregation was harmonious, should be allowed to vote at the meeting without regard to payments since the dissension began. To that end it was mutually agreed and fully understood that the members should be prepared to show their dues books at the hall.

"(13) The hall was opened at 7 o'clock in the evening of the day appointed, and between that hour and 8 o'clock the congregation assembled. A committee composed of members of both factions was stationed at the door to see that only those were admitted who were entitled to vote.

"(14) As to what took place from that time until the meeting closed at 11 o'clock, there is a marked conflict in the testimony. On the weight of the credible evidence, it is found: (1) That all male members of voting age were admitted who showed by their due books or otherwise that they had paid as late as 1905; (2) that by 8 o'clock all qualified members who so desired had been admitted; (3) that at that hour the meeting was called to order by the pastor, and was duly organized by the election of a chairman and secretary; (4) that its object was stated as well by the chairman as by the priest, namely, to take action on the question of substituting the bishop as trustee in place of the defendants; (5) that this was followed by prolonged discussion, pro and con, freely participated in by both factions, the speakers addressing the audience from the platform; (6) that eventually the question was submitted in the form of a resolution in writing after its terms had been explained at length; (7) that in substance and practical effect it was a proposal that the bishop be chosen as trustee to hold the title to all the property of the congregation in accordance with the laws, rules, and usages of the Catholic Church in this diocese.

"(15) By direction of the chairman, the vote was taken by a 'division of the house.' Those who favored the proposed change accordingly moved to one side of the hall, and those opposed took their station on the other side. Of the 1,000 or more members thus voting, an overwhelming majority voted in the affirmative. Exact figures cannot be had, but evidently not more than 100 voted in the negative, and it is so found.

"(16) The result was announced by the chairman accordingly, and the meeting closed after the appointment of the plaintiffs as a committee to attend to the details of procuring a transfer of the legal title from the defendants, with authority to take such proceedings at law or in equity as might be necessary 'to secure the conveyance from the trustees above mentioned to the Rt. Rev. Michael J. Hoban, Bishop of Scranton, trustee,' for the congregation.

"(17) In this way, as between the defendants and the bishop, a majority of the voting membership expressed its choice for trustee. But on demand being made the transfer was refused by defendants, and that brought on the present suit."

The court entered the following decree: "And now, November 19, 1910, this cause came on to be heard at a regular term of equity court, and was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed that the defendants shall

within seven days from the date hereof execute, acknowledge, and deliver a proper deed of the premises described in plaintiffs' bill, held by said defendants in trust for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, to Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton. It is further ordered that the defendants pay the costs, other than those which plaintiffs were directed to pay by order of the Supreme Court, on setting aside the former decree of January 7, 1910."

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

William Jessup Hand, for appellants. John G. Johnson, T. P. Hoban, and John P. Kelly, for appellees.

STEWART, J. Either the deliverances of this court, as reported in 221 Pa. 213, 70 Atl. 740, and 229 Pa. 47, 77 Atl. 1102, 31 L. R. A. (N. S.) 686, with respect to the ownership of church property and congregational power in connection therewith, have been seriously misapprehended, or the present proceeding is a clear attempt to circumvent the law as we have there declared it. In the first of the cases referred to (*Krauczunas v. Hoban*), the effort was on the part of the 10 lay members of the congregation, duly chosen trustees of the legal title to the church property, to compel a reconveyance to them of the title by Bishop Hoban, who had previously been designated trustee of the title for a special purpose, which had been fully accomplished. The effort of these trustees was resisted, not on the ground that the congregation was without statutory right to choose its own trustee or trustees for the purpose indicated, or that the election of these particular trustees was in any way irregular, but distinctly on the ground that any such election, except as it resulted in the choice of the bishop of the diocese in which the property was located, offended against the rules and regulations of the Catholic Church. To make this clear, it is only necessary to quote a single finding of fact, and the conclusion derived therefrom, on which the lower court rested its dismissal of the plaintiffs' bill. The finding was as follows: "The canons of the Roman Catholic Church provide and require that the title to the property of the Roman Catholic Congregation which is under the jurisdiction of the Roman Catholic bishop of the diocese in which the congregation has its place of worship, must be in the ordinary, or, in the present case, in the bishop of the diocese." This was the conclusion derived: "If a congregation is formed for the purpose of religious worship according to the faith and rites of the Catholic Church, and has accepted the pastor assigned to it by the bishop of the diocese, has placed itself under the authority of the bishop and sub-

mitted itself to his authority in all ecclesiastical matters, the title to its property must be taken and held as provided by the canons of the Catholic Church. The property acquired by the congregation under such circumstances is the property of the church, and is subject to its control, and must be held in the manner directed by its laws. * * * The title to the real estate described in plaintiffs' bill is properly and legally vested in the defendant, Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee for St. Joseph's Lithuanian Catholic Congregation, in accordance with the laws and usages of the Catholic Church."

Referring to this language in our review of the case, we said: "It will be seen from this that what was a controversy over an unimportant result—the right to substitute one dry, passive trustee of a legal title for another—was made to involve a question of ownership of property. * * * Conveyance to the church is not pretended; nor is forfeiture on the part of the congregation. Nothing is asserted in this connection but ecclesiastical rules and regulations, which, except as they are aided by legal conveyance, are ineffectual to divest any owner of his property."

[1] But more than this, the position taken by the defendant and sustained by the court is in direct opposition to the law, whose supremacy over all ecclesiastical rules and regulations, when rights of property are concerned, is not to be questioned. The act of April 26, 1855 (P. L. 330) § 7, provides that: "Whosoever any property, real or personal, shall hereafter be bequeathed, devised or conveyed to any ecclesiastical corporation, bishop, ecclesiastic, or other person, for the use of any church, congregation, or religious society, for religious worship or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or enure, than subject to the control and disposition of the lay members of such church, congregation, or religious society, or such constituted officers or representatives thereof," etc. We accordingly sustained the appeal, and ordered that Bishop Hoban reconvey the church property to the plaintiffs as trustees. It is to be remarked in this connection that these trustees, because of their attempt to vindicate their right under the law, had been excommunicated by the bishop. Appendix, p. 233.

Nevertheless, the bishop complied with the decree of the court, and made conveyance of the title; he followed it up, however, with an episcopal interdict which closed the doors of the church against the congregation. This interdict reads as follows: "The Members of St. Joseph's Congregation—Greeting: The court has decided that the Catholic bishop of Scranton must hand over to a band of excommunicated apostates the deed of the Catholic Church of St. Joseph's. As the church

cannot be used for any other worship than Catholic worship, and as it is intolerable to hold Catholic services in a church controlled by members who despise the church and her laws, and who have lost their Catholic faith, I am exceedingly pained to be obliged to place the Lithuanian Catholic Church of St. Joseph's under interdict until the members of the congregation shall turn these faithless men out and place the church once more under the care of the bishop of the diocese of Scranton, according to the laws of the Catholic Church. I now declare that the Lithuanian Catholic Church of St. Joseph's, North Main avenue, in this city of Scranton, is hereby placed under interdiction from midnight of Sunday, May 31-June 1, 1908, and that no Catholic services of any kind shall be held therein, nor shall any Catholic enter therein without incurring ecclesiastical censure, until the interdict shall be removed. [Signed] Michael John Hoban, Bishop of Scranton."

Simultaneously with the proclamation of this edict, a meeting of the congregation was called, elsewhere than in the church, to determine how the title to the property was to be held. We are not now concerned with the factional differences which disturbed that meeting, and resulted in a separate meeting of the dissentients, except to say that the latter repudiated the action attempted at the meeting regularly called, and declined to reconvey the title to the bishop. The present bill was filed to enforce compliance. A protracted hearing resulted; the one issue being the regularity in the proceedings and membership of the meeting, which declared for a reconveyance to the bishop. In the course of two or three days—we use the language of the chancellor before whom the case was heard—it became apparent that if the question were to be decided by review of the action taken at that meeting the result would be unsatisfactory or doubtful. It was consented to by the individual litigants that an election should be held in open court, conducted by the chancellor. Such election was held, covering several days, and resulted, according to the findings of the chancellor, in the election of Bishop Hoban as trustee. A decree followed, requiring a reconveyance of the title to him. On appeal to this court (*Mazaika v. Krauczunas*, 229 Pa. 47, 77 Atl. 1102, 31 L. R. A. [N. S.] 686), we held that the election before the chancellor in open court was without effect for reasons therein stated at length, and which need not be repeated here, and we accordingly set aside the decree and remitted the record; the case to be proceeded with as though the election in court had not been held. The case was thereupon proceeded with in due form, with like conclusions upon the issues raised by the original bill and answer, and we have this present appeal from a decree requiring a reconveyance to the "Rt. Rev.

Michael J. Hoban, Bishop of Scranton, as trustee for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton."

If the case rested simply on the findings of fact and conclusions of the learned chancellor with respect to the regularity of the proceedings in the meeting of the congregation at which Bishop Hoban was declared to have received a majority of the votes cast, while much that there occurred is open to criticism, we would not feel justified in prolonging this unprofitable controversy by a reversal. But there are other admitted facts which have a significance not to be overlooked. In this we make no reference to the excommunication of the appellants as a punishment for their appeal to the law of the land for a vindication of the right of the congregation they represented to the control of its property, nor to the episcopal edict which followed at once upon our decision, depriving the congregation of the privilege of Christian worship according to its faith and practice in its own sanctuary until such time as it chose to elect the bishop of the diocese the trustee of the legal title to its property. We will assume that these acts were within episcopal authority under the polity of the Roman Catholic Church, however much they may be at variance with the policy of our civil law, which regards with condemnation all interference with freedom of elections. No one is heard complaining in regard to them, and they concern us here only as they help to an understanding of the real purpose of the meeting of the congregation, whose action in the election of Bishop Hoban as trustee has been sustained by the court below.

The resolution embodying the action of the meeting was as follows: "Whereas, it is deemed advisable and proper, and it is also the desire of the members of St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, Pennsylvania, to vest the title to all the property of said St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, Pennsylvania, in Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee for said St. Joseph's Lithuanian Catholic Congregation, in accordance with the laws, rules and usages of the Catholic Church in the diocese of Scranton and state of Pennsylvania: Now, therefore, be it resolved, that all the property of said St. Joseph's Lithuanian Catholic Congregation is, and is hereby declared, subject to the jurisdiction of the Catholic Church and the Catholic bishop of Scranton; and be it further resolved, that Rt. Rev. Michael J. Hoban, Bishop of Scranton, be, and is hereby, chosen and designated trustee for said St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, Pennsylvania, to hold as such trustee all the property of said congregation, and the title thereto in accordance with the laws, rules and usages of the Catholic Church in

the diocese of Scranton and state of Pennsylvania."

The significance of the language here employed can be fully understood only as we recall what was said by this court in *Krauczunas v. Hoban*, supra, the language of the interdict of the bishop closely following upon our decision, and the rules and regulations of the Catholic Church with respect to the property of the congregation, as defined by Bishop Hoban in his testimony in the case. In the case referred to, we distinctly held that the case was one involving the right of property, and that the law governing was not to be found in the rules and regulations of the general ecclesiastical system, but in the statute of April 26, 1855 (P. L. 328), wherein it is declared that property "devised or conveyed to any ecclesiastical corporation, bishop, ecclesiastic or other person, for the uses of any church, congregation, or religious society for religious worship, or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or enure, than subject to the control and disposition of the lay members of such church, congregation or religious society, or such constituted officers or representatives thereof." The contention of the bishop there was that he had a right to hold the title to the property under the Catholic system, virtue officii. This view having prevailed with the court below, we sustained the appeal, and expressly held that the position taken "is in direct opposition to the law whose supremacy over all ecclesiastical rules and regulations, when the rights of property are concerned, is not to be questioned."

We further held that the conveyance to the appellees in that case constituted an executed legal estate in the congregation, and created a dry, passive trust, which gave the trustees neither interest in the estate, nor power to control it or direct its management in any way; that trustees in such case become simply the depository of the legal title and nothing more. We refer in this connection to only so much of the interdict as decreed that it shall continue in force "until the members of the congregation shall turn out these faithless men [the acting trustees] and place the church once more under the care of the bishop of the diocese of Scranton according to the laws of the Catholic Church." We make no question here of the authority of the bishop under the rules of the church for this coercive decree. It was nevertheless a manifest attempt to deny to the congregation freedom of action with respect to property of which, under the law of the land, it was sole owner; notwithstanding, the bishop, as he himself asserts, was acting strictly in line with his episcopal duty and prerogative. He had testified that as bishop of the diocese he had control and disposition of the church property under the general laws of the church. He was asked:

"Whether, under the ecclesiastical law of the Catholic Church, the lay members had the right of control and disposition of the property, or whether the bishop had the right." His answer was as follows: "Under the general law of the church, the lay people have not the right to control." He was again asked: "Under the law of the church, the ecclesiastical law, have the members of the church the right to hold the property as trustee for the congregation?" His answer was: "No; they have not." In this reflected light, we may see the real significance of the language used in the resolution declaring for the election of Rt. Rev. Bishop Hoban, "to hold as trustee all the property of said congregation and the title thereto in accordance with the laws, rules, and usages of the Catholic Church in the diocese of Scranton;" that is to say, even to a denial to the congregation of the chief incident of its ownership—control of the property which is its own under the laws of the state of Pennsylvania. In the case above cited, we took occasion to explain, in the hope that it would end this prolonged controversy, that a trust in such cases gives to the trustee neither interest in the estate, nor power to control it or direct its management in any way; that it creates no duty for the trustee to perform, and leaves nothing to his discretion; that he is simply the passive, silent depository of the legal title, and nothing more.

In view of the plain words of the statute thus called to their attention as to the exclusive right of property in the congregation, the unquestioned sovereignty of the law where rights of property are involved, the legal inhibition against the bishop, qua bishop, exercising control of the church property, the positive conflict in this respect between the rules and regulations of the Catholic Church and the statute laws of the state, what other conclusion can be reached than that the action of the meeting of the congregation, as expressed in the resolution we have referred to, and at which it is claimed Bishop Hoban was elected trustee, was a clear attempt to invest that particular ecclesiastical with an authority over the congregational property which the law expressly forbids? If no other purpose was intended than to elect Michael J. Hoban, in his private and natural capacity—the only capacity in which under the law he was competent to hold the legal title as trustee—was it for the purpose of identification that he was described as "Rt. Rev. Michael J. Hoban, Bishop of the Diocese of Scranton?" We should likely so conclude, were this all; but this is preceded by the express declaration that all the property of this congregation is to be subject to the jurisdiction of the Catholic Church and the Catholic bishop of Scranton, and followed by the equally express declaration that the bishop is to hold as such trustee all the property of said

congregation, and the title thereto, in accordance with the laws, rules, and usages of the Catholic Church, which invested him with absolute control. If it be said that the purpose back of the action is irrelevant in a proceeding of this character, where the formal requirements have all been met in the matter of the call for the meeting, and in the general conduct of the election, our reply is that the application here is for equitable interference, not in a matter resting in contract, but in a matter having to do with the general policy of the law and express statutory regulation as well, and for so much the greater reason the familiar maxim applies that equity will respond only as the suitor comes with clean hands. Need we argue the proposition that the suitor comes not with clean hands in such case, when the unmistakable purpose of his coming is to accomplish something which the law forbids?

[2] Let us make this plain, even though it be only to repeat: What the law does not expressly allow to such trustee, it forbids. The office of trustee simply of legal title is not created by ecclesiastical authority, but created by the law; such trustee can exercise no control whatever over the property held in trust; being an officer created by law, and answerable only to the law, he can derive neither authority nor power from any other source. His duties, privileges, authority and responsibility qua trustee can neither be enlarged nor impaired by ecclesiastical interference, and any attempt to so interfere would be quite as illegal as though forbidden in express terms.

But, suppose we are mistaken in attributing to the congregational meeting that elected Bishop Hoban a purpose to circumvent the law, it follows, then, that the election was made under a total misapprehension of the law regulating ownership of church property and the rights of the congregation therein. The fact of conflict between the rules and regulations of the Catholic Church and the laws of the state in this regard remains. It is idle to dispute such fact; it is too patent to be questioned, and further discussion of it would be but wasted effort. If in ignorance of its rights on the one hand, and the law's restriction on the other, the congregation by a majority of votes took the action on which these appellees base their claim, should the court lend its aid to compel compliance? Were contractual rights involved, we might feel constrained to do so; but we are embarrassed by no such consideration. No possible prejudice can come to any individual or interest by our withholding our sanction to the decree in this case. If St. Joseph's Lithuanian Congregation desires Michael J. Hoban, whether described by his episcopal office or not, to be the custodian of the legal title to their church property, let

them so declare by a majority vote of the adult male membership at a meeting regularly called, and their choice will not only be respected by the courts, but will by them be enforced, if necessary. In either case no other purpose or understanding can be imputed than that the individual so chosen is to hold his office by virtue of the law, with no power of control whatever, except what the law confers. However he may thereafter attempt interference with control of the property by the congregation, his action in this regard will be referred to his episcopal office, and its legality adjudged accordingly, without regard to his trusteeship of the legal title.

It is urged that the decree from which the appeal is taken does not and cannot subject the church property to the control of the legal title. This is quite true; but the decree, except as it gives effect to the purpose of the congregation as expressed in the resolution which prevailed, and which was the basis of its action, must be held extrajudicial, inasmuch as it substitutes for the will of the congregation in the matter of the selection of a trustee the power of the court. The presumption may not be violent that the congregation would have elected Bishop Hoban trustee to hold under the law, but the court cannot presume that. That he was to hold it under the rules and regulations of the church, in view of what we have said, must be regarded as a condition of his election, which the court had no right to suppress or to ignore.

The eighth assignment of error was the refusal of the court to instruct in accordance with the ninth request for conclusions of law. The instruction asked for was as follows: "The action of the alleged meeting of June 8, 1908, embodied in the resolution claiming to have been adopted by the meeting, and upon which plaintiffs based their right to the relief prayed for in their appeal, was illegal, and not binding upon the congregation, for the reason that its purpose was to put the control and disposition of the property of the congregation in the bishop of the diocese under the laws of the Catholic Church; the same being in conflict with the laws of Pennsylvania." For the reasons above stated, we are of opinion that this point should have been affirmed. We accordingly sustain the appeal.

The decree of the court requiring the defendants to execute, acknowledge, and deliver a proper deed of the premises described in the plaintiff's bill held in trust by them for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton to Rt. Rev. Michael J. Hoban, Bishop of Scranton, as trustee for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton, is reversed, and it is ordered that the appellees pay the costs of this proceeding.

WAGNER v. PHILADELPHIA, B. & T. ST. RY. CO. et al.

(Supreme Court of Pennsylvania. Oct. 9, 1911.)

1. CORPORATIONS (§ 482*)—SUIT BY BONDHOLDER—FORECLOSURE—DEMURRER TO BILL.

A suit by a bondholder, asking for the appointment of a receiver and the sale of the corporate property under the mortgage securing the bonds, is a foreclosure suit, and is demurrable where no copy of the mortgage is made a part of the bill, and no reference is given as to the place where it is recorded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1882; Dec. Dig. § 482.*]

2. APPEAL AND ERROR (§ 714*)—RECORD—SUFFICIENCY.

Where a bondholder sues for a receiver and for sale of the corporate property mortgaged to secure the bonds, and an appeal is taken from a decree sustaining a demurrer to the bill, the court cannot consider the mortgage securing the bonds when not made a part of the bill, though it is printed as an appendix to appellant's paper book.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.*]

3. COSTS (§ 192*)—RECEIVERS—IMPROPER APPOINTMENT—LIABILITY OF PLAINTIFF.

Where a bondholder has improperly sued and secured the appointment of receivers, such a suit being forbidden by the mortgage securing the bonds until certain events had happened and certain conditions had been complied with, none of which were shown to have happened, the complainant will be charged with costs when suit is dismissed, and with the expenses of receivers improperly secured.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 696; Dec. Dig. § 192.*]

Appeal from Court of Common Pleas, Bucks County.

Bill by Charles F. Wagner, Jr., against the Philadelphia, Bristol & Trenton Street Railway Company and another. From a decree sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and STEWART, BROWN, ELKIN, and MOSCHISKEER, JJ.

George Quintard Horwitz, Layton M. Schoch, and Harman Yerkes, for appellant. Charles L. McKeehan, Joseph S. Clark, and Gilkeson & James, for appellees.

BROWN, J. On September 1, 1908, the Philadelphia, Bristol & Trenton Street Railway Company defaulted in the payment of interest due on its bonds, secured by a mortgage on all of its property, rights, and franchises. The bonds so secured and issued amounted to \$650,000, and were of the denomination of \$1,000 each. On September 5th, four days after the default, Charles F. Wagner, Jr., who was the holder and owner of 10 of these bonds, filed a bill for the appointment of a receiver, with authority, *inter alia*, to sell, if necessary, all of the mortgaged property, real and personal, and to apply the funds realized from a sale to the

payment of the bondholders, creditors, and stockholders of the company. A further prayer of the bill was for an injunction to restrain the trustee in the mortgage from instituting foreclosure proceedings. The bill was filed without notice to either of the defendants named in it, and temporary receivers were at once appointed on the application of the complainant. On September 18th, 13 days after they were appointed, their appointment was vacated upon the petition of the street railway company; the court holding that the appointment had been "ill advised and improvidently made." There is no assignment of error to this, and we must therefore assume that the complainant concedes it to have been right. Subsequently the street railway company answered, and the trust company demurred to the bill. The demurrer was sustained, and in sustaining it the court directed the complainant to pay the costs and expenses of the temporary receivership.

[1] The first question to be passed upon on this appeal is as to the sufficiency of the bill. Several reasons were given by the court below for sustaining the demurrer to it. The complainant's averments, upon which he based his right to file it, were that he was a bondholder of the railway company, and his bonds were secured by a mortgage of that company; but his bill neither contained nor had appended to it a copy of one of the bonds or of the mortgage, nor was there any reference to the place where the latter was recorded. The court was therefore in ignorance of the complainant's rights under his bonds and the mortgage when called upon to pass on the sufficiency of the bill, which, in effect, is one for foreclosure, no matter how strenuously it is now repudiated as such by the learned counsel who filed it. It is not one of a common creditor asking for the appointment of a receiver for the conservation of the assets of an alleged insolvent corporation, but is that of a bondholder averring a right under his bonds and the mortgage securing them to ask for the appointment of a receiver and for a sale of all of the corporate property. The complainant avers no other interest than that of a bondholder, and relief is claimed under the mortgage. That instrument is referred to in the bill as the foundation of the right to file it, but with no copy of the same appended to or made part of the bill, and with no reference to the place where it is recorded, the learned chancellor below properly held that he was "utterly at a loss" to determine what plaintiff's rights were under the bonds and mortgage upon which he relied.

[2] Though the mortgage is not a part of the record, and cannot be regarded as having been before the court below in passing upon the demurrer, it is printed as an appendix

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to appellant's paper book, and we are referred to certain portions of it as showing the right of complainant to file his bill. This we cannot understand. In passing upon the sufficiency of the bill on the demurrer to it, nothing was before the court below but the bill itself; and on this appeal from the decree sustaining the demurrer we can consider nothing that does not appear upon the face of the bill. No better reason could be given why the mortgage should have been made a part of the bill than the references now made to certain clauses in it, as establishing the right of the complainant to file his bill. If his right to file the same was under the mortgage—and the bill substantially so avers—such right ought to have appeared affirmatively to the court below by submitting the mortgage as a part of the bill, and the references to it now by counsel for appellant, and the printing of it as an appendix to their argument, must be regarded as a concession by them that it ought to have been before the court below as a part of the pleadings in the case. Through failure to make it a part of them, the court was unable to pass upon the plaintiff's right to file his bill, which was the fundamental question in the case, and the demurrer was properly sustained for this reason alone.

After the appointment of the receivers had been vacated, they filed their account, charging themselves with the receipts of the road during their management of it, and taking credit for certain disbursements. The credits taken for moneys paid out for the operation of the road were not objected to, but exceptions were filed and sustained to the items making up the legal expenses of the receivership. These items were for counsel fees, receivers' compensation, etc., amounting to \$1,561.57, and the second complaint on this appeal is that Wagner, the complainant, was directed to pay them. When the court below passed upon the petition to impose the expenses of the receivership upon him, there was before it a clause in the mortgage, providing that no holder of any of the bonds secured by it should have the right to institute any proceedings for the appointment of a receiver until certain conditions had existed, no one of which existed when the bill was filed.

[3] Among these conditions precedent to the right to file a bill for the appointment of a receiver was one providing that default in payment of interest on the bonds should have continued for six months; that written notice of such default should have been given to the trustee named in the mortgage, and holders of 25 per cent. in amount of the bonds secured by it, and then outstanding, should have made written request upon the trustee to proceed to exercise the powers granted to it by the mortgage. This bill was filed four days after default in the payment of inter-

est, and, on the ex parte application of the complainant, without notice to any one, the temporary receivers were appointed. In view of the plain and unambiguous terms of the mortgage, with which the complainant is conclusively presumed to have been familiar, and which he deliberately disregarded in filing his bill, there is no conceivable reason why the costs and expenses of the receivership should be borne by the railway company. On the contrary, costs in equity being always in the sound discretion of the court, there is every equitable reason why the complainants should pay the costs and expenses that resulted from the filing of his bill, which he ought to have known from the terms of the mortgage he had no right to file. If the court below had been informed of the terms of the mortgage at the time the bill was filed, the receivers would not have been appointed. Among the many authorities which sustain the decree imposing the costs and expenses of the receivership upon the complainant are *High on Receivers* (4th Ed.) § 796; *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525; *Myres v. Frankenthal*, 55 Ill. App. 390; *Couper v. Shirley*, 75 Fed. 168, 21 C. C. A. 288; *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

The assignments of error are overruled, and the decree is affirmed, at appellant's costs.

MITCHELL et al. v. INHABITANTS OF LINNEUS.

(Supreme Judicial Court of Maine. Nov. 30, 1911.)

1. TOWNS (§ 30*)—ARBITRATION AND AWARD—AUTHORITY OF OFFICERS.

While the selectmen of a town cannot delegate their authority to determine the question of damages caused by taking land for a road, they may arbitrate a claim for such damages after they have assessed them.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 30.*]

2. TOWNS (§ 79*)—SELECTMEN—ARBITRATION—AUTHORITY TO SIGN SUBMISSION—EVIDENCE—SUFFICIENCY.

Evidence held to show that a town selectman was authorized to sign a submission to arbitration of a claim for damages through taking of land for a road.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 79.*]

Report from Supreme Judicial Court, Aroostook County.

Action by A. P. Mitchell and another against the Inhabitants of Linneus. On report. Judgment for plaintiffs.

Action of debt upon an award of referees. Plea, the general issue. At the conclusion of the evidence, the case was reported to the law court with the stipulation that "upon so much of the evidence as is admissible the

law court is to enter such judgment as the legal rights of the parties require."

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Madigan & Madigan and Leonard A. Pierce, for plaintiffs. Hersey & Barnes, for defendants.

HALEY, J. This is an action of debt upon an award of referees. The case is before the court upon report.

In 1910 the selectmen of the town of Linneus laid out a way in that town, in part over land of A. P. Mitchell, and land of Vernon Mitchell, a son of A. P. Mitchell. They made their return to the town, and the way, at a town meeting legally called, was duly accepted. They awarded to A. P. Mitchell \$100 for damages sustained by him, but made no award for damages sustained by Vernon Mitchell. A. P. Mitchell, being dissatisfied with the amount of the damages awarded him, seasonably took an appeal from the award to the Supreme Judicial Court, and the appeal is now pending awaiting the decision in this case.

In August, 1910, there were negotiations between the selectmen of the defendant town, James H. Ruth, Colby Estabrook, and Byron R. Stewart, and A. P. Mitchell in reference to settling the claim, or claims, for damages by arbitration, and papers were prepared to submit the question of damages to referees. The papers, or some of them, were signed by two of the selectmen and by A. P. Mitchell, and were afterwards destroyed.

It is claimed by the plaintiffs that the claims of both A. P. Mitchell and Vernon Mitchell were to be submitted, and that the submission was signed by two of the three selectmen of defendant town. It is claimed by the defendant town that it was the intention to submit only the claim of Vernon Mitchell for damages, that, after the papers were signed by the selectmen, A. P. Mitchell signed for Vernon, and that they then discovered that Vernon was more than 21 years of age, and the selectmen refused to admit the authority of A. P. Mitchell to sign for him, and, as they could not obtain his signature, the attempt to arbitrate was abandoned. The following day Mr. Ruth, one of the selectmen and the town agent of the defendant town, met A. P. Mitchell, and made an agreement to refer both claims to referees named in the agreement to refer the claims, with the further agreement between them, and the referees, that the award should not be made public until Vernon's return, which was to be in about 10 days, and that, if he would then agree to be bound by the award and would sign the submission to the referees, they should file their award.

The referees then viewed the way as laid out, upon which the town was then working, in company with A. P. Mitchell and Select-

man Ruth. Upon Vernon's return he was informed of the proceedings, and signed the agreement to submit the claims to arbitration, which is set forth below.

The referees then made public their award in which they allowed the plaintiffs the sum of \$375.

The agreement to arbitrate was as follows:

"Linneus, Me., August 25, 1910.

"We, the undersigned, James H. Ruth, in behalf of the town of Linneus, and A. P. Mitchell and Vernon Mitchell, owners of land across which road to avoid Coyle Hill, so called, has been located, do subscribe to the following agreement:

"We are willing to abide by the decision of Matthew Wilson of Houlton and John W. Davidson of Hammond Plantation, as to what damages shall be paid by the town of Linneus to said A. P. Mitchell and Vernon Mitchell for the right of way for said road located by said town of Linneus.

"J. H. Ruth, for the Town of Linneus.

his

"A. P. X Mitchell.

mark

"M. Wilson.

"Vernon Mitchell."

[1] This action is brought upon the award and the defense is:

First. That the selectmen had no authority to arbitrate the claim for damages.

Second. That Mr. Ruth, who signed the submission for arbitration, was not authorized to do so, and that his action has never been ratified by the town, or by either of the other two selectmen.

It is undoubtedly true, as claimed by the defendant town, that it is the duty of the selectmen to lay out ways in their town, and to assess the damages caused thereby, and report their doings to the town. While so engaged, they are acting as a court; and they cannot delegate their authority or refer the question of damages for the land taken. Being the court created by law to pass upon the question in the first instance, they cannot avoid their responsibility by referring the question to others.

In this case the municipal officers did assess the damages sustained by A. P. Mitchell in the laying out of the way. They assessed no damages for Vernon Mitchell, over whose land the way as laid out also passed. This was, in fact, as though they had reported that no damages had been sustained by him, and the duty of the court was ended when it made its report and filed it as required by law, and Vernon Mitchell had his right of appeal on the question of damages, as he would have had if an award had been made and he was dissatisfied therewith. *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380, and cases cited.

The duties of the selectmen, as a court, as far as the way in question was concerned, ended when their report was filed in the town clerk's office; but their duties as select-

men of the town were not ended. As selectmen, they still had charge of its business, which included the adjustment and payment of all just claims against the town.

At the time of the reference, the appeal of A. P. Mitchell was pending in the Supreme Judicial Court, and it was their duty to protect the interest of the town in that appeal. If Vernon Mitchell had a claim for damages for the taking of his land, or thought he had such a claim, it was their duty to protect the interest of the town in the adjustment of that claim. That being their duty, they had the right to employ counsel to assist them and contest the claim in court. Having the right to settle and adjust, they had the power to do whatever was necessary to settle and adjust, which included the right to submit to arbitration. As said by the court in *Hollister v. Pawlet*, 43 Vt. 425: "The right to settle and adjust includes the right to submit the subject-matter in dispute to arbitration. An arbitration is one of the usual ways of settling a disputed claim, and the selectmen had the right to settle and adjust this claim in any of the usual and ordinary modes of settling and adjusting such claims."

The same rule was recognized in *Fogg v. Dummer*, 58 N. H. 505, which was an action on an award where the selectmen had submitted to arbitration, and in which the court say: "It was their duty, as agents, to investigate the plaintiff's claim, and, in the absence of special instructions by the town, they had the power to submit the merits of the claim to arbitration."

Hine v. Stephens, 33 Conn. 497, 89 Am. Dec. 217, which overruled *Griswold v. North Stonington*, 5 Conn. 367, was an action upon an award, and the court held that the selectmen had authority to submit to arbitration, saying: "The avoiding of a lawsuit by a reference, and thereby escaping the delay, the expense, and the risk of a jury trial, is in most cases eminently judicious."

And in *City of Somerville v. Charles H. Dickerman*, 127 Mass. 272, the court held that the city had no right to submit the assessment of betterments to arbitration, but stated in regard to the power to submit to arbitration the question of damages sustained by the landowner: "In such a case the controversy or question is between the town and landowner separately, as to the damage he has sustained by the taking of his land. It concerns no one else. It may well be and often is settled by agreement, but it would seem that it might be referred to arbitrators as a convenient mode of settlement without affecting the rights of others or violating any principle of public policy"—citing three cases as authority.

[2] Having the right to submit to arbitration, the only remaining question is, Was Mr. Ruth, who signed this submission to arbitrate, authorized to do so, or was his action ever ratified by the other selectmen?

Mr. Ruth denies his authority. Mr. Estabrook and Mr. Stewart, the other selectmen, also deny it. The plaintiffs rely upon the declarations and acts of the selectmen to overcome the testimony of the three selectmen. It is undisputed that Mr. Ruth at the time the papers were signed was asked if he had authority to sign for the town, and he replied that he had. The writing itself shows that he claimed that authority. The day before the papers were signed other papers were signed to refer the same matters to arbitration, which was abandoned because no one had authority to sign Vernon Mitchell's name. Those papers were signed by a majority of the selectmen. It is argued that the first paper contemplated only the arbitration of Vernon's claim, but Mr. Ruth testified that it was understood, if the father had authority to sign for Vernon, both claims were to be submitted to arbitration, and Mr. Stewart testified that it was understood that they were going to submit the damages for laying out the whole road to arbitration, and he drew the papers for submission to arbitration, and the plaintiff A. P. Mitchell testified that both claims were to be submitted. The evidence fairly shows that the day before the submission acted upon was made the defendant town, by a majority of its selectmen, agreed to submit to arbitration the claims of both plaintiffs, and that the question of A. P. Mitchell's authority to sign for Vernon was raised, and the matter was left incomplete until that difficulty was removed; that the next day the arrangements were made to have the referees go upon the premises and make their award, seal it, and, when Vernon returned, if he would sign the submission, the referees were to make their award public. All this was done, and, when the award was made public, the selectmen of the defendant town were dissatisfied, and denied the authority of Mr. Ruth.

The selectmen sent two people to get A. P. Mitchell to arbitrate. Colby Estabrook, the day before the arbitration, was on the road, and stated that he thought that a fair way to settle it, and the day of the arbitration Mr. Stewart, who drew up the first papers, was out to the road where the men were working. The award was kept sealed, its contents unknown until Vernon returned, 10 days later. In a small town, like that of the defendants, the fact of arbitration must have been known. No selectman protested, or denied that the claim had been submitted to arbitration. When the award was made public, Mr. Ruth at once drove to the home of Selectman Stewart, and instructed him not to sign any papers in the Mitchell matter, and informed him that the referees had allowed \$375, and that they would not pay it. No question was asked by Mr. Stewart of how it came to be referred, when, or by whom, and no denial was made that it was done with authority.

Mr. Ruth fairly states the position of the selectmen when he answers the following questions:

"Q. If the award brought in by these men had been less than \$100, you would have stayed by it, wouldn't you? I am speaking of you.

"A. If it had been anywhere near reasonable at all, I would have stayed by it.

"Q. But, when you found that it was more than you thought it ought to be, then you refused to pay it, did you?

"A. I did."

In substance, the position of the selectmen is they would hold the plaintiffs to the agreement, if satisfied with the award. If not satisfied with it, they would deny their authority and repudiate it.

The facts, circumstances, and conduct of the interested parties, as they appear in the case, carry the conviction that the selectmen knew of the arbitration and consented, and that, if the award had been satisfactory to them, they would not have denied the authority of Mr. Ruth. The parties, having chosen the tribunal in which to litigate their differences, are bound by the decision of that court.

Judgment for plaintiffs for \$375, and interest from the date of the writ.

MULLEN v. EASTERN TRUST & BANKING CO.

(Supreme Judicial Court of Maine. Dec. 4, 1911.)

1. MORTGAGES (§ 209*)—TRUSTEES—LIABILITY FOR FALSE CERTIFICATION.

A trustee under a mortgage is bound to know that all the statements made by him in a certificate authenticating a bond secured by the mortgage are true.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466-468; Dec. Dig. § 209.*]

2. MORTGAGES (§ 209*)—DECEIT BY TRUSTEE—RIGHT TO RECOVER.

In an action against the trustee in a trust mortgage for falsely certifying an over issue of bonds, two of which were purchased by plaintiff from the mortgagor, it was sufficient that plaintiff prove that the trustee made false representations with intent that plaintiff as one of the purchasing public should rely and act upon them, or in such manner as would naturally induce her to act upon them; that the representations were material; that, being matters susceptible of knowledge, they were made as facts of the trustee's own knowledge; that plaintiff was induced thereby to purchase an invalid and worthless bond, and was thereby deceived and injured, willful fraud being unnecessary.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466-468; Dec. Dig. § 209.*]

3. MORTGAGES (§ 209*)—TRUSTEES—RESPONSIBILITY.

That a trust mortgage provided that the trustee, a corporation, might act by agents or attorneys, and should not be responsible for their acts, etc., does not relieve the trustee from liability for its secretary's act in falsely

certifying an overissue of bonds under the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466-468; Dec. Dig. § 209.*]

4. MORTGAGES (§ 217*)—FRAUD OF TRUSTEE—DAMAGES—MEASURE.

The measure of damages recoverable against a trust company as trustee under a mortgage for falsely certifying an overissue of bonds, two of which were purchased by plaintiff from the mortgagor, is the difference between the value of the invalid bonds when purchased and their value if they had been as represented, unaffected by the fact that the mortgagor became insolvent seven years later, and the holders of valid bonds then received only 58 per cent. in final settlement; valid bonds having been worth par at the time plaintiff purchased.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 559-562; Dec. Dig. § 217.*]

5. EVIDENCE (§ 113*)—VALUE OF BONDS—ADMISSIBILITY.

The price at which a corporation's valid bonds were sold is competent evidence of the value bonds, invalid as constituting an over-issue, would have had, if valid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

Report from Supreme Judicial Court, Penobscot County.

Action by Helen A. Mullen against the Eastern Trust & Banking Company. On report. Judgment for plaintiff.

Action of deceit against the defendant corporation, the trustee in a certain trust mortgage given to it by the Ounegan Woolen Company, a corporation, for falsely certifying certain bonds, purporting to have been issued by said Woolen Company, as secured by said mortgage.

Plea, the general issue with brief statement alleging as follows:

"(1) That it never declared to the plaintiff nor to any one representing her that it was the owner or holder of the two bonds referred to in plaintiff's writ and which plaintiff declares were purchased by her of said defendant, and that it did not request the plaintiff to purchase said bonds of it.

"(2) That the plaintiff did not bargain with the defendant to buy of it, nor did the plaintiff buy of the defendant, the said two bonds, upon the terms or in the manner alleged, and the defendant denies that plaintiff paid it \$1,000, or any other sum, for said two bonds as plaintiff alleges she did."

At the conclusion of the evidence, the case was reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Joseph F. Gould, for plaintiff. E. C. Ryder, for defendant.

CORNISH, J. Action of deceit against the defendant, the trustee in a certain trust mortgage, for falsely certifying certain bonds as secured thereby.

This raises the question, novel in this state, as to the legal liability of a banking corporation in certifying trust bonds.

It appears in the case at bar that the stockholders of the Ounegan Woolen Company on August 3, 1899, voted to authorize the directors "to raise funds for the use of the company by the issue of bonds to an amount not exceeding fifty thousand dollars, to be secured by mortgage upon the mill property of the company, the rate, time and all unspecified details of the bonds and mortgage to be left with the directors."

On August 22, 1899, the directors, in pursuance of this authority from the stockholders, voted "to issue ninety bonds of the denomination of five hundred dollars each, all payable to the Eastern Trust and Banking Company, trustee, or bearer, in ten days from the date thereof, dated September 1, 1899," etc. The mortgage provided that a certificate of the following tenor signed by the trustee should be indorsed upon each bond:

"Trustee's Certificate.

"The undersigned trustee named in the within bond and in the mortgage therein referred to hereby certifies that said mortgage has been delivered to it as trustee, and this bond is one of the series of ninety bonds secured thereby.

"Eastern Trust & Banking Company,
Trustee.

"By ———, Secretary."

Each bond also provided as follows:

"This bond shall not become obligatory until it shall have been authenticated by certificate endorsed thereon of said Eastern Trust & Banking Company, trustee, above named."

The mortgage was duly executed, the 90 bonds of \$500 each, numbered from 1 to 90, and aggregating \$45,000, were duly executed by the officers of the Woolen Company, duly certified by the trustee and sold. No question is raised as to the validity of these bonds or of the trust mortgage securing them.

Later, ten other bonds, each of the par value of \$500, numbered from 91 to 100, inclusive, and in all respects like the original 90, except that they purported to be of a series of 100 bonds, were placed upon the market. They were duly signed by the officers of the Woolen Company, and on the back of each was the following certificate signed by the defendant:

"Trustee's Certificate.

"The undersigned, trustee, named in the within bond and in the mortgage therein referred to, hereby certifies that said mortgage has been delivered to it as trustee and this bond is one of the series of one hundred bonds secured thereby.

"Eastern Trust & Banking Company,
Trustee.

"By G. B. Canney, Secretary."

The plaintiff, through her husband, as her agent, in November, 1901, purchased two of these bonds, Nos. 93 and 94, from A. H. Brown, who was the treasurer of the Woolen Company, and also manager of the Old Town branch of the Eastern Trust & Banking Company.

Interest was paid upon these spurious bonds during five years, the last coupon being met on September 1, 1906. Soon after that time the Woolen Company became insolvent, and its affairs were settled up by the defendant as receiver. It was then that the plaintiff was informed of the overissue, and discovered that her bonds were void, and she made demand upon the defendant for repayment the last of December, 1906.

The plaintiff introduced evidence to show that in the sale of the bonds Mr. Brown was acting for the Trust Company and not for the Woolen Company, but we deem this contention immaterial. The basis of recovery is the false representation contained in the trustee's certificate; and whether the purchase was made directly from the trustee or from the Woolen Company cannot affect the rights of the parties.

What duty did this trustee owe to the purchasing public in certifying these bonds, and has there been a breach of that duty?

[1] It is apparent that such certificate is no merely formal matter. It goes to the very essence of each bond, and no bond is binding until it is thus authenticated. The certificate is the royal stamp that makes it not only current, but valid. Its purpose is to guarantee, not the value or sufficiency of the property behind the bond, but the validity of the bond itself as a legal instrument and the fact that it is secured by the trust mortgage. It is made with the full understanding and expectation that it is to be acted upon and relied upon by all would-be purchasers, and therefore it is the duty of the trustee to ascertain the truth of the facts to which it certifies. It makes false statements at its peril. All the necessary sources of information are accessible to it, and it is compensated for its services. In this case the fee was \$100 for certifying the 90 bonds. Under these circumstances, the responsibility rests upon the trustee to authenticate no bond that should not be authenticated, and to be sure that all the statements in the certificate are true in fact.

[2] It cannot be denied that the certificate on the two bonds in suit was false. No mortgage had ever been delivered to the trustee to secure these bonds, and there was no series of 100 bonds secured by any mortgage whatsoever. Their issue had never been authorized by the directors. All these facts could have been ascertained, and the invalidity of the bonds have been established by a slight examination of the Woolen Company's records on the part of the defendant. Instead, its approval and guaranty are indorsed upon the bonds, and the

purchasing public are thereby misled, to their damage. What element of false representation within the legal meaning of that term is lacking? We see none. Mr. Mullen, the plaintiff's agent, testified that before making the purchase he examined the trustee's certificate upon the bonds and would not have purchased them except for that certificate. Willful fraud need not be proved. It is sufficient if the plaintiff prove that the defendant made false representations, with the intent that the plaintiff as one of the purchasing public should act upon them or in such a manner as would naturally induce her to act upon them; that the representations were material; that, being of matters susceptible of knowledge, they were made as of a fact of its own knowledge; that the plaintiff was induced thereby to purchase an invalid and worthless bond; and that she was deceived and injured. This is the accepted rule in this state. *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Banking Co. v. Cunningham*, 108 Me. 455, 70 Atl. 17. All these requirements, the plaintiff in the case at bar has met and her right of action is clearly established.

[3] The learned counsel for the defendant contends that, even if the trustee is *prima facie* liable, that liability is limited by the express stipulation in the trust mortgage that "the trustee may act by agents or attorneys and shall not be responsible for their acts or omissions, but shall be bound to use due care in their selection and retention." This provision was not intended to refer in any way to the act of the trustee in authenticating the bonds. It is found in the article which prescribes the duties and powers of the trustee if it takes possession of and manages the trust property in case of foreclosure proceedings or any breach of the conditions of the mortgage. It has no application to, and therefore in no way limits or affects, the responsibility of the trustee in certifying the bonds to secure which the mortgage was primarily given. This view is confirmed by the provision in the latter part of the same article that prior to its being called upon to take possession of the property "its sole duty is confined to certifying the bonds as of the series mentioned herein." The breach of this last duty is the cause of complaint here. The cases cited by the learned counsel for the defendant are in harmony rather than in conflict with the conclusion here reached.

In *Bauernschmidt v. Maryland Trust Co.*, 89 Md. 507, 43 Atl. 790, the certificate was true in fact, because the bonds certified were a part of the legal series and were secured by the mortgage, but the plaintiff contended that the certificate went further and constituted in effect a warranty of the sufficiency of the mortgaged premises, and guaranteed, not only that the bonds were legally and

formally, but financially and actually, secured by the mortgage. The court, of course, refused to so hold. The opinion concedes all the liability which the plaintiff in the case at bar invokes.

"It was not contended in this case, nor do we suppose it could be successfully contended, that the certificate here relied on can be construed as constituting a warranty of the sufficiency of the mortgaged premises as security for the bonds mentioned in the mortgage. * * * The certificate identifies the bonds on which it is placed as one of the series of bonds mentioned and described in the mortgage, and that it was secured by mortgage. * * * But it has never been understood here, or elsewhere, so far as we are informed, that a trustee, under a mortgage like the one before us, creating, as it does, a mere trust to certify the bonds, did more by the form of certificate adopted than to thereby identify them as the bonds of the company which the mortgage was executed to secure."

In *Tschetinian v. City Trust Co.*, 186 N. Y. 432, 79 N. E. 401, the certificate read: "This bond is one of a series of bonds numbered and described in the mortgage referred to." This was true in fact, but the plaintiff claimed that this certificate was comprehensive enough to guarantee that they were first-mortgage bonds; the mortgagor having indorsed "First-Mortgage Bond" on the back of each. The court held, however, that the certificate simply identified the bonds and assured the purchaser that they were entitled to the benefits afforded by the mortgage, but did not guarantee the nature or the extent of the security. The distinction is clearly made in the opinion in these words:

"The language employed, when interpreted in its natural and ordinary meaning, simply amounts to a statement identifying the bond whereon it is written as one of those mentioned in the mortgage, and the effect of this is an assurance to the purchaser that his bond is amongst those entitled to the benefit and protection afforded by such mortgage. But the statement does not upon any reasonable construction in the absence, as in this case, of any allegation of fraud or deceit active or passive, make the trustee a guarantor of the quality and extent of the security given by the mortgage or responsible for the accuracy of statements indorsed by the mortgagor purporting to describe the nature of such security."

[4] It remains to consider the question of damages. We see no reason why the ordinary rule adopted in this state and Massachusetts should be departed from, viz., the difference between the value of the bonds in question at time of purchase and their value if they had been as represented. *Wright v. Roach*, 57 Me. 600; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262.

[5] The first element is fixed. They were worthless because void. What does the evidence show they would have been worth at that time if as represented? The price at which they sold has probative force. Norton v. Willis, 73 Me. 580. The plaintiff paid par for her bonds, and Mr. Cassidy, the president of the company, took six of them, aggregating \$3,000, at the same figure, assuming that they were valid. This is strong evidence of what the bonds were worth at that time. Moreover, interest continued to be paid upon them for five years after their purchase, tending to show that the financial condition of the company continued sound for a considerable period at least.

The only evidence tending to diminish the value is the fact that finally the company became insolvent, and, had the bonds been valid and had the plaintiff seen fit to keep them, she would have received on receivership settlement only 58 per cent. of the face value. Subsequent events may be introduced as throwing light back upon a previous condition, but their value depends upon their nearness to the principal event, and the fact that a manufacturing corporation, whose success is so largely a matter of personal management and of general business conditions, is obliged seven years after bonds are issued to pass into the hands of a receiver, ought not to outweigh the estimate put upon the value of those bonds at the time and shortly after their issue by shrewd business men who should have been acquainted with the exact situation. Upon the evidence in this case, we think it fair to conclude that in November, 1901, when these bonds were purchased, the valid 5 per cent. bonds of the Woolen Company were worth par, and, as those belonging to the plaintiff were worthless, the entry should be:

Judgment for plaintiff for \$1,000 and interest from January 1, 1907.

GIDDINGS et al. v. GILLINGHAM et al.
(Supreme Judicial Court of Maine. Dec. 5, 1911.)

1. WILLS (§ 634*)—CONSTRUCTION—"CONTINGENT REMAINDER"—"VESTED REMAINDER."

Vested and contingent remainders are distinguishable, in that in the first there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate on expiration of the particular estate, and whose right to such remainder no contingency can defeat; while a contingent remainder depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1508-1506; vol. 8, pp. 7615; 7305-7307; 7828-7829.]

2. WILLS (§ 634*)—CONSTRUCTION—VESTED OR CONTINGENT REMAINDERS.

A will, after providing for testator's widow during her life, directed that his property be placed in the hands of trustees, and that on the death of the widow the residue of the estate should be disposed of according to several clauses, specifying persons and institutions to whom payment should be made, and the respective amounts thereof. *Held*, that such clauses created contingent and not vested remainders.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. WILLS (§ 774*)—BEQUESTS—LAPSE.

A bequest, to be paid over as directed by testator's wife, lapsed through her failure to exercise the power of disposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1995, 1996, 2001; Dec. Dig. § 774.*]

4. WILLS (§ 775*)—BEQUESTS—LAPSE.

Legacies, payable on termination of a life estate, lapsed on death of the beneficiaries before termination of the life estate; the bequests being contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1997-2000; Dec. Dig. § 775.*]

5. WILLS (§ 518*)—BEQUESTS—IDENTITY OF BENEFICIARY.

A bequest to the "Baptist Theological Seminary situate in Newton" is good as a bequest to the "Newton Theological Institution"; that appearing to be the institution intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1111; Dec. Dig. § 518.*]

6. WILLS (§ 517*)—BEQUESTS—IDENTITY OF BENEFICIARY.

A bequest to the "Baptist Missionary Union of Foreign Missions" is good as a bequest to the "American Baptist Foreign Mission Society"; that appearing to be the society intended as beneficiary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1112; Dec. Dig. § 517.*]

Report from Supreme Judicial Court, Penobscot County.

Bill by Moses Giddings and another, trustees in equity, against Elizabeth B. Gillingham and others. On report. Decree directed.

Bill in equity, brought by Moses Giddings and Franklin A. Wilson, surviving trustees under the will of Chapin Humphrey, late of Bangor, Me., deceased testate, against Elizabeth B. Gillingham, administratrix de bonis non with the will annexed of the estate of Marcia Humphrey, David G. F. Ward, Mable T. Ward Saltus, John B. Ward, Ralph L. Ward, George F. Maxfield, James L. Gillingham, surviving executor under the will of Dana B. Humphrey, Dana B. Pratt, Elizabeth G. Gillingham, Elliott W. Crowell, administrator of the estate of Harriet Crowell, the Children's Home of Bangor, the First Baptist Church of Bangor, the Newton Theological Institution, the American Baptist Foreign Mission Society, the Maine Baptist Missionary Convention, the Maine Baptist Education Society, and Arthur H. Isbell, to obtain a judicial construction of the will of the said Chapin Humphrey. Answers were filed by several of the defend-

ants. The cause was heard by the justice of the first instance on bill, answers, and proofs, and at the conclusion of the evidence the case was reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and HALEY, JJ.

John Wilson, for complainants. Charles H. Bartlett, for defendants Children's Home of Bangor. Allen E. Rogers, for defendants Newton Theological Institution, American Baptist Foreign Mission Society, Maine Baptist Missionary Convention, Maine Baptist Education Society, and First Baptist Church of Bangor. James L. Gillingham, for defendants Gillingham. Hugh R. Chaplin, for defendants Maxfield, Saltus, and Ward.

CORNISH, J. [1, 2] This is a bill in equity, brought by surviving trustees, to obtain a judicial construction of the will of Chaplin Humphrey, who died in Bangor, November 30, 1874, leaving a widow, Lucy L. Humphrey, and certain collateral kindred, but no children. The will, which is voluminous and apparently drawn with great care, is dated May 21, 1870, and was duly probated in December, 1874.

Seven questions are propounded to the court, but the answer to five involves a single issue: Whether the clauses giving rise to those questions created vested or contingent remainders. In order to comprehend the situation more intelligently, it is necessary to give a brief abstract of the provisions of the entire will, because the true construction must depend upon the intention of the testator, and that must be gathered, not from single or scattered paragraphs, but from the whole instrument.

In the first paragraph, the wife was given a life estate in the homestead, with the income from an adjoining tenement, and in case she desired to move to some other place the trustees were authorized and instructed, either to purchase for her another house at a cost not exceeding \$20,000, or, at her option, to lease one at a rental not exceeding \$1,600 per year.

In the second paragraph, the wife was given all the household furnishings and equipment of every kind.

By the third paragraph, all the residue of the estate, both real and personal, was bequeathed and devised to Lucy L. Humphrey, Moses Giddings, and Samuel Garnsey, trustees, to have and to hold the same in trust for the following uses and purposes, stated in an abbreviated form:

First. To pay to the First Baptist Society of Bangor the sum of \$100 per year during the lifetime of his wife, for the rent of the family pew.

Second. To pay to his unmarried sister, Marcia Humphrey, an annuity of \$500 during the lifetime of his wife.

Third. To pay to his wife an annuity of \$3,000.

Fourth. To pay at the decease of his wife, and after the probate of her will, the sum of \$20,000 to such persons or institutions, if any, as she might designate in her will.

Then follows these words: "The main object of this will is to provide, first, for the maintenance and support of my wife in the same style and manner that she may be living in at the time of my decease."

This marks the end of what might be appropriately designated as the first division of the will. It relates to what is to be done by the trustees during the lifetime of the wife, and is concerned almost wholly with provisions for the comfort and maintenance of her who was, as he himself states, the immediate object of his solicitude and recipient of his bounty.

Then begins the second grand division of the will, prescribing what shall be done with his estate when the life estate is ended, and introduced by these words:

"On the decease of my wife Lucy L. Humphrey, I direct the following disposition of the residue of my estate by my executors or administrators and the trustees under this will."

Then follow 13 clauses, marked A to M, inclusive, specifying various persons and institutions to whom payments shall be made, and the amount to each.

It is the construction of certain of these clauses, which will be considered *seriatim* hereafter, that the court is called upon to determine. Did they create a vested or contingent estate in the several remaindermen? In other words, did these remaindermen take an interest which vested at the death of the testator, the right of enjoyment being simply postponed; or was the vesting of the title itself postponed until the termination of the prior estate subsisting in the trustees during the life of the wife?

A careful examination of the entire instrument leads to the conclusion that it was clearly the intention of the testator to create by his will contingent and not vested remainders, and the language was appropriate for this purpose, both upon principle and authority. In reaching this conclusion, we have not overlooked the familiar and oft-quoted rule that remainders shall be deemed to be vested, rather than contingent, if they can properly be so construed. *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037. But this rule, like all others evolved for the construction of wills, is plastic, and is designed to aid, rather than to hinder, in the correct determination of the one controlling factor—the intent of the testator. The general scope and purpose, as well as the particular language, of each instrument, viewed in the light of the circumstances known to the testator, are superior to all arbitrary rules. *Weston v. Weston*, 125 Mass. 268, 270; *Heard*

v. Read, 169 Mass. 216, 223, 47 N. E. 778; Webber v. Jones, 94 Me. 429, 432, 47 Atl. 903.

It would be unprofitable to quote from or even to cite an ever increasing line of authorities, stating in varying language the distinction between vested and contingent remainders. It is sufficient to restate the comprehensive definition found in *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037, adopting the language in *Washburn*, Real Prop. vol. 2, c. 4, § 1, viz.:

"The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect."

With these definitions in mind, the reasons that have led the court to find the several bequests in the will under consideration to be contingent, rather than vested, are based both upon the general scope and purpose of the will, and also upon the particular language of the several bequests.

In considering the general scope and purpose of the instrument, it will be found:

(1) That the clear purpose of the testator was to have his estate converted into a single trust fund, and that it should continue a unit during the life of his wife. Not only does he bequeath and devise the full legal estate, both of real and personal property, into the hands of his trustees, but he specifically provides for the segregation of his varied interests in these words:

"I direct that all my real estate, excepting said homestead and tenement adjoining, shall be sold at as early a day as is consistent with the interest of my estate, and that all my personal estate shall be sold at its market value, and all notes and other evidences of debt due me, shall be converted into money, and the proceeds thereof, together with all other receipts of money and incomes be invested in good dividend paying securities until the decease of my said wife Lucy L. Humphrey."

In his general scheme for the disposition of his property, which he had worked out carefully, the first step consisted in its reasonably prompt conversion by his trustees into a fund composed of safe dividend-paying securities.

(2) That during the life of his wife this entire fund, with the exception of the annuity of \$100 to his church and of \$500 to his

sister Marcia, was to be so managed as to yield an income of \$3,000 per year for her support; and in another clause it is expressly provided that, in case the net income is not sufficient to pay all these annuities in full, the trustees shall sell such of his effects and property as they deem necessary to pay the same. The prime motive existing in his mind was an ample provision for his wife's comfort, and both principle and income could be devoted to that purpose. That was the second step in his general plan, and, as he himself says, that was the main and primary object of his will.

(3) That at the decease of his wife this trust fund, with all its accumulations and deductions, was to be broken up, and was to be disposed of by the trustees as specified in items A to M, inclusive. The language is significant:

"On the decease of my wife, Lucy L. Humphrey, I direct the following disposition of the residue of my estate by my executors or administrators and the trustees under this will"—and then follow the payments to be made by them. The "disposition" is not made by the testator at the time of his death, but is to be made by his legal representatives after the decease of his wife. Nowhere in the will is there a gift or bequest to these legatees, independent of the direction to his executors or trustees to pay them at a future time. The gift, therefore, implied from the direction to pay speaks as of the time of payment, and not as of the date of the testator's death. The courts have always held that the fact that there are no words of present gift has great weight in indicating that the testator intended that the title should not vest until the period of distribution should arrive; and that the bequest should be contingent until that time. *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166; *Eager v. Whitney*, 163 Mass. 463, 40 N. E. 1046; *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913; *Crapo v. Price*, 190 Mass. 317, 76 N. E. 1043; 30 Am. & Eng. Ency. of Law (2d Ed.) p. 771. "One of the subordinate rules is that, when the only gift is found in the direction to pay or distribute at a future time, the gift is future, and not immediate; contingent, but not vested. Its reason is plain. The direction has no reference to the present, and can be executed only in the future, and if, in the meantime, the donee shall die the direction cannot be exercised at all." *Dougherty v. Thompson*, 167 N. Y. 472, 60 N. E. 760.

(4) That some of the legatees in remainder could not be ascertained until after the termination of the life estate, as, for instance, under items A, D, and E; and this fact has been regarded by the courts as having a tendency to show that all the remaindermen must be ascertained at that time, and that the testator regarded all the remainders in the same category, and as con-

tingent. *Smith v. Rice*, 130 Mass. 441; *Crapo v. Price*, 180 Mass. 317, 322, 76 N. E. 1043.

(5) The amount to be paid to four of the legatees was made contingent upon the total of the estate at the time of payment, because the will provides that if the estate is insufficient at that time for the payment of all the items A to M then the trustees are directed to pay the first nine in full, and to distribute the balance among the last four pro rata.

(6) That, in case the estate should "prove to exceed"—that is, on the final reckoning—the amount disposed of under the provisions of the will, such excess was bequeathed under the residuary clause. So that, if any of the contingent legacies lapsed, they fall into this residuum, and need not be administered upon as intestate property.

These various reasons lead the court in this case to the conclusion before stated, as the same or similar reasons have led to the same conclusion in prior cases. *Hunt v. Hall*, 37 Me. 363; *Read v. Fogg*, 60 Me. 479; *Spear v. Fogg*, 87 Me. 132, 32 Atl. 791; *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. 615; *Robinson v. Palmer*, 90 Me. 246, 38 Atl. 103; *Webber v. Jones*, 94 Me. 429, 47 Atl. 903; *Storrs v. Burgess*, 101 Me. 26, 62 Atl. 730.

Passing now from general considerations, and taking up the separate items, we will find that the reasons for holding the remainders to be contingent are strengthened.

[3] "A. Said sum of twenty thousand dollars (\$20,000) shall be paid over as directed by my said wife, Lucy, as directed in clause 'fourth' on the 3rd page of this will."

This bequest was contingent upon the wife's exercising the power to dispose of the same by will. This she failed to do; and therefore this bequest, admittedly contingent, lapsed.

[4] "B. The sum of ten thousand dollars (\$10,000) shall be paid to my sister, the afore-said Marcia Humphrey."

This sister died after the death of the testator and before that of his wife. If her interest in that sum was vested, it passed to her estate; otherwise it lapsed. In the opinion of the court, for the reasons before given in considering the will as a whole, the interest was contingent upon her surviving the widow. It should further be borne in mind that this sister was provided for during the lifetime of the wife by an annuity of \$500. At the widow's decease, or at her own decease during the lifetime of the widow, that annuity stopped. This bequest was evidently made to take the place of the annuity, in case the sister survived the wife. Interest at 5 per cent. on the \$10,000 would be substituted for the annuity of equal amount. If living at the wife's decease, she would receive the legacy. If not, it would lapse; and the bequest means exactly what it says—the amount is to be paid to the sister personally, the same as if the words "if living" were added, and not to her heirs or

legatees. Had the testator wished it paid to others, he easily could, and doubtless would, have so provided. The answer to the first question must therefore be that this legacy should not be paid to the administratrix of Marcia Humphrey, but forms a part of the estate to be disposed of under the last six items, H to M, inclusive, and, if there is an excess, then to be disposed of under the residuary clause.

"C. The sum of five thousand dollars (\$5,000) shall be paid to Cordella, wife of my brother, Isaac B. Humphrey."

Cordella died subsequent to the death of the testator and before that of his wife. For reasons already stated, we hold this to have been a contingent estate. It might be added that this also was evidently to be a personal gift to Cordella, if living, but with no intention that, if she had deceased, it should pass to her children, because they are specifically provided for in the next item. The answer to the second question must therefore be that this legacy is not payable to the grandchildren of Cordella, but must be disposed of in the same manner as the lapsed legacy to Marcia under item B.

"D. The sum of one thousand dollars (\$1,000) shall be paid to each of the children of my brother, Isaac B. and his wife Cordella Humphrey."

This comes directly under the decision of this court in *Storrs v. Burgess*, 101 Me. 26, 62 Atl. 730, and cases cited, holding that, where there are no words in a will importing a gift to a class, as children or grandchildren, except in the direction to make a division among them at a period subsequent to the testator's death, the interest is contingent, and the members of that class are to be ascertained as of the time fixed for the division. The payment to each child means to each child surviving at time of payment. There is no mention of their heirs or descendants, and the only persons entitled to take would be surviving children. It is a legacy to them as of the time of distribution. Here all the children had died prior to the termination of the life estate, and there is no one to take the legacy. The answer to the third question therefore is that the sum mentioned in this item is payable, neither to the lineal descendants nor heirs of the deceased children, but must be disposed of in the same manner as the lapsed legacy in item B.

"E. The sum of one thousand dollars (\$1,000) shall be paid to each of the children of my late sister, Angella Pratt."

The children surviving at the termination of the life estate were Elizabeth B. Gillingham and Dana B. Pratt, and to them payment should be made. Concerning this no question is raised.

"F. Five thousand dollars (\$5,000) shall be paid to my brother, Dana B. Humphrey."

This legatee having died, the legacy lapsed

for reasons already stated, and payment should be made as specified under item B. This is in answer to question No. 4.

"G. One thousand dollars (\$1,000) shall be paid to my niece Mrs. Harriet Crowell."

The record shows the fact but not the date of the death of Harriet Crowell. If this occurred subsequent to the termination of the life estate, payment should be made to the administrator of her estate; otherwise the legacy lapsed, and payment should be made as specified under item B. This is in answer to question No. 5.

Two questions remain, which involve simply the sufficiency of designation of the legatee, viz.:

[5] "J. Ten thousand dollars (\$10,000) shall be paid to the Baptist Theological Seminary situate in Newton, in the commonwealth of Massachusetts, for the endowment of a professorship of elocution."

The correct corporate name of the legatee is the Newton Theological Institution. Although the name is not stated in the will with precision, it is not claimed that any other institution was intended; and therefore payment should be made as intended. *Preachers' Aid Soc. v. Rich*, 45 Me. 552.

[6] "K. Ten thousand dollars (\$10,000) shall be paid to the Baptist Missionary Union of Foreign Missions."

The correct corporate name of this legatee is the American Baptist Foreign Mission Society, and for the reasons stated above payment should be made to that corporation.

The legatees in their answers unite with the trustees in asking for a judicial construction of the will. The questions raised might well give rise to doubts. It is therefore proper that costs, including reasonable counsel fees, should be allowed the parties, paid by the trustees, and charged in their probate account.

Decree accordingly.

ROSENBLUTH v. DE FOREST & HOTCHKISS CO.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. BANKRUPTCY (§ 165*)—"PREFERENCE"—REQUISITES—"TRANSFER."

It is a necessary condition precedent to a preference that there shall have been a transfer of property by the bankrupt whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class, as provided by Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), so that, if a conveyance attacked as a preference was originally and remained a nullity as against creditors and the bankrupt's trustee, there was no "transfer" within such definition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 165.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498-5499; vol. 8, pp. 7759, 7064-7070; vol. 8, p. 7819.]

2. BANKRUPTCY (§ 143*)—TITLE OF TRUSTEE—LEVIALE PROPERTY—WHAT LAW GOVERNS.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), provides that the trustee shall be vested by operation of law with the bankrupt's title as of the date of the adjudication, except as to exempt property, to all property which prior to the filing of the petition of bankruptcy could by any means have transferred or which might have been levied on and sold under judicial process against him. *Held*, that whether or not property prior to the filing of the petition could have been levied on and sold under judicial process is to be determined by the local law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

3. FRAUDULENT CONVEYANCES (§ 154*)—QUITCLAIM DEED—RECORD.

Where a quitclaim deed was not recorded as required by Gen. St. 1902, § 4096, so as to give notice, it was invalid as to the grantor's creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485-492; Dec. Dig. § 154.*]

4. FRAUDULENT CONVEYANCES (§ 113*)—ABSOLUTE DEED—UNRECORDED DEFEASANCE—VALIDITY AS TO CREDITORS.

Where a warranty deed containing no condition or defeasance was executed by a debtor to his creditor, and at the same time an unrecorded agreement was executed giving the debtor the right to a reconveyance on payment of the debt, the record of the warranty deed alone did not show the true state of the incumbency of the property, rendering the conveyance invalid as against the grantor's creditors and trustee in bankruptcy.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 364-368; Dec. Dig. § 113.*]

5. BANKRUPTCY (§ 186*)—CONVEYANCE AS SECURITY—INVALIDITY—LIENS.

Where a contractor indebted to defendant for materials furnished executed a deed to defendant conveying certain real estate as security for the debt, and, relying on such security, defendant failed to take the necessary steps to perfect its materialman's lien, but the deed was void as to creditors because of defendant's failure to record a defeasance so as to show the true state of the title, defendant, on the setting aside of the deed at the instance of the grantor's trustee in bankruptcy, was not entitled to a decree imposing as a condition the payment of so much of the debt as might have otherwise been secured by the perfection of the liens.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 186.*]

Appeal from Superior Court, New Haven County; William H. Williams, Judge.

Suit by Louis M. Rosenbluth, as trustee in bankruptcy of the De Forest & Hotchkiss Company, to cancel certain deeds of real property made by the bankrupt to defendant. A demurrer was sustained to the second and third defenses in defendant's answer and to defendant's counterclaim, and judgment rendered for plaintiff, from which defendant appeals. *Affirmed*.

The plaintiff is the trustee in bankruptcy of Garrett J. Fitzgerald, a building contractor of New Haven, who was adjudged a bankrupt on February 27, 1909. On January

4, 1908, Fitzgerald was indebted to the defendant corporation, dealer in lumber, in the sum of \$3,200 for lumber furnished him in the construction of several buildings. On that day he executed and delivered to the defendant, at its request, a warranty deed of certain land in New Haven, together with the buildings thereon, subject to an outstanding mortgage of \$3,250. This deed, while absolute on its face, was in fact given and accepted as security for the payment of said indebtedness. The equity of redemption was worth \$2,250. Contemporaneously with the execution and delivery of the deed, the defendant made and delivered to Fitzgerald a collateral agreement, which, after rectifying the fact of the latter's indebtedness to it, and the giving of the deed, proceeded as follows: "Now, therefore, the De Forest & Hotchkiss Company hereby agrees with said Fitzgerald that, when said indebtedness shall have been paid, said De Forest & Hotchkiss Company will reconvey to said Fitzgerald said house and lot, or, in the event of the sale of said house and lot, that the purchase price therefrom shall be applied to the payment of the indebtedness, and the balance, if any, shall be paid to said Fitzgerald." This deed was recorded. The agreement never has been. Fitzgerald remained in possession until December 3, 1908. On that date Fitzgerald, having failed to pay any of said indebtedness, or to find a purchaser for the property, executed and delivered to the defendant, at its request, a quitclaim deed of the premises, surrendered to it the agreement, and turned over to it possession of the premises. The quitclaim was not recorded. Fitzgerald was adjudged a bankrupt upon his own petition February 27, 1909, and the plaintiff was thereafter appointed trustee. He qualified and is acting in that capacity. After the trial, and before judgment, counsel for the plaintiff, upon the suggestion of the trial judge and against the objection of the defendant, amended the complaint by adding thereto the following paragraph, to wit: "At the time of the execution of said quitclaim deed, the defendant was a creditor of said Fitzgerald, and said deed was executed and delivered to the defendant as a preference, and the defendant had reasonable cause to believe that it was intended by the execution and delivery of said deed to the defendant to give to the defendant a preference over the other creditors of said Fitzgerald." The court has found that Fitzgerald was at the time of the execution and delivery of the quitclaim insolvent; that in making and delivering it he intended to give a preference; that the defendant had reasonable cause to believe that he so intended; and that the effect of the transaction was to prefer the defendant over his other creditors. No person claiming to be a creditor of Fitzgerald claims or has ever claimed to have acquired any lien upon the property described in the two deeds since January 4,

1908, and no person, other than the plaintiff, claims any lien upon such property, or right thereto, adversely to the defendant, save under said mortgage. The defendant set up by way of special defense and counterclaim that at the time the warranty deed and defeasance agreement were given Fitzgerald was indebted to the defendant for materials furnished in the construction, then in progress, of the house upon the land conveyed; that at that time he was further indebted to it in two other sums for material furnished in the construction of two other houses then in process of erection, or recently erected, upon two other pieces of land; that within a short time after January 3, 1908, he became still further indebted to it for material furnished in the completion of the house upon the land in question, and that at said date it had a right of lien upon these several properties as security for the three several sums first named, and thereafter would have had a right of lien upon the property in question, were it Fitzgerald's, to secure the last-named sum; that the security furnished by such liens would have been ample; that relying upon the transaction of January 4, 1908, and the receipt of said warranty deed, it did not take the statutory steps necessary to perpetuate and enforce such liens for said sums, amounting in the whole to \$1,680.27, and that by reason thereof, in the case of both the properties not now in dispute, the indebtedness of Fitzgerald became reduced through their conveyance, free of lien, in the satisfaction of his indebtedness. The defendant asked by virtue of these facts that it be adjudged to have an equitable lien upon the property in dispute for the amount of such sums with interest, and that the plaintiff be required, as a condition of reconveyance to him or revesting in him, to pay to the defendant such amount. A demurrer to this defense and counterclaim was sustained. Upon the trial evidence was offered, and excluded, which was claimed for the purpose of reaching the same result as that aimed at in the defense and counterclaim thus disposed of.

Evidence claimed to show the entire scope and character of the verbal agreement pursuant to which the warranty deed and agreement of defeasance were given for the purpose of showing that the transaction of December 3, 1908, was within its contemplation, and, as thus bearing upon the question of the intent which characterized that transaction, was offered and excluded.

Sundry additions to and corrections of the finding in its relation to the matter of preference are asked for.

Leonard M. Daggett and Henry C. White, for appellant. Richard H. Tyner, for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff, as trustee in bank-

ruptcy, seeks from the superior court such equitable relief as will annul, and make as though they never were, two conveyances of real estate executed by his bankrupt to the defendant, one recorded and the other unrecorded, and give to him, as such trustee, the title to such real estate, unaffected by such conveyances, which title by reason thereof now appears upon the land records to be in the defendant. The complaint, as finally amended, contains in support of its prayers certain allegations which assert the invalidity, as against the plaintiff, of the conveyances in question, by reason of noncompliance therein, or in connection therewith, with the requirements of the law of this state. It also contains others which make an appeal to those sections of the bankruptcy act which deal with preferences.

[1] These two classes of averments relate to entirely separable and independent matters. If the first position is well founded it is sufficient for the plaintiff's purpose, and the second is wholly superfluous. It is a necessary condition precedent to a preference that there has been a transfer of property by the bankrupt, whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class. Bankruptcy Act, § 60a. If, therefore, the conveyances in question were originally, and remained, a nullity as against the grantor's trustee in bankruptcy, there was no transfer within this definition, and all those questions in the case which center about the charge that the bankrupt was guilty of an attempted preference would be altogether immaterial. Our first question, therefore, naturally relates to the legal effect, as against the plaintiff, to be given to the two conveyances.

[2] Section 70a of the bankruptcy act provides that a trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged to be a bankrupt, except in so far as it is property which is exempt, to all "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Whether or not property, prior to the filing of the petition, could have been levied upon and sold under judicial process against the bankrupt, is a matter to be determined by the local law. *Thompson v. Fairbanks*, 196 U. S. 516, 523, 25 Sup. Ct. 306, 49 L. Ed. 577. The question to be decided thus becomes resolved into one as to whether under the law of this state a creditor of the bankrupt, armed with a judgment and execution, could immediately before the filing of the petition in bankruptcy have appropriated, in satisfaction of the judgment, the real estate interest of the bankrupt which the two deeds purported to convey to the defendant, or whether these

deeds, or one of them, were at that moment effective to prevent such an appropriation.

[3] The quitclaim which is the second in the order of time of the deeds may be dismissed summarily. Having been withheld from record, it clearly would not, as a conveyance, have stood in the way of the creditor. Gen. St. § 4086. It is the warranty deed of January 4, 1908, or, more strictly speaking, that deed taken in connection with the events of December 3, 1908, which presents the questions calling for discussion.

[4] The defendant concedes that this later deed, although absolute in form, must be treated as a mortgage (*Williams v. Chadwick*, 74 Conn. 252, 255, 50 Atl. 720; *French v. Burns*, 35 Conn. 359, 363); while, as between the parties, good as a mortgage, it was not valid as against creditors of the grantor (*Ives v. Stone*, 51 Conn. 446; *Merwin v. Richardson*, 52 Conn. 223, 237). Clearly this was the situation after the deed was recorded down to December 3, 1908, at least. On that date the parties to the deed and unrecorded agreement had such further transactions that their actual status in relation to the property became conformed to their apparent status as disclosed by the recorded instrument, and their rights, as between themselves, such as the record announced them to be. It then, for the first time, came to speak the truth. The defendant claims that from that moment it became a valid conveyance as to all persons who had not acquired a lien upon the property during the interval when it did not do so. It makes a further and secondary claim that this transaction of December 3, 1908, which was within four months of the adjudication in bankruptcy, did not constitute a transfer as of that date within the meaning of the bankruptcy act, but related back to the original transfer, and simply rescued it from its infirmity. This secondary claim has no pertinence except as bearing upon the matter of preference, and therefore we have no concern with it in our present inquiry. We have for its purpose only to learn whether or not, the instrument on record having come to state the precise present position of the parties as between themselves, it thereupon acquired validity for the future as against all the world. We think that it did not. "It has ever been the policy of our law to make every man's title to his real estate, as far as practicable, apparent on record." *Beach v. Osborné*, 74 Conn. 405, 411, 50 Atl. 1019, 1118; *Bush v. Golden*, 17 Conn. 594, 601. To this policy we have given a rigid adherence, and in pursuance of it we have repeatedly held that a mortgage to be valid as against creditors must "disclose, with as much certainty as the nature of the case will admit of, the real state of the incumbrance upon the property." *Hart v. Chalker*, 14 Conn. 77, 79; *Ives v. Stone*, 51 Conn. 446, 456. The reasons underlying this policy are stated at length in the last-named

case, and need not be repeated. It would be a distinct relaxation of the strict application which has always been made of that policy, if we were now to hold that a deed, which, although absolute on its face, was, when made, a mortgage, by reason of the secret agreement of the parties, and thus a mortgage which not only did not disclose the real state of the incumbrance, but professed to be a conveyance which divested the grantor of all interest in the property, might be converted back again into what it was in form, and made valid as to everybody according to its tenor, through the operation of another secret agreement. That would be to hold that a deed might have its real character dependent upon the private agreement of the parties entered into after its delivery and record, and without any record indication to the world that a changed condition had arisen. A recorded instrument might thus have one effect one instant, and another the next, according as the parties chose to deal with the situation, and land records come to speak in uncertain and uninforming language, when certainty and information are the ends sought. "Once a mortgage, always a mortgage," is an accepted principle applicable here. *Lounsbury v. Norton*, 59 Conn. 170, 178, 22 Atl. 153. It will not do, if our recording system is to accomplish its intended purpose, to say that it was competent for these parties, however innocently they may have acted, to change their relations to this land or interest in it, as against all the world, by their mere private agreements and action.

This conclusion, that the deed of January 4, 1908, was not validated as to creditors by the events of December 3, 1908, carries with it the inevitable conclusion that it never became a valid conveyance as to such persons and as to this plaintiff. The judgment in the latter's favor was, therefore, justified. This justification results from a very few salient and unquestioned facts of the situation presented. All other claimed or found facts and allegations of fact are, therefore, superfluous. That being the case, all the questions of law presented by the record and discussed in the briefs relating to the amendment of the complaint, to the rulings excluding testimony offered by the defendant as bearing upon the subject of intent, to the finding and conclusions of the court upon subordinate matters pertinent to the claim of preference, and to the court's ultimate conclusion upon that subject, in so far as it may be claimed to have entered into the judgment, possess no further interest, and need not be considered.

[5] One question remains. The defendant was by rulings upon demurrer and the admission of testimony prevented from asserting its claim that it should not, in any event,

be deprived of the security of the conveyance of January 4, 1908, except upon the condition that the plaintiff pay to it the amount of certain lien claims which it, relying upon that security, failed to perpetuate, by taking the necessary steps. Were the question one of the existence of a preference, the fact that one security was substituted for another would have been distinctly material, at least if the surrendered security was of equal value with the substituted. *Cook v. Tullis*, 85 U. S. 332, 340, 21 L. Ed. 933; *Stewart v. Platt*, 101 U. S. 731, 743, 25 L. Ed. 816. But the defendant is not by the judgment deprived of any security or property, for the reason that it was obtained as a preference. His loss is one which results from a failure to comply with the law of this state governing conveyances and incumbrances. The fault lies at the defendant's own door, in that it withheld from record a document, which, being there, would have disclosed the true state of the title. Neither the plaintiff nor his bankrupt were responsible for that fault. The defendant certainly is in no better position, and presents no stronger claim for equitable protection by way of compensation for what it gave up, than would any other mortgagee be who, having accepted and recorded a mortgage invalid for want of a sufficient description of the condition, should ask to be reimbursed for the consideration which he in fact gave before the mortgage should be declared inoperative.

There is no error. The other Judges concurred.

DYER v. CITY OF DANBURY et al

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. MUNICIPAL CORPORATIONS (§ 778*)—OVERHANGING LIMBS OF TREES—"DEFECT."

A limb of a tree standing in a public street, though constituting a menace to travel by reason of its liability to fall on pedestrians on a sidewalk, does not constitute a defect in the street within Gen. St. 1902, § 2020, authorizing one injured by a defective highway to recover damages from the party required to keep it in repair, since the city is not required to remove the limb as a part of its duty to build and repair highways within its limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1632; Dec. Dig. § 778.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1931-1933.]

2. MUNICIPAL CORPORATIONS (§ 733*)—GOVERNMENTAL DUTIES—NONPERFORMANCE—LIABILITY.

The duty of a city to remove a limb of a tree in a street overhanging a sidewalk and endangering travel because of its liability to fall is a public governmental duty, for the neglect of which there is no liability, unless imposed by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 733.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. MUNICIPAL CORPORATIONS (§ 727*)—GOVERNMENTAL DUTIES—NONPERFORMANCE—LIABILITY.

A city accepting a charter imposing on it a public governmental duty is not liable for failure to perform or for a negligent performance of the duty, but is liable for negligence in the performance of a duty granted primarily for the benefit of its citizens at its request, or with its consent, and not belonging to it under the general laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545; Dec. Dig. § 727.*]

4. MUNICIPAL CORPORATIONS (§ 778*)—DEFECTIVE STREETS—NEGLIGENCE—LIABILITY.

A complaint in an action against a city and town for injuries to a pedestrian on a sidewalk, which alleged that plaintiff was hit by a falling limb from a dead tree standing within the street and overhanging the sidewalk, that the charter gave the council power to regulate the planting, and removal of trees in the streets, that the council had adopted an ordinance prohibiting persons from cutting down trees on the streets without a permit, and that the town had elected a tree warden, who had assumed the exclusive control of all trees, and which did not allege any duty on the part of the city to care for the trees or that it had undertaken the care of them, stated no cause of action against the city in view of Gen. St. 1902, § 4443, as amended by Pub. Acts 1903, c. 83, and Pub. Acts 1905, c. 114, providing for the election by towns of tree wardens who shall have the care and control of public shade trees in the town, which section is applicable to towns whose limits are not identical with those of a city contained in its boundaries, and, the defendant city being such a city, the town tree warden has sole authority to remove the alleged nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 778.*]

Appeal from Superior Court, Fairfield County; Edwin B. Gager and Joel H. Reed, Judges.

Action by Thomas Dyer against the City of Danbury and another to recover for injuries received while traveling on a sidewalk in the City of Danbury. From a judgment for defendants rendered on sustaining a demurrer to the original and amended complaints, plaintiff appeals, assigning as error the sustaining of the demurrer to the amended complaint. Affirmed.

Charles W. Murphy, for appellant. J. Moss Ives and Thomas A. Keating, for appellees.

THAYER, J. This action was brought against the city and town of Danbury. A separate demurrer was filed by each of the defendants, and each demurrer was sustained. The correctness of the judgment in favor of the city only is questioned by this appeal.

According to the allegations of the complaint, the plaintiff while passing along the sidewalk was hit upon the head and injured by a falling limb which had "become dislodged from," or "was broken off by the wind from," a dead tree which stood within the limits of the street, and overhung the side-

walk. The street was a public highway of the city, and it was the duty of the city to keep it in repair and in a safe condition for public travel. The tree had existed in its dangerous condition for more than a year, and constituted a nuisance upon the highway. The city charter provides that the common council shall have power "to regulate the planting and removal and provide for the protection, care and preservation of trees in the public streets and parks." The common council has passed an ordinance which provides that "no person shall cut down any trees standing upon any street or highway in the city nor set out any trees between the curb and sidewalk without a permit from the superintendent of public works," and that any person who shall violate these provisions shall pay a fine. The town of Danbury has elected a tree warden, and has assumed the exclusive control, care, and protection of all the trees upon the streets in the town and city. These are the essential facts alleged in the complaint.

[1] The overhanging limb did not constitute a defect in the highway. It did not obstruct travel thereon, and the city was not bound to remove it as a part of its duty "to build and repair" the highways within its limits. *Hewison v. City of New Haven*, 34 Conn. 136, 143, 144, 91 Am. Dec. 718. The complaint therefore does not state a cause of action under section 2020 of the General Statutes, which provides that any person injured by a defective road or bridge may recover damages from the party bound to keep it in repair.

[2] If the overhanging limb by reason of its liability to fall upon the traveled part of the highway constituted a nuisance, as alleged, it ought to have been removed. If it endangered travel upon the highway, it was a public nuisance, and the city could and should have caused its removal. But this duty of the city was a public governmental one, for the neglect of which no liability at common law ensued to the city, and no statute imposes any. *Hewison v. City of New Haven*, 37 Conn. 475, 483, 9 Am. Rep. 342. The complaint therefore states no cause of action arising from the city's failure to abate the nuisance. For the nonperformance or misperformance of a merely governmental duty imposed upon a city or town they are not liable in damages, unless a right of action against them is given by statute. *Jones v. New Haven*, 34 Conn. 1, 13; *Greenwood v. Westport*, 63 Conn. 587, 60 Fed. 560; *Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

[3] The acceptance of a charter imposing such a duty upon a city does not create a contract between it and the state rendering it liable in damages at common law for a neglect to perform or a negligent perform-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ance of the duty. *Hewison v. New Haven*, 37 Conn. 475, 482, 9 Am. Rep. 342. Where, however, some special power or privilege out of which grow public duties primarily for the benefit of its own citizens, is granted to a municipality at its request, or where with its consent some special duty, not belonging to it under the general laws, is imposed upon it, the case is different. In such cases the municipality is in a sense performing a private duty, and, although no liability for damages is imposed by statute for negligence in the performance of such duties, the municipality is nevertheless liable for it. *Jones v. New Haven*, 34 Conn. 14; *Hewison v. New Haven*, 37 Conn. 483, 9 Am. Rep. 342; *Hourigan v. Norwich*, 77 Conn. 358, 365, 59 Atl. 487.

In the *Jones Case*, above cited, as in the present case, a dead limb fell from a tree upon the plaintiff, and caused the injury complained of. The declaration in that case alleged that the city charter provided that the defendants through their common council might make such by-laws as they saw fit in relation to the cutting, breaking, or injury to trees and the protection and preservation of trees in the streets, highways, and public squares of the city; that by their common council they had passed a by-law by which it was provided that no person should, without the approbation in writing of the mayor and aldermen first obtained, cut, bruise, destroy, or aid in the cutting, bruising, or destroying or injuring any tree which had been or should be planted, set out, or standing for shade, ornament, or use in any of the public streets or highways; that the defendants had assumed upon themselves the task of superintending, regulating, and putting in proper condition trees so situated, and had agreed that they would so superintend, regulate, and put in proper condition such trees; that it thereby became and was the duty of the defendants to take proper care of such trees, and to use due care and diligence in and about superintending and regulating them, and particularly to remove all dead, decayed, and broken limbs remaining upon said trees; and that the defendants neglected this duty, and through such negligence the plaintiff received his injury. In that case we held that the declaration stated a good cause of action upon the ground that it therein appeared that the state had authorized the city as a special privilege to assume control of the "protection and preservation" of the trees, of which the pruning and removal of the dead limbs was a part, and that the city had assumed the exclusive control of the trees and the duty of protecting them for the special benefit of its own inhabitants, and that the duty was a private as distinguished from a governmental one. It is claimed that the allegations of the

complaint now in question bring the present case within the principle upon which the *Jones Case* was decided.

[4] The complaint contains no allegation of a duty on the part of the city to care for the trees, and none that it had undertaken or assumed the care and control of them. On the contrary, it is alleged that the tree warden of the town of Danbury had assumed the exclusive control, care, and protection of all the trees upon the street. Gen. St. § 4443, as amended by chapter 83, Pub. Acts 1903, and chapter 114, Pub. Acts 1905, provides for the election of such a tree warden by the towns, and provides that they shall have the care and control of all public shade trees in the town except those in public parks and open places (and of these under certain circumstances), and that they shall enforce all provisions of law for the preservation of such trees, provided such provisions do not conflict with any city or borough ordinance. This act does not apply to towns which have within their limits a city whose boundaries are identical with those of the town. The act is applicable to Danbury, which is not such a town. There is no conflict between this general law for the care and custody of the trees upon the highways and the ordinances of the city of Danbury recited in the complaint. The section of the charter quoted in the complaint gives to the city permission "to regulate the planting and removal and provide for the protection, care, and preservation of trees in the public streets and parks." The ordinances provide only that no person shall cut down any tree standing in any street or highway, nor set out any trees between the curb and sidewalk without a permit from a city officer. Here is no attempt to provide for the protection, care, and preservation of the trees. It is simply an attempt "to regulate the planting and removal of trees" in the city highways. After they are planted, and while they remain upon the street, the care and control of them is under the allegations of the complaint left to the town tree warden, who is charged with that duty, and who according to the allegations of the complaint has assumed the exclusive control of them. There is nothing in the ordinance or regulation which would prevent the tree warden or the owner of the tree in question from removing the dead branch which overhung the sidewalk and constituted the nuisance complained of as causing the plaintiff's injury. The complaint does not specifically charge a duty upon the defendant to remove this limb, and it states no facts which raise such a duty. It therefore falls to state a cause of action, and the demurrer to it was properly sustained.

There is no error. The other Judges concurred.

MURPHY v. CONNECTICUT CO. et al.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. TRIAL (§ 203*)—INSTRUCTIONS—THEORY OF PARTIES.

Each party is entitled to an instruction upon his theory of the case, if supported by any evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.*]

2. TRIAL (§ 204*)—INSTRUCTIONS—EVIDENCE.

The instructions should be so framed that the jury may clearly understand the issues submitted; and it may or may not be necessary to call their attention to particular facts claimed to have been established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 495, 497; Dec. Dig. § 204.*]

Appeal from Superior Court, Hartford County; Lucien F. Burpee, Judge.

Action by James J. Murphy against the Connecticut Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Robinson & Robinson, for appellants.
Hugh M. Alcorn and Richard Deming, for appellee.

RORABACK, J. The sole question for the jury in this case was the amount of damages. The verdict was for the plaintiff to recover \$13,669.35, which the court, upon motion of the defendant, refused to set aside. The court's action in this respect is not questioned.

In substance, the defendant contended that it was error for the court in its charge to characterize the loss of sight in the left eye as probable; that there was error in the court's use of the word "possible" in the charge, in confusing a possible injury with a probable injury, and in permitting the jury to consider mere possibilities of injury.

It appears that on October 11, 1910, the plaintiff was injured in a collision between two trolley cars on the defendants' line from New Britain to Plainville. There is no dispute as to the cause of the accident and the manner in which it occurred. The facts as to the collision are stated in the plaintiff's complaint substantially as follows: Neither car waited upon a siding for the other to pass, and both continued toward each other upon a single track at an unreasonable, excessive, and highly dangerous rate of speed until they reached a point when and where they collided, head on, with terrific force. Both cars were telescoped, windows broken, glass and splintered wood flew in all directions, and the cars were practically demolished. The east-bound car tore through the vestibule and into the body of the west-bound car for more than a third of its length, and the impact was so great that

the forward trucks were lifted from the track and hung suspended in the air, and the cars were locked together so tightly that they could be separated and removed only with great difficulty. The west-bound car upon which the plaintiff was riding was a closed car, with seats upon either side, and the plaintiff, at the time of the collision, was sitting at the front and to the left of the car, and upon the seat which runs parallel with the aisle. Just before the collision, the motorman in charge of the car saw the east-bound car approaching, and, seeing that a collision was inevitable, he abandoned his post and ran inside the car, leaving it running rapidly, and with no one to control it, or reduce its speed, or bring it to a stop.

As a result of the collision, it is alleged that: "The plaintiff was rendered unconscious and permanently injured; he was jammed and bruised about the head, limbs, and body; his face, nose, and lips were badly cut by broken glass, requiring several stitches, and his face and features permanently disfigured; he lost a large quantity of blood; his left leg was bruised and discolored from hip to ankle, and his left knee was wrenched and disabled; the ligaments of his left leg were strained; he received a deep gash on the left shoulder; he was severely cut over the right eye, and his right cheek bone was bruised and discolored; his right eye was so badly bruised and injured that he has entirely lost the sight of it, and he will, in all probability, lose the sight of the other eye, and thereby become totally blind; his nervous system was severely shocked, and injuries thereto will be permanent."

It appears that, among other things, the court stated to the jury that: "The plaintiff claims to have proved that the left eye is likewise involved or affected, and that in all probability he will sooner or later lose the sight of this eye also." "I suppose that the chief element of his damage is the loss of his right eye, and the possibility, or probability, of the prospective loss of his left eye, if you determine that any such state of facts exists." "You should consider the circumstances of the plaintiff, his condition in life, and reach a conclusion as nearly just as you can make it as to what damages he has suffered in the loss of his eye, and in the prospective, or possible, or probable, loss of his other eye, if you find there is any such prospect."

The defendants complain of these extracts from the instructions given, for the following reasons: "That no evidence was offered upon the trial that sight of the plaintiff's left eye would probably be lost, or that the vision of said left eye would probably be seriously impaired; that there is an involvement of the left eye due to the same cause

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that destroyed the sight of the right eye; that there is reason to fear and expect that this will grow worse instead of better; that it is probable that the sight of this left eye will be lost sooner or later."

[1] It is an elementary principle of law in jury trials that, when pertinent to the issues, each party is entitled to an instruction upon his theory of the case, if there is any evidence to support it. It clearly appears from the pleadings and the evidence that the parties were at issue as to the nature and extent of the plaintiff's injuries as to his left eye.

In the evidence certified to by the trial court, it appears that the plaintiff, Murphy, in connection with his statements as to his injuries testified, among other things, as follows: "Q. You have any pain in your head? A. Yes, sir; I do. Q. What is the nature of these pains, if you know; how do they affect you? A. It seems as though right through my eyes there is a needle running right through my head, as though somebody had a needle running right through my eyes; I have headaches. Q. Have you noticed an impairment of your vision while on the street? A. Oh, sure. If I am obliged to cross the street, I have to take precautions before I start."

Dr. E. Terry Smith, the plaintiff's physician, an expert, stated that: "It is not at all impossible that the same cause that caused the damage to the right eye at the time of the injury may have been transmitted to the left orbit. This was a terrific blow he got; a very strong man, in perfect health, he was rendered unconscious, and remained unconscious some time. It was a terrific blow, and a blow like that is able to do a great deal of damage." The following is a continuation of Dr. Smith's testimony: "Q. You don't mean to give the jury the impression that you think that the vision of his left eye is going to be seriously affected? A. I couldn't say. Q. You don't give that as a positive opinion? A. I mean to say that if I had lost one eye, and that the field of my eye remaining was in any way involved, if I had the slightest trouble, I should test my vision about once in two months; I would be scared to death. Q. Doctor, what do you mean by saying because he would be scared to death? A. I should expect the worst to happen; to have it grow worse instead of better. Q. Now, regarding the left eye, Doctor, you say this shows a disturbance in the perception of color? A. Perception of color form. Q. You say also there is a narrowing of the field of vision? A. Yes, sir. Q. In other words, there is a diseased condition of the eye? A. We sometimes have that happen to an involvement of the eye. Q. That is true of the left eye, as well as the one that is gone? A. Yes, sir."

From these extracts of testimony and oth-

er evidence to be found in the record, which was received without objection, it appears that there were two theories as to the extent of the injury which the plaintiff had sustained to his left eye. The plaintiff's evidence tended to show that the left eye was diseased, and that the disease was liable to progress and to result ultimately in the loss of the eye. The defendants' witnesses contended that the outcome of the plaintiff's injuries in this connection was purely conjectural, and of a speculative character.

[2] In properly instructing the jury, it may or may not be necessary for the court to recall the attention of the jury to the evidence and to the facts which the parties claim to have established, or to comment upon the evidence, or express an opinion as to its weight, or as to what verdict would be proper, if the jury should find certain facts to have been proved. The charge should be so framed that the jury may clearly understand the matters which are submitted to them. *State v. Alderman*, 83 Conn. 597, 601, 78 Atl. 331.

The amount of the verdict is large; yet the defendants do not directly contend that it is excessive. The trial judge in the court below who had seen the witnesses, heard their testimony, observed their demeanor, character, and means of knowledge upon motion refused to set aside the verdict as being excessive. The defendants' contention that from the size of the verdict it is more than probable that the passages from the instructions of the court above quoted improperly influenced the jury to consider damages of merely a conjectural or of a speculative character is not borne out by the record. The collision in question was a serious one. The extent of the plaintiff's injuries, other than to his left eye, was of a serious nature. Under all the circumstances appearing in evidence, the trial court was justified in giving sanction to the plaintiff's claims, as to the injuries to his left eye, by stating them to the jury. In so doing, it did not allow the jury to consider facts not fairly raised by the evidence. The facts referred to were simply stated by the trial judge in his charge as claims of the plaintiff. The charge as a whole shows that the court was careful not to assume that these facts had been proven; neither did it give undue prominence to any of them.

The appellants have pursued the remedy given by General Statutes, § 797, and asked that the finding may be corrected by adding thereto a certain paragraph from their draft finding, and by striking out certain statements from the finding as made. An examination of the record shows that the refusal to find as requested and the finding of the statements complained of were justified by the evidence, as we have heretofore stated. Therefore the motion to correct is denied.

There is no error.

BARRETT v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. NEGLIGENCE (§ 134*)—WEIGHT OF EVIDENCE.

It is sufficient if the jury may reasonably infer from the evidence the existence of facts essential to negligence, though there be no direct evidence of negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-273; Dec. Dig. § 134.*]

2. NEGLIGENCE (§ 134*)—SUFFICIENCY OF EVIDENCE.

If the evidence might support either an inference of negligence or its absence, the jury must adopt that inference which from the evidence appears probable.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-273; Dec. Dig. § 134.*]

3. EVIDENCE (§ 589*)—WEIGHT—EVIDENCE OF PARTY.

The jury may credit the uncorroborated testimony of plaintiff, though it seems contrary to the probabilities of the case.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2438; Dec. Dig. § 589.*]

4. STREET RAILROADS (§ 114*)—INJURIES ON TRACK—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLECT.

In an action against a street car company for injuries by slipping on its track claimed to have resulted from grease on the rails, evidence held not to sustain a finding that defendant placed the grease upon which plaintiff slipped upon the rail.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 114.*]

5. STREET RAILROADS (§ 86*)—OPERATION—NEGLECT—CROSSING TRACKS.

A street car company is only negligent in using grease on its tracks when it places grease upon its rails or the street in such quantities as to make the street not reasonably safe for traffic.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 150, 173-187; Dec. Dig. § 86.*]

Appeal from Superior Court, New Haven County; Gardiner Greene, Judge.

Action by Anna B. Barrett against the Connecticut Company. From a judgment for plaintiff for \$1,200, defendant appeals. Reversed, and new trial granted.

Harry G. Day and Thomas M. Steele, for appellant. Charles S. Hamilton, for appellee.

WHEELER, J. It appears from the evidence certified to this court that the plaintiff was walking westerly on the crossing on the southerly side of Chapel street from the east to the west side of Church street when she slipped and sustained injuries. The crossing, except its three most northerly feet, is paved with wood blocks. Upon both Church and Chapel streets are double tracks of defendant's railway. The southerly track on Chapel street is connected with the westerly track on Church street by a curve, the west rail of which runs within a few feet of the southwest corner of the curb. The plaintiff testified and claimed that she had

slipped on grease upon the westerly rail, the one nearest the southwest corner of the curb, at a point to the left of the center of the crossing. The cause of the complaint was either (1) that the defendant negligently put the grease on its rail; or (2) negligently allowed it to remain there. The case was tried on the first ground, so that the justification of the verdict and the question for determination is, Could the jury upon the evidence presented have reasonably concluded that there was a preponderance of proof (1) that the defendant negligently put the grease on the rail; and (2) that this grease caused the plaintiff to slip and injure herself?

[1] There was no direct evidence in support of these propositions, nor does our law require such. It only requires proof of relevant facts from which the jury may fairly and reasonably have inferred these elements of this action of negligence. It is enough if the jury from the evidence entertained a reasonable belief that the defendant negligently put the grease on its rail upon which the plaintiff slipped.

[2] If the evidence might support either the inference of negligence or that of non-negligence, the jury need not adopt the most reasonable one, but must adopt one which from the evidence appears probable. *Bradbury v. South Norwalk*, 80 Conn. 298, 301, 68 Atl. 321. They will not be permitted to substitute their conjecture or guess for relevant facts or inferences reasonably drawn and found in the evidence, and which fairly warrant the conclusion of negligence as charged. The evidence that there was grease on the rail was furnished by the plaintiff. No one else testified to it. She testified the grease on the rail was quite thick. "It looked as if it was a half inch or three-quarters of an inch on the rail and beside the rail." The traffic policeman, Cohane, called as a witness by the plaintiff, stationed at this corner, said by the plaintiff to be the busiest in New Haven, did not see it, though he saw the plaintiff just as she was in the act of trying to keep herself from going down, and when she was two feet west of the track and between that and the curb, and though he went back immediately after putting the plaintiff on a car, and looked at the place where she had slipped, and saw marks on the pavement. The plaintiff did not tell Cohane that she slipped on the grease, but said she slipped on the rail. On such testimony as this it would seem close to the border line of the unreasonable to credit the statement that grease one-half to three-quarters of an inch thick lay on and near this rail, and it would require a rarely confiding mind to be satisfied that the plaintiff slipped on grease upon the rail in any negligent quantity. It would have seemed more reasonable had the jury concluded that the plaintiff did not slip upon the rail, but upon the pavement,

which was of wood, wet and slippery, and upon which, from its construction and use, there may have been tar or oil or grease.

[3] But under our rule the jury were at liberty to credit the uncorroborated testimony of the plaintiff, even though it seems at variance with the probabilities. And we think that the verdict imports a finding by the jury that the plaintiff slipped on grease upon and near the tracks in such quantity as to make the place not reasonably safe for public travel.

[4] We reach, then, the remaining question of the case: "Could the jury upon the evidence presented have reasonably concluded that there was a preponderance of proof" that the defendant placed the grease upon the rail? *Fay v. Hartford & Springfield St. Ry. Co.*, 81 Conn. 330, 335, 71 Atl. 364. We think there was no evidence before the jury from which they might have reached such a conclusion. The plaintiff claims the evidence shows the necessity for the greasing by the defendant, the actual application of the grease by the defendant, and the slipping of the plaintiff upon the grease on the rail, thus warranting the conclusion of the jury. The fact that the defendant put grease on its rail was testified to only by Officer Cohane, a witness for the plaintiff, as follows: "Q. Had you ever seen the men of the railroad company greasing the tracks as it goes around the corner there? A. Yes. Q. How frequently had they greased it? A. Why, they used to grease it every morning. I would not be positive, but several times a week. * * * Q. Had you observed how soon next before that they had greased the rail? Had they greased it that day or not? A. No; I couldn't swear that they had greased it that day." We think it quite impossible to misunderstand the officer's meaning. He cannot testify grease was placed on this rail on the day of the accident, and he does not. All that he can say definitely was that it was placed on the rail around the corner several times a week. So that there was no evidence before the jury of grease having been put on the track on the day of the accident. This rail was a guard rail, used on sharp radius curves and composed of an ordinary rail with a guard rail welded onto it, leaving an opening between the rail head and the guard rail $1\frac{1}{4}$ inches wide for the flange of the wheel to run in. No evidence was offered to show where the grease was placed; but counsel agreed that it was placed within this open space where it engaged the flange of the wheel passing through it. The grease on which the plaintiff slipped was on top of the rail. Presumably the grease placed by the defendant was placed below the top and in this open space, since this was the place for the grease, and we cannot presume negligent conduct. There was no evidence that the defendant placed grease in this space at any time in such quantities that it was crowded out upon the rail by

the flange of the wheels. There was no evidence that at the time when the defendant placed grease in this space it did it negligently either by placing too much in the open space or by putting it on the rail in negligent quantities. Because the defendant placed grease in this open space at some time not later than the morning of June 2d, the jury could not take judicial notice any more than a court could, either that the grease placed there on June 2d was in the open space or on the rail at 3 o'clock of June 3d. Much less could they take notice that it was in either place in negligent quantities.

This rail was the westerly rail of the track nearest the curb, and at the point where the plaintiff slipped it was only a few feet from the Church street curb. The plaintiff slipped at a point in the crosswalk south of the center line of the crosswalk. Traffic of all sorts, trolley cars, automobiles, wagons, motorcycles, and foot passengers passed over this very spot continuously and in great numbers. The day of the accident was a pleasant June day. Is it credible that grease if pushed from between the rails at the time it was placed there on the morning of June 2d would have remained in negligent quantities during the time intervening before the accident? Rather is it not certain that the grease would have been worn away by the traffic, and evaporated by the heat in June weather? If it be said that it remained in this open space on June 2d, and was pushed out on June 3d, is it within the range of probability that grease could have so remained for such a time with the constant action of the flanges in the grease as each car passed over the track as to have been pushed out upon the rail in negligent quantities? Whether the grease came upon the rail on June 2d or June 3d, is it at all probable that it could have remained upon this rail in so large a quantity as to have made the street at this point not reasonably safe for public travel in view of the season of the year and the great tide of travel over this point? It seems to us this would in all human probability have been a physical impossibility.

[5] It must be remembered we are not concerned with a small particle of grease upon the rail, but with such a quantity as to have made it negligent to have placed it upon the track; for every bit of grease thrown from between the guard rail and the head of the rail upon the top of the rail or the street is not a negligent act. The use of the grease is a legitimate operation of the railroad, and it can only be liable when it places grease upon its rail or in the street in such quantities as to make the street not reasonably safe for public travel. The only evidence of the place where the railroad greased its rails was the answer, "Yes," of Cohane to the question, "Had you ever seen the men of the railroad company grease the tracks as it goes around the corner there?" "Around

the corner" is a very indefinite expression. The curve of this rail—that is, "around the corner"—was about 100 feet in length. If the grease was applied between the rails in order to decrease the friction and consequent slipping arising from the fact that on a curve the inner rail is shorter, as the plaintiff claims, and as we presume correctly, obviously the occasion for the application of the grease would exist at the central point of the arc of this curve, and, as the curve straightened, the need of the grease would cease, except at the point where it formed a junction with another track. The point where the plaintiff fell was on the left side of the crosswalk, which would be about 25 feet from this point of junction which was the end of the curve, and as the survey shows at a point where the curve had nearly ceased. So that there was no occasion for placing grease between the rails at this point, a fact which emphasizes the need of actual proof that grease was placed at this accustomed point of the curve before that fact should be found. And it emphasizes the insecurity of relying for proof of this solely upon testimony that the rails were greased "around the corner."

Again, there was no evidence that the grease which the railroad used on its rails was the same or similar in kind to that which caused the plaintiff to slip. Grease is of many different kinds. Oily preparations and lubricants are manifold. No evidence was offered describing the appearance of this grease, its color, consistency, or character. So far as this evidence shows, it may have been totally different from any grease ever used by the railroad at curves. This grease upon the rail might have come from automobiles, or other vehicles, passing over this crossing, or from other causes. The street railroad is not the sole cause of grease upon our streets. In order to justify a conclusion that the grease on which the plaintiff slipped was the grease which the railroad placed on the rail, there must be a finding that this grease was the same, or similar in kind, or that it had not been placed there by other causes. In the absence of evidence supporting either method of proof, an inference of identity or similarity, or an inference that other causes did not exist, is an unwarranted finding of a very material fact without evidence. This verdict, if upheld, would determine that, when a street railroad sometimes puts some kind of grease between its rails at the sharp point of a curve around a much traveled corner, it is liable to one who slips on a large quantity of grease upon the top and at the side of its rail at a point some distance from the point where the railroad had put grease between its rails at least a day and perhaps more before, and without other evidence showing a similarity between the grease used by the railroad and that oc-

causing the accident. This is not a case where the jury might have reasonably found that it was probable the defendant placed upon the rail the grease upon which the plaintiff slipped. There was no basis for such an inference.

We believe that our reports do not contain a case of negligence where a judgment has been supported with such a paucity of proof. The motion for the direction of a verdict for the defendant should have been granted. The motion to set aside the verdict should have been allowed. There is manifest error. The other Judges concurred.

TOWN OF WINCHESTER v. MORIARTY et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. PAUPERS (§ 37*)—SUPPORT—REMEDY OF PUBLIC AUTHORITIES.

A town required to support its poor, and authorized by Gen. St. 1902, §§ 1833, 2480, 2499, 2500, to prevent a spendthrift from becoming a charge on the town, and to compel relatives to support paupers, etc., but not given a lien on the property of its inhabitants who are liable to become paupers, or any authority to prevent conveyances by such persons of their property, except as above provided, has no power to compel a reconveyance after a conveyance by an inhabitant of all his property.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 144-158; Dec. Dig. § 37.*]

2. PAUPERS (§ 40*)—SUPPORT—REMEDY OF PUBLIC AUTHORITIES.

A town which becomes a creditor of an inhabitant who had conveyed all his property by reason of it furnishing support to his wife as a pauper may attach the property the same as if the conveyance had not been made and thereby secure its debt; the conveyance having been made to avoid the duty to support the wife.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 180, 181, 209, 210; Dec. Dig. § 40.*]

3. PAUPERS (§ 37*)—SUPPORT—REMEDY OF PUBLIC AUTHORITIES.

A town which has not become a creditor of an inhabitant who had conveyed all his property must on becoming liable to support his wife as a pauper proceed under Gen. St. 1902, §§ 2480, 2499, 2500, authorizing towns to compel relatives to support poor persons.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 144-158; Dec. Dig. § 37.*]

4. PAUPERS (§ 37*)—SUPPORT—REMEDY OF PUBLIC AUTHORITIES.

Mere proof that an inhabitant of a town made a voluntary conveyance of his property, and that his wife thereafter became a charge on the town, is not proof that the conveyance was made with the fraudulent intent that she should become such a charge, and the town could not sue in equity to set aside the conveyance.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 144-158; Dec. Dig. § 37.*]

Appeal from Court of Common Pleas, Litchfield County; Gideon H. Welch, Judge.
Action by the Town of Winchester against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Thomas Moriarty and others to compel a reconveyance of real estate and for an injunction. From a judgment for defendants rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Richard T. Higgins and Wilbur G. Manchester, for appellant. Samuel A. Herman, for appellees.

THAYER, J. The case of the plaintiff as set forth in the complaint is this: On December 30, 1908, and again on February 9, 1909, Thomas Moriarty, by reason of mental weakness, conveyed to Daniel J. Moriarty, without receiving any consideration whatsoever therefor, a lot of land with a dwelling house and other buildings thereon, of the value of about \$500. This land, together with their clothing and a few household goods, constituted all the property of said Thomas and his wife, Joanna Moriarty. At the time of the conveyance Thomas and his wife were settled inhabitants of the plaintiff town, were each then about 78 years of age, and were both infirm, feeble, and incapable of earning their support without the aid of the real estate so conveyed. The grantee, Daniel J. Moriarty, since the conveyance, has threatened to sell, and is seeking to sell, the real estate in question, and intends to convert the proceeds to his own use. He has closed the dwelling house, barred all means of access thereto, and has excluded the wife, Joanna Moriarty, from the occupancy thereof, and from access to her clothing and household goods contained therein. By reason of the premises, said Thomas Moriarty and Joanna Moriarty are left without any home and means of support, and without property upon which money can be raised for their support, and Joanna has become a charge upon the plaintiff as a pauper, and Thomas is likely to become so. The plaintiff is already under the necessity of furnishing Joanna support as a pauper. The defendant Daniel J. Moriarty has no property other than this real estate, and, if he disposes of this and the avails of it, the injury to the plaintiff will be irreparable. The relief asked is a temporary injunction to prevent the threatened sale of the real estate by Daniel, a judgment for a reconveyance by him to Thomas, and such other relief as doth to equity appertain.

A demurrer to the complaint was sustained. It questions the sufficiency of the complaint upon numerous grounds, some of them being that it does not appear that the conveyance from Thomas to Daniel was made to defraud creditors, or the plaintiff, or to avoid the duty of Thomas to support his wife or any debt or duty owed by him to the plaintiff, or that the plaintiff was a creditor of his; that the fact that Thomas is liable to become a charge, and that Joanna has become a charge upon the plaintiff, does not clothe it with authority to institute this action, and that it

has adequate remedy at law. The substance of all the 28 grounds of demurrer are embodied in these which sufficiently present the questions which have been argued before us.

[1] It is the plaintiff's duty by statute to support its paupers. Where a town has provided support for one of its inhabitants as a pauper, it may recover the amount so provided if the person so supported is found to have property. Gen. St. § 2480. The selectmen of a town may prevent an improvident and spendthrift inhabitant from becoming a charge upon the town by appointing some person to be his overseer to advise and order him in the management of his estate. Gen. St. § 1833. It may also avoid becoming chargeable for the support of those persons who are in fact needy, but who have relatives within certain degrees of kinship able to support them, by complaint to the superior court under section 2499 of the statutes. In a similar way, under section 2500 of the statutes, it may avoid the support of a needy widow the heirs of whose husband have estate inherited from him sufficient to furnish such support. The last two of these sections place upon relatives and heirs the obligation to support the poor therein mentioned, and give towns the power to enforce the obligation, and thus themselves escape the duty of supporting those persons. The first provides for a recovery for support furnished where a town has been imposed upon; and the second provides a means for preventing an improvident person from becoming a charge upon the town. There is no statute giving a town a lien upon the property of its inhabitants who are liable to become paupers or any authority to prevent conveyances of their property by such persons other than that above mentioned, and none to compel a reconveyance after a conveyance has been made. The plaintiff therefore stands like any other party seeking to set aside a conveyance.

It is not claimed that at the time the conveyances were made Thomas was mentally incapable of fully understanding the nature of his acts, or that any undue influence was exercised over him to secure the conveyances. The plaintiff in the brief which has been filed in its behalf says: "While it is alleged that he made the conveyances in question by reason of mental weakness, it may have been a weakness that manifested itself, not in a general incapacity, but in a purpose to wound the feelings of his wife by subjecting her to the humiliation of becoming a town pauper—a weakness manifesting itself chiefly in a spiteful, revengeful disposition," and that "it is exceedingly doubtful" if a proceeding to put him under a conservator would have been successful. The claim is that the conveyances are as to the plaintiff fraudulent and void. The conveyances were voluntary, and it does not appear that at the time they were made Thomas was indebted to the plaintiff or any one else.

There is no presumption that a voluntary conveyance made by a person who owes no one anything is made with the intent to defraud subsequent creditors, or to avoid any debt or duty which the maker may thereafter owe to them. The complaint contains no direct allegation that there was fraud in the transaction. It is claimed that fraud is sufficiently alleged, because, upon the facts stated in the complaint, Thomas must be presumed to have intended the natural consequences which would result from the conveyances, and that one of them was to impose upon the town the burden of supporting him and his wife as paupers. Assuming, without deciding, this to be so, we think that the plaintiff is not entitled to pursue this action. It does not clearly appear that at the time the action was commenced the town had actually paid anything toward the support of Joanna, the wife.

[2] Assuming that it had, and also that this fact made it a creditor of Thomas, there was no occasion for prosecuting this suit. If the conveyances were fraudulent as to the town, it could attach the property the same as it could had the conveyances not been made, and thus secure its debt. This would be its proper procedure. *Owen v. Dixon*, 17 Conn. 491, 498; *Birdsey v. Insurance Co.*, 26 Conn. 165, 171; *Easterly v. Keney*, 36 Conn. 18, 23; *Ullrich v. Ullrich*, 68 Conn. 580, 587, 37 Atl. 393.

[3] But if the plaintiff is not a creditor of Thomas, it can proceed under the statute to which reference has been made. Under section 2499 of the General Statutes, when any person having a husband, father, or mother, grandfather, or grandmother, children, or grandchildren who are able to support her becomes poor and unable to support herself, if her husband or other relative neglects to support her, the selectmen of the town or such wife may bring a complaint against such husband or relative, and obtain an order that he contribute to her support from the time the complaint is brought. In an action by a wife against her husband upon this statute, it was held that she was authorized to attach his property to secure the payments which he should be ordered to contribute. *Cunningham v. Cunningham*, 72 Conn. 157, 159, 44 Atl. 41. The town, proceeding under the same statute, would have the same authority.

[4] The plaintiff therefore in either case had adequate remedy at law if the conveyance was fraudulent. But, upon the facts stated in the complaint, it does not appear that it was fraudulent. The grantor, so far as appears, was not then indebted to any one and had some property; the furniture remaining after the conveyance. He had not become a charge upon the town at the time this action was brought. It is said that, because the wife has become a charge

upon the town, it was the intention and purpose in making the conveyance to throw her upon the town as a pauper. This does not follow. The purpose may have been to throw her upon her own blood relatives for support. The fact that there was a voluntary conveyance followed by the wife's becoming a charge upon the town is not equivalent to an allegation that the conveyance was made with the fraudulent intent that she should become such a charge. Such an allegation was necessary.

In *Ullrich v. Ullrich*, supra, where the question was raised, we left it undecided whether a husband's duty to support his wife is a debt or duty within the protection of our statute, or our rules of common law, against fraudulent conveyances. It is unnecessary to consider that question here as we are satisfied for the reasons above given that the case was correctly decided below.

There is no error. The other Judges concurred.

TINGIER v. WOODRUFF et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. WILLS (§ 549*)—CONSTRUCTIONS—DISTRIBUTION.

A will gave testator's widow, his daughter, and his granddaughter jointly the use of his property during their respective lives, or as to the widow, until her remarriage, the survivors to take on death of the daughter or granddaughter without issue or on death or remarriage of the widow, with provision that, on the last survivor's death, the property should be divided among testator's heirs, and that any issue of the daughter or granddaughter should have the share of the parent during the life of the last survivor. The widow died without remarrying before the daughter died without issue, and the granddaughter and her issue survive. *Held*, that the granddaughter takes the entire income during her life, and that distribution of the principal should occur at her death among those who are then testator's legal heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 7184; Dec. Dig. § 549.*]

2. PERPETUITIES (§ 4*)—COMMON-LAW RULE—OPERATION.

The common-law rule against perpetuities does not forbid a devise to one's legal heirs effective upon a life tenant's death, though one or more of the heirs be born after testator's death.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

Reservation from Superior Court, Tolland County; Milton A. Shumway, Judge.

Action by Lyman T. Tingier, trustee, against Etta L. Webster Woodruff and others. On reservation. Decree directed.

Lyman T. Tingier, pro se. Thomas F. Noone, for Etta L. Webster Woodruff. John E. Fisk, for Viola Webster Woodruff and others. Charles Phelps, for William F. Fay and others.

WHEELER, J. [1] The testator, Lorenzo Webster, died March 13, 1902, leaving a will which was admitted to probate March 19, 1902, the second clause of which is as follows: "I give, in manner as hereinafter provided, to my wife, Jerusha C. Webster; to my daughter Nellie L. Webster, and to my granddaughter, Etta L. Webster, the use, proceeds and benefit of all my property of every description and wheresoever situated, during the natural life of my said daughter and grand-daughter and during the life of my wife and so long as she shall remain my widow, and upon the decease or remarriage of my said wife, and upon the decease without issue of my said daughter or granddaughter, I give their share or portion respectively to the survivor or survivors of them. And upon the decease of the last survivor I will and direct that all my property be divided among my legal heirs according to the law for the distribution of intestate estate in this State. And in the event my said daughter or grand-daughter shall have issue such issue shall have the share of the parent during the life of the last survivor. It is my will and I authorize and direct my executor, soon as practicable after my decease, to sell all my property, at public or private sale as he shall deem most advisable, and deposit the avails in some savings banks or savings institutions in this State or in Massachusetts, of good repute, and collect, receive and pay over, as often as once a quarter, the interest and dividends of such avails to my wife, daughter and grand-daughter, and to their issue if any, in the proportion and according as I have hereinbefore given to them—my executor retaining from such interest and dividends a reasonable compensation for his services." The widow Jerusha C. Webster died intestate August 12, 1902, without having remarried, leaving as her sole heir and next of kin said Nellie L. Webster to whom all of her property was duly distributed. The daughter Nellie married October 22, 1902, and died June 13, 1907, without issue and leaving a will. Her estate was duly settled and distribution made. No interest in the estate of Lorenzo Webster was inventoried as a part of the estate of said Jerusha Webster or said Nellie L. Webster. The granddaughter Etta L. Webster was married August 19, 1896, and has three children living.

The trustee named in said will was succeeded by the plaintiff on September 27, 1904, who asks the advice of the court upon these questions:

(1) When should said trust estate held by the plaintiff as trustee be distributed, and to whom?

(2) Who is entitled to the income of said trust estate pending such distribution, and in what proportions?

The testator gives to his wife while she remains his widow, to his daughter Nellie and his granddaughter Etta, jointly, the use of all his property. Upon the decease

or remarriage of his wife, and the decease without issue of the daughter or granddaughter, he gives their share to the survivor or survivors of them. Upon the death of the wife without having remarried her share which was the life use of one third of the property went to the survivors, the daughter Nellie and the granddaughter Etta. Upon the death of Nellie without issue, her share which was then the life use of one-half of the property went to the last survivor, Etta, unless the subsequent provision, "And in the event my said daughter or granddaughter shall have issue such issue shall have the share of the parent during the life of the last survivor," gave to the issue of Etta either the income of this property after the death of Nellie, as the issue claim, or gave the fee of the entire trust fund to those persons who were the legal heirs of the testator at his death, as the devisees of Nellie claim. The several provisions of the will show that the testator intended that his property—income and principal—should be enjoyed by those of his own blood. Equality in the distribution of the income between the wife, daughter, and granddaughter was a main purpose of the will. The share of each upon death went to the survivor; the last survivor taking the entire income, unless daughter or granddaughter left issue. At the death of the testator two children of Etta were living, one born some six years before his death. It would be most unnatural that his great grandchildren should be preferred to his granddaughter with whom the testator was on such cordial terms that he in his will contemplated and provided for her possible ownership of all his property. To hold that, as soon as the issue spring into being, they take the income enjoyed by their parent, would strip the parent of the use of the property, and deprive her of its use in the care and nurture of her children. A construction inviting consequences so harsh and unnatural ought not to be adopted upon language susceptible of other reasonable construction, especially when that construction will effectuate the testator's intent. At the time the granddaughter is stripped of her share of the income the widow and daughter may be alive and enjoying their share of the income, or, at the time the daughter's share is taken by her issue, the widow and granddaughter may be alive and enjoying their share of the income.

The only ground for questioning the construction of this clause, "and in the event my said daughter or granddaughter shall have issue such issue shall have the share of the parent during the life of the last survivor," is that it is separated by a sentence from its proper context. It should have followed the clause, "and upon the decease without issue of my said daughter or granddaughter, I give their share or portion respectively to the survivor or survivors of them." Had its position been this, no one

would controvert that the gift to the issue was limited by the decease of the parent. The words "upon the decease" would have qualified each sentence. The fact that another sentence intervenes does not change the necessary construction. They are parts of the same subject of disposition; the one relating to the disposition if the daughter or granddaughter die without issue; the other, if they die with issue. We think the testator intended the granddaughter Etta to take the entire income during her life. The share or portion given the daughter or granddaughter in the event of their having issue is the share of the parent, and this is confined to the enjoyment of the income to the death of the last survivor as we have seen, and cannot have been intended to include the principal. Confirmation of this view is found in the gift of all the property to his legal heirs "upon the decease of the last survivor." The corpus of the fund is thus preserved intact until the time appointed for distribution, which is expressly stated to be "upon the death of the last survivor." Whether issue be born or not, the division of the principal is to take place upon the decease of the last survivor and among the legal heirs of the testator. The legal heirs take at the death of the last survivor rather than at the death of the testator. The language of the will compels this construction, and any other construction would defeat the main purpose of the testator to benefit by his bounty his own blood to the exclusion of strangers, and to hold the principal of the fund intact until that time. If the heirs existing at the decease of the testator took on the death of the last survivor, a large share of this estate would go to strangers to the testator's blood through Nellie's disposition of her estate, for she would have been an heir at this time. "If a class of takers is not clearly identified, kindred of blood are properly favored over kindred by affinity." Schouler on Wills (2d Ed.) § 26.

[2] The statute of perpetuities was repealed prior to the death of the testator, and the common-law rule against perpetuities does not forbid a devise to one's legal heirs to take effect upon the death of a life tenant, even though one or more of the heirs be born subsequent to the death of the testator. *Healy et al., Ex'rs, v. Healy et al.*, 70 Conn. 467, 471, 39 Atl. 793.

A final question remains. Who will be the legal heirs on the decease of the last survivor, Etta? The words "legal heirs" will be treated as words of limitation rather than of purchase. The wife, daughter, and granddaughter are given a life use merely. The principal is not divisible until the death of the last survivor. Very clearly they were intended to be excluded from participation in the principal. The testator intended the di-

vision to be made among those who were his heirs on the decease of the last survivor. This construction satisfies his language, and is the only construction permissible, for it is the only one which will carry out the purpose and plan of his will. This construction is the practical construction placed upon the will by the parties in interest as we find Nellie, the administratrix of Jerusha's estate, and the administrator of Nellie's estate omitted all interest in the estate of Lorenzo Webster from their respective inventories.

The superior court is advised that Etta L. Webster Woodruff is entitled to the whole of the income of said trust estate pending its distribution; that said trust estate should be distributed upon the death of said Etta L. Webster Woodruff among the legal heirs of Lorenzo Webster to be ascertained as of the date of death of the said Etta L. Webster Woodruff, and to be distributed among said heirs according to the law for the distribution of intestate estate in this state then existing.

McKIERNAN v. LEHMAIER.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. MASTER AND SERVANT (§ 302*)—INJURY TO THIRD PERSON—NEGLIGENCE OF SERVANT—ACTS IN SCOPE OF EMPLOYMENT.

A chauffeur, who, having taken his employer to the theater, and been told to be back there at a certain time, and then been loaned money by the employer for a hair cut, ran into a person, when, after going the round of the barber shops, to find a barber at leisure, he was returning to the theater, was then acting within the scope of his employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1229; Dec. Dig. § 302.*]

2. NEW TRIAL (§ 70*)—VERDICT CONTRARY TO EVIDENCE.

The question of contributory negligence is generally one of fact; and a verdict in a case involving such question should not be set aside where there was evidence on which they might have reasonably reached their conclusion.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. DEATH (§ 99*)—EXCESSIVE DAMAGES.

Under the statute (Gen. St. 1902, § 1094) providing that for death caused by negligence there may be recovered just damages, not exceeding \$5,000, such amount is not to be treated as the maximum value of a human life, but the amount, within such limit, which may be awarded for a death, is practically in the province of the jury, and their verdict should not be set aside as excessive, unless clearly indicating they had mistaken the rules of law by which the damages were to be measured, or justifying the suspicion of corruption, prejudice, or partiality.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

4. NEW TRIAL (§ 31*)—MISCONDUCT OF COUNSEL—TIME TO OBJECT.

A party knowing of misconduct of the adversary's counsel calculated to arouse the jury's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sympathies, not having complained thereof till after verdict, should not then be heard to do so.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 46; Dec. Dig. § 31.*]

5. APPEAL AND ERROR (§ 978*)—REVIEW—DENIAL OF NEW TRIAL.

The trial court, with an opportunity to fully appreciate the probable effect on the jury of the remarks of plaintiff's counsel in argument, in an action for death, that the amount which may be recovered in such an action is too small, that in a recent campaign the platforms of both parties were for removal of the limit, that counsel for defendant had from the platform urged such removal, and that in some jurisdictions verdicts as high as \$40,000 had been rendered in such cases, having denied a new trial on account thereof, its action cannot be said to be wrong.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Action by James H. McKiernan, administrator, against Louis A. Lehmaier for negligent killing of plaintiff's intestate. There was a verdict and judgment for plaintiff for \$5,000, and from the denial of a motion to set aside the verdict as against the evidence defendant appeals. Affirmed.

John H. Light, for appellant. Hurlbutt & Davis, for appellee.

RORABACK, J. From the evidence it appears that there was no substantial controversy as to the following state of facts: The plaintiff's intestate, George F. Seller, about 8:45 in the evening of August 6, 1910, was run over and instantly killed by an automobile owned by the defendant and operated by his chauffeur, Charles Shatzer. At that time Shatzer was running the automobile from Norwalk to South Norwalk in a dark place in the highway, which was about 56 feet wide. That on the night of the accident Shatzer had driven the defendant and a friend from the defendant's home in Norwalk to Hoyt's Theater in South Norwalk, reaching the theater about 8 o'clock. That Seller when he was killed was 28 years of age, perfectly healthy, and earning \$18 per week. The defendant claims that the superior court erred in overruling his motion to set aside the verdict because the evidence showed that Charles Shatzer at the time of the accident was on an errand of his own, and was not in the execution of the defendant's business; that the deceased at the time of the accident was guilty of contributory negligence; that the verdict was excessive; and that the character of the argument made to the jury by counsel for the plaintiff improperly influenced their verdict.

[1] There was evidence for the consideration of the jury from which they might fairly have found that Shatzer was the defendant's chauffeur, and on the night of the accident he brought the defendant from his home in

upper Norwalk, a distance of about 2½ miles, to a theater in South Norwalk. The business centers of the two cities are a mile and one-half apart. When the defendant alighted, he told the chauffeur to be at the theater at 9:30. The chauffeur then asked his employer to loan him a quarter with which to have his hair cut, and he did so. The chauffeur then visited two or three barber shops in South Norwalk, and, finding them crowded, he took his master's car and rode to the city of Norwalk, and found the shops there also crowded. He then started to drive back to the theater in South Norwalk, where he was going to wait for the defendant as he had been instructed. While on his way back to the theater to get the defendant, the car struck and killed Seller. It is conceded that the relation of master and servant existed between the defendant and Shatzer; and, this being established, the question arises whether at the time Seller was struck by the automobile and killed the servant was acting within the scope of his employment.

The general rule upon this subject is well stated in *Stone v. Hills*, 45 Conn. 44, 47, 29 Am. Rep. 635, as follows: "For all acts by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for the acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not under these conditions the servant alone is responsible." This court held that: "If the servant in going extra viam is really engaged in the execution of the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own. While the rule of such liability may be easily comprehended, its application to the varying facts is often difficult. The ultimate inquiry usually resolves itself into one of fact under the particular circumstances of each case." *Kitchie v. Waller*, 63 Conn. 155, 160, 163, 28 Atl. 29, 31 (27 L. R. A. 161, 38 Am. St. Rep. 361). Other cases similar in their nature and circumstances are of service in ascertaining what conditions are within or without the rule of liability. In *Loomis v. Hollister*, 75 Conn. 718, 55 Atl. 561, the master was held liable, although the servant made a detour with the defendant's team of about one-half a mile out of the direct course of his employer's business for the purpose of passing the post office where he stopped to get a newspaper for himself. While the servant was in the post office, the defendant's horses in his care, which he left unhitched, started for home, ran against the wagon of the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff, and so caused the injury complained of. In *Chicago Consol. Bottling Co. v. McGinnis*, 86 Ill. App. 38, the master was held liable for injuries inflicted by the driver of his wagon, though the driver had temporarily departed from his employer's service, and had deviated from the direct route over which his duty required him to pass to call on his wife, and the accident occurred after the completion of this personal mission, at a time when the servant had again assumed control of his master's vehicle, but before he had actually again performed any act in his master's service. In *Sleath v. Wilson*, 9 C. & P. 607, 38 E. C. L. 249, where a master directed his servant to take his carriage to a livery stable, and the servant, instead of going directly to the stable, started off to deliver a package of his own, and in returning to the stable after the delivery of such package injured a pedestrian through his negligent driving, it was held that the master was liable.

In the case before us the servant with the knowledge and consent of his master left him with his motor vehicle to engage in a matter personal to the servant for a limited period. The services of the day in which the servant was engaged had not been completed when the accident happened. He was not then wholly at liberty from his master's engagement and pursuing his own business exclusively. If the injury had been inflicted while Shatzer was going from barber shop to barber shop in Norwalk and South Norwalk, the question would have been different. But we do not deem it necessary to express any opinion upon this phase of the case, because the accident occurred when the private business of Shatzer had been completed, and he was operating the defendant's automobile back over the road which he had previously traveled, for the purpose of discharging the duty for which he was employed and intended to perform. When the automobile struck Seller, Shatzer was not engaged in any affair of his own, but was attending to the business of the defendant in the scope of his employment. As bearing on the subject, see *Mulvehill v. Bates*, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; *Rahn v. Singer Mfg. Co.* (C. C.) 26 Fed. 912.

[2] The question of contributory negligence in most instances is one of fact, and, when a case involving this question is tried to the jury, their verdict should not be set aside, when it appears that there was evidence upon which they might have reasonably rendered their decision. *Bradbury v. South Norwalk*, 80 Conn. 298, 300, 68 Atl. 321. An examination of the record shows that from the testimony given as to the care exercised by Seller at the time he was injured the jury might have reasonably found that in the evening of August 6, 1910, Shatzer was operating the defendant's automobile, with the lamps lighted, along one of the principal

streets in Norwalk in a dark place, and at an excessive rate of speed; that, just before the automobile reached Seller, it was operated so that it was running in a zigzag course, and in such a manner as to confuse Seller, toward whom the car was going. No signal of its approach had been given to Seller, who was on the street with a lantern, apparently attempting to find a knife which he had lost. From the facts just stated, and other circumstances in evidence, the question whether the deceased was in the exercise of reasonable care when he was injured was properly decided by the jury.

[3] The jury rendered a verdict for the plaintiff to recover \$5,000 as damages for the death of a young man of 28 years of age, of good habits, who was in perfect health, and earning \$18 a week. Our statute in force when this action was commenced relating to the limit of damages in actions for causing death provided that "the executor or administrator of any person whose death shall have been caused by negligence may recover of the party legally in fault just damages, not exceeding \$5,000." Gen. St. 1902, § 1094. It does not necessarily follow that, because the Legislature fixed the sum of \$5,000 as the largest sum that could be awarded in this class of cases, this amount should be treated as the maximum value of a human life. It is stated in *Broughel, Adm'r, v. So. New England Tel. Co.*, 73 Conn. 614, 619, 48 Atl. 751, 84 Am. St. Rep. 176, that the statute upon this subject does not in terms at least furnish any guide in this matter. It merely provides that the wrongdoer in such cases shall pay "just damages," not exceeding \$5,000. A general rule upon this subject supported by the authorities of this state is that the question as to the amount of damages which can be recovered in actions for death caused by negligence is one practically within the province of the jury, and their verdict will not be set aside as excessive unless it is so large as to indicate that manifest injustice has been done, and the wrong is so plain as clearly to denote that the jury have mistaken the rules of law by which the damages in the particular case were to be measured, or to justify the suspicion that it was the result of corruption, prejudice, or partiality. This is not such a case. *McCann v. McGuire*, 83 Conn. 445, 447, 76 Atl. 1003.

[4,5] The defendant complains because the plaintiff's counsel in the course of his argument to the jury stated that: "The judgment that may be recovered in actions of this kind is too small. In the recent campaign both parties in their platforms pledged themselves to remove the limit in these cases. Many of you have heard my friend (referring to counsel for the defendant) urge from the platform the removal of the statutory limitation in accident cases resulting in death. In some jurisdictions verdicts as high as \$30,000 and \$40,000 have been rendered in cases

of this character." These remarks were unfair and should not have been made, but it does not necessarily follow that a new trial should be granted on that account. The defendant was entitled to an objection and exception to these unwarranted statements. But the record discloses that no objection was made because of this improper language to the trial court until after the verdict was rendered. A party who has full knowledge of improper conduct by his adversary's attorney which is calculated to arouse the sympathies or friendly feelings of the jury should not remain silent and speculate on the chances of a favorable verdict, and afterward be heard to complain when the verdict is unsatisfactory. *Case, Adm'r, v. Clark*, 83 Conn. 183, 76 Atl. 518; *Jennie James' Appeal* from Probate, 83 Conn. 702, 78 Atl. 420. "The conduct of the trial must necessarily be left largely to the discretion of the presiding judge, a discretion which in its very nature cannot be made the subject of review by this court, except in a clear case of the abuse of that discretion." *State v. Laudano*, 74 Conn. 638, 51 Atl. 860; *State v. Washalesky*, 81 Conn. 22, 70 Atl. 62; *State v. Cabaudo*, 83 Conn. 160, 166, 76 Atl. 42. The defendant contends that these remarks were intended to influence the jury to render a verdict against him which is excessive and unwarranted by the evidence. The trial court, with an opportunity to fully appreciate the probable effect of these statements upon the jury, has found otherwise. We cannot say that it was wrong in so doing.

There is no error. The other Judges concurred.

IN RE THOMAS.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. APPEAL AND ERROR (§ 837*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where all the facts are before the Supreme Court, it is unnecessary to rule on the effect of a decision on a demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

2. INSANE PERSONS (§ 65*)—GUARDIANSHIP—SETTLEMENT OF CLAIMS—JURISDICTION.

Pub. Acts 1903, c. 203, providing that the court of probate may, after hearing, authorize conservators to settle disputed claims for or against the estates represented by them, authorizes a conservator to compromise a disputed claim for or against his ward's estate.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 65.*]

3. JUDGMENT (§ 749*)—RES JUDICATA.

An application by a conservator to the court of probate for authority to settle a claim of \$1,010.74 by cash payment of \$700.74 presents the question whether the compromise is a reasonable one and for the best interests of the ward's estate, and a decision of the court that it will approve of a compromise of the claim for \$200 settles nothing, and is conclu-

sive only of the question as to the reasonableness of the compromise, and is binding in no other respect.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 749.*]

4. INSANE PERSONS (§ 65*)—SETTLEMENT OF CLAIMS AGAINST ESTATE.

Where an attorney of a client involved in litigation as to the ownership of land agreed to act for him for compensation in land, and a conservator of the client was subsequently appointed, the court on the application of the conservator to compromise the claim of the attorney for a cash payment could direct a payment in cash, and not in land, on finding that the amount in cash was a reasonable allowance, and that it was for the best interest of the ward and his estate that the settlement should be made.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 65.*]

5. CONTRACTS (§ 72*)—CONSIDERATION—FORBEARANCE.

Forbearance or any promise to forbear from doing what one cannot legally do is no consideration for a compromise.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 72.*]

6. COMPROMISE AND SETTLEMENT (§ 2*)—VALIDITY.

Where a controversy is actual and in good faith, it is a proper subject-matter for a binding settlement, and a settlement free from fraud, mistake, or undue influence, whereby there is a surrender of a lawful claim in whole or in part on one side in exchange for something of value on the other, is binding.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 1-4; Dec. Dig. § 2.*]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Application by Edwin S. Thomas, conservator of the estate of Edward A. Spencer, for authority to compromise a claim. From a judgment of the superior court granting the application and reversing the action of the court of probate conditionally approving the application, the party aggrieved appeals. Affirmed.

William B. Stoddard and Robert C. Stoddard, for appellant. Frank S. Bishop and George W. A. Meyers, for appellee.

RORABACK, J. This is an application by one Edwin S. Thomas, conservator of the estate of Edward A. Spencer, for authority to compromise and settle a claim of \$1,010.74 by a cash payment of \$700.74. The court of probate for the district of Milford denied this application, but stated that it would approve of a compromise of this claim for \$200. The conservator appealed to the superior court. Before the reasons of appeal were filed in the superior court, a demurrer was interposed, which was overruled. The parties then went to trial in the superior court on issues raised upon the reasons of appeal, and judgment was rendered as hereinbefore stated. The appeal to this court assigned error in sustaining the demurrer,

and because judgment was rendered upon the facts set forth in the finding.

[1] With all the facts before us, it is unnecessary to rule upon the effect of the decision upon the demurrer. *Mechanics' Bank v. Woodward*, 74 Conn. 689, 691, 51 Atl. 1084. The finding shows that prior to the appointment of Mr. Thomas as conservator Mr. Spencer became involved in litigation as to the ownership of a sandy beach on Long Island Sound in the town of Milford. Spencer, who was entirely without means other than his land, the title of which was then in controversy, made an oral agreement with George E. Beers, a member of the New Haven county bar, that, if he would act as his counsel, he would pay him in land. Three cases growing out of the contention over Spencer's land reached this court, and are reported, respectively, as *Spencer v. Merwin*, 80 Conn. 330, 68 Atl. 370, *Merwin v. Backer*, 80 Conn. 338, 68 Atl. 373, and *Roberts v. Merwin*, 80 Conn. 347, 68 Atl. 377. Beers appeared as counsel for Spencer in these cases, and at their termination presented a claim for his fees and disbursements therein. He also included in this bill a claim for other matters in which he represented Spencer. In this connection the trial court finds that Thomas, the conservator, in an attempt to put an end to the litigation and expenses of Spencer, stated to Beers that he would approve his bill for the amount of \$700.74 in cash, and this Beers agreed to accept, to get Spencer out of his trouble and litigation; that the amount of this bill, \$700.74, payable in cash, is fair and reasonable; that it is for the best interest of the ward and his estate that this amount should be paid by way of compromise and settlement in accordance with the application of the conservator to the court of probate; that it is the intention of Beers to bring suit upon the original amount of his claim if a compromise is not effected; and that it is probable that, if such suit were brought, he would recover a larger sum than the amount named in the compromise, which suit would involve further expense to the estate of Spencer.

[2] Chapter 203 of the Public Acts of 1903 provides that "the court of probate, after public notice and hearing, may authorize executors, guardians, conservators, administrators and trustees in insolvency to compromise and settle any doubtful or disputed claims or actions or any appeal from probate in favor of or against the estates or persons represented by them, respectively." This language is clear. Under this statute, there is ample authority for a conservator to settle and compromise a disputed or doubtful claim for or against the estate represented by him.

[3] There is no merit in the contention of the town of Milford that it appears on the face of the papers that the conservator is

attempting to pay in the settlement of a claim against the estate he represents a larger sum than the court of probate thinks is equitably and legally due. The conservator under the provisions of the public acts above quoted presented his application to the court of probate for the district of Milford for authority to compromise and settle the claim under consideration for the sum of \$700.74. The court of probate denied the application, but stated that it would allow \$200 in full settlement of this claim. This application necessarily involved the question whether the compromise suggested was a reasonable one, and for the best interests of Spencer's estate. It is elementary law that judgments are as between parties and their privies conclusive evidence of the facts directly put in issue in the case and determined by such judgments, whenever the same facts are in question in another suit. But a judgment is coextensive only with the issue upon which it is founded, and conclusive only upon matters necessarily involved and included within that issue. *Scott v. Scott*, 83 Conn. 634, 638, 639, 78 Atl. 814. The statement of the court of probate that it would approve of a compromise of Beers' claim for \$200 settled nothing, and no legal inference or conclusion can be drawn therefrom. The judgment rendered by the superior court is assailed because it appears by the terms of the compromise that payment is to be made to Mr. Beers in cash, and not in land.

[4] Forbearance or a promise to forbear from doing what one cannot legally do is no consideration for a compromise. The agreement to receive payment in cash, instead of land, was not illegal.

[5] It appears that Mr. Beers had fully performed his undertaking, and was entitled to receive compensation for services actually rendered and disbursements made in Spencer's behalf for a legitimate purpose. The trial court has found that \$700.74 in cash is a reasonable sum to allow for the payment of this claim, and that it was for the best interest of Spencer and his estate that this settlement should be made. It is also shown that this settlement was an attempt to avoid litigation, and that it was made in good faith. The law favors settlements of this character. 1 *Parsons on Contracts* (6th Ed.) p. 438. Courts exist to furnish remedies where they cannot be obtained by peaceable means. The policy of the law is rather to discourage, than to encourage, a resort to litigation.

[6] If a controversy be actual and in good faith, it is a proper subject-matter for a binding contract or settlement. When such a settlement has been made free from fraud, mistake, or undue influence, whereby there is a surrender of a lawful claim in whole or in part upon one side in exchange for something of value upon the other, such an agreement is as binding as any that parties

competent to contract can make. See note 4 to 25 L. R. A. (N. S.) 287, 288, and cases there cited.

The other reasons of appeal which were argued in this court need no further discussion in view of what we have already stated.

There is no error. In this opinion the other Judges concurred.

SALLIES v. JOHNSON et ux.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. FRAUD (§ 12*)—MISREPRESENTATIONS—EXISTING FACTS OR EXPECTATIONS.

To be actionable, a misrepresentation must relate to a past or existing fact; and a promise to do an act in the future cannot as a rule be an actionable fraudulent representation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

2. FRAUD (§ 44*)—ALLEGATIONS OF COMPLAINT—PRESENT INTENTION—"ABOUT TO."

Allegations of the complaint in an action for damages for fraud in selling plaintiff a barber business that representations that defendant would not re-engage in the business in the city, that defendant represented to induce plaintiff to purchase, that he "was about to and would abandon the barber business" in the city, sufficiently alleged a present intention by defendant not to engage in that business, so as to constitute actionable fraud if false; "about to" meaning "on the point of" or "in the act of," and signifying present action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 38; Dec. Dig. § 44.*]

For other definitions, see Words and Phrases, vol. 1, pp. 21-28.]

3. FRAUD (§ 12*)—PROMISES FOR FUTURE.

A false promise to do an act in the future which the promisor has no present intention of doing will support an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

4. EVIDENCE (§ 269*)—DECLARATIONS AND ACTS—INTENT.

One's intention to do an act is a fact admissible in evidence to explain the act, and may be proved by his words or inferred by his conduct.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063-1067; Dec. Dig. § 269.*]

5. FRAUD (§ 4*)—RIGHT OF ACTION—BREACH OF PROMISE.

The breach of a promise made in good faith to perform an act will not support an action for fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2; Dec. Dig. § 4.*]

6. FRAUD (§ 42*)—ACTIONS—ALLEGATIONS—INTENTION NOT TO PERFORM.

While it is necessary to allege a present intention to deceive, in an action of deceit based upon an unfulfilled promise to do a future act, it is sufficient if such present intent may be reasonably inferred from the facts alleged without being expressly alleged.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 39; Dec. Dig. § 42.*]

7. FRAUD (§ 41*)—PLEADING.

Fraud need not be specifically pleaded if the facts alleged authorize an inference of fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

8. FRAUD (§ 42*)—INTENT TO DECEIVE—SUFFICIENCY OF ALLEGATION—"FALSE"—"FALSE REPRESENTATION."

An allegation that the "defendants falsely and fraudulently represented to plaintiff with the intent to deceive him" that one of the defendants was about to abandon his barber business sufficiently alleged a present intent by defendant not to perform their promise existing when it was made; the word "false," when applied to representations inducing an act to another's injury, implying a purpose to deceive, and a "false representation" being an untrue representation willfully made to deceive another to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 39; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2654-2655, 2668-2670; vol. 8, p. 7661.]

9. FRAUD (§ 9*)—"FRAUDULENT REPRESENTATION."

A fraudulent representation is one which is either knowingly untrue or made without belief in its truth, or recklessly made, and in each case made for the purpose of inducing action upon it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-14; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, p. 2961.]

10. FRAUD (§ 1*)—DEFINITION.

Fraud consists in deception effectually practiced in order to induce another to part with property or surrender a legal right.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 4-7; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Milo J. Sallies against Carl A. Johnson and wife. From the judgment for defendants, plaintiff appeals. Reversed.

Talcott H. Russell and Charles T. McClure, for appellant. John Elliott, for appellees.

WHEELER, J. The complaint sets forth these facts:

The defendants owned the equipment, worth not more than \$450, in a barber shop conducted by the defendant Carl A. Johnson at No. 63 Church street, in the city of New Haven, the good will of which was worth more than \$800, and the plaintiff owned the equipment; worth \$300, with the good will worth \$300, of a barber shop conducted by him in Westville in the town of New Haven. The plaintiff possessed no other property, and was dependent entirely upon his earnings as a barber. The good will and business at No. 63 Church street was of no value if the defendant Carl A. Johnson continued to transact a barber business in close proximity. The defendants, knowing these facts, for the purpose of inducing the plain-

tiff to purchase the barber business at No. 63 Church street with its equipment, falsely and fraudulently represented to the plaintiff, with the intent to deceive him, that the said Carl A. Johnson was about to and would abandon the barber business in the city of New Haven, and would no longer transact said business within the limits of said city in consideration that the plaintiff would purchase said property at the price of \$1,300, and transfer his property and good will of his business in Westville to be credited at \$500.

The plaintiff, believing, and induced by, said statements, entered into an agreement by which he agreed to pay defendants \$1,300 for the property and good will of the business No. 63 Church street, and transferred the property and good will of his business in Westville to the defendants to be credited at a value of \$500 on said \$1,300, and agreed to pay the balance in monthly payments of \$25, default in which was to give defendants the election to take possession of said property, and thereupon the interest of the plaintiff in the property ended. The plaintiff took possession of the barber business at No. 63 Church street, and, shortly after the transfer, the defendant Carl A. Johnson, with the consent and approval of the other defendant, opened a barber shop almost directly opposite, and induced nearly all of the customers of plaintiff to refuse to do business with him, and to give their business to said Carl A. Johnson. As a result the good will of his business was destroyed, and he could not meet the installments under his agreement, and the defendants subsequently took possession of the property under the agreement, and the plaintiff lost the business.

The defendants interpret their demurrer to contain two grounds, upon which they now rely:

(1) "The representations alleged are not representations of past or present existing facts, but are mere expressions of intention, or predictions or promises as to future actions or conduct."

(2) "If in this state fraud can be predicated upon promises as to future conduct, the intention at the time the promises are made not to perform them is the gist of the fraud, and must be specifically and directly, and not inferentially, alleged, and the complaint fails to allege this element of the cause of action."

Accepting the defendants' interpretation of their demurrer, we are unable to hold that either of these grounds was well taken.

[1] The defendants correctly state the general rule of law—misrepresentation, to be actionable, must relate to an existing or a past fact, and a promise to do an act in the future cannot be a fraudulent representation, because it cannot be an untrue representation at the time it is made. *Barnes v. Starr*, 64 Conn. 136, 156, 28 Atl. 980.

[2] We think their interpretation of the complaint as comprising promises of future conduct merely is too restrictive, and neither in accord with the true legal construction nor with the popular construction of such allegations of misrepresentations. The representation that Carl A. Johnson "was about to and would abandon the barber business" involves two elements: First, the statement of a present condition "that he was about to abandon"; and, second, a statement as to the future, that he would abandon. In ordinary grammatical construction "about" before an infinitive means, "on the point of" or "in the act of." It signifies present, and not future, action. The words "about to abandon" are synonymous with "intended now to abandon." These words may form the subject of an actionable misrepresentation.

[3] To the general rule of law that misrepresentations must relate to an existing or a past fact there are exceptions, each one growing out of the need of preventing the successful perpetration of fraud. One of the exceptions under our law and one existing in many jurisdictions and denied in more is that the promise to do a future act coupled with a present intention not to fulfill the promise will constitute a fraudulent promise. When one promises another to do something in the future as a consideration or inducement to him to do something, he impliedly asserts a present intent to carry out his promise. *Rogers v. Virginia C. C. Co.*, 149 Fed. 1, 78 C. C. A. 615, 627. A promise to do an act in the future which is the medium of a deception, and which the promisor has no present intention to perform, will support an action of deceit. *Ayres v. French*, 41 Conn. 142, 154; *Dowd v. Tucker*, 41 Conn. 197, 204, 205; *Barnes v. Starr*, 64 Conn. 136, 154, 28 Atl. 980. The intention to deceive is a condition of mind, and, when it exists, is as much of a fact as a condition of the body. That it is more difficult to prove does not change its inherent character. A man's love or hatred of another is a fact expressive of his feeling toward such person. *Vivian's Appeal*, 74 Conn. 257, 261, 50 Atl. 797.

[4] So a man's intention in doing an act is a fact admissible in any action which it helps to explain, to be proved by his words or inferred from his conduct. *Spencer's Appeal*, 77 Conn. 638, 641, 60 Atl. 289; *Dunham v. Cox*, 81 Conn. 268, 272, 70 Atl. 1033. A misstatement of a man's mind is therefore a misstatement of fact. *Bowen, L. J.*, in *Edgington v. Fitzmaurice*, 29 L. R. 483. The existence of the intent not to perform the promise at the time of its making makes the fraud. *Ayres v. French*, 41 Conn. 142, 154.

[5] The breach of an honest promise to perform can never support an action of fraud.

[6] The defendants urge that this exception

has no application to this action, since there is no allegation of a present intention not to perform, and that the promise was used to deceive. An allegation of a present intention to deceive is an essential allegation in an action of deceit based upon an unfulfilled promise to do a future act. But it is not indispensable that this be made by direct allegation of an intention to deceive. No mere form of words is necessary. It is sufficient if from the facts stated in their ordinary acceptation such intent may be reasonably implied or inferred. *Fredericks v. Krender*, 137 App. Div. 325, 327, 121 N. Y. Supp. 1001; *Bank of Montreal v. Thayer* (C. C.) 7 Fed. 622, 625.

[7] Similarly, fraud need not be specifically pleaded. The facts alleged must be such that it will be implied or inferred from them. *Fisk's Appeal*, 81 Conn. 433, 440, 71 Atl. 559; *Gustafson v. Rustemeyer*, 70 Conn. 125, 133, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92.

[8] Is the implication or inference that these defendants did not intend to fulfill their promise at the time of its making reasonably to be made from the facts alleged that "the defendants falsely and fraudulently represented to the plaintiff, with the intent to deceive him," etc.? "False" may mean untrue, or it may mean designedly untrue, implying an intention to deceive. When applied to the representations of one inducing an act to another's injury, it implies a purpose to deceive. *State v. Smith*, 63 Vt. 201, 210, 22 Atl. 604. Webster's New International Dictionary defines "false representation" as "an untrue representation, willfully made to deceive another, to his damage." And this is the approved definition and accords with the common understanding. If "false" stood as the only qualifier of the representations al-

leged to have been made, the words must have been construed to mean intentionally untrue representations designed to deceive. But, when the representations are alleged to be fraudulent as well as false, it is impossible to conceive that they were not made with a fraudulent intent.

[9] Fraudulent representations are those proceeding from or characterized by fraud. Their purpose is to deceive. A fraudulent representation in law is one that is either knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it. *Edgington v. Fitzmaurice*, supra. "After stating what representations were made with sufficient particularity, it is enough to aver that they were wrongful, false, and fraudulent. It is not necessary in such a pleading to define the meaning of these terms; and to say that the representations were made with intent to deceive would add nothing to the allegation that they were falsely and fraudulently made." *Bank of Montreal v. Thayer* (C. C.) 7 Fed. 622, 625. "The term 'fraudulent representations' imports of itself the commission of an active wrong in saying what was said." *Scholfield G. & P. Co. v. Scholfield*, 71 Conn. 1, 16, 40 Atl. 1046, 1050.

[10] "Fraud," says Cooley on Torts, p. 474. "consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed."

We think the complaint sufficiently states that the false and fraudulent representations were made with the intention of deceiving the plaintiff, and that their fraudulent purpose prevailed. The demurrer should have been overruled.

There is error. The other Judges concurred.

RIMMER v. AACHEN & MUNICH FIRE INS. CO.

(Supreme Court of Rhode Island. Jan. 5, 1912.)

EXCEPTIONS, BILL OF (§ 55*)—STATEMENT—ESTABLISHMENT.

Where certain of defendant's exceptions in its bill were not stated clearly and separately as required by statute, plaintiff's motion to dismiss the petition to establish the truth of the exceptions will be granted and his petition denied.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 55.*]

Action by Olive E. Rimmer against the Aachen & Munich Fire Insurance Company. Motion to dismiss defendant's petition to establish exceptions. Denied.

Irving Champlin and James Harris, for plaintiff. C. M. Van Slyck and Frederick A. Jones, for defendant.

PER CURIAM. The defendant's second, third, fourth, and fifth exceptions in its bill of exceptions are not stated clearly and separately as required by the statute. The plaintiff's motion to dismiss the defendant's petition to establish the truth of said exceptions is therefore granted, and the said petition is denied and dismissed.

BODDINGTON et ux. v. WILBUR.

(Supreme Court of Rhode Island. Jan. 5, 1912.)

Appeal from Superior Court, Newport County: Christopher M. Lee, Judge.

Bill by Frederick A. H. Boddington and wife against Charles R. Wilbur. From a decree for defendant, plaintiffs appeal. Affirmed and remanded for further proceedings.

Burdick & MacLeod, for appellants. Washington R. Prescott, for respondent.

PER CURIAM. The defendant in the above cause strongly contends that the evidence to sustain the complainants' claim of *res adjudicata* was not properly before the superior court and cannot be considered by this court because the transcript does not show that the papers in the previous lawsuit between the same parties were actually put in evidence at the trial of the cause in the superior court. We do not find it necessary to pass upon such contention, although it appears from the rescript on file in the cause that the superior court considered such evidence, because we are of the opinion, after careful consideration of the other evidence in the cause, and of the briefs and arguments of counsel, that, without giving any weight whatever to complainants' claim of *res adjudicata*, such other evidence is sufficient to justify the concluding section of the rescript of the superior court, and to support the final decree entered by said court, from which this appeal is taken.

The final decree of the superior court is therefore affirmed, except as to the date at which the same shall take effect, the appeal is dismissed, and the cause is remanded to the superior court, for the purpose of fixing a time when the decree so affirmed shall take effect, and for further proceedings.

CITY OF MONTPELIER v. McMAHON.

(Supreme Court of Vermont. Washington. Dec. 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 654*)—STREETS—PRESCRIPTION.

Proof that for 25 or 30 years some people, in going along N. street in a city, used a sort of path running between certain houses and a row of trees standing along the side of the street, was insufficient to establish a right of the city to use the land on which the path was located for street purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.*]

2. DEDICATION (§§ 20, 35, 38*)—LAND FOR STREET—VALIDITY.

Defendant's grantor agreed with a city street committee to relinquish to the city, for street purposes, a strip of land on the N. street side of his property, whereupon the line of the street was fixed and marked by an iron pipe driven into the ground, the city agreeing to relinquish to defendant's grantor a part of B. street in consideration for the strip released by him. Surveys of the grantor's remaining property and the street were thereafter made in accordance with such change of the street line, and in 1902 the city built a sidewalk the edge of which next to defendant's property extended within two or three inches of the street line so surveyed. Held to show an unequivocal dedication by defendant's grantor of such strip and an acceptance by the city for street purposes which was irrevocable.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30, 69, 75, 77, 78; Dec. Dig. §§ 20, 35, 38.*]

3. EQUITY (§ 395*)—MASTER—JURISDICTION.

Under P. S. 1261, 1262, 1266, regulating the trial of issues before a special master, a master had no jurisdiction to hear or report proceedings in a cause in no way appearing by the files or docket entries in the cause and attempted to be shown by testimony of counsel.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 854-856; Dec. Dig. § 395.*]

4. APPEAL AND ERROR (§ 219*)—APPEAL FROM CHANCERY—SCOPE OF REVIEW.

In a chancery case an objection may be of such a character that the Supreme Court will consider it though made there for the first time, in case the objection could not have been obviated if made below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1315; Dec. Dig. § 219.*]

5. NUISANCE (§ 63*)—"PURPRESTURE"—"PORPRESTURE."

A "purpresture," or more properly speaking "porpresture," exists when anything is unjustly encroached upon, against the King, as in the royal demesnes, or in obstructing public ways, or in turning public waters from their right courses, or when any one has built an edifice in a city on the King's street.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 152; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5867-5868; vol. 8, p. 7776.]

6. MUNICIPAL CORPORATIONS (§ 697*)—OBSTRUCTION OF STREET—JURISDICTION—PURPRESTURES.

Equity has jurisdiction to prevent purprestures which is not supplanted, but rather

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

supplemented, by the statutes prohibiting encroachments on streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

7. NUISANCE (§ 80*)—PURPRESTURES—EQUITY JURISDICTION.

Power of a court of equity in its usual course of procedure to protect by injunction a public right from encroachment in the nature of a purpresture, cannot be defeated by the denial of such public right, the court having full jurisdiction to determine both whether the right exists and whether there is an encroachment or an attempted encroachment thereon.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 192; Dec. Dig. § 80.*]

8. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—ENCROACHMENT.

In a suit by a city to restrain an alleged encroachment on land claimed to be a part of a street, an allegation in defendant's answer denying the orator's title in the land in question was sufficient to raise the question whether the municipality had such an interest in the streets within its territorial limits as to entitle it to sue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1505; Dec. Dig. § 697.*]

9. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—OBSTRUCTION—RIGHT TO SUE.

A city being charged by the state government with the duty of maintaining for public use its streets located within its limits, though it does not own the same, it was a proper complainant in a suit to restrain the obstruction of a street by the construction of a piazza over a part thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1504; Dec. Dig. § 697.*]

10. DEDICATION (§ 43*)—STREETS—EVIDENCE.

In a suit to restrain the construction of a piazza over land claimed to have been dedicated to complainant city for street purposes, evidence of a verbal agreement between the city and defendant's grantor with reference to a surrender of the land in controversy to the city was admissible as bearing on the question of dedication.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 83, 84; Dec. Dig. § 43.*]

Appeal in Chancery, Washington County: Willard W. Miles, Chancellor.

Bill by the City of Montpelier against John McMahon. Decree for complainant, and defendant appeals. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Harry C. Shurtleff, for appellant. Frederick P. Carleton and Fred B. Thomas, for appellee.

HASELTON, J. This is a bill in chancery. The defendant is the owner of land abutting on Northfield street, so called, in the city of Montpelier. The bill alleges, among other things, that the defendant is threatening to build a piazza on a part of the street used for a sidewalk, and that he thereby threatens great injury to the inhabitants of Montpelier

and of the state at large, and that no adequate remedy at law can be had. The bill prays that the defendant be enjoined from so occupying the sidewalk. In his answer the defendant admits his intention to build a piazza on a part of the land used as a sidewalk; but he claims ownership of the land on which he intends to build, and asserts his right to build thereon. The case was referred to a special master, and upon his report a decree was rendered in accordance with the prayer of the bill. The defendant appealed. The property of the defendant on Northfield street consists of lots and houses extending along that street from its intersection with Berlin street; and the question of the location of Northfield street along past the defendant's real estate is the issue, or one of the issues, in this case. In the summer of 1909, the defendant began to build a piazza on the street side of one of the houses mentioned and on land which the city claimed was a portion of Northfield street. The bringing of this bill and the issuance of a temporary injunction followed.

[1] The orator claims that the land in question is a part of the street by dedication, by virtue of a resurvey of the street, and by prescription. The claim of prescription, or adverse use, is based upon the finding that for many years, 25 or 30, some people in going along Northfield street to and from Berlin street used a sort of a path which ran somewhere between the houses above referred to and a row of trees standing along the side of the street. It is so clear that the doctrine of adverse possession or use cannot here be successfully invoked that we do not deem it necessary to discuss the law in that regard nor to go into the details of the evidence relied on under the claim of adverse use.

[2] We consider now the question of dedication. In 1889, one Johannott was the owner of the property in question, and in that year the street committee of the city council met Mr. Johannott on the premises, and an agreement was entered into between them that the city would relinquish to Mr. Johannott a part of Berlin street, and that Mr. Johannott would relinquish to the city, for street purposes, as we must understand, a strip of land on the Northfield street side of his property, and the lines on the Berlin street side and the Northfield street side were then agreed upon, and the corner of the two streets was then fixed, and the next day it was marked by an iron pipe driven into the ground. The strip of land relinquished by Mr. Johannott extended the whole length of the defendant's property on Northfield street. The next year, May 19, 1900, the defendant purchased of Johannott, taking a warranty deed. Prior to giving the deed the grantor employed one Smith, a civil engineer, whose competency was conceded by the defendant, to survey the land. When the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

survey was made, both Mr. Johonnott and the defendant were present. At the suggestion of Johonnott the surveyor took as his starting point the corner agreed upon between him and the city council during the summer before; from thence there was made around the lot a survey which was followed in the description of the deed afterwards given by Johonnott to the defendant. When the deed was given, the grantor told the defendant about the exchange of land agreed upon, as hereinbefore stated, and the defendant then knew how much land was to be given up by the city on the Berlin street side, but it does not appear that he then had information as to where the agreed line on the Northfield street side was further than that the agreed corner was pointed out to him, that he had been present when the survey was made, and that he had the information contained in his deed. As to this survey the master finds that on account of local magnetic attraction the needle of the compass could not be accurately relied upon.

In the following year, 1901, the city council caused to be made what is called a resurvey of Northfield street, and in making such survey it employed the same civil engineer who had surveyed for the defendant's grantor in the year previous. Of this survey the master finds that it was made "in accordance with the agreement made with Mr. Johonnott in 1899," at the time of the exchange of land, and it appears from the report that this survey corresponds substantially with the former. In 1902, the city built along Northfield street adjacent to the defendant's property a plank sidewalk the edge of which, next to the defendant's property, extended to within two or three inches of the street line of the survey last mentioned, which, as the master finds, follows the agreement made between the city and the defendant's grantor at the time of the exchange between them. This sidewalk has remained in the same place from the time of its building until the present, and is the one which the defendant has been enjoined from building a piazza over. So far as the agreement of exchange was for the benefit of Johonnott or his grantee, the defendant, it was also acted upon, for the designated land on Berlin street side was made a part of the lawn of a house on the defendant's property and it was, and is, inclosed as a part of the lawn.

The facts recited show an unequivocal dedication of the land in question on Northfield street for a highway and a like acceptance by the city authorities, and such dedication is irrevocable. *Folsom v. Underhill*, 36 Vt. 580; *Fairfield v. Morey*, 44 Vt. 239. The latter case was that of an exchange between a town and a landowner, quite similar to the exchange here in question, and that case is full authority for the conclusion above reached, and is obviously sound. In view of the result already reached it is unnecessary to consider whether or not there

was any validity in the proceedings taken for a resurvey and relocation of Northfield street.

[3] The defendant's counsel complains of certain proceedings in the cause taken by the court of chancery, or by the chancellor, in no way appearing by the files or docket entries in the cause. With regard to these, counsel testified before the master, subject to the orator's objection, and the proceedings complained of are set out in the master's report. But such matters cannot be so brought before us, for to try, determine, and report upon them is beyond the province of a special master. P. S. 1261, 1262, 1266. The gist of the defendant's complaint in this regard is that he was denied an opportunity to have it determined by a jury in an action at law whether or not the strip of land in question is a part of the highway. In this court the defendant insists that it was his right to have that matter so determined and that it is a matter not properly cognizable in a court of equity, and what he says amounts to a demurrer *ore tenus*.

[4] In chancery cases, an objection may be of such a character that this court will consider it although it is made here for the first time, as where the objection could not have been obviated if it had been made below. *Enright v. Ansden*, 70 Vt. 183, 187, 40 Atl. 37; *Weed v. Hunt*, 76 Vt. 212, 215, 56 Atl. 980. Here, in view of the nature of the question raised, and of the fact that the defendant has been permitted to argue it, we take it under consideration without reference to the proceedings below. The bill in this case charges the defendant with something in the nature of a purpresture, which exists where there is a wrongful appropriation or occupation by one of a highway, or common, or harbor.

[5] In the work upon the *Laws and Customs of England* of which Glanville was without much doubt the author, it is said: "A purpresture, or more properly speaking, a porpresture, is when anything is unjustly encroached upon, against the King, as in the royal demesnes, or in obstructing public ways, or in turning public waters from their right course, or when any one has built an edifice in the city upon the King's street." In the definition of a "purpresture," Glanville is substantially followed by both Coke and Blackstone, and neither of them is more clear, or more exact than is the author of our earliest treatise upon the common law. Glanville, book 9, c. 11 (Beames' translation); Co. Litt. 277b; 4 Bl. Comm. *167.

[6] Now courts of equity have from very early times taken cognizance of purprestures. *Attorney General v. Richards*, 2 Anst. 603, and authorities there cited; *Eden on Injunctions*, 158, 159 (Ed. 1822). Our statutory provisions aimed at the prevention of encroachments upon highways do not supplant this equitable jurisdiction, but supplement it rather. *Bristol v. Palmer*, 83 Vt. 54, 65, 74 Atl. 332, 31 L. R. A. (N. S.) 881.

[7] Moreover, the power of a court of equity in its usual course of procedure to protect a public right from an encroachment in the nature of a purpresture cannot be defeated by the denial of such public right. For a court of equity may determine both whether the right exists and whether there is an encroachment or an attempted encroachment upon it.

[8] In his answer the defendant makes denial of "the title of the orator to the land in question"; and this denial may fairly enough be taken to raise the question of whether a municipality has such an interest in the highways within its territorial limits as to make it a proper complainant in such a case as this.

[9] A municipality does not own the highways within its limits, for highways are public ways; but a municipality is charged by the state government with the duty of maintaining for the public use highways so located. *Slizer v. Hyde Park*, 55 Vt. 481. And the duties and liabilities imposed upon a town or other municipality in respect to highways are such as to make it a proper complainant in equity in respect to obstructions to the highways committed to its charge. *Town of Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571. This matter was alluded to in *Bristol v. Palmer*, 83 Vt. 54, 64, 74 Atl. 332, 31 L. R. A. (N. S.) 881, though there was there no decision upon it, for no question respecting it was there raised. *Town of Burlington v. Schwarzman*, 52 Conn. 181, 52 Am. Rep. 571; *Appeal of Township of North Mannheim (Pa.)* 14 Atl. 137; *Watertown v. Cowen*, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; *County of Stearns v. St. Cloud*, etc., R. Co., 36 Minn. 425, 32 N. W. 91; *Springfield v. Connecticut*, etc., R. Co., 4 Cush. (Mass.) 63; *Council Grove Township v. Bowman*, 76 Kan. 563, 92 Pac. 550; *Sierra County v. Butler*, 136 Cal. 547, 69 Pac. 418.

[10] The defendant filed exceptions to the report, under which he claims that it was error for the master to receive evidence of the verbal agreement between the orator and the defendant's grantor. But on the question of dedication and in connection with the other evidence bearing thereon, such evidence was clearly admissible.

Decree affirmed, and cause remanded.

SEMKIN v. HOLLANDER et al.

(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error based upon the admission of illegal testimony should clearly indicate the testimony complained of and its alleged legal imperfection. An assignment in

general terms that the evidence was admitted "tending to contradict, alter, add to, and vary the contents and force of the written instrument sued on," without indicating the evidence complained of, or the exception relied on, is not sufficient to require its consideration by an appellate court. The rule established in this state is that the appellate court is not required to search for errors not definitely pointed out.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

2. TRIAL (§ 82*)—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY.

An objection to the admission or rejection of evidence must point out the precise point of the objection, and an objection to "the entire line of the testimony," without pointing out to the trial court any reason for the objection, does not state any ground for the setting of an exception requiring consideration on a writ of error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 194-210; Dec. Dig. § 82.*]

3. BROKERS—COMPENSATION.

The case made by the plaintiff on the trial of this cause was sufficient to sustain the cause of action set up in his declaration, and the refusal of a motion for nonsuit made at close of plaintiff's case was not error.

(Additional Syllabus by Editorial Staff.)

4. BROKERS (§ 80*)—ACTIONS FOR COMPENSATION—DEFENSES.

A broker made negotiations for an exchange of property between O. and defendants. O. agreed to pay to the broker and his partner \$4,650 commission when the property was transferred. Defendants refused to execute the contract unless the broker would accept \$1,500 as his share of the commission out of the \$4,650, to be retained by defendants with the consent of O. to pay the commission. The broker finally accepted the written promise of defendants to pay him \$1,500 on the signing of the contract with O. Held that, in an action by the broker to recover the \$1,500, a nonsuit asked on the ground that if the agreement to pay that sum is to be construed in connection with the agreement of the defendants to pay \$4,650 to the broker and his partner, the plaintiff must fail because he has not proved performance of the agreement to pay \$4,650, was properly refused, the nonperformance by defendants of their contract with O. not relieving them from performing their contract with plaintiff.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 100; Dec. Dig. § 80.*]

5. FRAUDS, STATUTE OF (§ 16*)—PROMISE TO PAY DEBT OF ANOTHER.

A broker made negotiations for an exchange of property between O. and defendants. O. agreed to pay to the broker and his partner \$4,650 commission when the property was transferred. Defendants refused to execute the contract unless the broker would accept \$1,500 as his share of the commission out of the \$4,650 to be retained by defendants with the consent of O. to pay the commission. The broker finally accepted the written promise of defendants to pay him \$1,500 on the signing of the contract with O. Held, that such promise was not invalid on the theory that when it was made there was no agreement legally binding defendants to pay O. any money, and that the oral agreement of defendants to pay the broker and his partner \$4,650 was an agree-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment to pay O.'s debt, and within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 22-26; Dec. Dig. § 16.*]

Error to Circuit Court, Essex County.

Action by Isaac Semkin against Adolph Hollander and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Phillip J. Schotland, for plaintiffs in error.
Pitney, Hardin & Skinner, for defendant in error.

BERGEN, J. According to the case made by the plaintiff, the business ingenuity of the defendants developed the following situation: Defendants, desiring to acquire certain real estate owned by Joseph Okin, sent for the plaintiff, who was a real estate broker, and suggested that he open negotiations with Okin, which he did, and when Okin's terms had been obtained the defendants, having ascertained from plaintiff the amount of commissions he would be entitled to from Okin if the sale was consummated; insisted that Benjamin, the son of the defendant Adolph Hollander, be accepted by plaintiff as a partner in the transaction so that the son might be entitled to one-half of the commissions, and the plaintiff submitting to this, procured from Okin a written agreement to pay the plaintiff and Benjamin Hollander as brokers 2½ per cent. commissions on \$200,000, or any lower price satisfactory to him, to be paid on the day of settlement. The negotiations between Okin and the defendants resulted in an agreement for the exchange of properties, and, as reduced to writing, provided that the defendants should satisfy a part of the consideration they were to pay Okin by paying the brokers as commissions \$4,650 on the date of settlement, "being the amount which will become due said agents if this agreement is performed." When the terms of the proposed exchange had been settled, the defendants refused to execute the contract of sale with Okin unless the plaintiff would agree to accept \$1,500 in satisfaction of his interest in the \$4,650 to be retained by defendants, with the consent of Okin, for the purpose of paying the agreed commissions, and plaintiff, fearing to lose all commissions unless he consented, finally agreed, upon condition that the \$1,500 be paid upon the signing of the contract of sale, instead of when the agreement was carried out, and thereupon the following written agreement was executed by the defendants: "The amount that Isaac Semkin is to receive as commissions on the exchange of properties between us and Joseph Okin by virtue of agreement of even date herewith, having been agreed upon at fifteen hundred dollars, we hereby agree to pay said Semkin said sum of fifteen hundred dollars in cash as soon as agreements are signed by all parties

and wives. Harry Hollander. Adolph Hollander." At the same time the plaintiff and Benjamin Hollander executed an agreement releasing Okin and accepting the liability of defendants for payment of the commissions. After these agreements were signed, the contract of exchange was executed by the parties thereto and their wives. Thus all that remained to plaintiff out of the \$4,650, paid by Okin for commissions, was the written promise of defendants to pay him \$1,500 when the contract was signed, the balance of \$3,150 remaining in the hands of the Hollanders, and this action is based on the written promise of defendants to pay the \$1,500. At the close of the plaintiff's case a motion for a nonsuit was made and refused; the plaintiff had judgment for the amount of his claim which this writ of error seeks to reverse.

Three errors are assigned: First, that the trial court admitted oral evidence over the objection of the defendants' counsel, "which evidence tended to contradict, alter, add to, and vary the contents and force of the written instrument sued upon by the plaintiff and annexed to and made a part of the declaration, and offered in evidence by the plaintiff below"; second, that the trial court denied the motion for a nonsuit made at the close of the plaintiff's case; third, that the trial court denied the motion for nonsuit at the close of plaintiff's case after it had been reopened.

[1] The first assignment of error is too broad and indefinite to require its consideration by this court. The evidence complained of as being improperly admitted is in no way indicated, nor does it appear whether the disputed testimony came from one or more witnesses, or which of the numerous exceptions sealed are relied upon to support it. The established rule in this state is that the appellate court is not required to search for errors not definitely pointed out in the assignment. *Donnelly v. State*, 26 N. J. Law, 463-512. In this case the court would be required to examine numerous exceptions in order to ascertain upon which this general assignment is rested.

[2] Nor are the exceptions upon which the plaintiffs in error base their argument under this assignment entitled to any consideration, because they do not point out the particular ground of objection. In the first exception the question was: "Q. What was said?" To this the only objection interposed was: "I object to what was said." This does not point out the definite ground of the objection. It does appear that counsel followed the objection by an interrogation which was not answered, but that did not give a reason or point out to the court why counsel considered the precise question objectionable. The ground of objection was indefinite and ambiguous. In the second exception the ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

jection was: "I want to have it on the record that I object to the entire line of the testimony." It is difficult to conceive of a more indefinite objection or a greater violation of the rule relating to this subject. The trial court and opposing counsel are entitled to have pointed out by counsel the precise point of his objection to the testimony tendered. If, however, we assume that the exceptions were properly taken and sealed, and the assignment sufficiently clear and definite to warrant us in considering the evidence pointed out by counsel on the argument as that to which the exceptions apply, we think the evidence was properly admitted. It was offered and admitted to show the consideration of the writing under which plaintiff claimed to recover, which was that the Hollanders, having agreed to assume Okin's liability, insisted that plaintiff should reduce the commissions to which he was entitled, the whole amount of which they were intending to keep out of the consideration due to Okin, to the sum of \$1,500, payable when contract for the exchange was signed, and threatened if he did not accept that offer they would not sign the contract of sale. There was nothing in this evidence to alter or vary the written contract, its sole purpose and effect being to show the consideration of the agreement sued on. The original contract for commissions was made with Okin, the owner, whose liability the defendants assumed, and, having limited the amount by a contract with plaintiff, it was proper and necessary to show upon what consideration the defendant assumed to satisfy the obligation of Okin to the plaintiff. The second assignment of error has no sealed exception to support it.

[3, 4] The third assignment of error is that which challenges the action of the trial court in refusing the nonsuit after the case had been reopened. The first reason stated in the brief of the plaintiffs in error is that when the agreement to pay the plaintiff was made by the defendants there was no agreement in existence legally binding the defendants to pay any money to Okin; that the oral agreement to pay the plaintiff and Benjamin Hollander \$4,650 out of the purchase money retained on the exchange of the properties was not enforceable because it was plainly an agreement to pay Okin's debt and comes within the statute of frauds.

The difficulty with this proposition is that it does not truly state the conditions existing. The plaintiff had a written contract with Okin to pay commissions upon the happening of a condition, which was that the transaction should be consummated, not by the contract of sale, but by the actual transfer of the property, while the defendants, having agreed upon the terms of a contract with Okin which they presently intended to, and afterwards did, reduce to writing, by which they agreed to liquidate the claim of the plaintiff against Okin, entered into an

agreement with him to pay a part, in satisfaction of his entire claim. Okin would not sign the agreement unless he was relieved from the payment of commissions to the plaintiff, and the defendants would not execute the contract of exchange unless the plaintiff would agree to reduce his claim for commissions, and the execution of each agreement was conditioned upon the execution of the other. If, however, it was simply an agreement to pay Okin's debt, it was in writing and for a good and valuable consideration moving to the promisor. The plaintiffs in error cite *Joslin v. N. J. Car Spring Co.*, 38 N. J. Law, 141, but the brief does not point out in what particular this case sustains the proposition advanced, nor can we, upon examination of the case, discover in it any support of the proposition tendered. The rule which seems to have been adopted in that case is that in cases of simple contracts, if one person makes a promise to another for the benefit of a third, the latter may maintain an action on it, though the consideration does not move from him, but the opinion states that the "case avoids the question which is sometimes raised, where the assumption is by parol, whether as a promise to pay the debt of another, it is not within the statute of frauds, because here the proposal and resolution of acceptance are in writing, and the consideration is fully expressed"—citing *Hetfield v. Dow*, 27 N. J. Law, 440.

In the case under consideration the promise was in writing and there was also a new and distinct consideration for the promise of the defendants moving to them from the plaintiff in the surrender of his right of action against Okin, in order that the defendants might have the benefit of all the money to be retained by them on account of commissions due from Okin to the plaintiff, except the amount which they then agreed to pay him. It would seem that the case cited, if at all applicable, is an authority against, rather than in favor of, the plaintiffs in error. The argument that, when the defendants executed their agreement to pay \$1,500 in settlement of plaintiff's claim for commissions, the contract authorizing defendants to retain \$4,650 from the contract price had not been signed has no force. The three instruments were dated the same day, and were all a part of the same transaction agreed upon by the parties, and mere priority in execution, when all were executed as a part of the joint agreement, did not destroy the legal effect intended, each must be executed to make the others efficient, and all could not be signed by the parties at the same instant. In addition to this the release of Okin did not become binding on the releasors until the consummation of the contract of sale, and the promise of defendants to pay plaintiff the \$1,500 was not enforceable unless the contract of sale was duly executed, and it did not become a binding

contract until after the agreement of sale was completed, the legal sequence being the release of Okin; his contract being that defendants might retain the amount of commissions out of the contract price for the purpose of satisfying the debt from which he had been released, and defendants' contract to pay plaintiff.

[5] The second point urged in support of the nonsuit is, according to the brief of the plaintiffs in error, that "if the agreement to pay \$1,500 is to be construed in connection with the agreement in writing of the defendants to pay \$4,650 to Semkin and Benjamin Hollander then the plaintiff must fail, because he has not proved performance of the agreement to pay \$4,650." A sufficient answer to this is that the defendants had contracted to retain \$4,650 due to Okin under the contract of exchange to be by them paid to the brokers, and the nonperformance by the defendants of their contract with Okin would not relieve them from performing their contract with the plaintiff.

We have examined the other reasons urged in support of the nonsuit, and find nothing in them worthy of further comment.

The judgment under review is affirmed.

WOOD et al. v. PRICE.

(Court of Errors and Appeals of New Jersey.
Nov. 28, 1911.)

(Syllabus by the Court.)

1. LIS PENDENS (§ 2*)—STATUTORY PROVISION—PURPOSE.

"An act respecting notice of lis pendens, Revision of 1902" (P. L. 1902, p. 477), took origin in order to eradicate the injustice of the rule of the old law, which was that, during the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. LIS PENDENS (§ 13*)—STATUTORY NOTICE—FAILURE TO FILE—EFFECT.

The omission to file and record the statutory notice under the act of 1902 (P. L. 1902, p. 477) left the parties free to deal with the subject-matter of the litigation untrammelled, and one acquiring an interest therein pendente lite is unaffected by the litigation provided his acquisition was made bona fide and without notice of equities.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 23; Dec. Dig. § 13.*]

3. LIS PENDENS (§ 22*)—NOTICE OF LITIGATION—EFFECT.

This statute (P. L. 1902, p. 477) does not deal with the rights of persons who had notice, either actual or constructive, of equities which would bind or charge their rights.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 31, 34-37; Dec. Dig. § 22.*]

4. VENDOR AND PURCHASER (§ 232*)—RIGHTS OF PURCHASERS—NOTICE—POSSESSION.

Possession of real estate which is actual, open, and visible occupation, inconsistent with the title of the apparent owner by the record

and not equivocal, occasional, or for a temporary or special purpose, is constructive notice to all the world of the rights of the party in possession.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

5. VENDOR AND PURCHASER (§ 232*)—RIGHTS OF PURCHASERS—NOTICE—POSSESSION.

This rule also includes those equities of one who occupies as tenant, that are connected with the tenancy, as well as interests under collateral agreements, as a contract to convey the land, or to renew the lease.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

6. VENDOR AND PURCHASER (§ 232*)—RIGHTS OF PURCHASERS—NOTICE—POSSESSION.

The possession of premises by a tenant is constructive notice, not only of such tenant's rights and equities, but as well notice of those of the landlord.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

7. SEQUESTRATION (§ 13*)—INDORSEMENT OF WRIT—EFFECT OF FAILURE TO INDORSE.

The provision for the indorsement of a writ of sequestration contained in the act of 1907 (P. L. 1907, p. 482, § 26) is for the benefit of the person against whom the writ is directed, and if it lack such indorsement, until application be made by such person to set it aside, it is not wholly void, but merely voidable.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 17-20; Dec. Dig. § 13.*]

Appeal from Court of Chancery.

Bill in equity by Caroline Wood, as guardian, to foreclose a mortgage against Robert A. Price and others. From a decree (81 Atl. 1093) denying the petition of Jacob C. Price to have surplus money paid to him as purchaser of the mortgaged lands from Robert A. Price, in preference to the claim of Alice C. Price, wife of Robert A. Price, based upon her inchoate right of dower, and also and especially upon sequestration proceedings taken by her in a suit for maintenance against Robert A. Price, the petitioner Jacob C. Price, appeals. Affirmed.

See, also, 81 Atl. 664.

Veeland, King, Wilson & Lindabury, for appellant. Charlton A. Reed, for respondent Alice Price.

VOORHEES, J. The opinion written for the Court of Chancery by the learned Chancellor has the approval of this court, and but for the stress in argument and in the briefs filed on appeal upon points which were not particularly treated in it, it would be quite unnecessary to add in any way to the careful exposition of the principles therein set forth. A restatement of the facts is, of course, uncalled for.

The argument is made that a suit for alimony is a personal action and results in a personal decree for the payment of money; therefore, to sustain it, service of process upon the defendant within the territorial limits of the state is requisite to give the courts of such state jurisdiction to render

such judgment. *Elmendorf v. Elmendorf*, 58 N. J. Eq. 113, 44 Atl. 164; *Hervey v. Hervey*, 56 N. J. Eq. 424, 39 Atl. 762. It is also further contended that the employment of the writ of sequestration in order to compel an appearance, pursuant to section 26 of the divorce act (P. L. 1907, p. 482), at once ipso facto, renders the suit a proceeding in rem, or quasi in rem. This was the view entertained by the Court of Chancery.

[1] The defendant, however, further argues from this premise that the suit, having thus become an action in rem, the land being the res which is proceeded against, the suit, from the time of issuing the writ of sequestration, was thereby transformed into a "suit relating to or affecting the possession of or title to lands or real estate," and so falls directly within the purview of "An act respecting notice of lis pendens (Revision of 1902)" (P. L. 1902, p. 477), which act provides that "neither the issuing of a * * * subpoena or other process or writ nor the filing of a * * * bill * * * nor any proceedings had or to be had thereon * * * shall be deemed or taken to be constructive notice to any bona fide purchaser * * * of any lands or real estate to be affected thereby until the complainant * * * shall have first filed * * * a written notice of the pendency of such suit."

Conceding, for argument's sake, the correctness of the reasoning, and that the action, by the employment of the writ of sequestration and the filing of the preliminary petition for it, has been transformed from an action in personam into one in rem, as distinguished from a personal action, commenced by subpoena, but wherein sequestration had been resorted to merely by way of mesne process, for some incidental purpose, the fallacy of the proposition lies in the misconception of the general doctrine of lis pendens, and of the distinction existing between that doctrine and the doctrine of notice. Our statute, above cited, while it uses the words hereinbefore quoted, as to "constructive notice," yet a consideration of the purposes for which it was enacted will demonstrate that it took origin in order to eradicate the injustice of the old law.

Although many judicial deliverances, as well as text-writers, have stated that the doctrine of lis pendens is referable to the doctrine of notice, that view has by the best authority been denied, and as stated by Prof. Pomeroy, in his *Equity Jurisprudence*, § 633, the rule is "during the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent." In this state, this view has been adopted. Vice Chancellor Pitney, in *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28, examined and collated many authorities on that subject, and recognizes the rule above set forth, and continuing refers to the reason which led to

the adoption of the statutory notice of lis pendens in the following language: "The manifest hardship of applying this necessary maxim in cases of conveyances in good faith to parties without notice led to a statutory provision for the public registry of a notice." While this case was formally overruled (55 N. J. Eq. 593, 39 Atl. 1114), yet not upon this point, and the doctrines enunciated by the learned Vice Chancellor have not been by it at all repudiated. *McMichael v. Webster*, 57 N. J. Eq. 295, at page 300. 41 Atl. 714, 73 Am. St. Rep. 630, sets forth the reasons for the reversal. Indeed, this court, in *White v. White*, 61 N. J. Eq. 629, 47 Atl. 628, refers approvingly to the case. So that, what our statute really did, not only in effect, but in words, for it is limited in its scope to any bona fide purchaser or mortgagee, etc., was to abrogate the rule that parties to a litigation could not alienate the property in dispute as against the rights of the opposing parties to such suit.

[2] It made the recording of such notice necessary in order to preserve the former effect of the litigation. So that the result of omitting to file and record the statutory notice under the act of 1902 left the parties free to deal with the subject-matter of the litigation untrammelled, and one acquiring an interest therein pendente lite is unaffected by it, provided his acquisition was made bona fide and without notice of equities.

[3] It will thus be clear that the statute did not at all deal with the rights of persons who had notice, either actual or constructive, of equities which would bind or charge their rights. The old rules, under which the litigation itself was made to limit the rights of parties acquiring interests in the subject-matter were changed by the statute above cited, unless the statutory notice was recorded. Having now disposed of the effect of the lis pendens act, and shown that it does not apply to persons who do not acquire interests in the subject-matter bona fide, we must look to the situation of the parties and discover whether there was notice, either actual or constructive, to the purchaser of the property.

[4] Jacob C. Price had purchased the premises at the foreclosure sale, on October 8, 1908. The equity of redemption had been conveyed to him by the mortgagor, his brother, in August previous, pending the foreclosure suit. Before that, the writ of sequestration had been issued and served. Now Dr. Price took the deed without the signature of the wife, whom he knew to be entitled to dower, subject to payment of the mortgage. He was, therefore, put upon inquiry as to the rights of the wife, at least, so far as her strict dower interest was concerned. He was also put upon inquiry as to the lien of the writ of sequestration, by reason of the open, notorious and exclusive possession of the tenant of the property,

and it is conceded that so far as the tenant's rights were concerned, he was chargeable with notice of whatever rights the tenant had to remain in the property, and which the tenant could enforce against it. All authorities are agreed that the general rule is that possession of real estate which is actual, open and visible occupation, inconsistent with the title of the apparent owner by the record and not equivocal, occasional, or for a temporary or special purpose, is constructive notice to all the world of the rights of the party in possession.

[6] This agreement of the authorities also extends to include those equities of one who occupies as tenant that are connected with the tenancy, as the contents of and the covenants contained in the lease, and as well to interests under collateral agreements, as a contract to convey the land, or to renew the lease, etc. *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Daniels v. Davison*, 16 Ves. 249; *Allen v. Anthony*, 1 Mer. 282; *Barnhart v. Greenhields*, 9 Moore, P. C. C. 18; *Le Neve v. Le Neve*, 2 Leading Cases in Eq. 187.

In the Court of Chancery, Chancellor Runyon in *Havens v. Bliss*, 26 N. J. Eq. 363, says: "If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser." Now, it is the duty of a purchaser to inquire of the person in possession of the premises and ascertain the rights under which he holds, and if this duty of inquiry be disregarded, the purchaser is chargeable with notice of such facts as the inquiry, if it had been in fact made, would have revealed. 2 Leading Cases in Eq. p. 188; *Holmes v. Stout*, 10 N. J. Eq. 419, 426; *Havens v. Bliss*, supra; *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209.

[8] Where the possession is that of a tenant, the authorities are conflicting as to the extent of the notice flowing from such occupancy. The English rule is that "the occupation of land by a tenant affects a purchaser of the land with constructive notice of all that tenant's rights, but not with notice of his lessor's title or rights." *Hunt v. Luck*, 1902, 1 Ch. 428, where the English cases are reviewed. Under this authority, a purchaser is charged with notice of those rights which a tenant might enforce, but not with constructive notice of the rights of some other person to whom the tenant pays rent. This rule in some of the American states has been followed, but, Prof. Pomeroy in his *Equity Jurisprudence* says: "Another and more numerous group of decisions by the courts of various states hold that a purchaser, by means of a lessee's possession, is put upon inquiry respecting all the rights and interests under which the tenant holds, and which affect the property, and is therefore charged with constructive notice of the lessor's title and estate." He concludes that

the latter rule may be regarded as the American doctrine. Section 625, where the author has collected the cases. See, also, sections 615, 616, 618. This subject does not seem to have been passed upon by this court. There are, however, in the Court of Chancery, cases which approach the question.

In *Havens v. Bliss*, 26 N. J. Eq. 363, Runyon, Chancellor, writing the opinion says: "It is true there are to be found cases in this country in which the notice which possession gives is confined to a known title under which the possessor holds, but the rule is, and I see nothing to take this case out of its operation, that the occupancy of land is equivalent to notice, to all persons dealing with the title of the claim of the occupant. If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser. 2 Sugd. on Vend. (11th Am. Ed.) 543; *Daniels v. Davison*, 16 Vesey, 254. In *Baldwin v. Johnson*, 1 N. J. Eq. 441, the language of Lord Rosslyn, in *Taylor v. Stibbert*, 2 Ves. Jr. 440, is quoted with approbation, and applied to a case where a mortgagee had taken her mortgage on land, the legal title to which was in the mortgagor, but was subject to a trust in favor of another person, of which the mortgagee had no knowledge or information. The tenants of the mortgagor were in actual possession of the property. The court held her bound to inquire of them as to the title. The language of Lord Rosslyn above referred to is: 'It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time that there were interests as to the extent and terms of which it was his duty to inquire.'" The same learned Chancellor in *Wanner v. Sisson*, 29 N. J. Eq. 141, denies the character of a bona fide purchaser to one who had notice of the claim of persons in possession, and says: "If they were tenants or had notice of the claims of those under whom they claim, the rule is that the occupancy of land is equivalent to notice to all persons dealing with the title of the claim of the occupant. If a tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title."

In *Essex County Nat. Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 209, Pitney, V. C., declared "that the effect of the constructive notice due to possession is a notice of everything which a party interested in the premises would get by inquiring of the party in possession. In other words, the actual possession of the premises puts any person having a claim or seeking to acquire title thereto, to an inquiry of such person as to what his title actually is."

It seems that to give to a tenant's possession, the effect of notice of his landlord's title is the more reasonable conclusion. The possession of a tenant is the possession of the landlord. The origin and reason for the contrary doctrine are not made clear in the English cases, and although the learned judge who delivered the opinion in *Barnhart v. Greenshields*, supra, reviews the cases, not one of them referred to discusses this exact question, and his examination of them concludes: "There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject is the other way." Now an inquiry of a tenant of necessity would result in being informed of the landlord under whom the tenant occupied, and whose possession it was that the tenant held, and through whom the latter must assert whatever right he claims to retain the premises. To limit, therefore, the effectiveness of the inquiry merely to the rights of the tenant, is to deprive the notice of practical and beneficial usefulness to a purchaser, a result which must have been originally intended in the beneficent design for his protection, at the foundation of the doctrine. As Chief Justice Field of California says, in the well-considered case of *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765, in discussing the subject: "It is not easy to give to the fact of possession, any influence as notice, without making it notice of all such matters as a prudent man desirous of purchasing the property would naturally inquire about respecting the title. Ascertaining that the possession of the occupant is that of a tenant, he would, in the ordinary course of things, proceed to inquire as to the title of the landlord."

Dickey v. Lyon, 19 Iowa, 544, contains an instructive examination of the question, and concludes: "It seems to follow, therefore, that if the possession of a tenant is notice of his lease and its contents, as the authorities uniformly concede, it must necessarily become notice of the fact that the landlord claims title and holds possession adverse to the proposed purchaser's vendor, and, having notice of such fact, he cannot become a good-faith purchaser of the estate." Another case which deals with the subject, exhaustively and satisfactorily, is *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1, in which the same result is attained. The text-books generally also regard this as the more logical and generally accepted conclusion (Wade on Notice [2d Ed.] § 286; Fetter on Equity, p. 85; Eaton, Equity, p. 141), and it is so held in the greater number of the states of the Union. They have been collected in 23 Am. & Eng. Ency. of Law, p. 501. and also

in the notes to *Crooks v. Jenkins*, 124 Iowa, 317, as reprinted in 104 Am. St. Rep. at page 348. We conclude, therefore, that the possession of premises by a tenant is constructive notice, not only of such tenant's rights and equities, but as well notice of those of the landlord.

From an examination of the case, it appears that *Guerin*, the tenant, originally had a lease made in February, 1904, and duly recorded, for a term of two years, with a privilege of renewal for three additional years, and an option to purchase at any time during the demised term, and that he was in the open and actual possession of the premises. The fact that the term had expired at the time of the transfer to Jacob C. Price takes the case out of the rule that there is no obligation to inquire when the possession is not inconsistent with the record title, a question alluded to in *Gardom v. Chester*, 60 N. J. Eq. 238, 245, 46 Atl. 602. The tenant's occupation was not then necessarily under this lease as disclosed by the record. It was, at the best, uncertain. Besides, the character of the tenant's occupation had changed, for he had, before the transfer of title, attorned to the sheriff under the writ of sequestration, and of such change, as we have before pointed out, the purchaser had constructive notice. In executing the writ, *Guerin* was notified by the sheriff in writing, dated August 5, 1908, to attorn and pay to the sheriff arrears of rents and rents growing due for the property, so that the tenant—for he paid the sheriff afterwards on the 24th of August, \$156.50, as rent—became a tenant of the sheriff by virtue of the command of the writ.

The books say that a sequestration out of chancery is more effectual than an execution at law, and binds from the time of awarding the commission and not from the time of executing it. 1 Vern. 58. Here execution of the writ antedated the deed. It is therefore unnecessary for us to hold that sequestration binds before its execution. The sequestrators, formerly seven in number, were officers of the court, and to act from time to time as the court should direct and account to the court for moneys received. Motion might be made and an order obtained for tenants to attorn and pay their rents to the sequestrators or for a sale and disposition of the goods of the party, and, when the sequestrator is in possession, he cannot be disturbed without leave of the court. 9 Vesey, 336. Under the authority of the writ, the sequestrators may enter into possession of real estate in the occupation of the disobedient person, and may also enter into the receipt of the rents of such estates as are in occupation of tenants. Upon entering into the real estate, they should serve the tenants in possession with a notice to attorn to pay their rents to them. 3 Vesey, 22 and 24. If the tenants refuse to attorn, the

proper course is to obtain upon notice to the tenants, an order to attorn and pay the rents. Jacobs, Law Dictionary, vol. 6, tit. Sequestration; 8 Bacon, Abdg. tit. Sequestration; 2 Dan. Chany. 1054 et seq. The petitioner's duty was to make inquiry of the tenant, and therein he failed. He is therefore chargeable with notice of the facts which he would have learned had he pursued such inquiry, not only as to the tenant's title, but as to all the facts and circumstances which the tenant knew concerning the title, and specially concerning the right in which the person in possession was occupying the premises, and that would have led to notice of the execution of the writ, the attornment of the tenant to the sheriff, and that the property was then in custodia legis.

[7] It is argued that the book does not show that the writ was indorsed, according to the statute. To make this available, it should clearly appear that such was the fact. The point does not seem to have been raised in the court below and is not mentioned in the opinion of the Chancellor. If, however, it be conceded that the writ lack such indorsement, yet it will be noted that no application was made by Robert A. Price, against whom it issued, to set it aside for that reason, and it may be that, if such application had been made by him, under the rule laid down in *Jernee v. Jernee*, 54 N. J. Eq. 637, 35 Atl. 458, the relief would have been granted, but until such application was made, the writ was not wholly void against him, but at the most, merely voidable.

The provision for the indorsement was intended to operate for the benefit of the person against whom the writ was directed. The process did not deprive the defendant of his liberty as was the fact in the case just cited. The defendant, instead of appearing to the suit, has rather defied the process of the court, has not appeared, has not claimed the benefit that the indorsement of the writ would have given him, and cannot, therefore, claim that he has been harmed.

If the writ was voidable in his favor, it is not perceived how Jacob C. Price, the petitioner, can reap any benefit from that fact until it has been vacated.

The decree of the Chancellor will be affirmed.

WALLING v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 337*)—OPERATION—ACCIDENTS AT CROSSINGS—FRIGHTENING ANIMALS.

It appeared in this case that, by reason of trees and shrubbery growing along the line of

the defendant's railroad, the plaintiff, who was driving a horse and wagon along the road toward the railroad crossing, had his view obstructed for a long distance which prevented him from seeing the approach of a locomotive engine to the railroad crossing until he attained a point in the road within 20 feet of the crossing; and it was then for the first time that he was enabled to see a locomotive engine approaching the crossing rapidly, within 120 feet of it. Neither of the statutory signals had been previously given to give warning of its approach to the crossing, and none was given until the engine was close to the crossing, when it emitted a loud blast from its whistle, which frightened the horse and caused him to become unmanageable and to run into the locomotive engine, whereby the plaintiff was injured. *Held*, that the proximate cause of the injury was the original wrong of the defendant in failing to give either of the statutory signals in time to warn the plaintiff from entering into a place of danger, and that it was immaterial that the immediate cause of frightening the horse and causing him to run into the locomotive engine was the lawful blowing of the whistle for the next crossing; the injury to the plaintiff being attributable to the original unlawful act of the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. § 337.*]

Gummere, C. J., and Swayze and Voorhees, JJ., dissenting.

Error to Supreme Court.

Action by Thomas H. Walling against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo awarded.

Aaron E. Johnston, for plaintiff in error. George Holmes, William A. Barkalow, and Durand, Ivins & Carton, for defendant in error.

KALISCH, J. The writ of error in this case brings under review the propriety of a nonsuit ordered in a Supreme Court issue tried in the Monmouth circuit. This was a second trial of the cause. At a former trial, upon the same evidence as presented by the plaintiff at the second trial, the case was submitted to the jury and a verdict returned in favor of the plaintiff. This verdict upon the defendant's rule to show cause was subsequently set aside by the Supreme Court at the June term, 1909. Prior to the second trial, the plaintiff's declaration was amended to contain an averment that the defendant company, by its servants, negligently failed to give the statutory signals, and because of such failure, etc., the plaintiff, who was driving a horse and wagon and approaching the railroad crossing where the collision took place, and whose view of the approaching train was obstructed, and who had no notice of the approach of the train to the crossing, drove the horse and wagon close to said crossing in a place or zone of danger, from which he was unable to extricate himself, and while said horse was in said position of danger the defendant, by its servants, carelessly, etc., blew the whistle of said engine close to the said horse and to said crossing,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thereby frightening said horse so that he became unmanageable, and the plaintiff could not hold or control him, and said horse plunged forward and into said locomotive engine, whereby the plaintiff was injured, etc.

The testimony adduced by the plaintiff tended to establish these facts, as alleged in the declaration, and it also appeared thereby that the plaintiff for a long distance on the road had his view shut off by trees and shrubbery in the direction from which the locomotive engine and train were approaching the crossing, and that the first opportunity of any view at all afforded to the plaintiff was when he was within 20 feet of the railroad crossing and in a place of danger, and that then it was that he was first enabled to see the locomotive engine approaching, and that at that time the engine was about 120 feet away from the crossing. The plaintiff's testimony tended, also, to establish that he had cautiously proceeded along the road, and had been looking and listening for signals, and that he had neither seen nor heard any, until he reached within 20 feet of the crossing, when the presence of the locomotive engine and train first became visible to him.

In granting the nonsuit the trial judge said: "There was, however, no proof that the blowing of the whistle was negligence. The statute requires it to be blown or a bell rung when a train approaches a crossing and arrives at a certain distance from it. It was not shown that, when the train was at this crossing, another was not so near as to require the statutory signal to be given. It was not per se carelessness to blow the whistle, unless the plaintiff was in such a position as to charge the engineer with knowledge of his presence. Malice or wantonness attributable to the defendants is not shown." This was the exact language used by the Supreme Court in setting aside the verdict obtained in the first trial. This was an erroneous view of the law as applied to the facts of the plaintiff's case. The jury might have reasonably found that the failure on the part of the defendant to give either of the statutory signals to warn travelers of the approach of the train to the crossing where the collision occurred was the negligence on which the action was based. And the jury might also have properly found that the blowing of the whistle near or at the crossing (whether negligent or not) where the collision took place was a mere contributory cause. And the jury might also have reasonably found that if the whistle had been blown 900 feet from the crossing as required by law, and the whistle blown or the bell sounded continuously thereafter, it would have been a warning to the plaintiff that would have enabled him to avoid driving too close to the crossing and into a place of danger. But, under the circumstances, as developed here, the failure to give either of the statutory signals lulled the plaintiff into

a sense of security, and lured him into a place of danger where he would not have been, if he had had timely warning. The plaintiff occupying a place of danger when the locomotive engine reached near the crossing and gave the blasts of the whistle which frightened the horse was due to the failure of the defendant to give either of the statutory signals in time.

The defendant attempts to excuse the original wrongful act by the plea that the statute imposed a duty upon the engineer either to blow a whistle or ring a bell 900 feet from a crossing, and to continue to give either of those statutory signals until the crossing has been passed, and that, therefore, when the whistle was blown near the crossing which startled the horse and caused the collision, the engineer was in the performance of a statutory duty to give a signal for the next crossing, and that, unless there was proof tending to show that this duty was negligently performed, the plaintiff's case must fail. But this position assumed by the defendant, in view of the circumstances of this case, is manifestly unsound. To give to the defendant's contention the effect asked for would be to release a wrongdoer from the consequences of his own wrong. It is wholly immaterial that the act or acts intervening between the original wrongful act and the act which injured the plaintiff was or were lawful, because it was the force of the defendant's original wrong which placed the plaintiff in a position of peril. And the force of the defendant's original wrongful act continued so long as the plaintiff occupied a position of danger induced by such wrongful act. It is the negligent act in its causal relation to the consequent injury that determines the proximate cause. The principle here stated is well illustrated by the famous squib case, *Scott v. Shepard*, 2 Wm. Black Rep. 892. Although it appeared in that case that after the original wrongdoer had thrown the squib, the lawful acts of two individuals had intervened before the plaintiff was struck by the squib, and that it was the lawful act of the last thrower of the squib, which injured the plaintiff, *De Grey, C. J.*, held that, the force of the original act of the wrongdoer having resulted in an injury to the plaintiff, he must be held responsible for the consequences which ensued.

As the plaintiff's testimony in this case tended to prove that the defendant had failed to give either of the statutory signals, and that the plaintiff had no notice of the approach of the locomotive engine and train until he was within 20 feet of the railroad crossing and in a place of peril, when the horse became frightened and unmanageable by the blasts from the whistle of the engine, and plunged into it, injuring the plaintiff, there was a case established for a jury to pass upon, and the action of the trial court in nonsuiting the plaintiff was error, requiring a reversal of the judgment.

The judgment of the Supreme Court will therefore be reversed, and a venire de novo awarded.

GUMMERE, C. J., and SWAYZE and VOORHEES, JJ., dissent.

KEOUGH v. CENTRAL R. CO. OF NEW JERSEY et al.
(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

Error to Supreme Court.
Action by John W. Keough against the Central Railroad Company of New Jersey and others. Judgment for defendants, and plaintiff brings error. Reversed.

Aaron E. Johnston, for plaintiff in error. George Holmes, William A. Barkalow, and Durand, Ivins & Carton, for defendants in error.

PER CURIAM. The action in this case was for damages sustained by the plaintiff to his property, a horse and wagon, and was founded upon the same state of facts as was disclosed in case 8 (No. 85), Walling v. Central R. Co. of New Jersey, 81 Atl. 987, decided at the present term. For the reasons stated in the opinion in that case, the judgment will be reversed, and a writ venire de novo awarded.

GUMMERE, C. J., and SWAYZE and VOORHEES, JJ., dissent.

NEW JERSEY & H. R. RY. & FERRY CO. v. AMERICAN ELECTRIC WORKS.
(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 51*)—CONSOLIDATION—PETITION BY DISSIDENTING STOCKHOLDER—SUFFICIENCY.

Proceedings for a consolidation of traction companies having been taken pursuant to section 18, etc., of the traction act of March 14, 1893, under which said companies were organized (P. L. p. 315; 3 Gen. St. p. 3235, § 137), and a dissenting stockholder having applied to the circuit court of the county pursuant to section 23 for the appointment of commissioners to appraise the market value of his stock, etc., held, that section 23 provides for a proceeding that is voluntary as between the parties, and at the same time highly beneficial; that the section ought to be liberally construed in aid of the proposed remedy; and that the procedure should not be hampered by technical conditions that are not expressed in the language of the statute.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 51.*]

(Additional Syllabus by Editorial Staff.)

2. JUDGES (§ 29*)—ABSENCE FROM CIRCUIT—AUTHORITY OF SUPREME COURT JUSTICES.

Where the justice of the Supreme Court assigned to a certain circuit, and the circuit court judge likewise assigned to that circuit, were absent from the state, any justice of the Supreme Court could discharge the duties of the judge of such circuit under act March 23, 1900 (P. L. pp. 351, 355) §§ 14, 28.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-152; Dec. Dig. § 29.*]

3. STREET RAILROADS (§ 51*)—CONSOLIDATION—ACTION BY DISSIDENTING STOCKHOLDER—SUFFICIENCY OF PETITION.

An order appointing appraisers on petition of a dissenting stockholder on consolidation of traction companies, which requires them to appraise the full market value of the stock owned by the petitioner, and to do whatever else the appraisers are by law, under the statute in such cases made and provided, authorized to do, is sufficiently specific, when read in connection with the petition and the consolidation agreement referred to in the petition, to show that the statute referred to is the traction act of March 14, 1893 (P. L. p. 302).

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 51.*]

Error to Supreme Court.

Action by the New Jersey & Hudson River Railway & Ferry Company against the American Electric Works. Judgment for defendant (78 Atl. 670), and plaintiff brings error. Affirmed.

Wendell J. Wright, for plaintiff in error. Arthur F. Egner and McCarter & English, for defendant in error.

PITNEY, Ch. Prior to the consolidation presently to be mentioned, the Hudson River Traction Company and the New Jersey & Hudson River Railway & Ferry Company were, respectively, corporations organized under the so-called "Traction Act" of 1893, being chapter 172 of the laws of that year, and found in P. L. 1893, p. 302 (3 Gen. St. p. 3235, § 120). That act, by its eighteenth and succeeding sections, authorizes a consolidation of the stock, property, franchises, and railways of corporations created under the act, and prescribes the steps to be taken in order to bring about such consolidation. Section 23 provides, in substance, that any stockholder of one of the constituent companies who shall refuse to convert his stock into the stock of the consolidated company may within 30 days after the adoption of the consolidation agreement by the stockholders apply by petition to the circuit court of the county in which the chief office of said company may be kept, or to a judge of said court in vacation, on reasonable notice to said company, "to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by such proposed consolidation, and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive, and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof without regard to any depreciation or appreciation in consequence of the said consolidation, and the said company may at its election either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined," and, upon the payment of the value of the stock, the dissenting stockholder is to transfer his stock to the company; and in case

the value of the stock is not paid within 30 days from the filing of the award and confirmation thereof by the court, and notice to the company, he is to have judgment against the company for the amount of the damages so found and confirmed, to be collected like other judgments.

Under this legislative authority the two corporations above mentioned on February 25, 1910, made an agreement of consolidation, taking the name of the New Jersey & Hudson River Railway & Ferry Company as the name of the consolidated company, and established its principal office in the county of Bergen. In the consolidation agreement it was recited that the consolidation was made under and in pursuance of the provisions of chapter 172 of the Laws of 1893 (reciting also the title of the act).

The American Electrical Works, now defendant in error, which was and is a stockholder of the Hudson River Traction Company, dissented from the consolidation and refused to convert its stock, and within the 30 days presented to his honor, the Chief Justice, a petition, addressed to the Bergen county circuit court, in which, after setting forth the making of the consolidation agreement, and averring that the petitioner was unwilling to convert its stock, the prayer was that the court would, "in pursuance of the statute in such case made and provided, upon reasonable notice to the said New Jersey & Hudson River Railway & Ferry Company prescribed by this court, appoint three disinterested appraisers to appraise the full market value of the stock owned by your petitioner, without regard to any depreciation or appreciation thereof in consequence of the said consolidation, and to report thereon to this court together with their award, and that your petitioner may have such further relief in the premises as may be just and the nature of the case in accordance with the statute in such case made and provided may require." The Chief Justice, acting as a judge of the Bergen circuit court, made an order appointing a time and place when and where that court would proceed to hear the application and proceed thereon as the law might require, and ordered that notice of the application and of the time and place fixed for the hearing thereof be given to the said New Jersey & Hudson River Railway & Ferry Company. At the time and place specified, the circuit court proceeded to make an order designating three disinterested persons "to appraise the full market value of the stock owned by said petitioner in Hudson River Traction Company without regard to any depreciation or appreciation thereof in consequence of the consolidation, and to do whatever else the said appraisers are by law in accordance with the statute in such case made and required (sic), authorized, or required to do in the premises, and to make such decision and award as to them shall appear just and proper, and to report thereon to this court together with their award."

This order was brought before the Supreme Court by certiorari, and was there attacked upon the ground, among others, that the petition and the order appointing appraisers did not conform to the provisions of section 23 of the traction act, in that they failed to provide for an estimation of the damage done to the stockholder by the proposed consolidation, as distinguished from an appraisal of his stock, with the result (as claimed) that the consolidated company would be deprived of its option to either pay the amount of the latter appraisal and take the stock, or to pay the damages and leave the stockholder in possession of his stock. The Supreme Court, deeming (or at least assuming for the purposes of the decision) that the criticism thus made upon the petition and order was well founded, and entertaining the view that it was not properly the subject of amendment in the circuit court, held that the stockholder could, by a voluntary stipulation or declaration on its part, afford full protection to the consolidated company by filing in the cause and delivering to the prosecutor a stipulation that its petition and the order of the circuit court obtained upon it, and all proceedings had or to be had thereunder, should be conclusively taken as based upon section 23 of chapter 172 of the Laws of 1893. Such a stipulation having been filed and served, and the costs of the prosecutor having been tendered, the Supreme Court made an order affirming the proceedings of the Bergen county circuit court. This judgment of affirmance is now before us for review.

[2] We may as well dispose first of an objection that seems to have been taken by the plaintiff in error in the Supreme Court, and is renewed here, but which is not referred to in the opinion below. This point is that it was improper to present the petition to the Chief Justice, since he was not the judge of the Bergen circuit court. But it appears by the agreed state of facts that at the time the petition was presented, and from thence until the expiration of the 30 days limited by the statute for its presentation, both Justice Parker, of the Supreme Court, he being the justice assigned to hold the Bergen circuit, and also Circuit Court Judge Black, likewise assigned to that circuit, were absent from the state. The authority of any justice of the Supreme Court to discharge the duties of judge of the Bergen circuit in such a juncture is clear from the language of the act relative to the Supreme and circuit courts. P. L. 1900, pp. 351, 355, §§ 14, 28.

It is further objected that the order made by the Chief Justice ought to have set out the fact that the Bergen county circuit court was not in session, and that Justice Parker and Judge Black were prevented from discharging their duties in the circuit by reason of absence from the state or otherwise. This point is entirely without substance. The circuit court is not such a tribunal as

needs to display upon the face of its proceedings the facts necessary to exclude the inference that it is erroneously assuming jurisdiction or is proceeding erroneously in any matter within its jurisdiction.

We come now to the main contention, which is that the petition presented to the circuit court and the order appointing appraisers do not conform to the traction act of 1893, because there is no prayer in the petition for an ascertainment of the damages done to the stockholder, and no mandate in the order requiring the appraisers to take such damages into account or make any return respecting them. It seems to us the criticism is formal rather than substantial. As already shown, the Hudson River Traction Company, in which the petitioner held stock, and also the other company with which it consolidated, were incorporated under the traction act of 1893. The consolidation agreement was made under and in pursuance of the provisions of that act, and this fact was declared upon the face of the agreement.

The petition plainly refers to the agreement, giving its date, the date of its ratification, and adoption by the stockholders, and the date of its filing in the office of the Secretary of State; and it then prays for the appointment of appraisers to appraise the market value of the stock owned by the petitioner, and for "such further relief in the premises as may be just and the nature of the case in accordance with the statute in such case made and provided may require." It seems to us plain that the statute thus referred to is the statute under which the consolidation agreement was made, and that the prayer for further relief is broad enough to include the granting of other relief, either more or less extensive than appraisal of the full market value of the stock, so long as such other relief is warranted by the statute referred to.

[3] Upon like grounds it seems to us that the order appointing the appraisers is sufficiently explicit. They are thereby required to "appraise the full market value of the stock owned by said petitioner," etc., and "to do whatever else the said appraisers are by law in accordance with the statute in such case made and required, authorized or required to do in the premises." Reading this, as it must be read, in connection with the petition and with the consolidation agreement referred to in the petition, it seems to us clear that the statute referred to is the traction act of 1893; and since that statute requires the damages to be estimated, as well as the market value of the stock to be appraised, the duties of the appraisers are rendered as clear as if section 23 of that act had been recited or specifically referred to in the order. It seems to us improper to construe such a proceeding as that which is now under review with the strictness that would be appropriate in a penal action, or

even in a proceeding for the condemnation of property. This proceeding does not, in our view, partake of the nature of either of these.

It is, of course, familiar and well-settled law that a majority of the stockholders of a corporation cannot effect a consolidation with another corporation without unanimous consent, unless the right of consolidation has been conferred by legislation that may be read into the contract of incorporation. *Colgate v. United States Leather Co.*, 75 N. J. Eq. 229, 72 Atl. 126. And on familiar principles a consolidation that is attempted to be made in violation of the rights of minority stockholders may at their instance be restrained by injunction, on the ground that it would violate their contract rights, and thus, in effect, take their property without their consent. We may concede, for the purposes of the argument, that the Legislature, in furtherance of a public use, might authorize a consolidation to be made at the will of a majority of the stockholders, notwithstanding the objection of the minority in interest, and without previous legislative authority that could be read into the contract of incorporation, provided provision were at the same time made for compensating the dissenters. And we might in such a case regard the action of the majority as amounting in effect to a taking of the property of the minority stockholders for public use, and deal with it as strictly and technically as would be proper in the case of proceedings taken to condemn the lands of an outside party for public use. But it does not seem to us that proceedings taken by a dissenting stockholder to have compensation for property that is wrested from him for a public use are to be construed with the like strictness. The same considerations that require strictness of procedure from a corporation that assumes to exercise the sovereign power of eminent domain against an unwilling property owner should in logic lead to a liberal treatment of the unwilling property owner in his action for recovery of compensation.

However that may be, in the present case we have an authorization for consolidation that is to be read into the contract of incorporation of each of the companies concerned, because it is contained in the act under which they were respectively organized. It thus was one of the terms under which the American Electrical Works participated in the stock of the Hudson River Traction Company that that company might be consolidated with another, pursuant to section 18 and the succeeding sections of the act, upon making compensation to the stockholder in the manner pointed out by section 23, provided the stockholder dissented from the consolidation and refused to convert his stock. And, on the other hand, when the companies in question made their consolidation agreement, they made it—and no doubt consciously made it—subject to the duty imposed by section 23 to

compensate any dissenting stockholder, either by paying him his damages or by taking his stock and paying him its market value, provided he should make application to the circuit court within the time and in the manner pointed out by section 23.

Thus the act contemplates that a consolidation, however desirable in the estimation of a majority of the stockholders, may, in fact, be detrimental to the interests of individual stockholders, and compensation is provided for them accordingly.

The scheme of the act is to provide a simple and prompt remedy for what otherwise might be a serious injustice to the minority stockholders. The majority in interest in availing themselves of the privilege conferred by the act to make a consolidation of companies agree in advance to make compensation to the dissenters in accordance with the decision of appraisers, when the same shall be confirmed by the court. The proceeding is not like an ordinary action at law—much less like a penal action or a proceeding for taking property without the consent of the owner. It is a conventional arrangement, somewhat analogous to that provided by our "Act for regulating references and determining controversies by arbitration" (1 Gen. Stat. p. 69), which permits persons who are desirous of ending any controversy by arbitration to make an agreement that their submission to the award of an arbitrator or arbitrators shall be made a rule of any court of record of this state, and which provides that, in case of disobedience to the arbitration, the party refusing or neglecting to perform it shall be subject to punishment as for contempt of court. The remedy afforded by section 23 of the traction act is not only voluntary as between the parties, but is highly beneficial. The section contemplates a simple procedure, beginning with a mere petition followed by reasonable notice to the company, and without elaborate refinements of any kind. The section ought to be liberally construed in aid of the proposed remedy, and the procedure under it ought not to be hampered by the imposition of technical conditions that are not expressed in its language.

We hold as a matter of interpretation that the petition and order appointing appraisers under consideration, where they mention "the statute in such case made and provided," refer to the provisions of the traction act of 1893 respecting consolidation and the making of compensation to dissenting stockholders; and this for the reason that this act was referred to in the consolidation agreement as the authority for the consolidation, and the agreement is referred to in the petition as the ground of the relief thereby prayed.

This leads to an affirmance of the judgment of the Supreme Court, which affirmed the order and proceedings in the circuit,

without regard to the question whether those proceedings were not amendable under the Practice Act (P. L. 1903, p. 572, § 126), and without regard to whether the Supreme Court erred in requiring the petitioning stockholder (now defendant in error) to file the stipulation or declaration above referred to or in basing its judgment thereon.

Let the judgment be affirmed accordingly.

In re JACKSON.

(Court of Chancery of Delaware. Dec. 18, 1911.)

CORPORATIONS (§ 283*)—ELECTION OF DIRECTORS—FAILURE TO HOLD—SUMMARY ORDER.

General Corporation Law (Laws 1901-03, c. 394) § 31, provides that, if the election for directors of any corporation shall not be held on the day designated by the by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be, and that no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but the chancellor may summarily order that an election be held on the application of any stockholder, and may punish the directors for contempt for failure to obey the order. *Held*, that where petitioner owned a majority of the voting stock of a corporation, and in litigation in another state had been enjoined from transferring and otherwise exercising rights of ownership over the same, but such order had been modified so as to expressly permit him to vote the stock at any election or elections of officers of the corporation, and to demand an immediate election of officers in accordance with the Delaware laws, the directors having permitted the date fixed in the by-laws for the holding of an election of directors to pass without holding such election, petitioner was entitled to a summary order from the chancellor requiring the holding of such election.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 283.*]

Petition of Oliver D. Jackson to compel the election of directors by the National Lumber Vulcanizing Corporation. Granted.

The petition alleged that the National Lumber Vulcanizing Corporation, after its incorporation under the General Corporation Law of this State (Laws 1901-03, c. 394), adopted by-laws, Article IV of which provides, as follows:

"Section 1. The Annual Meetings of Stockholders shall be held after the year 1909 on the first Monday of March in each year, at eleven o'clock in the forenoon, when a Board of Directors for the ensuing year shall be elected. * * *

"Sec. 2. A majority in amount of the common stock issued and outstanding shall constitute a quorum for an election or for the transaction of other business. The preferred stock of the corporation shall have no voting powers.

* * * * *

"Sec. 4. Notice of the meetings shall contain notice of the time and place at which the same are to be held, and such notice

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and the conduct of the said meetings shall be as prescribed by the Board of Directors.

"Sec. 5. Special meetings of the Stockholders shall be held at said registered office unless otherwise ordered by the Board of Directors, and shall be called by the Secretary on written request of two Directors, or on the written request of the owners of a majority of the common stock, by notice given to each Stockholder of common stock at least three days prior to such meetings. * * *

It is alleged that the annual meeting of stockholders was not held on the first Monday in March, 1911, owing to the failure and neglect of the officers and directors of said Corporation to give notice of and call such meeting, and that said officers and directors have, since that time, refused, notwithstanding repeated requests and demands, of the petitioner, to call and hold a special meeting for the election of a board of directors. It is also alleged that the petitioner is the owner and holder of a majority of the shares of common stock issued and outstanding; that on October 31, 1911, he made written demand upon the directors, vice president, the office of president being vacant, and the secretary of said Corporation, that they forthwith call a stockholders meeting for the purpose of electing a board of directors, and that they have neglected and refused to do so.

Upon presentation of the petition to the Chancellor an order was made fixing the date on which said petition would be heard, and requiring notice thereof to be sent to said corporation and its officers and directors by registered mail.

At the hearing, appearance was made and an answer filed on behalf of said corporation. The answer alleged certain facts, which are the basis of a suit by the Lumber Securities Corporation, another stockholder of said National Lumber Vulcanizing Corporation, against Oliver D. Jackson, the petitioner in this cause, and the National Lumber Vulcanizing Corporation, in the Supreme Court of the State of New York, attacking the validity of the ownership of the stock issued to said Oliver D. Jackson by the said National Lumber Vulcanizing Corporation. The solicitor for the petitioner also filed an exemplified copy of the proceedings in the Supreme Court of the State of New York, from which it appears that on May 2, 1911, it was:

"Ordered until the further order of this Court, that the defendant Jackson, his agents, servants and attorneys be enjoined and restrained from selling or transferring, or in anywise exercising any ownership of or rights in the said 5250 shares of the capital stock of the National Lumber Vulcanizing Corporation, or any part thereof, and the said National Lumber Vulcanizing Corporation, its agents, servants and attorneys be enjoined and restrained from transfer-

ring on the books of the corporation, any of the certificates representing the said 5250 shares of the capital stock thereof, now standing in said books in the name of the defendant Jackson, * * *" and required the defendants to show cause on May 10, 1911, "why the preliminary injunction herein contained shall not be considered pending the trial of this suit, and the final judgment of this Court."

On October 16, 1911, on application of the solicitor for said Jackson, the petitioner in this cause, to amend the order made on May 2, 1911, it was:

"Ordered, pending the action and until the final judgment of the Court, that the defendant Jackson, his agents, servants and attorneys, be enjoined and restrained from selling or transferring, or in any wise exercising any ownership or rights in the said 5250 shares of the capital stock of the National Lumber Vulcanizing Corporation, or any part of the original shares of stock of the defendant, the National Lumber Vulcanizing Corporation, constituting and being part of said 5250 shares received by said Jackson from the plaintiff corporation under the contract specified in the complaint and now standing in the name of defendant Oliver D. Jackson, excepting the right to vote on each and every share of said 5250 shares, at any election or elections of officers of the defendant, the National Lumber Vulcanizing Corporation, of Delaware, and the right to demand an immediate election of officers of said defendant corporation, in accordance with the laws of the State under which the defendant corporation exists, and the by-laws of the defendant corporation. * * *

The complainant in said suit, at the same time, was ordered to give bond within three days in order to make the injunction effective, and it is admitted by the solicitors in the cause pending in this Court that such bond was not given.

Arley B. Magee, for petitioner. William M. Hope, for National Lumber Vulcanizing Corporation.

THE CHANCELLOR. The petition in this cause is presented to the Chancellor under the provisions of section 81 of the General Corporation Law of this State (Laws 1901-03, c. 394); which is as follows:

"If the election for directors of any corporation shall not be held on the day designated by the by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but the Chancellor may summarily order an election to be held upon the application of any stockholder, and may punish the directors for contempt of Court for failure to obey the order."

It appears from the proofs, and is not

disputed, that the petitioner is the holder upon the books of the corporation of a majority of the shares of the common stock of the corporation, and that the annual meeting and election of directors, which should have been held on the first Monday in March, 1911, was not held. It may be that proof of these two facts, even upon ex parte proof by the petitioner and without notice to the company, may under the language of the General Corporation Law above quoted, justify the Chancellor in "summarily" ordering such meeting and election to be held. But in this case an order was made upon presenting the petition, setting the petition down to be heard on a date fixed by the order, and requiring notice to be sent by registered mail to each of the officers and directors of the company, at the post office addresses furnished by the petitioner.

This Court certainly should not, on this petition, undertake to try the issues which are raised in the New York Court, and which are to be tried there. It is evident that that Court by so modifying its first order as to expressly authorize the stockholder Jackson, one of the defendants in that suit, to exercise his right to bring this petition in this Court, must have concluded that the granting of the prayer of it would not have injuriously affected the rights of the parties to that suit. It should be noted that express consent of the New York Court, given to the stockholder, Jackson, not only to vote his shares of stock at an election, but also to ask for a summary order of this Court for the holding of an election, was not dependent in any way upon the giving of the bond by the complainant in the suit pending before that Court.

Therefore, an order will be made requiring the directors of the said National Lumber Vulcanizing Corporation to hold a stockholders' meeting for the election of a board of directors.

The order was in the following form:

"And now, to wit, this eighteenth day of December, A. D. 1911, the foregoing petition of Oliver D. Jackson that the Chancellor summarily order the holding of a meeting of the stockholders of the National Lumber Vulcanizing Corporation for the purpose of electing a board of directors of said Corporation, having come on to be heard before the Chancellor upon said petition, the answer of said Corporation, affidavits and exhibits, and the same being duly considered, and argued by counsel for the respective parties,

"It is ordered by the Chancellor that a special meeting of the stockholders of said National Lumber Vulcanizing Corporation be held for the purpose of holding an election of directors of said Corporation, at eleven o'clock in the forenoon on Tuesday, the sec-

ond day of January, A. D. 1912, at the registered office of said corporation in the State of Delaware, namely, at the office of The Capital Trust Company of Delaware, situate at the corner of State and North Streets, in the town of Dover, Kent County, and State of Delaware, the said The Capital Trust Company of Delaware being a corporation by whom the said National Lumber Vulcanizing Corporation is represented in the State of Delaware;

"And further, that the said election shall be held pursuant to the laws of the State of Delaware and the by-laws of the said National Lumber Vulcanizing Corporation, and for this purpose, that the officers of said Corporation shall so hold said election at said time and place, and give due notice thereof;

"And further, that a copy of this order be forthwith mailed by the Register in Chancery by registered mail to each of the officers of said National Lumber Vulcanizing Corporation, including the directors thereof, at their several and respective residences and places of business, as set forth in the said petition of the said Oliver D. Jackson;

"And further, that within three days after the time shall be fixed for the holding of said election at said special meeting, the officers or other persons who shall hold said election shall file in the office of the Register in Chancery for Kent County a report of their proceedings;

"And further, the Chancellor reserves the right to make such further or other orders in the premises as he shall deem proper."

DELAWARE, L. & W. RY. CO. v. WELSER et al.

(Supreme Court of Pennsylvania. Oct. 9, 1911.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW— QUESTIONS OF FACT—FINDINGS OF CHANCELLOR.

Where a decree, reforming a written instrument, is based on findings of fact by the chancellor, supported by the clear and precise testimony of three witnesses for plaintiff to the averments of the bill, while the testimony for the defendants is for the most part evasive and inconclusive, the decree will not be reversed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. RAILROADS (§ 64*)—RIGHT OF WAY—PURCHASE OF LAND—VALIDITY.

A vendor of land to a railroad for its right of way cannot complain that the contract of sale called for the purchase of more land than the railroad actually required; it being for the company to determine whether it can secure the necessary accommodation by meeting the owner's demands, and purchasing more land than it actually requires, or by condemnation proceedings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 144, 147-152; Dec. Dig. § 64.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CORPORATIONS (§ 439*)—POWERS AND LIABILITIES—LIMITATIONS OF CHARTER—CONVEYANCE OF PROPERTY.

Though public policy forbids corporations from engaging in other business than that for which they are chartered, yet a sale by a corporation of property acquired for a proper purpose, but for which it has no use, is not engaging in business in violation of its charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

Appeal from Court of Common Pleas, Northampton County.

Bill in equity by the Delaware, Lackawanna & Western Railway Company against Alice Welser and others for specific performance. From a decree for plaintiffs, defendants appeal. Affirmed.

The chancellor found the facts to be as follows:

"(1) Alice Wesler, prior to May 11, 1909, had title to a tract of land in this county, and on said date she and her husband executed and granted, under seal, an option or right of purchase for the same to the plaintiff company 'within a period of ninety days.' William Welser signed it, also, as mortgagee. The land was described in this option, a copy of which is printed in complainant's bill, to consist of 'about twelve acres,' and the consideration was to be \$150 per acre, 'as shown by a survey to be made.' It was afterwards ascertained to be 12⁴/₁₀ acres, for which the purchase price would be \$1,860. There is no contention that it was indefinitely described. This option, without further expression of its terms, expired on August 9th. There was a written acceptance of it by plaintiff, through its superintendent, on August 10th, but not before, either orally or by writing, nor by tender for execution of contract or deed.

"(2) The last two paragraphs of the option are as follows: 'Should the party of the second part elect to take the benefit of this option within ninety days the five (\$5.00) dollars paid on this option shall be considered part of the purchase price. Twenty-five (\$25.00) dollars on closing by contract or delivery of gen'l warranty deed free of all encumbrances and the balance within sixty days from the execution of said contract or delivery of deed. Contract or deed to be delivered at the Pen Argyl station of the Bangor and Portland Div. of D., L. & W. R. R. Co. between the hours of 9 a. m. and 4 p. m. on or before August 11, 1909.

"(3) On said August 11, 1909, the agent of plaintiff was at the place thus appointed, and tendered to Mr. Welser, in the presence of his counsel, \$25 and a contract of sale, prepared for signature, both of which were refused, upon the ground that the option had expired without acceptance. (The counsel declared he represented Mrs. Welser also, but such authority cannot be established legally by the declarations in pais of the alleg-

ed agent. Grim v. Bonnell, 78 Pa. 152.) On August 17th he tendered to both the full consideration, in gold, with a deed for execution, which was also declined. The money was then deposited in bank, and notice given that it would be paid when deed was delivered.

"(4) Mrs. Welser and her husband, on August 11th granted an option on the same property for three months (Exhibit 4), to Henry Male, the other defendant, for the consideration of \$8,000. This was recorded the following morning (August 12th) at 7:55 o'clock, preceding by 10 minutes the entry of the one now involved in dispute. Subsequently, on August 23d, they made a conveyance of said premises to Male, by deed, a copy of which appears, in plaintiff's bill. The premises sold to Male embraced those described in the option, and included 2¹/₂ acres more, upon which were erected buildings and improvements, permanent, and of substantial value.

"(5) The option now in question was drafted by the real estate agent of plaintiff company, who was also a lawyer, in the office of a justice of the peace to whom he was a stranger, but selected by the defendants to advise them in the transaction. The husband is a laborer in a slate quarry, can read but little, and nothing that is not printed or typewritten; the wife not at all. The justice read and explained its terms to them before execution. (What was said there will require further attention, for upon it solely, if competent for consideration, depends the question whether the plaintiff shall have relief or be denied it.) Neither of them possesses quite the average degree of intelligence of persons similarly situated.

"(6) Henry Male, on August 11th, before the expiration of the hour named for delivery of contract or deed, knew of the existence of this option to plaintiff, by his presence at the tender and refusal between the parties (Hottenstein v. Lerch, 104 Pa. 460), and the one granted to him that day contains the following reservation: 'It is agreed that this option is null and void if the D., L. & W. R. R. succeed in compelling the said party of the first part to convey the land to said railroad company by law.'

"(7) I further find, if it be admissible under the pleadings or rules of law to apply these contemporaneous declarations to define the written terms of the option, that in the presence of the two intending grantors and the justice of the peace designated by them as adviser the agent of the plaintiff company, in the act of drafting it, said that, as misunderstandings sometimes arose about the time of expiration of such limitations, the agreement should mean that the 90 days mentioned were to end on August 11th. The draftsman who had completed the agreement, except the last clause, proceeded then to finish it; after which it was read over to them by the justice, and explained as providing the

'option' would expire on this last-mentioned date. To which they assented. This explanation of its meaning was accepted by the intending vendors as expressing their purpose and intention before signature."

The court entered a decree for specific performance.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Robert A. Stotz and S. Bruce Chase, for appellants. Kirkpatrick & Maxwell, for appellee.

STEWART, J. The bill in this case, as amended by leave of court and pleaded to by the defendants, alleged that, before the execution of the contract as prepared by the scrivener, in which it was recited that the option for the purchase of the land in question was for 90 days, it was distinctly understood and agreed between the parties that the date of expiration was to be August 11th following, and that the concluding clause, in these words, "Contract or deed to be delivered between the hours of nine a. m. and four p. m. on or before the 11th day of August, 1909," was added to express such understanding and agreement. No exception was taken to the order allowing the amendment. The original bill was for specific performance of the contract; the amendment prayed for reformation of the contract, to the end that what was supposed to be obscurity of phrase in the last clause might be removed, and the contract be made to read that the option was to expire August 11, 1909, instead of at the end of 90 days, which would have been August 9, 1909. It was supposed to be necessary, or at least desirable as a cautionary measure, inasmuch as it was not until August 11th that the plaintiff attempted to exercise the option granted. Whether the contract as written left the date of expiration of the option doubtful is a question we need not consider. The case proceeded on the theory that this was a disputable question, and the errors assigned can be disposed of on the assumption that it was.

[1] What is urged upon us is that the evidence introduced by the plaintiff in support of the averment contained in the amended bill was insufficient to warrant a reformation of the contract in the particular referred to. A discussion of the evidence in detail is unnecessary. It is enough to know that three witnesses, one of them a justice of the peace, selected by the grantors to represent them in the transaction as friend and adviser, and a stranger to the parties representing the plaintiff, testified that it was distinctly stated, and as distinctly agreed to by all the parties, that, for the purpose of avoiding misunderstanding and dispute as to the limit of the option, August 11th was to be regarded as the last day for its exercise;

and that the final clause was added to express this understanding. Counsel for appellants admit that the testimony of these witnesses was both clear and precise, but insist, nevertheless, that it does not measure up to the standard required for the reformation of a written contract. To the mind of the chancellor, it was not only clear and precise, but indubitable, in the sense that it was convincing. The opposing testimony was, for most part, evasive and inconclusive. It was a matter of controversy whether the one witness who denied directly and unequivocally that any specific date was fixed upon for the expiration of the option was present during the whole of the conversation. If the conversation upon which the execution of the contract followed was as testified to by plaintiff's witnesses, it requires no argument to vindicate the correctness of the chancellor's conclusion as to its sufficiency for the purpose for which it was offered. The credibility of the witnesses was for the chancellor; and that for the plaintiff having been unassailed his findings with respect to the disputed facts are not to be questioned. It is argued that the testimony does not show mutual mistake, but simply a misunderstanding on the part of the plaintiff as to when the option was to expire; that it does not show that the vendors were of the same mind as the vendee as to the purpose and significance of the clause that was to be added to the agreement as originally prepared. The testimony which prevailed with the chancellor was to the effect that August 11th was distinctly agreed upon as the date of expiration; that the final clause of the agreement was added in order to express the entire contract; and that after it had been added the entire paper was read over to the grantors, with special explanation that the last clause fixed the date of expiration of option. If credited, and the concluding clause in the contract does not clearly define another limit for the option than the 90 days originally agreed upon, it necessarily follows that the common understanding as to what it should express was disappointed. If the conversation between the parties which led to the insertion of this clause was what the witness testified to, no room exists for any misunderstanding as to what was agreed upon. Indeed, misunderstanding is not pretended. What is insisted on is that the conversation did not occur. The evidence was convincing to the chancellor, for reasons which we think entirely adequate, that it did occur, and that, without more, established mutuality of mistake.

[2] The other questions raised on the record are quite as free from difficulty. The contract gave the plaintiff an option for the purchase of 12 acres out of a tract of land containing 14 acres. The negotiation began with an offer from the plaintiff to buy a right of way through the tract, for the pur-

pose of laying its tracks thereon. Mrs. Welser, owner of the land, objected to this, giving her reasons, but expressing a willingness to sell the whole tract. After a day's consideration, it was agreed that the company should have an option for the purchase of the 12 acres, a condition being that the company, at its own expense, was to remove the improvements on the 12 acres, and reconstruct them on the remaining 2. It is argued that the 12 acres are in excess of what is required for the relocation of the company's tracks; and that therefore the contract on the part of the company is ultra vires and not enforceable. This is taking a very narrow view of corporate rights and powers. It is not open to question that a railroad company may obtain its rights of way upon such terms as are most favorable to it, and to this end may resort to condemnation proceedings, or purchase such estate or interest in the land as may be necessary for its accommodation. Whether it can secure the conveniences it requires on better terms by condemnation or by purchase is for itself to determine; and so whether it can secure the accommodation upon better terms by meeting the owners' demands that it purchase more land than it actually requires than it can by resorting to condemnation proceedings is for itself to determine. So long as its only purpose in acquiring more land than it actually requires is to secure what it does require upon the easiest terms to itself, it is acting within proper limits.

[3] Corporations are restrained by considerations of public policy from engaging in other business than that for which they are chartered; but it has never been understood that a corporation, in making sale of what it has acquired for a proper purpose, but for which it has no use, is engaging in business not permitted by its charter. The true test in all such cases is the good faith of the transaction. Was the purchase made to accomplish an object falling within the general purpose and scheme of the corporation? If so, it would be a legitimate exercise of power. It would be otherwise only were it a clear attempt to enlarge the operations of the corporation, so as to embrace more than the charter contemplates. There is not a suggestion that the railroad company in this transaction was attempting to combine with its business of common carrier that of dealing in real estate. Says Mitchell, J., in *Malone v. Lancaster Gas Light & Fuel Co.*, 182 Pa. 309, 37 Atl. 932: "In considering such question, much weight must be allowed to the judgment of the parties most interested, the officers and stockholders of the corporation itself, and while they will not be permitted, as against the commonwealth or a dissenting stockholder, to go outside of their legitimate corporate business, yet when

the act questioned is of a nature to be fairly considered incidental or auxiliary to such business, it will not be unlawful, because not within the literal term of the corporate grant." In the same opinion, the following from Bigelow, C. J., in *Brown v. Winnisimmet Co.*, 11 Allen (Mass.) 328, is quoted approvingly: "We know of no rule or principle by which an act creating a corporation for certain specified objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of business which properly appertain to the general purposes for which the charter was granted. But it may also enter into, contract, and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold." These authorities are so conclusive as to make further discussion of the question unnecessary. The transaction in this case being lawful on the part of the railroad company, mutuality of remedy follows as a matter of course. The case, as we read it, stands clear of all suspicion of fraud or overreaching, and we see nothing in the record that questions in the slightest degree the right of the plaintiff to a specific performance of the contract as established.

The assignments of error are overruled, the appeal is dismissed, at the costs of the appellants, and the decree is affirmed.

DOUGHERTY v. WELSHANS et al.

(Supreme Court of Pennsylvania. Oct. 9, 1911.)

1. EJECTMENT (§ 90*)—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

The predecessor of plaintiff in ejectment in the line of record title had purchased the land in question 60 years previously at a sale under order of orphans' court for the payment of a decedent's debts. The deed of the administratrix contained a recital that the title of the original patentee from the state became vested by sundry conveyances in decedent. There was nothing on the record and no other evidence to show how the title passed from the original patentee to the decedent. The defendants in ejectment claimed title under a tax sale, made years after the administratrix's deed. *Held*, that the deed was admissible in evidence.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.*]

2. EJECTMENT (§ 16*)—RIGHT OF ACTION—RIGHT TO POSSESSION.

Where wild and mountainous lands have never been the subject of an actual *pedis possessio*, proof of actual possession is not required in an action of ejectment, inasmuch as the legal title draws to it the possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. § 16.*]

3. ADVERSE POSSESSION (§ 104*)—EFFECT—PRESUMPTION OF GRANT.

Courts will presume whatever grant may be necessary to quiet title to land in persons whose title has been unchallenged through a great lapse of time, not only as against a mere intruder, but also as against one claiming under color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

4. DEEDS (§ 96*)—RECITALS—EFFECT AS EVIDENCE.

Where possession accompanies an ancient deed, recitals therein are prima facie evidence of the facts recited, even against third persons.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

5. DEEDS (§ 96*)—RECITALS—EFFECT AS EVIDENCE.

A recital in an administratrix's deed of land sold 60 years prior to suit for the payment of a decedent's debt, that the title of the original patentee from the state became vested by sundry conveyances in the decedent, while not conclusively showing title in decedent, was evidence which might be considered as a foundation for the presumption of a grant to the decedent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256-260; Dec. Dig. § 96.*]

6. TRIAL (§ 53*)—RECEPTION OF EVIDENCE—OFFER OF PROOF.

Though an administratrix's deed, executed 60 years before suit, containing a recital that title had become vested in the decedent, was offered in evidence to show title, the recital could be considered as evidence to raise a presumption of grant to the decedent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 124, 129; Dec. Dig. § 53.*]

7. EJECTMENT (§ 95*)—EVIDENCE—SUFFICIENCY.

A verdict and judgment for plaintiff in ejectment is sustained by plaintiff's evidence that he had paid the taxes on the mountain land in question, which was assessed on the seated list for 1891, and that the lands had been assessed on the seated list for more than 20 years previously, though the defendants prove that they had bought the lands at a tax sale on taxes assessed against them on the unseated list for 1891, but without showing how they came to be assessed as unseated lands in that year.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

Appeal from Court of Common Pleas, Lycoming County.

Action by W. A. Dougherty against William T. Welshans and others. From a judgment for plaintiff, defendants appeal. Affirmed.

At the trial it appeared that the lands had been warranted to one Jacob Sallor, and subsequently, on July 2, 1795, granted by the commonwealth by patent to one John Kantner. There was then a break in the chain of the record title until May 3, 1849, when Margaret Sharp, as administratrix of Anthony Sharp, deceased, conveyed the lands to one Mathias Baier. The lands had been sold under an order of the orphans' court to pay the debts of Anthony Sharp. The deed from the administratrix to Baier contained

the recital that the title of John Kantner "by sundry conveyances became vested in Anthony Sharp." The plaintiff claimed under a direct record title from Baier. The defendants claimed under a sale for taxes assessed in 1891.

At the trial the following offer was made: "Counsel for plaintiff offer in evidence deed, Margaret Sharp to Mathias Baier, dated May 3, 1849, for all that certain tract of land situate in Limestone township, bounded and described as follows: 'Beginning at a post, thence by land of Jacob Sallor, south 65 degrees east, 368 perches to stones; thence by vacant lands north 65 degrees east, 200 perches to a pine; thence by land of Thomas Reed and surveyed land, north 65 degrees west, 368 perches to a post; thence by Nicholas lands south 65 degrees west, 200 perches to the place of beginning—containing 433 and $\frac{3}{4}$ acres and allowance, being the same tract of land.'

"Counsel for defendants object to counsel for plaintiff reading the contents of this deed to the court and jury until the deed has been admitted by the court, and request that counsel for plaintiff now state the purpose of offering this deed. To which counsel for plaintiff reply that this deed is offered for the purpose of showing a conveyance from Margaret Sharp to Mathias Baier for the John Sallor warrant; also for the purpose of showing title in Anthony Sharp, deceased, by the following recitals in said deed: 'Which said tract of land was patented by the commonwealth of Pennsylvania by patent dated the 2d day of July, 1795, and enrolled in Patent Book No. 28, page 396 unto a certain John Kantner, and by sundry conveyances became vested in said Anthony Sharp, deceased, and by virtue of an order of the orphans' court of Lycoming county, sold by public outcry on the 28th of April, 1849, to said Mathias Baier, this sale so made was confirmed by said court as by reference to said proceeding will fully appear.'

"Counsel for defendants object to the deed now offered: (1) Because no title to the warrant in question has been properly shown out of the commonwealth. (2) Because the deed offered in evidence is not competent for the purpose for which it is offered. (3) Because the deed purports to be made by an administrator under authority of the orphans' court of Lycoming county, and cannot be introduced in evidence until proof of authority by the orphans' court has first been introduced. (4) Because there is no title shown in Anthony Sharp, the person for whom Margaret Sharp, the grantor, was administrator. (5) Because incompetent and irrelevant.

"The Court: Before this deed is admitted plaintiff should show title in Anthony Sharp. To which suggestion by the court counsel for plaintiff reply that the only way they can

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

show what is intimated by the court is by the recital in the deed; that that is the best evidence they can give and is the strength of plaintiff's title; that plaintiff has been unable to find the title deed, and the next best evidence is the recital in the deed and for that purpose plaintiff offers the deed in evidence.

"Defendants further object to the admission of this deed because plaintiff does not offer the precedent conveyance from Kantner or Sallor, or any of the intermediate steps, by which title became vested in Anthony Sharp, if it became vested in him at all, but simply offers a deed which says 'by virtue of sundry conveyances became vested in Anthony Sharp, deceased,' which is a common thing when people have not a good title, and that titles cannot be manufactured by inserting in a deed that title was vested 'by virtue of sundry conveyances.' To which objection counsel for plaintiff reply that this is the title upon which plaintiff and his predecessors have relied for years and years, and that the muniments of title precedent have been lost and the only record plaintiff has is the citation in this deed now offered, which was made in 1849.

"The Court: In order that there may be no delay in this matter, I will overrule these objections for the present and admit the deed in evidence; to which the defendants except, and at their request an exception is noted and bill sealed."

The court charged in part as follows: "Now, we say to you these various conveyances have vested in this plaintiff a sufficient paper title upon which this action of ejectment may be sustained, and that he would be entitled to recover in this action, were it not for the defense set up here showing, or tending to show, that this title, prior to the time that it became vested in William A. Dougherty, was divested by a tax sale."

Plaintiff presented this point: "(4) That if the jury are satisfied from the evidence in this case that the land shown on the seated list to be taxed in the name of John B. Dougherty, David Dougherty, William Kilday, and D. and H. Dougherty is the same land as that taxed in the unseated list in the name of the said John Sallor warrant, then the plaintiff is entitled to recover. Answer: This point is affirmed."

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZISKER, JJ.

W. O. Kress and Seth T. McCormick, for appellants. James B. Krause and C. La Rue Munson, for appellee.

ELKIN, J. [1] The question upon which this controversy depends is whether the deed of the administratrix of Anthony Sharp to Mathias Baier was admissible in evidence. No paper title was shown in Anthony Sharp who at the time of his death in 1847 was a resident of Schuylkill county, but his widow

as surviving administratrix presented her petition first to the orphans' court of that county, and subsequently to the orphans' court of Lycoming county, asking leave to sell the real estate of decedent for payment of his debts. This petition recited the necessary jurisdictional facts, and described the John Sallor warrant patented to Kantner in 1795 as part of the real estate of which Anthony Sharp died seised. The sale was ordered to be made, and pursuant thereto the property was subsequently sold at public outcry to Mathias Baier for \$346.46. The sale was confirmed by the court, and the deed in question here was executed and delivered in compliance with the terms thereof in 1849. This occurred more than 60 years ago, and the appellee holds an unbroken chain of title from that time to the present. The offer of this deed in evidence was objected to upon the ground that no title was shown in Anthony Sharp, and, further, that there was no offer to prove the precedent conveyances, if any, connecting the title of Kantner, the patentee, with that of Sharp, the decedent. The land in question was warranted in the name of John Sallor in 1793 and patented to John Kantner in 1795. The plaintiff at the trial in the court below first offered in evidence the patent to Kantner and then offered the deed from the administratrix of Anthony Sharp to Baier which is the one to which objection is made. There is nothing to connect the grant to Kantner with the title in Sharp except the record of the proceedings in the orphans' court above referred to and the recital in the deed made pursuant thereto. There is an unbroken chain of title from Mathias Baier in 1849 to W. A. Dougherty, the appellee in the present case. Moreover, the title became vested in Daniel Dougherty, the ancestor of appellee, in 1857, and has remained in the Dougherty family from that time to the present. It was wild uncultivated mountain land, but possession such as could be taken of such lands was taken by the Doughertys. Logs were cut, a small clearing made, some fences at one time built, taxes were assessed and paid for a long period of time, certainly extending back to 1870, as shown by the testimony and presumptively for years prior to that time. Daniel B. Dougherty testified that he was familiar with the John Sallor warrant and remembered when his father purchased it in 1857. He helped to make a survey and run certain lines of the tract in the early sixties, a few years after the purchase by his father. They cut some logs from the woodland and raised rye on an old field prior to 1862. These facts show that the elder Dougherty held a deed and claimed title to the land at that time and had taken actual possession soon after his purchase. The possession of the Doughertys was never disputed, and no one has claimed any adverse title until appellants set up the tax title upon which they

stand. The record is silent as to the Kantner title from 1795 to 1849 when the proceedings in orphans' court and the deed to Mathias Baier recite the facts that by sundry good conveyances it became vested in Anthony Sharp and that he died seised of the same. It was sold under decree of court as the property of Sharp and for the payment of his debts. The highest bidder was awarded the property upon payment of the purchase price, and the title thus conveyed has remained unchallenged for more than 60 years by any one claiming adversely from or through John Kantner.

[2] No proof was offered to show that Anthony Sharp died in actual possession of the land, but as we view the record this was not imperatively required. The lands were wild and mountainous, and at that time no doubt had never been the subject of an actual *pedis possessio*. In such cases the rule does not require proof of actual possession. *Taylor v. Dougherty*, 1 Watts & S. 324; *Foust v. Ross*, 1 Watts & S. 501. As Chief Justice Lewis said in *Hole v. Rittenhouse*, 25 Pa. 491: "If any principle in the law of Pennsylvania can be regarded as well settled by argument and authority, it is that which affirms that the legal title to uncultivated lands draws to it the possession, and that this possession is to be deemed actual, for all purposes of remedy. * * *" If the legal title was in Anthony Sharp it passed to Mathias Baier under the sale authorized by the orphans' court for the payment of debts, and, the lands being unseated, possession would be deemed actual for the purposes of remedy in the holder of the legal title.

[3] But it is said appellee failed to prove legal title in Anthony Sharp, which is true. The answer to this position is that under the facts disclosed by the orphans' court record, the deed in question here, and other circumstances of the case, the presumption is that Anthony Sharp at the time of his death was seised of the title to this land. This presumption stands as *prima facie* evidence of the fact until overcome by countervailing proof which was not attempted. The claim of title in Anthony Sharp is much strengthened by the proceeding in the orphans' court, the regularity and validity of which have never been questioned. Of course a decree of court cannot breathe life into a title that never existed, but all presumptions are in favor of judicial proceedings. These presumptions when not rebutted make out a *prima facie* claim of title in the person asserting the same, especially when applied to ancient transactions, which have not been questioned for a long period of years. The claim of title in Anthony Sharp has been spread on record since 1849 when the land in controversy was sold for the payment of his debts. No one has ever appeared to contest the title so asserted, nor to question the proceeding under which the sale was made. Under these circumstances the law

will presume the facts to be as averred in the record upon which the judicial proceeding was founded. Of course, this is only a presumption, subject to rebuttal by proof of facts sufficient to overcome it, but nothing of this kind appears in the present case. We think the deed was properly admitted.

Again, we have concluded, after a careful consideration of the whole record and an exhaustive examination of the authorities, that the doctrine of a presumptive grant applies to this case. The principle has been recognized and sustained by our courts since the early days of the commonwealth. It has been approved in a long line of cases, and the only question for decision here is whether it should be applied under the facts of the present case. An examination of the following cases will show not only the foundation of the rule, but the extent and limitation of its application: *Galloway v. Ogle*, 2 Bin. 468; *Taylor v. Dougherty*, 1 Watts & S. 324; *Kingston v. Lesley*, 10 Serg. & R. 383; *Hastings v. Wagner*, 7 Watts & S. 215; *Garrett v. Jackson*, 20 Pa. 331; *Fox v. Thompson*, 31 Pa. 172; *Carter v. Tinicum Fishing Co.*, 77 Pa. 310; *Brown v. Day*, 78 Pa. 129; *Wallace v. Presbyterian Church*, 111 Pa. 164, 2 Atl. 347; *Townsend v. Boyd*, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1148. The contention of appellants is that the presumption of a grant can only be invoked against an intruder without color of title. While it is true that in many of the cases in which the presumption of a grant was held to apply the defendants were intruders without color of title, nothing said or decided by this court warrants the conclusion that the rule is thus limited in its application. No case has been called to our attention, nor have we discovered any after exhaustive examination, that so holds.

The exact question does not seem to have been decided, but many judicial expressions found in the decisions in which the rule was discussed clearly indicate that no such limitation was intended. As far back as *Kingston v. Lesley*, 10 Serg. & R. 383, Chief Justice Tilghman said: "The rational ground for presumption is when the conduct of the party out of possession cannot be accounted for, without supposing that the estate has been conveyed to the one who is in possession." In *Taylor v. Dougherty*, 1 Watts & S. 324, above cited, Chief Justice Gibson in discussing the question, said: "The execution of a deed is presumed from possession in conformity to it for thirty years; and why the entire existence of a deed should not be presumed from acts of ownership for the same period, which are equivalent to possession, it would not be easy to determine." The same chief justice, in *Hastings v. Wagner*, supra, remarked: "These presumptions conduce to repose; and there is a growing tendency to encourage them not only here but elsewhere." Mr. Justice

Sergeant also observed: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry." *Foulk v. Brown*, 2 Watts, 209. It was said in *Baskin v. Seechrist*, 6 Pa. 154, that: "It is true that a defective claim of title may be amended by presuming a conveyance from one shown to have title, where the presumptive grantee has exercised, for a long course of years, such acts of dominion over the lands as can only indicate a claim of beneficial ownership unchallenged by any counterclaim of the supposed grantor." In *Warner v. Henby*, 48 Pa. 187, Mr. Justice Thompson, in discussing presumptive grants, said: "These presumptions, when ripened by time, and the silence of the warrantee, supply the place of a conveyance when there have been continuous acts of ownership on the part of the claimant. That period is not less than twenty-one years." Mr. Justice Clark in *Wallace v. Presbyterian Church*, supra, in discussing the necessity of the rule as a security of title, said: "Witnesses will die, papers will be lost or destroyed, and the exact proof of an ancient transaction thereby often becomes exceedingly difficult, sometimes impossible. The rule of law which authorizes the presumption is therefore founded in necessity and should be applied in all proper cases." In a late case, *Townsend v. Boyd*, above cited, our Brother Potter expressed the view of this court in the following language: "After a great lapse of time and a series of circumstances disclosing the enjoyment of an unchallenged title during such period, the courts will presume whatever grant may be necessary to quiet the title." In that case the right to invoke the presumption against one claiming under color of title, indeed, an ancient outstanding title, was expressly recognized. We there adopted the view of Chancellor Kent to the effect that if an outstanding title in a third party is set up as a defense in an action of ejectment, it must be a present subsisting one, otherwise it will be presumed to have been extinguished by a conveyance to the one who has asserted title to and exercised rights of ownership over the land for a long period of years.

There is nothing said in any of these cases, or in any other case in which the rule has been discussed, sufficient to warrant the deduction that the presumption of a grant can only be invoked against an intruder without color of title. The presumption depends upon the facts of each particular case and not upon the kind or character of title set up as a defense. In the present case the facts all point in one direction, and not a single fact indicates anything to the con-

trary. Anthony Sharp at the time of his death claimed this land. It was sold for the payment of his debts. Record notice was given that the purchaser at that sale took title from the estate of Sharp who held under claim of title from Kantner by sundry conveyances. That purchaser and those holding under him have had the constructive or actual possession since 1849. The Doughertys have paid the taxes assessed against it for a period of 40 years at least. They have exercised dominion over it for more than 50 years. During all these years no one asserted an adverse claim of title under John Kantner, and no one asserts such a claim in the present case. There is a break in the chain of title from Kantner to Anthony Sharp, but from the time his title passed to Mathias Baier to the present, the successors in title have stood upon this ancient title unchallenged by any adverse claimant. If any one else ever claimed adverse title under John Kantner, and there is nothing to even remotely indicate that such a claim was ever made, he hauled down his flag and fled the field long ago. The presumptions are all against any such claim and in favor of those asserting the Sharp title under the orphans' court sale in 1849. The elder Dougherty purchased this title in 1857 and the Dougherty family have relied on it ever since. They have been in the actual or constructive possession during all these years. They have exercised dominion over the land to the exclusion of others, and have borne their share of the public burdens by the payment of taxes assessed against it. No one else has done any of these things. Surely under such circumstances a conveyance to Anthony Sharp, under whom the Doughertys claim, will be presumed. The facts of this case bring it within the very spirit and purpose of the rule.

[4] But it is contended that the recital in the deed from the administratrix of Anthony Sharp to Mathias Baier was too general in its terms to be evidence of a conveyance from John Kantner, and that the learned trial judge committed error in admitting it. We have already said that the deed was properly admitted in evidence, but did not discuss the effect of the recital. The general rule is that recitals in a deed are evidence against the grantor and all persons claiming under him, but are not evidence against a stranger, or other person claiming under a title derived from the grantor before the deed containing the recital. This rule which applies to recent conveyances has a well-established exception in the case of an ancient deed. Recitals in ancient deeds, where possession accompanies the deed, are prima facie evidence of the facts recited even against third persons. *James v. Letzler*, 8 Watts & S. 192.

[5] The rule as applied to ancient deeds generally is not disputed, but it is contended that the recital in the deed in question

here is not specific enough to be admitted, as evidence of the fact. The recital is that the title of John Kantner "by sundry conveyances became vested in Anthony Sharp." It is argued that to make such recitals competent evidence they must contain the names of the parties and give the dates of the lost deeds, also that there must be proof of the existence and loss of such deeds before offering the deed containing the recital. If such were the rule it would be almost impossible to meet its requirements in offering ancient deeds in evidence. As for instance, in the present case Mathias Baier took title in 1849, and there is perhaps no living person who could be called as a witness to testify that he knew of the existence of prior conveyances, or that they had been destroyed or lost. In many instances such a rule would place an impossible burden upon the holder of an ancient title, and one which might result in doing great injustice. The law only requires the production of the best evidence possible under the circumstances and never demands an impossibility. The rule as to the admission of ancient deeds and papers in evidence is one of necessity, and grows out of the recognized difficulty and frequently the impossibility of proving the actual facts connected with old transactions. It is a wholesome rule and should not be frittered away by technical refinements in its application. The position of appellants in this respect loses sight of the real question involved. It was the deed which was offered in evidence to which objection was made. We have already said that the deed was properly admitted as a link in the chain of title. When admitted, it was proper to read its contents for the information of the court and jury, and this necessarily included the recital. The recital is only evidence of the facts recited. When the facts are specifically recited, giving names of parties, dates of deeds, and other information in detail, the evidential value of the recital is greater and more conclusive. We do not deem it necessary to put this case on the ground that the general recital in the Mathias Baier deed was sufficient to conclusively show the vesting of the John Kantner title in Anthony Sharp. It was some evidence of it, and, taken in connection with all the other facts and circumstances, laid the foundation for the presumption of a grant to Anthony Sharp. We think it was proper for this purpose at least, and in the disposition of the present case it is not necessary to go further.

[8] But it is argued that it was not offered for this purpose, and therefore cannot be so considered. This objection is purely technical, and does not go to the merits on the question of the admissibility of the deed containing the recital. While there is force in the argument we do not think it is necessary to reverse the judgment on this narrow and technical ground. The offer was

for the purpose of showing a conveyance from the administratrix of Anthony Sharp to Mathias Baier and by the recital to show title in Anthony Sharp. We have already decided that the deed was properly admitted as a link in the chain of title, and, when admitted, it could be used for any evidential purpose. It did show a conveyance to Mathias Baier and this was one purpose of the offer. The recital was some evidence of title in the estate of his grantor, and as such could be offered and considered in connection with other facts tending to establish that title. It would be sticking in the bark to hold that the recital, although otherwise admissible, was improperly admitted because the offer did not specifically state that it was to be used in connection with other facts to lay the foundation of a presumptive grant. It was offered as evidence of title in Anthony Sharp, whether by presumptive grant or otherwise was not stated. The recital being part of the contents of an ancient deed it was at least an item of evidence in support of the offer.

The fourth assignment raises a nice question and one not free from difficulty. The instruction complained of was: "Now we say to you these various conveyances have vested in this plaintiff a sufficient paper title upon which this action of ejectment may be sustained, and that he would be entitled to recover in this action, were it not for the defense set up here showing, or tending to show, that this title, prior to the time that it became vested in William A. Dougherty, was divested by a tax sale." It is argued that this was a binding instruction to the jury in favor of plaintiff upon all questions of evidence in the case and left nothing open except the validity of the tax title held by appellants. In this connection it is not improper to remark that in law and in fact this is the only question involved in real controversy here. More than 70 years ago Chief Justice Gibson, in discussing the effect of evidence in a similar case, said: "On every principle of authority and reason, this was sufficient not only to be left to the jury, but in the absence of conflicting evidence, to command a verdict." *Taylor v. Dougherty*, 1 Watts & S. 324. To instruct the jury that under the evidence the plaintiff is entitled to recover unless the validity of the tax title set up is established is a very mild form of "commanding" a verdict. The jury were instructed that the action may be sustained and that the paper title was sufficient to entitle plaintiff to recover. All of which is true when considered in connection with other facts and circumstances of the case. In other parts of the charge the legal status of the title relied on by appellee was more accurately and fully stated. There was no conflicting evidence relating to the title of appellee. Appellants did not undertake to set up an outstanding title in any one claiming under John Kantner. They relied on

their tax deed and contended that appellee had failed to show a good title by reason of the missing link. The learned trial judge thought the evidence was sufficient to account for the missing link, and so do we. The jury were so instructed. Under all the facts, we have concluded that the fourth assignment does not constitute reversible error.

[7] The fifth assignment relates to the affirmation of the fourth point submitted by counsel for plaintiff at the trial. By affirming this point the jury were instructed that if they found from the evidence the land in dispute was taxed in the name of the Doughertys on the seated list for 1891, and was the same land as that taxed on the unseated list in the name of the John Sailor warrant, the plaintiff would be entitled to recover. This point standing alone might be confusing and even misleading, but when taken in connection with the whole charge as well as the other points affirmed, we cannot believe the jury were misled by it. It was intended to and did narrowly and sharply define the real question in the case. Appellants relied on a tax title derived from the sale of the land for taxes assessed against the John Sailor warrant on the unseated list for 1891. If this was a valid tax title appellants could hold under it no matter how perfect or imperfect the paper title of appellee might be. Appellants did not claim under John Kantner, nor did they set up any adverse outstanding title in conflict with that of appellee. They simply relied on their tax deed. If the tax title was valid the land was theirs; if invalid, it did not belong to them. This was the whole question. In this connection the remarks of Mr. Justice Woodward in *Fox v. Thompson*, 31 Pa. 172, are pertinent: "If he has title, he should have permitted the prima facie case, presented by the plaintiffs, to have been received by the court, and then shown his own right. The question raised upon the plaintiff's title could have been contested with better advantage, after showing his own, if he had any to show, than upon the competency of the evidence." The position of appellee was that the tax title set up by appellants was void because these same lands were taxed on the seated list to the Doughertys in 1891 and the taxes so assessed were paid. If so, no valid title passed under the tax sale. The evidence, if believed, was ample to sustain such a finding. The Doughertys did pay taxes upon mountain land assessed on the seated list for 1891. These lands had been assessed on the seated list for more than 20 years and why they were also assessed on the unseated list for 1891 does not satisfactorily appear. All these facts were for the jury. It was a question of identifying the lands and the jury were so instructed. This was the real question in the case, and it was carefully submitted. All other ques-

tions were but incidental. The jury found in favor of appellee upon ample evidence.

There are some technical errors in this record, but as we view it appellants had a fair trial on the merits of the case, and the matters complained of in the assignments of error do not affect the real question in controversy which is the validity of the tax title. On this question, the jury found against appellants, and this should be an end of the controversy.

Judgment affirmed.

INHABITANTS OF EDEN v. INHABITANTS OF SOUTHWEST HARBOR.

(Supreme Judicial Court of Maine. Dec. 4, 1911.)

1. PAUPERS (§ 39*)—“TOWN TO WHICH HE BELONGS.”

The phrase “town to which he belongs,” within Rev. St. c. 18, § 51, providing for the furnishing of nurses, etc., to a quarantined person at the charge of the town to which he belongs, means the town in which he has his pauper settlement.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 162-179; Dec. Dig. § 39.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7019-7029, 7817.]

2. STATUTES (§§ 159, 161*)—REPEAL BY IMPLICATION.

To effect a repeal by implication, a later statute must be so clear and explicit as to show that it was intended to cover the whole subject-matter, and displace the prior statute, or the two must be plainly repugnant and inconsistent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 229-234; Dec. Dig. §§ 159, 161.*]

3. PAUPERS (§ 39*)—EXPENSES UNDER QUARANTINE—LIABILITY OF TOWNS.

Rev. St. c. 18, § 51, providing that nurses and their assistants and necessities furnished a quarantined person shall be at his charge, or that of his parents or master if able, and otherwise, at that of the town to which he belongs, was not repealed by implication by Pub. Laws 1909, c. 25, § 2, providing that expenses, including supplies of food, medicines, etc., furnished a quarantined person, or such part thereof as the board of health may determine, shall be deemed a legitimate expenditure for the protection of the public health, and shall be charged to the account of incidental expense of the town, but not to any pauper account, and that no person so quarantined and assisted shall be considered a pauper; the former statute being designed to divide the expenses, so that the part designed to protect the community where the infected person is found should be borne by that town, and the part incurred for his healing and comfort should be borne by the patient or by the town of his settlement, while under the latter statute both kinds of expenditures for indigent persons are grouped together, and it is left to the board of health to determine how much shall be borne by the town of the settlement, and how much by the town where the quarantined person is found.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 162-179; Dec. Dig. § 39.*]

4. PAUPERS (§ 39*)—AID—REIMBURSEMENT BY TOWN.

Under the express terms of Pub. Laws 1909, c. 55, a town furnishing antitoxin to an

indigent person is entitled to reimbursement by the town of his settlement.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 162-179; Dec. Dig. § 39.*]

5. PAUPERS (§ 39*)—QUARANTINE—EXPENSES—LIABILITY.

Under Pub. Laws 1909, c. 25, § 2, providing that expenses of a quarantined person or such part thereof as the board of health may determine shall be charged to the account of incidental expenses of the town, etc., determination by the board of health of a town where nurses, necessities, etc., were furnished persons having their pauper settlement in another town, that the expenses should be paid by the town of settlement, renders the latter town liable.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 162-179; Dec. Dig. § 39.*]

Agreed Statement from Supreme Judicial Court, Hancock County.

Action by the Inhabitants of Eden against the Inhabitants of Southwest Harbor. On an agreed statement of facts. Judgment for plaintiffs.

Action by the town of Eden against the town of Southwest Harbor to recover for supplies and services furnished certain persons infected with diphtheria, said persons having their settlement in the defendant town, though found in the plaintiff town when said supplies and services were furnished, brought under Rev. St. c. 18, § 51. Writ dated March 8, 1911.

The declaration in the writ is as follows:

"In a plea of the case, for that the said defendant at said Eden, to wit, Ellsworth, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of \$195.04, according to the account annexed, then and there in consideration thereof, promised the plaintiffs to pay them the same sum on demand:

Bar Harbor, Me., Dec. 12, 1910.

Town of Southwest Harbor, To Town of Eden, Dr.

To supplies and services furnished George Marshall and family as follows:

To medical services rendered by Dr. J. H. Patten.....	\$65 00
To medical services rendered by Dr. R. G. Higgins.....	2 00
To services as undertaker and necessities for funeral of child Eugene Marshall, rendered and furnished by F. E. Sherman	61 43
To groceries.....	10 21
Services hauling water, ice, and supplies rendered by Ralph Brewer.....	13 20
Fumigating	10 00
To antitoxin.....	2 20
To team hire.....	10 00
To services as nurse rendered by Mrs. Susie J. Sullivan.....	21 00
	\$195 04

"Also in a plea of the case, for that on the 13th day of August, 1910, one George Marshall and his family, consisting of the following named persons, to wit: George Marshall, Villa A. Marshall, and Eugene Marshall—had their legal settlement in the defendant town, which said legal settlement in said defend-

ant town has continued ever since, and on said 30th day of August at said Eden said George Marshall and his family had recently been and then were inflicted with diphtheria, a disease and sickness dangerous to the public health, and thereupon the local board of health of the town of Eden in which town said Marshall and his said family were then living provided for the safety of the inhabitants as they, the said board of health, thought best, by removing them to a separate house, viz., to the isolated hospital, so called, in the said town of Eden, said removal not being dangerous to their health, and by providing medicines, medical attendance, and necessities to the amount of \$195.04 as specified in the account annexed hereto, and neither the said George Marshall nor his said family, nor the parent or master of either, was or is able to repay said charge, of all of which said defendant town then and there had notice, and said defendant town by virtue of the statute then and there became liable and promised the plaintiff to pay it said sum of \$195.04 on demand."

When the action came on for trial, an agreed statement of facts was filed and the case reported to the law court for determination.

The agreed statement of facts is as follows:

"On August 30, 1910, and ever since that date, Geo. Marshall and his family, said family consisting of said Geo. Marshall, his wife, Villa A. Marshall, and his child, Eugene Marshall, have had their legal settlement in the defendant town.

"On said date said Geo. Marshall and his family aforesaid were residing in the plaintiff town, and were and had recently been infected with diphtheria, a disease and sickness dangerous to the public health. On said August 30, 1910, and other days between said date and September 13, 1910, the local board of health of the plaintiff town, being the town where said Marshall and his family aforesaid then were, for the purpose of providing for the safety of the inhabitants, the said local board of health, thinking it best to do so, removed said Marshall and his family aforesaid to a separate house, to wit, to the isolated hospital, so called, in said plaintiff town, and on said August 30th and other days up to and including September 13, 1910, the plaintiff provided for said Marshall and his family aforesaid at said hospital nurses and other assistants and necessities as set forth in the account annexed to the writ. The removal to the isolated hospital above referred to was done without great danger to the health of the persons removed. Neither said Geo. Marshall nor his family aforesaid, nor the parent or master of either, was or is able to pay said charges.

"On the 12th day of December, 1910, the secretary of the local board of health of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff town by order of said board wrote and mailed to chairman of the board of selectment of the defendant town a letter inclosing the bill in suit except the last item thereof, said letter being in the form following:

"Bar Harbor, Me., Dec. 12, 1910.

"Chairman of Board of Selectmen, Southwest Harbor, Me.—

"Dear Sir: We are sending you bill for the George Marshall family. His boy having been sick and died with diphtheria. This is the actual money paid out and no cost of the board of health services added to it.

"Hoping that you will send us your check not later than the 20th, as our books close January 1st, and we want these accounts all in if possible.

"Yours very truly,

"[Signed] J. Alden Morse,

"Sec'y Board of Health."

"This letter was received by chairman of the selectmen of the defendant town December 14, 1910, the items set forth in the account annexed, so far as the plaintiff town is entitled to recover, are suitable in character, and charges therefor are reasonable and proper, and, if the plaintiff is entitled to recover, it may recover the amounts specified in the writ. The writ and declaration shall be printed and form a part of the agreed statement.

"It is also agreed that the said defendant town duly filed its offer to be defaulted for the sum of \$2.20 for the antitoxin charged in the account annexed, and that said offer was rejected."

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Charles H. Wood and Deasy & Lynam, for plaintiffs. George R. Fuller and Hale & Hamlin, for defendants.

CORNISH, J. [1-3] August 30, 1910, the local board of health of Eden, the plaintiff town, quarantined one Marshall and his family as persons infected with a contagious disease, and provided for them "nurses and other assistants and necessities." R. S. c. 18, § 51. Mr. Marshall and his family, though then commorant in Eden, had their pauper settlement in the defendant town, Southwest Harbor, and were unable to pay for the services and supplies thus furnished them. Accordingly, the town of Eden brought this action against the town of Southwest Harbor to recover for the expenses of such services and supplies under the statute (R. S. 1903, c. 18, § 51), which provides that the "nurses and other assistants and necessities" furnished a quarantined person shall be "at his charge, or that of his parent or master, if able; otherwise at that of the town to which he belongs." It is conceded that the phrase "the town to which he belongs" is meant the

town in which he had his pauper settlement. *Kennebunk v. Alfred*, 19 Me. 221; *Hampden v. Newburgh*, 67 Me. 370. It is further conceded that the plaintiff can recover for the items and amounts sued for if the right of action given by that statute was not taken away by the later statute of Pub. Laws 1909, c. 25.

The later statute does not in terms take away the right of action given by the earlier, and the repeal, if accomplished, must be by implication. But, to effect a repeal by implication, the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject-matter, and displace the prior statute, or the two must be so plainly repugnant and inconsistent that they cannot stand together. *Goddard v. Boston*, 20 Pick. (Mass.) 407; *Smith v. Sullivan*, 71 Me. 150; *Staples v. Peabody*, 83 Me. 207, 22 Atl. 113.

The court will, if possible, give effect to both statutes, and will not presume that the Legislature intended a repeal. *Diver v. Keokuk Savings Bank*, 126 Iowa, 691, 102 N. W. 542.

"As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter unless the repugnancy between the two is irreconcilable." *Sutherland on Damages*, p. 152.

A critical comparison of these two statutes under consideration dissipates any apparent repugnancy. The act of 1909 simply amends the last 10 words of R. S. c. 18, § 51. All the rest of the section remains unchanged. To make this clearer: The earlier statute (R. S. c. 18, § 51) is as follows:

"When any person is or has recently been infected with any disease or sickness dangerous to the public health, the local board of health of the town where he is, shall provide for the safety of the inhabitants, as they think best, by removing him to a separate house, if it can be done without great danger to his health, and by providing nurses and other assistants and necessities, at his charge or that of his parent or master, if able; otherwise, at that of the town to which he belongs."

The later statute (Pub. Laws 1909, c. 25, § 2) is as follows:

"All expenses including all supplies of food and medicine, including antitoxin, incurred in carrying out the provisions of section one of this act, or incurred in furnishing families or persons affected with tuberculosis with burnable spitcups, or other supplies needed to prevent the spread of infection, or such part thereof as the board may determine, shall be deemed a legitimate expenditure for the protection of the public health and shall be charged to the account

of incidental expenses of the town, but not to any pauper account, nor shall any person so quarantined and assisted, be considered a pauper, or be subject to disfranchisement for that cause unless such persons are already paupers as defined by the Revised Statutes."

This later statute was, in effect, further amended at the same session of 1909 by the passage of chapter 55, which provides, among other things, that "the local board of health in any town furnishing an indigent residing in another town antitoxin, upon application shall be reimbursed by the town where the patient resides." The word "resides" in this statute is evidently used in the same sense as "belongs" in R. S. c. 18, § 51; that is, the town where the indigent has his pauper settlement.

The right of action named in section 51 of chapter 18 of the Revised Statutes was provided for at the organization of the state by section 1 of chapter 127 of the Public Laws of 1821, and it has come down through all the revisions of 1841, 1857, 1871, 1883, and 1903, in essentially the same form, except that prior to 1887 the municipal officers were charged with the duty which since that time has devolved upon the local board of health (1887, c. 123, § 27). It has never been one of the pauper statutes, enacted for the relief of the poor. That matter lay wholly in the control of the overseers of the poor who were and are obliged to follow certain statutory requirements as to notices, etc., in order to recover from the town of the pauper's settlement. But, in case of an infectious disease or one dangerous to the public health, at first the municipal officers and later the local board of health were given these powers and duties in order not merely to relieve the patient, but "to provide for the safety of the inhabitants." The assistance rendered and the expenses incurred were in no sense pauper supplies. They need not be applied for by the pauper himself nor by some one authorized by him, and no notice need be given to the town where the patient has his pauper settlement. The municipal officers and later the local board of health had full power to act when the emergency arose, and it was outside the jurisdiction of the overseers of the poor.

But this court in *Kennebunk v. Alfred*, 19 Me. 221, in construing the original statute, held that there should be a division of expenses, that part of the authorized expense was designed wholly for the protection of the community and should be borne by the community, while another part was for the healing and comfort of the patient and should be borne by the patient if financially able, otherwise by the town of his settlement.

Now the effect of chapter 25 of the Laws of 1909 is simply to change the last clause of section 51, touching those persons who

might not be able to pay, the indigent persons and to make the town where such persons fall sick, liable for all the expenses, including those designated to prevent the spread of the disease and those for the comfort of the patient, "or such part thereof as the board may determine." Without that clause, the town furnishing the supplies would be liable for all the expense, but, with it, the effect is to give the local board the power to charge a part or the whole to the town of settlement.

In other words, under the old statute as construed in the decision before referred to, expenditures for food for indigent persons were chargeable to the town of settlement, but expenditures for protection of the public health must be borne by the town supplying them. Under the new statute, all kinds of expenditures for indigent persons are grouped together, and it is left to the board of health to decide how much shall be borne by the town of settlement, and how much by the town where found. This new act does not restrict the power of the board under R. S. c. 18, § 51, to remove the sick and place them in quarantine. They still have that power. Nor does it abridge their power to collect all the expenses from the person himself if able. They still have that power, and as to those persons there never has been any division of expenditures. They were liable for the whole or nothing. But, if the person is indigent, then the new act prescribed a change, and instead of dividing the expenses along the line that separates personal relief from public protection, and collecting the former from the town of settlement and compelling the latter to fall upon the town rendering the services, it groups all kinds of expenses in one class, and leaves to the board of health the determination how much, if anything, shall be borne by one town, and how much, if anything, by the other. In short, it substitutes the judgment of the board of health for the arbitrary rule of law laid down in *Kennebunk v. Alfred*, supra.

[4] This is subject to one exception, however, which was made later by chapter 55 of Public Laws of 1909, which provides that for antitoxin furnished an indigent person the town furnishing shall be reimbursed. Antitoxin then shall be charged to the town of settlement, but all other expenses shall be charged according to the determination of the board of health.

[5] True, it may be argued that in practice the board will invariably charge all expenses to the other town, and thereby relieve their own town from all liability. This may be so, but the Legislature has seen fit to place the power in their hands, evidently relying upon their judgment, honesty and sense of fairness, and it is not for the court to assume that the confidence has been misplaced. If experience proves that fact, it

is within the power of the Legislature to remedy the difficulty by statutory enactment.

The record in this case shows that the board of health of Eden considered the matter and demanded of the defendant town the amount actually paid out with no cost of services of the board.

It follows that the certificate of decision must be:

Judgment for plaintiffs.

MOULTON v. CHAPMAN et al.

(Supreme Judicial Court of Maine. Dec. 11, 1911.)

1. WILLS (§ 629*)—CONSTRUCTION—REMAINDERS.

A testamentary remainder will not be construed to be contingent, if, consistently with testator's intention, it can be deemed vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

2. WILLS (§ 634*)—CONSTRUCTION—REMAINDERS.

A will and codicil directed payment of income to testatrix's brother during his life, and that, at his death, the principal be paid to a specified person, etc. *Held*, that the remainder was vested, and not contingent, entitling the remainderman's administrator to payment.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.*]

3. WILLS (§ 463*)—CONSTRUCTION—CONTRACTS.

While in construing a will every clause and word should be considered, a clause which is unnecessary for its declared purpose, is repugnant to the other provisions of the will, and unexplainable except upon assumption that it results from an error of the scrivener, will be disregarded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 982; Dec. Dig. § 463.*]

Report from Supreme Judicial Court, Cumberland County.

Bill in equity brought by the plaintiff, William H. Moulton, against Woodman E. Chapman, individually and as administrator of the estate of Sarah Elizabeth Chapman, late of said Limerick, deceased, and others, for the construction and interpretation of the will and codicil of Eliza Chapman Rogers, deceased. Answers were filed by the several defendants. The case was then reported to the law court for determination. Decree rendered.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Augustus F. Moulton, for plaintiff. Henry W. Swasey, for Woodman E. Chapman. Symonds, Snow, Cook & Hutchinson, for Maria A. Rogers. Walter B. Grant, for Joseph M. Mayall. John C. Mayall, and George W. Chapman. Ardon W. Coombs, for Lucy M. S. Crockett.

BIRD, J. [1, 2] This is a bill in equity brought for the construction and interpre-

tation of the will and codicil of Eliza Chapman Rogers. The bill is brought by complainant as trustee under the second item of the will as modified by the second item of the codicil. The will was made the 25th day of March, 1880, and the codicil on the 7th day of June, 1900.

By the first item of the will, the testatrix devised to Maria Adams Rogers, granddaughter of her late husband, a house and lot in Portland, Me., which some two months earlier had been conveyed to her by her husband's son, and also certain personal property received by her from the estate of her late husband.

The second item of the will is as follows:

"Second. I give and bequeath to William H. Moulton of said Portland, whom I hereby appoint my testamentary trustee to carry out the trusts in this will, the sum of five thousand dollars to be held by him in trust for the following purposes, to wit, to keep the same safely invested and to pay the annual income therefrom to my brother William Woodman Chapman, in quarterly payments for his support during his life, and at the decease of my said brother I hereby direct that the sum of one Thousand dollars of said five thousand dollars be paid to my niece Sarah Elizabeth Chapman of Limerick, Maine, and that the remaining four thousand dollars be divided equally among my five nephews, George Smith, John Mayall, Joseph Mayall, George W. Chapman and Woodman Chapman, and that on the payment of the same said trust shall thereby terminate."

By the third item of the will another trust is created, the income of which is to be paid to her sister, Lucy Maria Smith, during life, and, at her decease, the trust fund is directed to be divided equally between Lucy Maria Smith, daughter of Esther S. Smith, and said Sarah Elizabeth Chapman. The remaining items of the will are unimportant.

By the first item of the codicil the testatrix devises to her brother William Woodman Chapman for life a farm, and the personal property thereon, in Hollis, with remainder over to her niece, Sarah Elizabeth Chapman, mentioned in the will.

The second item of the codicil is as follows:

"Second: I increase the trust fund of five thousand dollars (\$5000.) given by the second section of my said will to William H. Moulton, for the benefit of my brother William W. Chapman to the sum of ten thousand dollars (\$10,000) to hold and apply the income thereof as set forth in said second section with regard to said sum of five thousand dollars. And on the decease of my said brother I direct that the whole of said trust fund of \$10,000 be paid, transferred and conveyed to my said niece Sarah Elizabeth Chapman,—free and discharged of all trusts.

"My nephews and nieces mentioned in said second section having deceased I revoke the bequests therein made for them."

The third item is unimportant, and by the fourth item the residue of her estate is given to Maria Adams Rogers.

The testatrix died on the 7th day of June, 1900. Sarah Elizabeth Chapman died on the 28th day of May, 1903, at the age of 58, and William Woodman Chapman on the 23d day of September, 1910, each unmarried and intestate.

The heirs at law of the testatrix at the time of her decease were her brother, Aaron B. Chapman, now deceased, leaving as his heirs at law Woodman E. Chapman and Sarah Elizabeth Chapman, a nephew, George C. Smith, and Lucy M. S. Crockett, respectively, son and granddaughter of Lucy Maria Smith, a deceased sister, Joseph M. Mayall and John C. Mayall, children of Sarah Mayall, a deceased sister, George W. Chapman, son of George Chapman, a deceased brother, and William Woodman Chapman, now deceased, as already stated.

The nephew of the testatrix, Woodman E. Chapman, administrator and heir at law of Sarah Elizabeth Chapman, claims that the remainder constituted under the second item of the codicil vested in said Sarah upon decease of the testatrix. The four other nephews contend that the second paragraph of the second item of the codicil shows a revocation of item 2 of the will in consequence of a mistake of fact entertained by testatrix, and that not only should they share in the trust fund of \$5,000 provided by the second item of the will, but also, in the same proportions, in the increase in said fund made by the second item of the codicil; while the residuary legatee denying that the remainder was vested and contesting the claim of the nephews urges that the trust fund of the second item of the codicil should be paid to her.

In considering the claim of the nephew, Woodman E. Chapman, the second paragraph of the second item of the codicil will be disregarded for the present. It is a well-recognized rule of construction of this court that no remainder will be construed to be contingent, which may, consistently with the intention of the testator, be deemed vested. *Robinson v. Palmer*, 90 Me. 246, 248, 38 Atl. 103; *Storrs v. Burgess*, 101 Me. 26, 33, 62 Atl. 730. A most careful scrutiny of both will and codicil fails to reveal an intention on the part of testatrix that the remainder should not vest. *Torrey v. Peabody*, 97 Me. 104, 106, 53 Atl. 988. We cannot regard the fact that habenda in fee simple are made use of in the first item of the will and in the first and fourth items of the codicil, and that no habendum appears in the second item of the codicil as conclusive, as urged, or indicative of an intention on the part of testatrix that the remainder should not vest. In the first two instances real estate is

specifically devised, and might be included or pass under the last or residuary clause, while in the second item of the codicil personal property only is bequeathed. Nor were such habenda necessary when used. *R. S. c. 76, § 16*; *Hopkins v. Keazer*, 89 Me. 347, 355, 36 Atl. 615; *Fuller v. Fuller*, 84 Me. 475, 479, 24 Atl. 946; *Richardson v. Richardson*, 80 Me. 585, 594, 16 Atl. 250; *Nash v. Simpson*, 78 Me. 142, 146, 3 Atl. 53; *Mitchell v. Morse*, 77 Me. 423, 425, 1 Atl. 141, 52 Am. Rep. 781; *Jones v. Leeman*, 69 Me. 489, 491.

In behalf of the residuary legatee, it is forcibly urged that the general rule that, where there are no words importing a gift other than a direction to divide or pay at a future time, the legacy is contingent, and does not vest until that time arrives, is applicable to the will before us. An examination of the cases cited in support of this contention makes it evident that the rule is applied where the remainder over is to a class the members of which are determinable only at a future time. But it is said by one of the courts most frequently applying the rule that it will hesitate to apply it where the gift is to legatees by name. *Roosa v. Harrington*, 31 Misc. Rep. 529, 65 N. Y. Supp. 601, 65. See *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709. See, also, *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116. We conceive no occasion for its application in the present case.

[3] The claim of the nephews arises under the second paragraph of the second item of the codicil. In construing a will it is true that every clause and word are to be taken into consideration, and no clause or material matter of description rejected, but, in view of the provisions of the will and codicil and the admitted facts, it seems hopeless to give a consistent or intelligent interpretation to this clause. It speaks of "nieces" mentioned in the second item of the will, yet but one niece was mentioned. It alleges that the "nieces" mentioned have deceased, but the preceding sentence bequeaths the remainder to the only niece mentioned, and she was then living. The paragraph itself was wholly unnecessary, since revocation of the second item of the will was unquestionably effected by the first paragraph of the codicil. It is unnecessary, inconsistent with, and repugnant to other provisions of the will and codicil, and unexplainable except upon the supposition that it is the result of a misconception by the scrivener of something said by testatrix. We are forced to conclude that an attempt to reconcile this clause with the other clear and unambiguous expressions of the will and codicil will be futile. *Isley v. Isley*, 80 Me. 23, 25, 12 Atl. 796; *Cotton v. Smithwick*, 66 Me. 360, 367; 3 Jarm. on Wills (5th Am. Ed.) 706 (Rules of Construction, 12, 13). We find nothing in this second paragraph of the second item of the codicil affecting the conclusion already reached as to the vesting of the remainder in Sarah Elizabeth Chapman, nor can we find in it

grounds to support the claim of the nephews to share in the remainder.

Nor do we find ground for the contention of Lucy M. S. Crockett that the remainder of the fund should be paid to the heirs at law of the testatrix.

Our conclusion upon the whole will and codicil is that the remainder of the fund belonging to the trust created by the second item of the codicil should be paid over by the trustee to Woodman E. Chapman, as administrator of the estate of the deceased remainderman, Sarah Elizabeth Chapman.

Costs of complainant, including reasonable counsel fees, to be retained from the trust fund by the trustee, reasonable costs, as between counsel and client, to be paid by the trustee from said fund to the respondents filing answers, all answering jointly to be treated as one respondent and all questions as to costs, arising hereunder, to be determined by the sitting justice. All sums so retained and paid by the trustee are to be allowed in his account.

Decree accordingly.

WEBSTER v. BALLOU, Sheriff.

(Supreme Judicial Court of Maine. Dec. 11, 1911.)

1. MANDAMUS (§ 1*)—WHEN PROPER REMEDY.

Mandamus is an appropriate and necessary proceeding where a petitioner shows that his right to have the act done, which is sought by the writ, has been legally established; that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion exists; that the writ will be availing; and that there is no other adequate remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

2. MANDAMUS (§ 3*)—SUBJECTS OF RELIEF—PROCEEDINGS AGAINST SHERIFF.

Mandamus lies to compel a sheriff to execute a writ of possession; proceedings against the sheriff for contempt, or an action for damages, being inadequate remedies.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 8; Dec. Dig. § 3.*]

3. SHERIFFS AND CONSTABLES (§ 106*)—REFUSAL TO EXECUTE WRITS—DEFENSES.

A sheriff could not excuse refusal to execute a writ, directing him to place plaintiff in possession of lands, because he was notified that defendant occupied them as tenant of one who was not a party to the suit, and who was in possession under claim of right.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 175, 176, 204; Dec. Dig. § 106.*]

Exceptions from Supreme Judicial Court, Sagadahoc County.

Petition by Joseph F. Webster for mandamus against John W. Ballou, Sheriff of Sagadahoc County. Petition denied, and defendant brings exceptions. Exceptions overruled, and peremptory writ directed.

The bill of exceptions states as follows:

"This was a petition for mandamus to compel the respondent to serve a writ of possession issuing out of the supreme judicial court for Sagadahoc county, in a real action wherein the petitioner, Joseph F. Webster, was plaintiff, and Francis Holmes defendant.

"The petition for mandamus is dated September 12, 1911, and was made returnable before Mr. Justice Haley on September 14th. On that date the alternative writ was, by agreement of parties, ordered to issue, and was issued; the return of the respondent Ballou thereto was filed, and also the petitioner's answer to the return. At the same time the motion of Clara A. Holmes for leave to intervene was presented to the justice.

"A hearing was had thereon and on the petition, at the conclusion of which the presiding justice denied the motion to intervene, and ordered that the peremptory writ issue.

"To the denial of the motion and the ordering of the peremptory writ, the respondent and the said Clara A. Holmes, by their attorney, seasonably excepted, and pray that their exceptions may be allowed."

The exceptions were allowed and certified to the Chief Justice for decision, as provided by Revised Statutes, c. 104, § 18.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

Foster & Foster and E. C. Plummer, for plaintiff. Frank L. Staples, for John W. Ballou and Clara A. Holmes.

KING, J. At the August term, 1910, of the supreme judicial court for Sagadahoc county, the petitioner, Joseph F. Webster, recovered judgment against Francis Holmes for the possession of certain real estate in Bath, in that county. A writ of possession issued upon said judgment, and was placed in the hands of the respondent, John W. Ballou, sheriff of Sagadahoc county, commanding him "that without delay you cause the said Joseph F. Webster to have possession of and in the said premises." The sheriff did not execute the writ of possession, whereupon these proceedings for a writ of mandamus against him were commenced. In answer to the alternative writ, he made return that he had not executed the mandate of the writ of possession because he was notified "that Francis Holmes, the defendant in said writ of possession, was occupying a part or all of said premises as the tenant of one Clara A. Holmes, who, as he is informed and believes, and therefore avers, is the legal owner of a part or all of said described premises, and is, therefore, tenant in common with the petitioner of said premises: that he was notified that said Clara A. Holmes was in actual possession of said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

premises, and that any attempt to oust her from possession would result in legal proceedings against him; that, being in doubt what course to pursue, he consulted the attorneys of both the petitioner and of said Clara, and urged them to come to some adjustment of the matter, * * * and by reason of his doubt as to his legal right to actually evict the said Francis Holmes, and to oust said Clara A. Holmes from her possession, he has up to this time forbore to do so."

The said Clara A. Holmes presented a motion to the justice before whom the proceedings were pending, in which she set forth grounds on which she claims to be an owner of an undivided portion of the premises described in the writ of possession, and that the execution of the writ will be prejudicial to her rights and interests in the property, and praying that she might be permitted to intervene as a party defendant in the proceedings. Her motion to intervene was denied, and after hearing a decree was made that the peremptory writ be granted. To that ruling and decree exceptions were filed and allowed, and certified to the Chief Justice for decision, under the provisions of section 18, c. 104, R. S.

[1] Mandamus is an appropriate and necessary proceeding where a petitioner shows: (1) That his right to have the act done, which is sought by the writ, has been legally established; (2) that it is the plain duty of the party against whom the mandate is sought to do the act, and in the doing of which no discretion may be exercised; (3) that the writ will be availing; and that the petitioner has not other sufficient and adequate remedy. *Dennett v. Mfg. Co.*, 106 Me. 476, 478, 76 Atl. 922.

[2] In the case at bar, the petitioner's right to have immediate possession of the real estate in question as against Francis Holmes has been established by a judgment of the supreme judicial court of this state, which judgment has not been modified or reversed, but remains in full force and effect.

Further, that court has issued its mandate; the writ of possession to the sheriff commanding him to cause the petitioner "forthwith" to have the possession of the real estate in accordance with its judgment. The duty of the sheriff to do the act which is sought by the writ is plain, unequivocal, and ministerial, in the discharge of which no discretion on his part is required.

The writ of mandamus will be availing. The execution of its mandate will give the petitioner immediately the benefit of his judgment. And it cannot be reasonably contended that he has any other sufficient and adequate remedy. If for such a neglect the sheriff would be subject to proceedings for contempt in not obeying the mandate of the writ of possession, such proceedings would not give the petitioner the benefit of his judgment—possession of the property. Neither should he be required to rely upon a suit

for damages against the sheriff. Such a right of action, with its attendant delays, expenses, and uncertainties, is not a sufficient and adequate remedy. It is not a remedy commensurate with the petitioner's right. "To supersede the remedy by mandamus, a party must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application." *Fremont v. Crippen*, 10 Cal. 212, 215, 70 Am. Dec. 711. In the case at bar, the relief to be afforded is the putting of the petitioner in possession of the premises in pursuance of the judgment and order of the court.

[3] The matter set forth in the sheriff's return to the alternative writ is immaterial, and does not justify his delay and forbearance to execute the writ of possession. He points out no defect in his precept. It was "fair on its face" and issued by a court having complete jurisdiction of the suit and the parties, and he was fully protected in following its mandate. The fact that he was informed that Clara A. Holmes claimed to own an undivided portion of the premises described in the writ of possession, and that she claimed that Francis Holmes was in possession of the property by her authority, should not have deterred him from serving the precept as commanded.

The writ of possession was issued against Francis Holmes alone. It was binding only upon him and any one claiming possession under him since the beginning of the lis pendens. Clara A. Holmes was not a party to it. If she has title to an undivided portion of the premises (which claim the petitioner disputes), her title is in no way affected by the judgment in the action of Webster against Francis Holmes, under which the writ of possession was issued, since she was not a party to that suit. The execution of the writ of possession will not take away any of her rights of possession to the premises.

If it were permissible in these proceedings to consider the claims made by Clara A. Holmes, and in her behalf, we do not perceive how they could affect the merits of the issuance of the judgment for possession in favor of Webster against Francis Holmes. The latter was admittedly in possession of the property at the time the real action was commenced against him. It cannot be said that he was then occupying the property as agent for his sister Clara, because she alleges in her motion to intervene that on the 7th day of October, 1910, she gave him "authority to occupy said premises as her agent." But the action was commenced July 7, 1910. He made no claim in the action that he was in occupation by right of anybody. He was there as a stranger to the title. One tenant in common may bring an action against a stranger for the recovery of possession of the property without joinder of his cotenant. Section 9, c. 106, R. S.

If it be a fact, as Clara alleges, that she made some use of the property herself while Francis and his family lived there, that fact could not prevent Webster, even if a cotenant with Clara, from proceeding to recover possession against Francis. Having so proceeded to final judgment, and obtained from the court the writ of possession against Francis, no sufficient cause is shown why that judgment should not be made effective by the prompt execution of the mandate of the writ of possession. To hold otherwise in such case would tend to impair the certainty and efficiency of judicial proceedings.

It is therefore the opinion of the court that the motion of Clara A. Holmes to intervene was properly denied, and the peremptory writ properly ordered.

Exceptions overruled.

Peremptory writ to issue as ordered.

KARAHALIES v. DUKAIS.

(Supreme Judicial Court of Maine. Dec. 1911.)

1. STATUTES (§ 279*)—PLEADING—STATUTORY ACTION.

In relying upon a public statute it is sufficient that a pleading states facts bringing the case within the statute, which need not be set out or referred to.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 378; Dec. Dig. § 279.*]

2. STATUTES (§ 244*)—STATUTES AUTHORIZING SUMMARY PROCEEDINGS—CONSTRUCTION.

Statutes authorizing summary proceedings must be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 325; Dec. Dig. § 244.*]

3. LANDLORD AND TENANT (§ 290*)—RECOVERY OF POSSESSION—FORCIBLE DETAINER.

Forcible entry and detainer is a proper remedy against a tenant at will whose tenancy has been terminated by alienation by the landlord for a term of years.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1216; Dec. Dig. § 290.*]

4. FORCIBLE ENTRY AND DETAINER (§ 24*)—DECLARATION—SUFFICIENCY.

Under Rev. St. c. 98, §§ 1, 2, authorizing actions for forcible entry and detainer, and under section 4, requiring it to be commenced by inserting the substance of the complaint as a declaration in a writ of attachment, where plaintiff proceeded upon the theory that defendant was a disseisor within section 1, the declaration was insufficient for not so stating and for failing to allege in substance any complaint or cause of action.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 107-120; Dec. Dig. § 24.*]

Exceptions from Lewiston Municipal Court, Androscoggin County.

Forcible entry and detainer by Nicholas Karahalies against Peter Dukais. Judgment for plaintiff, and defendant brings exceptions, and case was certified to the Chief Justice of the Supreme Judicial Court. Exceptions sustained.

Plea, the general issue with a brief statement alleging that the tenancy of the defendant had not been legally terminated, etc. An agreed statement of facts was filed and the case heard thereon. The judge of said court rendered judgment for the plaintiff for possession and costs, and the defendant excepted.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

McGillcuddy & Morey, for plaintiff. Herbert E. Holmes, for defendant.

HANSON, J. This is an action of forcible entry and detainer and comes before the court on exceptions by defendant.

The declaration is as follows: "In a plea of forcible entry and detainer for that the said defendant at said Lewiston on the 28th day of September, A. D. 1910, having before that time had lawful and peaceful entry into the lands and tenements of the plaintiff situated in Lewiston aforesaid and described as follows: The bakery and bakershop at 187 and 189 Lincoln street, Lewiston—and whose estate in the premises was determined on the 27th day of September, A. D. 1910, then did and still does forcibly and unlawfully refuse to quit the same, although the plaintiff avers that he gave legal notice in writing to the said Peter Dukais before the 28th day of September aforesaid to terminate his estate in the premises."

The plea was the general issue, with the following brief statement:

"And for a brief statement of special matter of defense to be used under the general issue above pleaded the defendant further says: That he was a tenant at will in the premises described in the plaintiff's writ under one Maurice Alpren as landlord, and that his tenancy was never terminated by said Alpren by 30 days' written notice to quit as required by Revised Statutes, but that he, the defendant, quit and vacated the premises of his own accord before the plaintiff's writ was entered in this court, and is not now in possession of the premises or any part thereof."

The following facts were agreed upon by the parties: The defendant was a tenant at will holding the premises described in the plaintiff's declaration under one Morris Alpren as his landlord. His tenancy was not terminated by Alpren by 30 days' notice to quit in writing, but on September 24, 1910, the same Alpren made a lease in writing of the premises to the plaintiff, Karahalies, for the term of two years from September 24, 1910. The plaintiff gave the defendant a written notice of the fact that he had taken a lease of the premises from Alpren and that he demanded the possession of the premises. The defendant did not vacate, and on the 28th day of September, 1910, the plaintiff be-

gan his action of forcible entry and detainer against him. Before the writ was entered in court the defendant vacated the premises.

The defendant claimed that the declaration was the kind of declaration authorized only when the suit of forcible entry and detainer is against a tenant at will whose tenancy had been terminated as provided in section 2 of chapter 96, Revised Statutes, and that the agreed statement of facts proved that the defendant was a disselector who had not acquired any claim by possession and improvement, and that consequently there was a variance between the allegations and the proof.

The plaintiff claimed that the declaration was sufficient to maintain the action under the facts stated in the agreed statement.

Upon the pleadings and statement of facts, the judge ruled that the plaintiff's declaration was sufficient to entitle him to maintain the action, and further ruled that the fact that the defendant vacated the premises before the writ was entered in court constituted no defense to the suit. To which ruling the defendant excepted.

The certified statement shows the whole case. The declaration followed the form in general use in this state to the clause relating to the termination of the tenancy by notice, and then concludes with the following words: "Although the plaintiff avers that he gave legal notice in writing to the said Peter Dukals before the 28th day of September aforesaid to terminate his estate in the premises." The defendant raised the question of sufficiency of the declaration, and urges that the plaintiff has not stated a case within the terms of the statute, and that the proof of the termination of the tenancy submitted is a fatal variance from the allegations in the declaration before us. The plaintiff contends that the declaration is sufficient to maintain the action under the facts stated in the agreed statement.

Was there a case stated within the terms of the statute? If so, has the plaintiff proved his case? R. S. c. 96, § 1, authorizes the process of forcible entry and detainer against a disselector who has not acquired any claim by possession and improvement, against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice, if commenced within seven days from the expiration or forfeiture of the term; and against a tenant at will, whose tenancy has been terminated as provided in section 2 of the same chapter, which is by 30 days' notice in writing for that purpose, given to the other party. Section 4 of the same chapter provides that "the process of forcible entry and detainer shall be commenced by inserting the substance of the complaint as a declaration, in a writ of attachment to be indorsed and served like other writs."

[1] It is well settled that, where a public statute is applicable to a case, it is sufficient

that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it. 36 Cyc. 1237; *Peru v. Barrett*, 100 Me. 213, 60 Atl. 968, 70 L. R. A. 567, 109 Am. St. Rep. 494.

[2] Again, it is not necessary in a civil action to set out the statute or to make any reference to it in the declaration, but the case must be brought within its provisions by alleging the requisite facts. *Peru v. Barrett*, supra. It is equally well settled that all statutes authorizing summary proceedings must be strictly construed, and strict conformity to the statute, in the exercise of the jurisdiction it confers, is essential to the regularity and validity of the proceeding. 36 Cyc. 1189; *Woodman v. Ranger*, 30 Me. 180.

[3] It is not denied that forcible entry and detainer was the proper form of action, inasmuch as the defendant was a tenant at will whose tenancy had been terminated by alienation by the landlord for a term of years. *Seavey v. Cloudman*, 90 Me. 540, 38 Atl. 540; *Howard v. Merriam*, 5 Cush. (Mass.) 563.

[4] R. S. c. 96, §§ 1, 2, authorize the action of forcible entry and detainer. Section 4 prescribes that the action "shall be commenced by inserting the substance of the complaint as a declaration, in a writ of attachment to be indorsed and served like other writs." The plaintiff resorted to the process of forcible entry and detainer, and, having done so, he must "insert the substance of the complaint as a declaration, in a writ of attachment"; in other words, he must state a case within the terms of the statute. The agreed statement of facts discloses that the complaint or cause of action was that the defendant was a tenant at will whose tenancy had been terminated by the alienation of the premises by the landlord for a term of years. It further appears that the plaintiff proceeded upon the theory that the defendant was a disselector, within the meaning of R. S. c. 96, § 1; but he does not so state in his declaration, nor does he allege in substance any complaint or cause of action within the meaning of the statutes as interpreted by this court since the creation of the remedy of forcible entry and detainer. A complaint for forcible entry and detainer must disclose enough upon its face to give the court jurisdiction without resort to parol testimony. *Treat et al. v. Bent*, 51 Me. 478.

In the recent case of *Eveleth v. Gill*, 97 Me. 315, 54 Atl. 756, the plaintiff proceeded under section 1 of chapter 17, R. S. 1883 (the nuisance act). The declaration, so far as it relates to the "substance of the complaint," is identical with the case at bar. The evidence adduced was that on the day named (the day of the alleged termination of the tenancy) the defendant was using the building or tenement, or some part thereof, for one of the purposes forbidden by the act above mentioned. The declaration in that case, like the case at bar, contained no specific allegation or complaint against the de-

pendant as contemplated by the statute, except that "his estate was determined" on a certain day. Among other things, the court held that, "granting her (the plaintiff's) contention as to her rights under section 3, c. 17, we think it clear that in resorting to the legal process, authorized only by the statute, she must state, as well as prove, a case within the terms of the statute, and this she has not done. * * * It follows that, under the general law of pleading, the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used." Thus it was said by this court, in *Treat v. Bent*, 51 Me. 478: "This process of forcible entry and detainer is one created and regulated by the statutes, and, in order to be maintained, must come clearly within their provisions." In that case the process was quashed because it did not "disclose enough upon its face to give the court jurisdiction," and finally, and controlling in the case at bar: "The statutory case should be fully and clearly stated. Want of allegations necessary to show a case within the terms of the statute are as fatal as want of evidence in such a case."

It is unnecessary to consider the question of variance. There was not a case stated within the terms of the statute, and the entry must be:

Exceptions sustained.

HASSETT v. CARROLL

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—DISTRICT COMMITTEE—POWERS—STATUTES—"INSTITUTION."

Gen. St. 1902, § 1368, provides that every person, who, being a trustee or officer of an institution receiving state aid, shall furnish supplies or be interested in any contract for furnishing supplies to such institution, unless he be the lowest bidder for such supplies or contract after open competition, shall be fined \$50. *Held*, that the term "institution," as so used, did not embrace such municipal districts or corporations composed of the inhabitants of certain territory as a school district; and hence a member of a school district committee did not violate such act by selling coal to the district without submitting to competition.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 80.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3661-3663.]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 21*)—NATURE—QUASI CORPORATION.

Under Gen. St. 1902, § 2177, making school districts bodies corporate for certain prescribed purposes, and empowering them to levy taxes and borrow money for the accomplishment thereof, school districts are not permanent corporations, but only quasi corporations of a public nature with limited powers strictly defined by statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 39, 40; Dec. Dig. § 21.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 21*)—NATURE OF CORPORATION.

Under Gen. St. 1902, §§ 2175, 2177, relating to school districts, such districts are not separate corporations from the town or city nor independent corporations themselves for all purposes of common school education, but their regulations in the conduct of the schools are generally subject to the ordinances of the towns within which they are situated, and subject to be formed, altered, or dissolved by such towns.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 39, 40; Dec. Dig. § 21.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—PUBLIC MONEY—APPORTIONMENT—STATUTES.

Gen. St. 1902, § 2157, providing for the apportionment of public money among certain school districts, applies only to school districts described in section 2154, which elect a board of education, and not to those governed by a district committee.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 19.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—PUBLIC FUNDS—PAYMENT.

Gen. St. 1902, § 2257, provides that the comptroller shall annually draw orders for the support of the common schools at the rate of \$2.25 for each child, which orders shall be payable from the funds of the state, to be divided and distributed among the several towns in proportion to the number of persons in each between the ages of four and sixteen years, as ascertained from the returns, the comptroller being required to transmit the amount to be distributed to each town, to its treasurer on application of school commissioners, or its town school committee. *Held*, that such funds are to be paid by the comptroller's order to the treasurer of the particular town, and not by the state to the school districts.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 19.*]

6. LIBEL AND SLANDER (§ 36*)—ABSOLUTE PRIVILEGE.

The class of communications absolutely privileged is narrow, and is practically limited to legislative or judicial proceedings and acts of state.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 114, 115; Dec. Dig. § 36.*]

7. LIBEL AND SLANDER (§ 51*)—QUALIFIED PRIVILEGE—MALICE.

Where a priest made slanderous statements concerning a member of his congregation as a part of a sermon on the theory that it was necessary for the welfare of his parish, the communication was, at most, only qualifiedly privileged, and hence sufficient to sustain a recovery on proof of express malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 113-115; Dec. Dig. § 51.*]

8. LIBEL AND SLANDER (§ 123*)—WORDS LIBELOUS PER SE—QUESTIONS FOR COURT AND JURY.

Where words spoken by a priest against a member of his congregation as a part of a sermon were false and actionable per se, the nature of the occasion, as privileged or not, on which the charges were made, was a question for the court, but the character of the use which defendant made of the occasion was for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353-364; Dec. Dig. § 123.*]

9. LIBEL AND SLANDER (§ 112*)—JUSTIFICATION—BELIEF IN TRUTH—MALICE IN FACT—EVIDENCE.

Gen. St. 1902, § 767, providing that in actions of libel and slander, under stated circumstances, plaintiff must prove malice in fact, does not require that evidence of malignity, spite, or ill will shall be offered nor that those facts shall be found, but is satisfied by proof that the false and slanderous statements were spoken in an improper and unjustifiable manner, or with improper and unjustifiable motives, which is evidence of malice in fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

10. LIBEL AND SLANDER (§ 104*)—PUBLICATION—MALICE—EVIDENCE.

In an action for slander, proof of the time, place, and manner, and other circumstances of the preparation and publication of the defamatory charges, as well as the language of the publication itself, are admissible to show that the false charge was made with malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

11. LIBEL AND SLANDER (§ 112*)—QUALIFIED PRIVILEGE—MALICE—EVIDENCE.

Where a priest as a part of his Sunday sermon made libelous charges against a member of his congregation who was a member of the city's board of school trustees, falsely charging him with misconduct and personal impropriety, in intemperate and violent language, accompanied by abusive epithets, such facts were sufficient to show that the publication was malicious and actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

12. LIBEL AND SLANDER (§ 116*)—DAMAGES—MEASURE OF DAMAGE.

Where only general damages are demanded in an action for slander, only such damages are recoverable as are sufficient to compensate plaintiff for such injuries as the law presumes to be the actual and proximate result of the publication, such as damaged reputation, injured feelings, humiliation, and disgrace, and for the expense of the litigation less recoverable costs.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 343-349; Dec. Dig. § 116.*]

13. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES—ALLOWANCE.

While the amount of damages recoverable in an action for slander rests to a great extent in the discretion of the jury, courts will review the amount allowed and grant a new trial absolutely or conditionally when satisfied that the sum awarded is perversely excessive or the result of some gross error on a matter of principle, or that the jury misconceived the case or have been influenced by improper motives.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

14. LIBEL AND SLANDER (§ 121*)—DAMAGES—EXCESSIVENESS.

Defendant, a priest, published concerning plaintiff certain false and improper statements as a part of defendant's Sunday sermon, attacking plaintiff's personal and official acts, which he claimed were detrimental to the people of his parish. Plaintiff, voluntarily, however, attended the church to hear the slanderous statements repeated, and it did not appear that his reputation had seriously suffered therefrom.

Held, that a verdict allowing plaintiff \$4,000 was excessive, and should be reduced to \$2,500.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353-354; Dec. Dig. § 121.*]

15. DAMAGES (§ 87*)—PUNITIVE DAMAGES.

The common-law doctrine of punitive damages which allows juries to award damages beyond mere compensation, practically in their own discretion, does not obtain in Connecticut.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Slander and libel by William Hassett against John H. Carroll. Judgment for plaintiff for \$4,000, and defendant appeals. Reversed conditionally.

The plaintiff, a resident of Wallingford, in this state, is a member of the Holy Trinity Roman Catholic Church of that place, has for many years been a member of the Central school district committee of Wallingford, and been engaged in the retail coal business in that town. The defendant is a Roman Catholic priest, and is the pastor of said church.

On Sunday the 12th of September, 1908, at each of three masses held on that day, one of which was attended by the plaintiff's children and another by the plaintiff and his wife, the defendant read from the pulpit to the congregation certain writings previously prepared by him concerning the plaintiff, which are set forth in the complaint, and of which the following are parts:

"I have a very disagreeable duty to perform this morning, my dear people, about the school. Fearing I might detain you too long, I have put my thoughts in writing, and I want you to pay particular attention to them.

"To-day, my dear people, I wish to call your serious and thoughtful attention to the studied indignity put upon your children, the lambs of my flock, and a Catholic teacher, a native-born Catholic teacher, by an Irish born and bred school committeeman, who on account of his scandalous actions against the conceded authority of your lawfully appointed pastor I would not dare call Catholic.

"This public servant insists, whether it pleases you or not, in placing your children in an ill-smelling, filthy, and unsanitary building. A self-respecting American pig would commit suicide rather than spend an hour in that malodorous pigsty.

"You elected this man, no doubt, and in spite of your pastor, to be your servant, to hire your daughters for school teachers when they were properly educated for that purpose, and to do it not as though it were doing you a favor or putting you under any sort of obligation to him, but as matter of justice and honesty in performance of his sacred duty that you have elected him to execute. But if we are to judge from his ac-

tions of many years duration, he is firmly convinced that he is your master, and the power you put in his hands he can use to humble you to your very knees, even scorn and refuse to grant what belongs to you by right.

"Any opposition which is noticed on your part he regards as impertinence and insubordination, not thinking in his pride of power that you who made him can speedily unmake him.

"For this sleek article knows well that he can wheedle his dupes with his soft talk which will enable him to put on again the cloak of power of his assumed right of authority.

"He uses every man and every woman, the schools, the teachers, and even the pastor himself if he could, to further his coal business. God help the man, woman or child, pastor or people that try to thwart him in this respect! Would he be allowed to if that microbe infested shack where he insists on putting your children were not heated with his coal!

"Would he dare for one moment treat our respected and respectable Protestant friends in like manner?

"His tender solicitude about allowing the little ones to cross the track is deeply touching. It enables him to quote his reverend pastor's remark on last Sunday in support of his wisdom and humanity in sending Catholic children to these pest holes, and making a Catholic school teacher leave her room in the Colony school, that he could replace her with a Protestant teacher. Again I ask, would our Protestant neighbors ever allow such a thing?

"The dangers of the railroad crossing may with some little care be avoided, but who can avoid the bad ventilation, the malarial atmosphere and filthy surroundings of that germ-breeding schoolroom?

"It seems this man's policy is that any old thing is good enough for his Irish constituents. Now for the facts in proof of this assertion. Has he ever allowed a Catholic Irishman to be associated with him on that school board, in that very lucrative office, especially for a man in the coal business? When, years ago, the pastor suggested that such a thing could be very easily done, he replied 'We have all we want now and we can afford to be generous.' Whom he meant there cannot be a shadow of doubt. * * *

"This self-constituted champion of our rights and privileges represents nothing but his own interests. And it was simply to propitiate our fellow Protestant citizens by making them think that he controlled you and me, and anything to keep him feeding at the public crib he subsists upon, like a pack of blound hounds till they let up and cry for mercy.

"I have it on the best authority that he is and has been making deals with them, thus

humbugging our people. You are all aware of another deal where he used all sorts of duplicity and trickery to oust a poor Catholic girl from the Colony street school under the pretense of incompetency.

"Again it became my duty to defend this member of my flock from this injustice, and, thanks to my policy of never letting my bone go with any man, I succeeded in keeping her from being dismissed.

"Again with vindictiveness, he refused, as though he had a right to refuse, to hire another girl, a native of this town and an orphan, simply because her brother was my friend. This is the teacher he now puts in the pesthouse.

"On account of this I deemed it my duty to resent this high-handed conduct by giving to other parties the church coal which he had furnished for many long years. Immediately he stops his munificent sum of two dollars to the monthly collection. The church that paid him thousand of dollars for his coal was now to lose that princely contribution.

"Now the war is on with the priest and war to the knife. The pastor must be down and ruined by any means fair or foul, and especially foul—no stone left unturned to hurt him with his own Catholic people. Even the vestry of the church must suffer his vengeance. He makes, even forces, the Catholic people to make his private quarrels their own. * * *

"A short time before this he solemnly states in the pastor's library that no power on earth will induce him to accept the office of school committeeman if the board of education, of which I was then an honored member, would insist on engaging a superintendent. I very foolishly believed him and set about to get a good man in his place.

"You all know what happened that never to be forgotten night when the Catholic henchmen of this lying trickster forgot their manhood and religion and insulted their pastor, who was solely and disinterestedly looking out for their interest and good.

"There was this fraud running for office with all his public dupes and followers making the night hideous with their yelling and cursing. In honor of this glorious victory the saloons kept open house that night by order of the victor. * * *

"Now let's see. A fellow member with me on the school board was suspected by the boss of being friendly with the pastor. During his absence in New York City, this powerful individual, by a trick that would bring the blush of shame to the cheek of a heathen Chinese, tried to remove him from that board. Did he do it? Not so you could notice it. * * *

"Then his anger against the pastor was now at white heat. He began now his lowest and craftiest sorts of tricks to down

the priest. He forces the so-called Catholic doctor to sell his birthright of manhood and honesty for less than the scriptural mess of pottage, to run against the priest on the board of education. What did he promise him for this shameless perfidy? The position of health officer. Did he get it? Not yet, nor never while I can oppose him. What did the lawyer get? Nothing that you can see. What did the representative get? A large wind pudding with lemon sauce. What did the sleek article himself get? A salutary and well-grounded fear that kept him from running for the water commissioner.

"Let us all fervently pray this wholesome fear may prevent him from running next June for school committeeman.

"Were my people to put this fellow in that office again, an A. P. A. or a North of Ireland Orangeman would deem him too treacherous and unclean to spit upon.

"In his written complaint against me to the bishop, he tells what he did years ago to prevent the Protestants from devouring us, body and soul. How two reverend curates were sent on the highways and byways to compel them to come to meeting. Why? To save themselves? Not at all, but, as the bishop remarked, 'to save him from losing his coal.'

"Why should he break the law of the state and shut out the other poor coal dealers, who have nothing else but their coal to depend upon, from honest competition? As long as you allow this in this borough you partake of his crime. * * *

"The proof of this—I want to tell you how many long years this man has been breaking the law. Here is the law. I am not talking through my hat, but I have facts that cannot be refuted. Now you know, my dear people, what will be the result of this.

"When I went up to protest the other night at the school committee, there I saw my friend's henchmen. I wouldn't speak to him any more than I would speak to the wolf. * * *

"Your children are as dear to me as the apple of my eye, and any one who maltreats or hurts these children hurts me personally. I don't care what their nationality is, that never enters my mind. They are my children because they are God's. I am the pastor and the pastor supposes that he has sheep and lambs. And these are my lambs. And any man who will put insult on my people insults me to the core. And no matter what he is, if he were the king of England or the president of the United States, I would fight him to the bitter end.

"What right has he to put these Catholic children down in that pest hole? Would he dare do it to our Protestant neighbor? Not at all; because he had got power and he knows where he can use the lash.

"And now he has stated if you don't send your children there you will be arrested for not sending them to school. The

law never meant anything of that sort, and if it did it would be an unjust law that you would not be bound to obey. If the public school insists on your sending your children, they must be fit public schools. They must not be pest holes or places that breed all sorts of microbes. Then why didn't he select a Protestant teacher to go there? Not at all. He insults our nationality by putting one that he has a spite against. * * *

"No one is allowed to sell on any committee or any political position, to sell any commodity to himself, under fine of \$500 and a term of imprisonment for each occasion. In every other city and town and village in this United States, bids are to be given in, sealed bids, and then the lowest bidder is to get the coal. Has there ever been any sealed bids given in since that man took the position? Never. He puts in the coal in any time he pleases.

"Then again it is against the law to put in that coal while the children are in session. What does he cart up to the Colony street? There is more coal up there in that Colony street school than there is in his coal bins, and he puts that in while the children are in session. What does he care about the children? Not at all, because their parents did give their body and soul to him by electing him to that position.

"Who weighs that coal? A man who is tricky enough to put in that coal by unlawful means is bad enough to give short weight. A man who would run his other brothers out of business in order to accomplish his ends—how can you trust a man of that sort?

"You have an object to accomplish, and are afraid to stand by your pastor who has only your good and your interest at heart. What good has he at heart except his own interest and his own good? And any one with an ounce of sense, with the brains of a louse, could understand that; could understand that a man of his place and position and his tricks, that all see this, that he is working these to the limit. And not only that, but he is even controlling the press.

"I wrote an article a short time ago, just before the last election for this school committeeman. I had to write it on the train in order to be in time so it could appear and that you men would go and assert your rights. But I couldn't get it in the paper. I approached several names. I couldn't get it in the paper. Now I wonder who it is who is buying the paper up. I can't get it in the paper. Just the same, although I was prevented, I will read that very letter, in order to show you that I am not afraid to read it and not afraid to assert the rights that you have. If you are not capable of asserting them yourselves I will assert them for you.

"Now listen to this and see if there is one word of exaggeration or untruth in it.

I mean this was written for that occasion. The caption was 'Pertinent Questions with Pertinent Answers.'

"On next Thursday evening the citizens of this borough will be called upon to elect a school committeeman. The candidate to be honored will not, of course, be the people's choice, but the selection of the fellow committeeman who has, as far back as the writer's memory goes, chosen by unseemly tricks his fellow members of that board, and unvaryingly succeeded in electing his spineless tools.

"Why people of our education can be wheedled into doing this man's behest is to me a mystery past finding out. One would think that, far from pleasing, his blarney and flattery would disgust even his brainless dupes. Nevertheless his sweet manner is a thing to conjure with and he works it to its conjuring limit. His henchmen within the province of both parties smile and obey while he is handing it out to them in generous doses.

"The saccharine methods of this sly boss get people to work his ends and his fellow colleagues, but who shall pardon successful politicians of political parties who, under the influence of the cheap cajolery of this careful, calculating and shrewd self-seeker, have surrendered their honest judgment and conscientious convictions? It makes honest people chafe to be obliged to live in the community under the régime of a trickster who uses every office for his own selfish ends."

"So much for the introduction. Now for the questions.

"Is there any man who will go to that meeting on Thursday night courageous enough to ask the following pertinent questions? Who sells all the coal to all the schools in this borough? Has he or will he allow any competition? Who weighs the coal? Who commits this exclusive monopoly? As a leading member of this board does he commit this graft, or are the other parties by conniving, perhaps allowing him? Being on that board is he allowed to sell that committee coal or any other committee? Has not his attention been called to the fact that there is a fine and term of imprisonment attached to violation of this law? Does he not laugh and jest at such a law when other dealers threaten him with it? How long will this wholesale graft and open and contemptuous violation of the law be permitted to continue? If this board permits itself to be the subservient instrument to carry out the will of this dominating member, can he not in like manner, and as a matter of fact he does, hire all the teachers for all the schools and thus rule with a rod of iron, the native-born citizens? Just what is the state of affairs in this borough? I ask you in trepidation, what part does the purchase of coal play in the employment of teachers and the education of our children? A very important one.

"A small matter that he thinks himself superior to law and the principles of common justice, when he is allowed to ride rough shod over the common people who do not dare to resent his arrogance or question his right to hire all the teachers and sell his coal to all the schools without let or hindrance. * * *

"Thinking that the clergyman's superiors were as easily hypnotized by his diaphanous, swiss muslin sort of voice as his parishioners, he sneaks up to the episcopate with his complaints. This pompous old humbug gets a most frigid reception and is told to go home, and if he has any grievances to put them in writing. * * * For this czar of Wallingford has waxed so fat and saucy with extraordinary power, that any one, be he priest, bishop or pope, who stands in the way of his selfish aggrandizement, must be removed from office, political or ecclesiastical.

"Who has not heard of his wonderful sacrifices he has made in behalf of our public school? Sacrifices that bring their own reward from the town treasury in checks for thousands of dollars. Oh, let the dear public share even a little in those sacrifices which result in such rich and abundant returns.

"To be candid, dear dictator, it would take the most powerful microscope to find enough of your sacrifices for the sake of any one else except yourself to fill the eye of a cambric needle. That is worthy of a Mr. Pecksniff. Let concealment be met by openness, by telling the truth, by opening the doors, by turning on the light, and fighting to a man at the next election for consolidation. If you fight for consolidation that man is out of doors. That is policy. Then thank the Lord heartily, your next sore will be removed."

These writings were given by the defendant to a reporter of a Meriden newspaper who copied them and sent them to said paper for publication. They were returned to the defendant unpublished.

The complaint contains two counts. The first alleges that the defendant read said writings, as above stated; and the second that he published them by sending them to said reporter and to the editor of said newspaper, both of whom read the same. The complaint asks for \$10,000 damages. No special damages are alleged. The second defense to said counts alleges, in substance, that in the performance of his duty as pastor the defendant read and published said writings in good faith, believing them to be true. A third defense to both counts alleges that the plaintiff "flagrantly and openly violated and defied the law and persistently committed a criminal offense" by refusing to call for bids for the furnishing of said coal for the schools, and in not awarding the furnishing of such coal to the lowest bidder. The jury rendered a verdict for the plaintiff for \$4,000. The trial judge denied the de-

fendant's motion to set it aside. The entire evidence has been certified to this court.

Walter J. Walsh, for appellant. E. P. Arvine, Jacob P. Goodhart, and Oswin H. D. Fowler, for appellee.

HALL, C. J. (after stating the facts as above). Of the numerous reasons of appeal assigned in the record we shall consider only those discussed in the defendant's brief.

[1] The first of these relates to the interpretation placed by the trial court upon section 1368 of the General Statutes, which reads as follows: "Every person who, being a trustee or officer of any institution receiving aid from the state shall furnish supplies, or be interested in any contract for furnishing supplies to such institution, unless he be the lowest bidder for such supplies, or for such contract, after open competition, shall be fined fifty dollars." It was undisputed at the trial that the plaintiff had for many years been a member of the school district committee of the Central school district of Wallingford, and that in connection with his retail coal business he had for many years sold coal to said school district without asking for competitive bids from other coal dealers. The defendant claimed and requested the court to charge the jury that such acts were in violation of the provisions of section 1368, and constituted proof of the truth of certain of the charges contained in said writings. The court did not so charge, but instructed the jury that said school district was not an "institution" within the meaning of that word in section 1368, and that such sales of coal by the plaintiff to the school district, without competitive bids, were not violations of the provisions of said statute. The instruction so given was correct. It was one of the statutory duties of the district committee to furnish fuel for the schoolrooms in the district. Section 2233, Gen. St. The statute does not direct how such fuel shall be purchased or provided. If, with the approval of the committee, the plaintiff himself, as a coal dealer, furnished it at as low a price as it could be obtained elsewhere, he committed no illegal act by so doing, unless section 1368 imposes a punishment upon him for such acts. If it does, he rendered himself criminally liable to a fine of fifty dollars for every such act. By the language of said section the persons who become liable to such punishment must be (1) trustees or officers; (2) trustees or officers of institutions; (3) trustees or officers of institutions receiving aid from the state. The plaintiff as a member of the school district committee was clearly an officer of the school district. By statute the committee are made agents of the school district. Section 2174, Gen. St. As such they were public agents and officers, performing governmental duties. *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429.

But is the school district of which the plaintiff was an officer an "institution" with-

in the meaning of that word in section 1368? This section is a penal statute, and should therefore be strictly construed. It should not be held that the plaintiff has rendered himself liable to the criminal punishment which it imposes, unless it clearly appears that the word "institution" was intended to embrace such an establishment as a school district.

[2] Our statutes have made school districts bodies corporate for certain prescribed purposes, and have empowered them to lay taxes and borrow money for the accomplishment of those objects. Section 2177, Gen. St. School districts are quasi corporations of a public nature, with limited powers, strictly defined by statute. *Hotchkiss v. Plunkett*, 60 Conn. 230, 234, 22 Atl. 535. They are not permanent corporations.

[3] Generally they may be formed, altered, or dissolved by the towns within the limits of which they exist. Section 2175, Gen. St. They are not separate corporations from the town or state, with the ordinary powers of corporations, nor independent corporations themselves for all the purposes of common school education. Their regulations in the conduct of schools are generally subject to those of the towns within the limits of which they are situated. Section 2177, Gen. St. *Bartlett v. Kinsley*, 15 Conn. 327, 334. They are generally parts of towns, and always territorial corporations, forming political subdivisions of the state itself, for the purpose of maintaining and administering the system of public education, and are therefore mere agencies or instruments of the state, for the effectual performance of the governmental duty of the education of children, which is assumed by the state. *Gilman v. Bassett*, 33 Conn. 298, 304; *State ex rel. Walsh v. Hine*, 59 Conn. 50, 60, 21 Atl. 1024, 10 L. R. A. 83; *People v. School Trustees*, 78 Ill. 136.

The statutes to which our attention has been called as showing that the school district in question receives aid from the state are sections 2157, 2257, and 2242.

[4] The provisions of section 2157 do not apply to the school district of which the plaintiff was an officer, but only to those school districts described in section 2154, and which elect a board of education, instead of a district committee.

[5] The funds referred to in section 2257 are paid by the comptroller's order to the treasurers of towns, and not by the state to the school districts. There appears to be no evidence that the school district ever availed itself of the aid which it might have received under section 2242. While the words of section 1368 may be sufficiently comprehensive to include, among other corporations or associations, established institutions of education or learning, we think they do not aptly describe and were not intended to embrace such municipal districts, or corporations composed of the inhabitants of certain territory (*State ex rel. Bulkeley v. Williams, Treasurer*, 68 Conn. 131, 153, 35

Atl. 24, 421, 48 L. R. A. 465), as the school district of which the plaintiff was an officer.

Upon the question of privileged communications, the defendant, among other requests, asked the trial court, in substance, to charge the jury that if the defendant as a priest, prompted by a sense of duty to his parishioners, made such publications in the manner stated, in good faith, and honestly believing them to be true, the verdict should be for the defendant; that every communication is privileged which is made in good faith to obtain redress for an injury, or to prevent or punish some public abuse; and that the defendant had a right to criticise the doings of the plaintiff as a public officer, so long as his criticisms were fair and just. The trial court charged the jury that if they found the defamatory words true, even if they were published from malicious and vindictive motives, they should return a verdict for the defendant, and further charged as follows: "The official acts and conduct of any person holding public office are proper subjects of comment and criticism, and any such comments and criticism were proper on the part of the defendant, and it might properly be hostile criticism, provided such criticism was kept within the limits of an honest intention to discharge a public duty, and was not made the means of promulgating slanderous and malicious allegations. But his position or office of parish priest gave him no right as to such criticism, under the claim that it was a part of a sermon to his congregation, which was greater than that possessed by him as a citizen, or which was superior to the right of such criticism possessed by any other person interested in and affected by such official acts. The circumstances under which it is admitted the words were spoken and the subject-matter of the words recited in paragraph 5 of the complaint disclose no conditions of absolute or of qualified special privilege. . . . The publication of defamatory words may be under an absolute or under a qualified or conditional privilege. Under the former, there is no liability, although the defamatory words are falsely and maliciously published.

[8] The class of absolutely privileged communications is narrow, and practically limited to legislative and judicial proceedings, and acts of state.

[7] One publishing defamatory words under a qualified or conditional privilege is only liable upon proof of express malice. *Blakeslee & Sons v. Carroll*, 64 Conn. 223, 232-235, 29 Atl. 473, 25 L. R. A. 106; *Denehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920; *Roche v. O'Connell*, 66 Conn. 175, 181, 33 Atl. 920. The only privilege which the defendant could have invoked in this case was the conditional or qualified privilege. The court properly charged the jury that the position of the defendant as a pastor did not justify these publications, if the charges were false,

and that the circumstances under which it was admitted the words were spoken and the subject-matter of the publications themselves disclosed no conditions of absolute or of qualified special privilege. *Odgers on Libel and Slander* (5th Ed.) 285; *Townshend on Slander & Libel* (4th Ed.) § 2416; *Newell on Slander & Libel*, 527; *Fitzgerald v. Robinson*, 112 Mass. 371; *Burt v. Newspaper Co.*, 154 Mass. 242, 244, 28 N. E. 1, 13 L. R. A. 97.

[8] The words published were actionable per se in charging the plaintiff with an offense for which he was liable to criminal punishment in imputing to him official misconduct as a public officer and dishonesty in the conduct of the business in which he was engaged. These charges were found to be false. The legal character of the occasion upon which these charges were made was a question for the court, but the character of the use which the defendant made of that occasion was a question for the jury. *Atwater v. Morning News Co.*, 67 Conn. 504, 513, 34 Atl. 865.

[9] That the defendant believed the false charges to be true did not justify him in publishing them in an improper and unjustifiable manner, or with improper and unjustifiable motives. Proof that they were published in such manner and with such motives was sufficient proof of malice to meet the provisions of section 767 of the General Statutes, which requires that, in actions of libel and under stated circumstances, the plaintiff must prove malice in fact. This statute does not require that evidence must be offered of malignity, spite or ill will, nor that those facts should be found. *Osborne v. Troup*, 60 Conn. 485, 493, 23 Atl. 157; *Moore v. Stevenson*, 27 Conn. 14; *Hotchkiss v. Porter*, 30 Conn. 414, 422; *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362.

[10] The time, place, manner, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice. *Newell on Slander & Libel*, p. 532; *Hotchkiss v. Porter*, 30 Conn. 422; *Osborne v. Troup*, supra.

[11] The time, place, manner, and language of the publication in this case were undisputed. The position and relation of the parties, the very remarkable circumstances of time, place, and manner of publication, the intemperate and violent language contained, and the abusive epithets applied in the writings themselves, could upon the evidence before us justify no other conclusion than that manifestly reached by the jury, that the publication was malicious, and was made with improper and unjustifiable motives, and rendered the defendant liable in damages.

[12] Did the trial court err in denying the defendant's motion to set aside the verdict of \$4,000 upon the ground that such damages were excessive? No special damages were alleged or proved. The plaintiff

was therefore entitled to recover only general damages, for such words as were actionable per se, and the court so instructed the jury. The court also properly instructed the jury that any so-called punitive damages awarded must be limited to a reasonable sum for the expenses of this litigation, less the taxable costs recoverable. The damages recoverable should, therefore, have been limited to a sum sufficient to compensate the plaintiff for those injuries which the law presumed as the natural and proximate results of the publication (*Wynne v. Parsons*, 57 Conn. 83, 17 Atl. 362), such as his damaged reputation, his injured feelings, the humiliation, insult, and disgrace to which he was subjected by the defendant's false charges, and the time, manner, and language in which they were made and for his said expenses of litigation less the recoverable costs. *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963; *Newell on Slander and Libel* (2d Ed.) 424, 864.

[13] While the amount of such damages rests to a great extent in the discretion of the jury, courts have always exercised the right of revising the amount of damages allowed, either by granting a new trial absolutely or conditionally, when satisfied either that the sum awarded was perversely excessive, or was the result of some gross error on a matter of principle, or that the jury misconceived the case, or were influenced by undue motives. *Newell on Slander and Libel*, 848; *Woodruff v. Richardson*, 20 Conn. 237, 243; *Noxon v. Remington*, supra.

[14] From the amount of the verdict we think the jury must have failed to understand that the damages to be awarded were practically to be compensatory, or at least not punitive beyond the allowance for expenses of litigation. The actions and language of the defendant were unlawful and unjustifiable and were undoubtedly most exasperating to the plaintiff, yet he appears to have voluntarily attended the church to hear them repeated, and it does not appear that he has seriously suffered in his reputation. Under our laws, it is not the purpose of this action to punish the defendant for his offense, but to compensate the plaintiff for his injuries.

[15] The common-law doctrine of punitive damages which allowed juries to award damages beyond mere compensation and practically at their own discretion is no longer the law of this state. *Hanna v. Sweeney*, 78 Conn. 492, 62 Atl. 785, 4 L. R. A. (N. S.) 907. We think the verdict was too large under our rule of damages. In *Haught v. Hoyt*, 50 Conn. 583, which was an action of slander, the defendant charged the plaintiff with having burned his barns. This court granted a new trial upon the ground that a verdict of \$4,000 was too

large, and showed that the jury did not comprehend the true rule that should govern in the assessment of damages. We do not recall any case of slander or libel in this state where a verdict as large as the one in this case has been allowed to stand. We are not aided upon this question by decisions of other tribunals in which the common-law rule of punitive damages is applied in such actions.

There were no errors in the rulings upon questions of evidence discussed in the defendant's brief which would entitle him to a new trial or which call for discussion.

The trial court erred in not granting either absolutely or conditionally the defendant's motion for a new trial upon the ground that the damages were excessive, and a new trial is ordered unless the plaintiff shall within 10 days file with the clerk of the trial court a remittitur of the sum of \$1,500 from the amount of said verdict. The other Judges concurred.

Appeal of STRONG et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. WILLS (§ 612*)—CONSTRUCTION—LEGACIES—LIMITATIONS OVER.

A paragraph of a will gave an absolute legacy. The next paragraph provided that, on the beneficiary's death without issue, the legacy should go to specified persons. *Held*, that the gift became absolute on the legatee surviving testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1387-1392; Dec. Dig. § 612.*]

2. WILLS (§ 538*)—CONSTRUCTION—LEGACIES. A legacy with provision that, on the beneficiary's death, any portion remaining should go to a parish, passed to the parish on the beneficiary dying before testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1162; Dec. Dig. § 538.*]

3. WILLS (§ 634*)—REMAINDERS—LIMITATION UPON FEE.

While a remainder cannot be limited upon a fee, the principle, itself somewhat limited in its operation by a recognition of executory devise, does not apply where the fee has never vested, and cannot vest through a contingency which has happened, and another estate has been created as a substitute for it in that contingency.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.*]

Appeal from Superior Court, Litchfield County; William S. Case, Judge.

In the matter of the estate of Alice C. Bostwick, deceased. From an order and decree for distribution, Adelaide B. Strong and others appeal. Affirmed in part. Reversed in part and remanded.

Alice C. Bostwick, late of New Milford, died August 17, 1908, leaving a will and an estate which consisted of about \$196,000 in cash and securities and certain real estate in Connecticut and Florida. She was 72

years of age, and left neither husband nor child. By the first and second paragraphs of the will she disposed of a piece of real estate, and by the sixteenth her personal effects. The real estate was given in fee to Elizabeth Buck, the mother of the appellants, who was a sister of the testatrix's husband. It was provided, however, that, in case Mrs. Buck died before the testatrix, the appellants should share the property.

The remainder of the will is as follows:

"Third. I give and bequeath to the said Adelaide Buck, niece of my deceased husband, Henry E. Bostwick, the sum of fifteen thousand dollars, to her absolutely and her heirs.

"Fourth. I give and bequeath to the said Alice Buck, niece of my deceased husband, Henry E. Bostwick, the sum of fifteen thousand dollars to her absolutely and her heirs.

"Fifth. If either of the above named Adelaide and Alice Buck should die before me without issue, then it is my will that her share go to her surviving sister. If either of them or both of them die before me leaving issue, then it is my will that such issue take the share that would have gone to the mother if living.

"Sixth. I give and bequeath to St. John's Parish of the town of New Milford, Conn., the sum of six thousand dollars, the income thereof only to be used from time to time, by said parish to support the preaching of the Gospel and to pay toward the annual expenses of said parish.

"Seventh. I give and bequeath to my nephew, Henry M. Baldwin, the sum of twenty thousand dollars to him absolutely and his heirs and assigns forever.

"Eighth. In case my said nephew die before me leaving issue, then it is my will that such issue take the legacy herein left to said Henry M. Baldwin.

"Ninth. I give and bequeath to my cousin and best friend, Jennette L. Gaylord, daughter of Irwin B. Gaylord, the sum of fifteen thousand dollars.

"Tenth. In case of the decease of the said Jennette L. Gaylord without issue, then it is my will that the above legacy be equally divided between Henry M. Baldwin, Henry G. Elliott, Adelaide Buck and Alice Buck.

"Eleventh. To Emily Merwin, daughter of my deceased aunt, Betsey Warner, I do give and bequeath the sum of three thousand dollars, and in case she dies before me, then this legacy is to go to her daughter, Caroline, absolutely and to her heirs.

"Twelfth. To Ellen Taylor, daughter of my deceased aunt, Betsey Warner, I do give and bequeath the sum of three thousand dollars to her absolutely and her heirs, and in case the said Ellen Taylor die before me, then it is my will that the legacy above left to her go to her issue absolutely.

"Thirteenth. To Jane Taylor, daughter of my deceased aunt, Betsey Warner, I do give and bequeath the sum of three thousand

dollars. At the decease of said Jane Taylor, then it is my will that any portion of said legacy that remains, the remaining portion shall be given and go to St. John's Parish, New Milford, Conn., to be used for the purposes specified in the first bequest under this will to said parish.

"Fourteenth. To my cousin, Henry G. Elliott, I do give and bequeath the sum of fifteen thousand dollars to him and to his heirs, and if he die before me, then said sum to go to his heirs-at-law absolutely.

"Fifteenth. To my cousin, Robert F. Gaylord, I do give and bequeath, as a friend, the sum of two thousand dollars to him absolutely and to his heirs, and if he dies before me leaving issue, then the above legacy is to go to such issue absolutely.
* * *

"Seventeenth. To my faithful maid and friend, Mary Donnelly, I give and bequeath the sum of one thousand dollars absolutely.

"Eighteenth. All the rest and residue of my property of every sort and kind wherever situated that is not hereinbefore disposed of and which I may own at the time of my decease, I do give and bequeath to the above named, Henry M. Baldwin, Jennette L. Gaylord, Henry G. Elliott, Adelaide and Alice Buck equally share and share alike, to them absolutely and to their heirs forever, and in case either of them die before me, it is my will that his or her share of my residuary estate go in the same manner as the legacies left to them respectfully, excepting the share of this residue which would belong to said Jennette L. Gaylord in case of her decease before me without issue shall be equally divided between Henry M. Baldwin, Henry G. Elliott, Adelaide Buck and Alice Buck or their heirs."

Henry M. Baldwin was the testatrix's nephew and next of kin, married, and had children living when the will was executed. Adelaide and Alice Buck are the present appellants. They were then unmarried, and aged, respectively, 23 and 21 years. Henry G. Elliott, described in the will as the testatrix's cousin, was married and had children living. Jennette L. Gaylord was a spinster, aged about 45 years, and a cousin of Mrs. Bostwick. From her infancy she had been on terms of the closest intimacy with Mrs. Bostwick and the latter's companion. Her financial means when the will was made were very limited, as Mrs. Bostwick well knew. Emily Merwin and Robert F. Gaylord had children living at the execution of the will. The finding is silent concerning Ellen Taylor and Jane Taylor in this respect. For many years prior to her death Mrs. Bostwick had been much interested in the affairs of St. John's parish and in assisting financially its benevolent work, and her contributions toward its parish expenses had been liberal. Jane Taylor died before Mrs. Bostwick. She was neither the child, grandchild, brother, or sister of the latter. The

will was drawn by a layman. Baldwin and Elliott, above mentioned, were named and qualified as executors.

Samuel A. Herman and Henry S. Sanford, for appellants. Morris W. Seymour and John T. Hubbard, for appellant St. John's parish. Donald T. Warner and Howard F. Landon, for appellee Jennette L. Gaylord. Frederic M. Williams, for appellees Elliott and others, executors.

PRENTICE, J. (after stating the facts as above). [1] The first question presented by these appeals arises from the ninth and tenth paragraphs of the will. By the ninth Jennette L. Gaylord is given the sum of \$15,000 absolutely. By the tenth it is provided that, in case of her decease without issue, the legacy should go to other persons. She claims that upon the death of Mrs. Bostwick the legacy vested in her absolutely. The appellants, being two of the four donees under the tenth clause, contend that she took only an estate tail by implication with a gift over by way of executory devise to the four persons named. The ninth paragraph contains an express absolute gift. Such a gift will not be reduced to a lesser estate "by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating intent and equivalent to a positive provision." *Mansfield v. Shelton*, 67 Conn. 390, 394, 35 Atl. 271, 272 (52 Am. St. Rep. 285); *Browning v. Southworth*, 71 Conn. 224, 226, 41 Atl. 768, 769. "It is a sound rule of construction that an express and positive devise in fee cannot be cut down to an inferior estate by a subsequent clause in the will, unless that be equally express and positive." *Fanning v. Main*, 77 Conn. 94, 99, 58 Atl. 472, 473. "Executory devises of personal property and contingent remainders are governed by the same rules, so far as concerns their alienation or transmission." *Ingersoll v. Ingersoll*, 77 Conn. 408, 410, 59 Atl. 413.

Turning now from the clear and positive provision of paragraph 9, making in express terms an absolute gift, to the subsequent provision in paragraph 10, which is relied upon as cutting it down, we find that the latter paragraph is one of uncertain meaning. *Lawlor v. Holohan*, 70 Conn. 87, 90, 38 Atl. 903. Read in one permissible way—that is, limiting the contingency of death to one before that of the testatrix—its effect would not be to subtract from Miss Gaylord's absolute interest, should she live to have any interest vest in her. Read in another way, as having in view Miss Gaylord's death after that of the testatrix or at any time, its purport would be to diminish her interest in the fund upon its vesting to something less than the original gift expressed. In other words, the attempt here is to cut down an absolute gift upon the strength of an ambiguous expression. It is clear, to say the least, that, unless the ambiguity is one which

can be resolved with such certainty as that in the end the purpose of the testatrix to accomplish that result and her provision for its accomplishment are so manifest and positive as to satisfy the requirement of the rules stated, the attempt must fail. This means that the interpretation of the ambiguous language must depend upon something more substantial than a mere *prima facie* presumption. It must rest upon the more solid foundation of an intent clearly manifested and sufficiently expressed. We have no occasion, therefore, to inquire whether the law attaches to the words "in case of the decease without issue" as used in the paragraph a presumptive limitation to death before the testator or a presumptive extension to death after the testator. It is sufficient to note that there is in the will, read in the light of the surrounding circumstances, no reasonably clear indication of an intent or purpose on the part of the testatrix to give to Miss Gaylord anything substantially less in amount, or any lesser estate therein, than she gave to the four other persons who with her form the group of residuary legatees and principal legacy beneficiaries. These five are placed upon a precisely equal footing as sharers of the large residuum, and they receive legacies in equal amounts, save that Baldwin gets \$20,000 where each of the others gets \$15,000. Here are indications of a purpose to treat the members of this group substantially alike and to make them the substantially equal beneficiaries of the great bulk of the estate. The appellants point to certain matters as being indicative of a contrary intent. But they possess little real significance, and fall far short of resolving the doubt which gathers about the testatrix's language in favor of the appellants' contention. The superior court was not in error in confirming the order and decree of the court of probate adjudging that Miss Gaylord has an absolute estate in this \$15,000 legacy.

[2] The second question arises out of paragraph 13, which gave to Jane Taylor \$3,000, with the further provision that, at her decease, any portion of the legacy remaining should go to St. John's parish. The superior court overruled, and, we think, erroneously the claim of the parish that by reason of Jane Taylor's death before the testatrix it became entitled to receive the \$3,000 upon Mrs. Bostwick's decease, and sustained the claim of the appellants that the legacy lapsed and fell into the residuum. A determination of the question thus at issue before the court does not call for an adjudication as to what estate Jane Taylor would have taken in the fund thus set apart for her, had she survived Mrs. Bostwick, or as to what, if any, would have vested in the parish in that event. Jane Taylor's death, occurring in point of time as it did, prevented the vesting in her of any estate, and the sole question for adjudication is as to what, if anything,

the parish took in the order of events as they transpired. The answer to this question is one which, as will be seen, is in no manner dependent upon the conclusions which might be reached upon the subjects just suggested. It involves two incidental inquiries—the first as to what disposition of the fund in controversy the testatrix made in terms, as the language of her will is to be interpreted; and the second, as to whether or not the law interposes any obstacle in the way of that disposition being effectuated, and, if so, with what results. The clear language of the will makes it apparent that the testatrix intended that St. John's parish should have such portion of the legacy as Jane Taylor, surviving the testatrix, should leave unexpended at her death, and therefore that the words "at the decease of said Jane Taylor," in the second sentence of the paragraph, are not to be construed as referring only to her decease before that of the testatrix. This signifies that she contemplated that the parish might thus receive the entire principal of the fund, and that such a result would be in consonance with her wishes. She had for many years been much interested in the affairs of the parish and a liberal contributor toward the payment of its expenses and benevolences. Her regard for it and desire to continue her assistance is evidenced by the gift to it contained in the sixth paragraph. In the instance of every other one of the nine personal legacies contained in the will, save only a small one to a servant, there is a provision attempting a disposition of it to other persons than the first donee in the event of such donee's death prior to the testatrix's, so that in all these cases she clearly intended that nothing therefrom should fall into the already considerable residuum. It is difficult to believe from a reading of the will in connection with the pertinent surrounding circumstances that the inexperienced lay scrivener who drew it, or Mrs. Bostwick when she executed it, had any thought or intent that by the slight variation in the by no means uniform language elsewhere employed she was making a provision which should control the bestowal of the \$3,000 in question, in the event that Jane Taylor should predecease her, differently from what was done throughout the instrument under similar conditions, and one which in the event named would result in an increase of the residuum.

The words "at the decease of Jane Taylor," upon which the appellants rely for the contrary contention, are as aptly and naturally descriptive of the event of decease at one time as at another. It was an appropriate phrase to use as indicative of such a contingency, whenever, in the order of events, it should occur. It is language which, however, may be used in a more narrow sense, and as limited to death in one case before and in another after the testator's; and it will be so interpreted when the intent to

that effect appears. In all these cases the ordinary and natural meaning is restricted by reason of the controlling factor of intent. What we have to determine here, as best we can, is Mrs. Bostwick's meaning and intent. The evidences of that intent are by no means as clear as they might be, but our examination of the will in the light of the pertinent circumstances leads us to the conclusion that Mrs. Bostwick used the words she did with reference to the death of Jane Taylor at any time, and as conveying to her mind the same idea as some such phrase as "in the event of," or "in case of," and that her intent, sufficiently expressed in the paragraph, was to make the parish a substitute legatee for Jane Taylor in the event of her death whenever occurring as to the \$3,000 fund or such part thereof as she having taken should leave unexpended. We discover nothing of substance which could be urged against this conclusion except the fact that the fund in its entirety is not referred to as the subject of the secondary gift, but only a remaining portion of it. As the will was drawn by a lay scrivener whose legal conceptions were by no means precise and accurate, it would be dangerous to place great reliance upon the mere matter of phraseology which chanced to be used to express the testatrix's conception and purpose.

The appellants rely upon the cases of *Stone v. McEckron*, 57 Conn. 194, 199, 17 Atl. 852, and *Horton v. Upham*, 72 Conn. 29, 31, 43 Atl. 492, in both of which the words under consideration appeared in the will in a connection somewhat similar to the present as strongly supporting their contention that the secondary gift to the parish must fall for the reason that Jane Taylor died before the will took effect, and therefore that it could not take "at her decease." In each of these cases the question was whether or not a gift "at the decease of" the first donee was one which took effect only in the event of the death of such donee before that of the testator—the reverse question to that here. In each the first donee had survived the testator, and the question was whether he took a fee or only a life estate. That question was one to be resolved by a discovery of the testator's intent from the language of the respective wills and the surrounding circumstances. The opinion in each case undertook to so resolve it, and what was said was spoken in argument to that end. The words in question were noticed for the inferences which might be drawn from them as to the testator's intent and in connection with such other matters as might furnish a foundation for an inference, but as not by any means of themselves conclusive or carrying controlling weight. There was no attempt, as clearly appears, to lay down any arbitrary rule of construction to be applied to them. Such an attempt would have been in direct violation of the accepted rules for the interpretation of wills, which do not

give to ordinary language fixed and inflexible meanings, or demand in its construction rigid conformity to its strict or technical import. We have, then, a will in which the testatrix used language which sufficiently expressed her intent to make St. John's parish, as regards the \$3,000 legacy in question, a substitutionary legatee to take the place of Jane Taylor, whenever she should die, and that as such substitute it should in the event named, whenever occurring, take the legacy or whatever should then remain of it, if a portion had already been expended by her. Such a disposition is not in contravention of any rule of law. This is equally true whether it be held that Jane Taylor, had she survived Mrs. Bostwick, would have taken the fund absolutely or only a life estate in it with remainder over to the parish. If she would have taken a life estate with remainder over, the gift to the parish, as the donee in remainder, would, upon the decease of Mrs. Bostwick, have vested in the parish as an absolute one. *Hollister v. Butterworth*, 71 Conn. 57, 60, 40 Atl. 1044.

[3] If, on the other hand, Jane Taylor, in the event of her survival, would have taken absolutely, the result in the order of events as they occurred would have been to make the parish the legatee of the fund when the will took effect upon Mrs. Bostwick's death. It is indeed a familiar principle that a remainder cannot be limited upon a fee. But this principle, itself somewhat limited in its operation by a recognition of executory devises, is not applicable to cases where, as here, the fee has never vested and cannot vest by reason of the contingency which has happened and another estate has been created as a substitute for it in that contingency. In such a situation the reasons for the principle are entirely absent. If the fee first in order vests, all subsequent limitations become void. If it does not and cannot, there is nothing to stand in the way of the substitutionary estate taking effect. English and American courts, including this, in cases recent and by no means recent, have recognized and applied this general principle. *Higgins v. Dawler*, 1 P. Wms. 98; *Doe v. Founereau*, 1 Douglas, 470; *Sheffield v. Orrery*, 3 Atkyns, 287; *Burbank v. Whitney*, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; *Thomas v. Castle*, 76 Conn. 447, 451, 56 Atl. 854; *Fearne on Remainders*, s. p. 517.

There is error in part, and so much of the judgment as relates to the legacy contained in the thirteenth paragraph of the will is reversed, and the cause remanded for a correction of the judgment in such manner that the order and decree of the court of probate appealed from be confirmed in respect to those matters which were made the subject of that appeal.

THORSON v. GROTON & S. ST. RY. CO.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. CARRIERS (§ 311*)—INJURIES TO PASSENGERS—NOTICE—REQUISITES.

The purpose of Gen. St. 1902, § 1130, requiring written notice containing a general description of the injury and of the time, place, and cause of its occurrence as a condition precedent to the maintenance of an action against a railway company, is to enable the company to ascertain the facts within a reasonable time after the occurrence, and a notice which is sufficient for that purpose is good.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1272; Dec. Dig. § 311.*]

2. CARRIERS (§ 311*)—INJURIES TO PASSENGERS—NOTICE—REQUISITES.

A notice of injury to a trolley car passenger which alleges that, while plaintiff was a passenger on a car which left N. for G. at about 10:45 p. m. on a designated date, she was struck on the head by the falling of one of the transoms of the car, bruising and injuring her head, brain, and nervous system, and that the injuries were inflicted on plaintiff while she was on the car shortly after the taking of the first fare and before taking the second, sufficiently gives a general description of the injury and of the time, place, and cause of its occurrence within Gen. St. 1902, § 1130.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1272; Dec. Dig. § 311.*]

3. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—EVIDENCE—SUFFICIENCY.

A trolley car passenger was injured by the falling of a ventilator. Shortly before the accident the ventilator had been opened by the conductor. The passenger was in a seat directly beneath the ventilator. The cause of the fall of the ventilator was not shown, but the evidence showed that it was so constructed that it could not fall from its place if the fixtures and fastenings were in proper condition and properly cared for. *Held* to prima facie show actionable negligence, without proof of any specific defect in the ventilator or any particular act of misconduct in its management or inspection constituting the negligence causing the injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

4. CARRIERS (§ 280*)—PASSENGERS—OBLIGATION OF CARRIERS.

Carriers are not insurers of the safety of their passengers, but they must exercise the highest practical degree of human skill to carry them in safety.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1098-1106; Dec. Dig. § 280.*]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Anne Thorson against the Groton & Stonington Street Railway Company. From a judgment for plaintiff for \$375, defendant appeals. Affirmed.

Charles W. Comstock and Lee R. Robbins, for appellant. Philip Z. Hankey, for appellee.

RORABACK, J. The complaint in part alleges that the plaintiff while seated as a passenger in a trolley car of the defendant company, through the negligence of the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant in not properly maintaining, caring for, and inspecting its car, was injured by the falling of a transom from its place over a window, which transom struck the plaintiff on her head. The plaintiff annexed to and made a part of her complaint a written notice containing an alleged description of her injuries, of the cause thereof, and of the time and place of their occurrence. The defendant demurred to the complaint on the grounds that this notice was insufficient in its description of the cause of the alleged injuries, and the place of its occurrence. The demurrer was overruled. This action of the court is one of the reasons of appeal.

[1] Gen. St. §1130, requires as a condition to the maintenance of an action against a railway company that "written notice containing a general description of the injury, and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of, unless the action itself commenced within said period of four months." The object of this requirement is that the railway company may investigate and ascertain the facts within a reasonable time after the occurrence of the alleged injury. It is manifest that no specific rule can be laid down which will govern in all cases. The sufficiency of the notice must be determined to some extent by the facts of the case. Its sufficiency is also to be considered with reference to the purpose for which it is required. If sufficient for that purpose, it is a good notice. *Budd v. Meriden Electric R. Co.*, 69 Conn. 272, 285, 37 Atl. 683.

[2] The notice before us states that "on May 5, 1909, while the plaintiff was a passenger for hire in one of the cars of your company, which car left the village of Noank for Groton Bank in the town of Groton at about 10:45 p. m. on said day, she was struck on the head by the falling of one of the transoms or windows in the top of said car, which bruised and injured her head, brain, and nervous system. Said injuries were inflicted upon the undersigned while she was in transit on said car from said Noank to said Groton shortly after the taking of the first fare, and before taking the second." The falling of the ventilator was the cause of the accident. This occurred in the nighttime upon a moving car. This car, the notice states, left the village of Noank for Groton at 10:45 p. m. and shortly after the taking of the first fare and before taking the second. Under such circumstances, information as to the precise location of the defendant's car when the plaintiff was injured would not have materially assisted the defendant in investigating this claim. In the language of the statute upon this subject, such a description of the place was as near as the same could be ascertained.

The defendant also contends that the notice to it as to the cause of the injury was valueless as the negligent acts complained of were not set forth in the notice. The office of the notice required in this class of cases is not to allege all the circumstances necessary to support the action. It is not a pleading. It is sufficient if it gives the officers of the corporation a general description of the injury and of the time, place, and cause of its occurrence. Testing the notice by what it contains under the circumstances of this case, it states with required certainty a description of the place and cause of the plaintiff's injuries.

[3] It appears from the finding that the falling of this ventilator was not caused by reason of any outside force or the act of a stranger or by collision with any object from the inside or outside of the car. Shortly before the accident, it was opened by one of the two conductors in charge of the car. The plaintiff at the time she was injured was in a seat directly beneath the ventilator. The exact cause of the fall of the ventilator was not directly shown in the evidence. It was so constructed that it could not have fallen from its place if the fixtures and fastenings had been in proper condition, and if it had been properly cared for at the time it fell. Neither of the conductors in charge of the car at the time of the accident were called as witnesses, and no explanation as to the cause of the accident was offered by the defendant. The court has found that upon these facts the plaintiff was entitled to recovery. If this conclusion were justified, the judgment cannot be disturbed.

[4] This court in substance has said: Carriers of passengers are not insurers of their safety, but the law imposes upon them the duty to exercise the highest practical degree of human skill to carry the passengers in safety. *Murray v. Lehigh Valley R. Co.*, 66 Conn. 512, 518, 519, 34 Atl. 506, 507, 32 L. R. A. 539. "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under control of a defendant, and the accident is such as in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." *Breen v. N. Y. Central R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450. While it was necessary for the plaintiff to affirmatively establish the alleged negligence on the part of the defendant either in the condition or in the operation, or in the inspection of its car, it was not necessary that she should prove either the specific defect in the ventilator or the particular act of misconduct in its management or inspection which constituted the negligence causing the injury complained of. It was sufficient if she proved facts from which the trial court might fair-

ly infer that the ventilator was either defective in its construction, or was negligently cared for or inspected. *Griffen v. Manice*, 166 N. Y. 188, 196, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Whitney v. Boston Elevated Railway Co.*, 208 Mass. 115, 117, 94 N. E. 254. The plaintiff was a passenger on the car of the defendant company. She was entitled to be carried in safety, and it was the duty of the defendant to exercise a high degree of care to safely carry her while she remained in its car. In the order of common events, an accident like the one under consideration could not have happened. It is plain that it could not have occurred if the transom had been in proper condition and properly cared for. Just before the ventilator fell it was opened by a conductor. In the absence of any explanation upon the part of the defendant, the court below was clearly justified in inferring that the negligence complained of was the cause of the accident.

It was not necessary that the evidence should show that it was impossible that there should be any other cause. It was sufficient if it reasonably satisfied the trial court that there was none.

There is no error. The other Judges concurred.

SIMS v. O'FLAHERTY.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

APPEAL AND ERROR (§ 1005*) — REVIEW — SUFFICIENCY OF EVIDENCE.

Where the trial court has denied a motion to set aside a verdict as against the evidence, and it fairly sustains the verdict, it will not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

Appeal from Superior Court, Hartford County; Lucien F. Burpee, Judge.

Action by William J. Sims against Hugh O'Flaherty. Judgment for plaintiff, and defendant appeals. No error.

Francis P. Rohrmayer, for appellant. Albert C. Bill and Joseph P. Tuttle, for appellee.

RORABACK, J. This is an action for the recovery of a balance of \$382.50, alleged to be due from the defendant to the plaintiff upon a written contract made between the parties April 20, 1904. The contract was for the removal of a frame building belonging to the defendant, and the erection for him of a three-story brick block on the site of the former building. The plaintiff was to furnish all the material and labor necessary to complete the contract, for which he was to be paid the sum of \$12,720. The work was to be performed by the plaintiff on or before

October 1, 1904, and the plaintiff was to pay the defendant the sum of \$8 per day for each and every day that the work was delayed after October 1, 1904, if the delay was caused by the fault of the plaintiff. The plaintiff did not complete the work until 53 days after October 1, 1904. The substantial controversy between the parties was whether the defendant was entitled to recover \$8 for each day said work was so delayed.

Article 7 of the contract, among other things, provides that: "By the abandonment of the work by the employés through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any and all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the architects, but appeal from their decision may be made to arbitration, as provided in article 111 of this contract."

It appears that the plaintiff contended that immediately after the execution of the contract he started at once to construct the work, and to push the same to completion as rapidly as possible; that on August 11, 1904, he was obstructed and delayed in the prosecution and completion of the work in consequence of the abandonment by the masons employed by him, through no fault of his, and on that day, and within 24 hours of the occurrence of the delay, he, acting under the provisions of article 7 of the contract, presented to John J. McCarty, the architect employed by the defendant, his written claim that his employés had abandoned the work, and that he would require extra time to complete the same. John J. McCarty, the architect employed by the defendant, certified to the duration of the extension of the time of 53 days as lost by the defendant in the prosecution of the work aforesaid, under the provisions of article 7 of the contract, and no appeal was ever taken by the defendant from the decision of the architect, as provided for in article 7.

The plaintiff claims that the defendant was bound by the certificate of the architect, both on the question of the proper fulfillment of the contract by the plaintiff and as to the allowance of extra time by the architect. The defendant, to avoid the effect of the architect's certificate, claimed that the architect, McCarty, had abandoned the contract, and that the plaintiff was duly notified of such abandonment before the certificate was issued. The jury decided this question of fact against the defendant, and disallowed his claim, based upon the plaintiff's failure to complete the contract within the time specified therein.

Upon this point testimony was offered by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

each party. The judge who denied this motion had an opportunity to judge as to the weight of this conflicting evidence, and has, by overruling this motion, given his approval of the verdict. From an examination of the testimony, it is apparent that the jury might from it have reasonably and fairly reached the conclusion now complained of. "In such cases, the rule is that the court should not set aside a verdict, where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside, where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they, or some of them, were influenced by prejudice, corruption, or impartiality." *Burr v. Harty*, 75 Conn. 127, 129, 52 Atl. 724; *Fell v. Hancock*, M. L. I. Co., 76 Conn. 494, 496, 57 Atl. 175.

There is no error. The other Judges concurred.

CITY OF NORWALK v. TOWN OF NEW CANAAN.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. TAXATION (§ 186*)—MUNICIPAL CORPORATIONS—LAND IN ENJOINING CORPORATION.

Land owned by a city in an adjoining town which is not used for reservoir purposes is liable to assessment for taxation by such town.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 295; Dec. Dig. § 186.*]

2. CONSTITUTIONAL LAW (§ 229*)—TAXATION (§ 193*)—EXEMPTIONS—CONSTITUTIONALITY—DISCRIMINATION.

Gen. St. 1902, § 2321, provides that land owned by a municipal corporation and used by it for reservoir purposes and situated in an adjoining town shall be taxed in such town at a fair agricultural valuation, unless the inhabitants of the town where the land is situated have the right to use and actually do use the water supply from the reservoir upon the same terms and conditions as the inhabitants of the municipality which owns the reservoir, in which case the land is exempt from taxation. *Held*, that the statute is not invalid as discriminating against municipalities owning reservoirs in towns whose inhabitants have not equal rights with its own to the use of the water supply, there being no constitutional provision that taxation shall be equal and uniform, and exemptions being within the legislative discretion.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 685; Dec. Dig. § 229.* *Taxation*, Cent. Dig. § 309; Dec. Dig. § 193.*]

3. TAXATION (§ 217*)—EXEMPTION—PUBLIC PROPERTY—LAND IN ENJOINING CORPORATION—DAM.

Under Gen. St. 1902, § 2321, which provides for the taxation of land owned or taken by a municipal corporation for the creation or furnishing of a supply of water, if the inhabitants of the town in which it is situated do not have the use and do actually use such water supply on the same terms as the in-

habitants of the municipal corporation, in which case the property shall be exempt, a dam located on such land is not an item subject to taxation separate from the land, and should have been included in an item of the assessment denominated "land used in connection with reservoir."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

4. TAXATION (§ 217*)—MUNICIPAL CORPORATIONS—WATER MAINS—STATUTORY PROVISION.

While, under such statute, the mains and pipes laid in land owned by the municipal corporation are exempt, the land itself is assessable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

5. TAXATION (§ 217*)—EXEMPTIONS—PUBLIC PROPERTY—WATER MAINS—"LAND."

Such statute having been enacted to remedy a defect in the existing exemption law which allowed the unconditional removal of such property from the assessment list of the town, and thereby deprived it of taxes upon the property without the necessity of extending to it any use of the water supply, and not to subject the municipality owning the land to any other or further tax, water mains and pipes laid in the highways and through private property are not subject to assessment for taxation as "land."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3975-3984; vol. 8, pp. 7700, 7701.]

6. TAXATION (§ 217*)—EXEMPTIONS—MUNICIPAL PROPERTY—EASEMENT.

The easements acquired by the municipality for the laying of its mains through private property are a mere right therein, and not an estate in land, inconsistent with that of the owner of the fee, and taxable as such within the meaning of the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

Reservation from Superior Court, Fairfield County; Joel H. Reed, Judge.

Action by the City of Norwalk to review a refusal of the Board of Relief of the Town of New Canaan to reduce a tax assessment. On reservation from the superior court of Fairfield county on an agreed statement of facts. Decree advised in part for plaintiff.

Action in the nature of an appeal from the board of relief of the town of New Canaan for refusing to reduce the amount for which the plaintiff had been assessed for taxation by the assessors of that town, brought to the superior court for Fairfield county and reserved upon an agreed statement of facts for the advice of this court. The essential part of the statement of facts is as follows:

"In pursuance of said provisions of the charter, and because the necessities of said city and others required the same, the plaintiff now owns, and for many years last past, and on October 1, 1910, owned and held in the town of New Canaan, a large quantity of land, with a dam permanently located thereon, used by the plaintiff for reservoir pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

poses, which reservoir is required for the purpose of distributing water to the inhabitants of said city of Norwalk, and other persons and corporations. The plaintiff also owns underground pipes necessary to convey and distribute said water to said city of Norwalk and other places, a portion of such pipes being situated in said town of New Canaan, and permanently located therein for the purposes aforesaid, of which pipes so located in the town of New Canaan 5,600 feet are located in the highways of said town and 9,900 feet are located in, upon, or through the rights of way or easements hereinafter described. The underground pipes, described in paragraph 4 hereof, commence at the reservoir, described in paragraph 3 hereof, and run in, upon, or through the easements or rights of way, and the highways referred to in paragraph 4 hereof to the city of Norwalk, in one continuous trunk line. A majority of the inhabitants residing along said line of pipes have connected their premises therewith, and are drawing upon and using said water supply by permission of the water commissioners of the plaintiff city, duly authorized to grant such permit. The rates charged to those inhabitants of the defendant town who have received such permission and have in fact connected with such water pipes, and are using said water, are 50 per cent. greater than the rates charged to the inhabitants of the plaintiff city, but said rates, are the same as those charged to the inhabitants of the town of Norwalk outside of the limits of the plaintiff city. During the month of October, 1910, the plaintiff made out and returned to the assessors of said town of New Canaan, a list of its real estate and taxable property, in the manner prescribed by law, said list being as follows: '30 acres of land not used for reservoir purposes. Said city is also the owner of 33 acres of land on which is a dam, and all of which is used for reservoir purposes, and also owns pipes and mains, underground, used for the purpose of distributing water to residents of New Canaan and Norwalk, all of which, together with said 33 acres of land on which is a dam, are claimed to be exempt from taxation, and are not hereby returned for taxation.' The assessors of said town of New Canaan thereafter added to said list as so returned the following:

Dam located at reservoir.....	\$15,000
Underground mains and pipes located in New Canaan.....	40,000
Said \$40,000 being made up as follows, viz.:	
Underground pipes through private property.....	\$25,000
Underground pipes in highways.....	14,000
Underground pipes in property of city of Norwalk.....	1,000
	\$40,000
Easements and rights of way.....	\$ 2,000
28 acres land used in connection with reservoir.....	1,120

The assessors valued said land returned, as aforesaid, as follows:

35 acres of land, not used for reservoir purposes \$ 1,400

"The city of Norwalk and its predecessor, the borough of Norwalk, prior to said 1st day of October, 1910, had acquired by deed from a great number of persons perpetual easements and rights of way in the lands belonging to such persons severally, to wit, the right to itself and its successors, to perpetually maintain in and over such pieces of land pipe lines and mains for the carrying of water from the dam in question to the city of Norwalk and for the repairs and replacing thereof, from time to time, each of such easements or rights of way having been conveyed to said borough or said city by deed of conveyance duly executed and recorded in the public land records of said town of New Canaan, and on said 1st day of October, 1910, the said city was seized and possessed of said easements or rights of way, and had laid and was maintaining by virtue of such deeds the pipe lines and underground mains referred to in paragraph 4 hereof."

Louis Goldschmidt, for plaintiff. Homer S. Cummings and Epaphroditus Peck, for defendant.

THAYER, J. (after stating the facts as above). The questions upon which the advice of the court is asked are: "Whether or not, upon the agreed statement of facts the property of the plaintiff or any part thereof as described therein is liable to taxation by the defendant; and if it is partially liable to taxation, what portion of the same is taxable, and for what amount and in what proportion." The list which the plaintiffs gave in to the defendant's assessors included for taxation only the land which was not used for reservoir purposes.

[1] This was liable to assessment and properly assessed. *West Hartford v. Board of Water Commissioners*, 44 Conn. 360, 371. The assessors added to the list the land which the plaintiff used for reservoir purposes. The plaintiff claims that this was improper. In *West Hartford v. Board of Water Commissioners*, 44 Conn., supra, we held that lands owned by a municipal corporation and used by it for reservoir purposes was not liable to assessment for taxes in an adjoining town where the land was located. This would be decisive of the question in the plaintiff's favor had there been no subsequent legislation to affect the matter. But after that decision was rendered an act was passed, now section 2321 of the General Statutes, which provides that land so owned, used and situated shall be set in the list for taxation in the town where it is situated at a valuation which would be fair

for such land if used for agricultural purposes; unless the inhabitants of the town where the land is situated have the right to use and actually do use the water supply from such reservoir upon the same terms and conditions as the inhabitants of the municipality which owns the reservoir, in which case the land is exempt from taxation. It appears from the statement that the defendant's inhabitants do not receive water upon the same terms and conditions as the plaintiff's inhabitants do, and it is conceded by the plaintiff that, if this statute is valid, the addition to its list of the reservoir land was justified. But it claims that the statute is invalid as discriminating against municipalities owning reservoirs in towns whose inhabitants have not equal rights with its own to the use of the water supply.

[2] The statute is not upon that ground invalid. Taxes seldom bear equally upon all. There is no constitutional provision either expressed or implied that taxation shall be equal and uniform. *State v. Travelers' Ins. Co.*, 70 Conn. 593, 605, 40 Atl. 465, 66 Am. St. Rep. 138; *State v. Travelers' Ins. Co.*, 73 Conn. 255, 266, 47 Atl. 299, 57 L. R. A. 481. It is for the Legislature to determine what property shall be taxed. The statute in question has selected a class of property formerly exempt from taxation and made it subject to assessment. The plaintiff's property comes within the class. The plaintiff cannot complain because other like property subject to different uses, still remains exempt. The property is held for public uses. *West Hartford v. Board of Water Commissioners*, supra. The Legislature might well continue the exemption as to such property when the inhabitants of the taxing community receive the same public benefit from the reservoir which the inhabitants of the owning municipality do, and provide that where the inhabitants of the taxing community do not receive such benefit the land held for reservoir purposes may be taxed at what would be its fair valuation if used for agricultural purposes.

As to the remaining items which were added to the plaintiff's list the question between the parties has been whether they constitute "land" within the meaning of the statute above referred to. It is to be noticed that the assessors did not describe them as land nor assess them as land. The statute authorized the listing only of "land owned or taken by a municipal corporation for the purpose of creating or furnishing a supply of water," etc., and provides in what manner its valuation shall be fixed. The 63 acres were assessed at an average value of \$40 per acre.

[3] It is clear that the dam which is assessed at \$15,000 and the mains and pipes which were assessed at \$40,000 cannot have been assessed as land. If not, the assessment

was wrong and the board of relief should have corrected it.

As regards the dam it appears from the agreed statement of facts that it stands upon the land which is used for reservoir purposes, and if not so it is apparent that the land on which it stands is as much owned and taken for creating or furnishing a supply of water as the land which is covered by the water. It should have been, and, we suppose, was included in the item denominated, "land used in connection with reservoir." The dam separated from the land was not an item subject to taxation under the statute.

[4] The same is true of any land owned by the plaintiff in which it has mains or pipes for furnishing water to its inhabitants or others. The mains and pipes are not assessable under the statute, but the land owned by the plaintiff in which such pipes are laid is liable to be set in its list at a valuation to be fixed by the rule established by the statute. If that land was not included in the 28 acres assessed as land used in connection with the reservoir it should be added thereto.

[5] Water pipes and mains located in highways and in the private property of others than the owner may under some circumstances be treated as land and under other circumstances as personal property. *Field v. Guilford Water Co.*, 79 Conn. 70, 72, 63 Atl. 723. In the case cited such pipes were held to be personal property and taxable as such in another town than that in which they were located. In the present case the pipes and mains which were assessed constitute a continuous trunk line some miles in length extending from the plaintiff's reservoir to its corporate limits. They were a part of the machinery for furnishing its inhabitants with water. It is not to be presumed that the parties contemplated that these expensive pipes should become a part of the realty and belong to the owners of the fee. The statute, in terms, makes no reference to such pipes. It refers solely to land. We think that it does not intend that the municipality which owns such pipes shall be assessed therefor or for the easements and rights of way in which they are located. If taxable under the statute, it is as real estate according to the rule fixed by the act; that is, at a valuation which would be fair for the land if used for agricultural purposes. The land in the highways is not a subject of taxation. The land of private owners through which pipes are laid is assessable against the owners. It is not conceivable that the Legislature, had it intended to make such pipes subject to taxation, would have taxed them as land or adopted such a rule of valuation if taxed as personal property. The purpose in view in the enactment seems apparent. Under existing law

as held in *West Hartford v. Board of Water Commissioners*, supra, land owned or taken for reservoir purposes by a municipality was removed from the assessment list of the town where the land was situated. Such town thus became a loser by such taking unless its inhabitants had the use of the water supply thus created. If they were given the use of the water supply upon the same terms as the inhabitants of the municipality owning the reservoir, they shared in the public use. It was proper that towns not thus sharing in the public benefit should not lose the tax upon the lands taken for the reservoir. It was the purpose of the act to restore this exempted land to the assessment list of such towns. It was not the purpose expressed by the act to subject the municipality owning the land to any other or further tax. The assessment of the pipes and mains in the highways and through private property was improper and the board of relief should have stricken these items from the list.

[§] The statement of facts shows that pipe lines and mains through private property were laid where the plaintiff had acquired an easement or right of way for the purpose. These are the only easements, which, so far as the case shows, the plaintiff owned. The same "land" was thus assessed twice, if at all; once as pipes and mains, and once as easements and rights of way. Easements such as rights of way and the right to conduct water by pipes from or across the lands of another are not estates in land, but mere rights—incorporeal hereditaments. They give no right of possession, and are consistent with the possession and occupancy of the land by the owner of the fee. They may add value to the dominant estate to which they are attached, and diminish to some small extent the value of the servient estate. Such mere incorporeal rights are not ordinarily separately assessed. It is the tangible property which is subject to assessment and taxation. Unless the taxing statute either expressly or by implication makes them taxable they are not to be included in the list. The purpose of the statute here in question, as we view it, precludes the assessment of such rights as land and this item should have been stricken from the assessor's list.

The superior court is advised that the 63 acres of land described in the statement as owned by the plaintiff are liable to taxation in the defendant town at what would be its fair valuation for agricultural purposes and were properly assessed, and that the other items of property therein described as belonging to the plaintiff are not liable to taxation.

No costs in favor of either party will be taxed in this court. The other Judges concurred.

RAYMOND v. PARKER.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. EVIDENCE (§ 166*)—BEST EVIDENCE.

In an action by the trustee of a bankrupt stockbroker to recover amounts claimed to have been paid as margins upon selling stocks for defendant, it was error to admit oral testimony by plaintiff that the items shown to have been paid by the bill of particulars were regularly charged upon the broker's books; the books themselves not being lost or destroyed, and being accessible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 556, 557; Dec. Dig. § 166.*]

2. EVIDENCE (§ 318*)—HEARSAY.

In an action by a stockbroker to recover amounts claimed to have been paid out as margins upon selling stock purchased for defendant, in which plaintiff claimed that there was an actual purchase and sale of the stock by plaintiff, acting through a brokerage company, evidence of plaintiff that, when he received orders from defendant, he telegraphed them to the company and received a confirmation of the order, and that the company filled the orders by actual purchases and sales, was not admissible; evidence of what the brokerage company reported to plaintiff being mere hearsay when offered to prove whether it actually made purchases and sales.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

3. GAMING (§ 14*)—STOCK SPECULATIONS.

While contracts for the purchase on margin of stocks having fluctuating values are speculative, they are not necessarily illegal if the stocks are actually purchased to be held for delivery upon payment of the price, but such contracts are mere gaming contracts, and illegal where the parties only contemplate the payment of the difference in the market prices as they rise and fall.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*]

Wheeler, J., dissenting.

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Action by Gilbert S. Raymond, trustee in bankruptcy, against Frank E. Parker. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Donald G. Perkins and Samuel Park, for appellant. Charles F. Thayer, George Curtis Morgan, and Charles V. James, for appellee.

HALL, C. J. The complaint alleges that Herbert S. Davis, for several years prior to 1908, at which date he was adjudicated a bankrupt and the plaintiff was appointed trustee of his estate, had been engaged at New London "in the business of buying and selling stocks, grain, and securities upon margins, as a broker"; that during three years prior to such adjudication the defendant had been one of his customers; and that during said time Davis "at the request and on the order of the defendant bought and sold stocks, grain, and securities for the defendant and advanced money to keep good his margins as per bill of particulars." Under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

head of "Purchases" the first item of the bill of particulars, under date of August 20, 1906, is, "20 shares American Smelting and Refining Co. at 130½—\$2,610.00." There follow, under said heading of "Purchases" and under stated dates in 1906 and 1907, 15 other items, giving the number and prices of other stocks, and one of May wheat, all of which purchase items are summed up at \$34,845. Following these, as credits, and under the heading of "Sales made on March 14, 1907" are the same items of stocks and May wheat described under the head of "Purchases," with the sale prices carried out, and summed up at \$31,862.50. The bill of particulars concludes with the statement, "Balance due to trustee of bankrupt estate of Herbert S. Davis \$2,482.50," that being the difference between the sums of said purchase and sale prices. There are no other charges or credits in the bill of particulars. The answer denies the averments of the complaint above stated, and further avers, in substance, that the alleged contracts between Davis and the defendant were illegal and void; that Davis was engaged in conducting what is called a bucket shop, the business of which consists in making wagers upon the rise and fall of the prices of stocks on the New York Stock Exchange, with the understanding that no stocks are to be purchased or delivered; and that such was the real character of the alleged contracts between Davis and the defendant. The judgment file states that the issues were found in favor of the plaintiff.

The following are some of the facts which appear in the finding:

At the time of the transactions referred to in the bill of particulars, Davis had an office in New London in which there was a blackboard having at its top the names of stocks dealt in on the New York Stock Exchange, and upon which were entered the quotations of purchases and sales on said Stock Exchange as they were reported by a ticker in the office. The office was connected by private wires with the Public Stock & Grain Company, and the Nolan Commission Company, having offices in New Jersey, and through which Davis transacted the business of his office. Neither Davis nor either of said New Jersey companies were members of the New York Stock Exchange or of any other exchange. The defendant ordered Davis to purchase the stocks named in the bill of particulars, and Davis transmitted the orders to one of said New Jersey companies. This was done without giving the name of the purchaser, but by giving a number of the order. Orders to purchase were called "evens" and orders to sell "odds." When such orders were transmitted, the New Jersey Company receiving the same reported back the execution of the same. When the price, at which any stock was ordered bought or sold, appeared upon the blackboard, as the price at which it was bought or sold on the New York Stock

Exchange, the customer was immediately notified that the purchase or sale was complete at that price, and the customer was required to pay his margin, which was \$1 for each share of stock ordered purchased. When the price of the purchased stock declined to the extent of \$1 a share, Davis was required to advance further margin, and he then called upon the defendant to reimburse him for the money advanced. The stocks named in the bill of particulars were sold, when upon a decline in the market price the defendant refused to make the margin good, and the then selling price was credited to the defendant. The balance shown by the bill of particulars is the amount advanced by Davis for the defendant to the New Jersey companies, and which he has refused to pay. Neither in the transactions named in the bill of particulars, nor in any of the many other similar transactions between them, did either the defendant or Davis receive any certificate of the stock ordered purchased. No interest was ever charged or claimed by Davis upon the transactions with the defendant, nor was the defendant ever credited with any dividends upon the stock claimed to have been purchased. Upon the trial in the superior court, the plaintiff, having testified in chief, upon direct examination, that Davis assisted him in preparing the bill of particulars, was asked by his counsel from what the bill of particulars was prepared. The witness answered from his ledger. To this evidence the defendant objected upon the ground that the book itself was the best evidence of its contents. The court admitted the testimony.

This ruling was clearly erroneous. It, in effect, permitted the plaintiff to support the averments of the complaint by his oral testimony that the items of the bill of particulars were regularly charged upon Davis' books, without producing them, and when, as the court finds, they were not lost or destroyed, but were in the hands of the public prosecutor in New London.

[2] Upon the trial the following questions were, against the defendant's objection, permitted to be asked of and answered by Davis upon his direct examination as a witness for the plaintiff: "Q. On August 20, 1906, in the bill of particulars, appears 20 shares American Smelting & Refining Company at 130½, what does that represent? A. Yes; I believe there was such a transaction. Q. What was done upon giving that order? A. I telegraphed the order to the Nolan Commission Company over private telegraph wire. Q. Did you or not have an operator in your office? A. I did then; yes. Q. And was or not this order given by you to your operator? A. It was. Q. And then transmitted by him? A. Why, presumably, I don't know. I might have * * * telegraphed it myself. I cannot tell. It is two years and a half back. Q. What in this particular was the next step? A. I received a con-

firmation by wire. Q. Did you hear in this case the reply in relation to the order? In relation to this order do you know whether or not it was followed by a fulfillment of it? A. Yes; I knew it was." There were similar questions and rulings respecting the other items of the bill of particulars under the head of "Purchases." Regarding the items of credits the following questions were, against the defendant's objections, permitted to be asked of and answered by said witness Davis: "Q. Did you or not give orders to close all of these stocks out? A. I think I gave them verbally to the operator. Q. What was the next step after the order was given? * * * A. I received a confirmation from the Nolan Commission Company that they were sold, and then I informed Mr. Cantwell (the claimed representative of the defendant) to that effect." Regarding this testimony, so objected to, the record shows that counsel for the defendant further claimed as a matter of law that evidence that the defendant gave an order, and that Davis telegraphed it to the alleged commission house, and that the latter telegraphed back that it was filled, was insufficient proof of an actual purchase, and the trial court overruled said claim.

The rulings as to the admissibility and effect of this evidence were erroneous. What the real character of the transactions between Davis and the defendant were, was the principal matter in dispute. The testimony of Davis, as above detailed, was evidently offered for the purpose of proving the averments of the complaint that Davis actually bought the stocks in question as ordered by the defendant. Davis did not claim to have purchased them himself, but claimed that he had transmitted the defendant's orders to one of the named New Jersey companies, and that such company executed the same. It was the plaintiff's duty to prove, and he attempted to prove, that at his request his correspondent, the New Jersey company, actually executed the orders given by the defendant, as alleged in the complaint. What the New Jersey company in fact did was not proved by evidence of what such company reported to Davis that it had done. Such report was mere hearsay evidence. There was no proof that the New Jersey companies bought or sold any of the stocks described in the complaint. *Hurd v. Taylor*, 181 N. Y. 231, 234, 73 N. E. 977.

The defendant claimed that the arrangements shown to have been entered into between Davis and the defendant were mere gambling transactions. This claim the trial court overrules. It appears that neither the defendant nor Davis ever received any certificate of any of the stocks alleged to have been purchased. Whether the New Jersey companies, with whom Davis transacted business, but who could not themselves purchase

stock on the New York Stock Exchange, ever received certificates of the stocks in question, or ever made any contracts by which they could deliver the certificates of such stocks to the defendant, upon payment by him of the prices at which he had ordered them, less the margins he had paid, does not at all clearly appear, although Davis testified that the certificates would at any time have been delivered upon such payment.

[3] Although contracts for the purchase of stocks of fluctuating values upon a margin are speculative, they are not necessarily for that reason illegal, when there is a bona fide employment of the broker to make actual purchases of the stock to be held for delivery upon payment of the purchase price. But contracts relating to stocks and other commodities of fluctuating prices when there is no actual purchase, and by which the parties contemplate only the payment by one to the other of the difference in market prices as they rise or fall, are mere gaming contracts, and are void. *Hatch v. Douglas*, 48 Conn. 116, 127, 40 Am. Rep. 154; *Skiff v. Stoddard*, 63 Conn. 198, 223, 26 Atl. 874. 28 Atl. 104, 21 L. R. A. 102 (overruling *Ingraham v. Taylor*, 58 Conn. 503, 20 Atl. 601. 18 Am. St. Rep. 291; *Ling v. Malcom*, 77 Conn. 517, 525, 59 Atl. 698; *Hurd v. Taylor*, supra. The complaint in this case describes a valid contract. But the finding by the trial court of the issues regarding the alleged contract and its performance was based, to a material extent, upon inadmissible evidence. We are not therefore in a position to determine what the real transactions between Davis and the defendant were, nor to decide whether the contracts between them were or were not legal and valid.

There is error, and a new trial is granted.

WHEELER, J. (dissenting). I concur in the opinion of the court that there was error in the admission of evidence, but am of the opinion that upon this record the court should remand the case with instruction to enter judgment for the defendant.

The facts in the evidence certified to us, indeed, those stated in the finding and in the opinion, purchases and sales of stock and grain on a 1 per cent. margin and a 1/8 per cent. charge for commission by Davis in New London through a foreign correspondent, and neither a member of any exchange, no certificates given, no interest charged for carrying the stock and grain, no dividends credited, though many earned, the purchase or sale complete when its price was reached by a purchase or sale on the New York Stock Exchange and recorded from telegraphic advices on a blackboard in Davis' New London office, and this, too, whether the purchase or sale was a small lot order or not, all indicate a plain gamb-

ling transaction. The orders were mere wagering contracts on the fluctuations of the market with no actual purchases or sales, and no intent that any such be made. All the business world will, we think, recognize the nature of Davis' business as that of a "bucket shop," and these transactions mere wagers on the market.

If our conclusion as to the meaning of these facts is correct, a new trial would be a useless proceeding.

SUTHERLAND v. BROWN et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. APPEAL AND ERROR (§§ 169, 719*)—QUESTIONS REVIEWABLE—OBJECTIONS WAIVED.

A question neither properly presented by the reasons of appeal nor raised in the trial court will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034, 2968-2982; Dec. Dig. §§ 169, 719.*]

2. GARNISHMENT (§ 52*)—PROPERTY SUBJECT TO—STATUTES—"CONCEALED."

Gen. St. 1902, § 880, providing that when the effects of defendant are "concealed in the hands of his agent or trustee so that they cannot be found or attached," etc., plaintiff may garnishee the agent or trustee, and thereby secure all effects of defendant in the hands of his agent or trustee, do not mean that personality can only be reached by garnishment when it is hidden from sight by the agent or trustee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 102, 104; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

3. CHATTEL MORTGAGES (§ 138*)—PRIORITIES—"CONCEALED."

An owner of household furniture in an apartment leased the apartment as furnished to a tenant who entered into possession, and who held, in the apartment, the furniture, either under the lease or after its expiration. A creditor of the owner sued the owner, and garnisheed the tenant, who did not offer to surrender the furniture to the officer nor give permission to the officer to enter the apartment to take it. *Held*, that the property was sufficiently concealed within Gen. St. 1902, § 880; and, where the garnishee subsequently delivered the goods to the officer pursuant to an execution issued in the garnishment, a chattel mortgagee of the owner in a mortgage not filed until after the service of garnishment could not enjoin a sale of the chattels under the execution.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

4. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where an answer which was demurred to was amended and the facts were found on plaintiff's denial of its averments, the correctness of the ruling sustaining the demurrer to the original answer was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action for an injunction by Orlando Sutherland against Roscoe P. Brown and another to restrain the sale of personalty held on execution. From a judgment granting a permanent injunction rendered after sustaining a demurrer to the answer which was subsequently amended, defendants appeal. Reversed and remanded.

George M. Wallace and Ezra C. Terry, for appellants. James E. Wheeler, for appellee.

HALL, C. J. The plaintiff, claiming to be a mortgagee of certain household furniture, asks by this action an injunction to restrain the defendants Mason and Brown, the former a creditor of the owner of said furniture, and the latter an officer who is alleged to have attached and levied upon it in behalf of Mason, from selling said property on execution.

The facts relevant to the claims of the respective parties are these:

On the 21st of April, 1910, this property, consisting of a piano, paintings, rugs, etc., in all some 100 articles of household furniture, was owned by one De Ford, who on that day undertook to mortgage it to the plaintiff to secure payment of his note to the plaintiff for \$500. The mortgage, called "Exhibit A," enumerates the articles of furniture, but does not describe them as household furniture, nor does the court find that they were used by the owner in housekeeping, nor does the mortgage state the location or who was in possession of the property, nor the residence of the mortgagee. The mortgage was not recorded until November 29, 1910. Some time prior to November 26, 1910, De Ford leased the apartments in which said furniture was situated, as furnished apartments, to William Vonder Brake and Louis Jordan. When the term of the lease commenced and ended does not appear. On November 26, 1910, and while Vonder Brake and Jordan were still in possession of said furniture in said apartments, the defendant commenced an action against De Ford for \$1,100 damages and garnisheed said tenants, Vonder Brake and Jordan, the process being served by the defendant Brown, who, as well as the other defendant Mason, knew at the time of the service of the copies that the furniture belonged to De Ford. At the time of the service of copies, the officer, Brown, made no demand for the delivery of said furniture, nor any attempt to take possession of it. The trial court states in its finding that at the time of the service of the garnishee process the furniture "was so situated that it could have been attached by said officer, and that he could have taken the same into his possession," and states among its conclusions that the property was not then concealed so that it could not be found or attached, but was exposed so that it could have been attached, and that, therefore, no valid attachment was made by the officer by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

foreign attachment process. On the 27th of December, 1910, Mason obtained judgment in said action against De Ford for \$1,054, and on February 10, 1911, Brown gave notice that he would sell the property by virtue of the execution issued upon such judgment. He was restrained from doing so by a temporary injunction, which by the judgment in this action was made permanent. Neither De Ford nor the lessees, Vonder Brake and Jordan, appear to object to the sale of the property on execution. To enable the plaintiff to successfully do so, the law required him to prove a title valid as against Mason on February 10, 1911, when Brown attempted to sell the property on execution. This he endeavored to do by proving that Exhibit A was executed upon a good consideration on the 21st April, 1910, and was recorded November 29, 1910, and before Brown took the property upon the execution.

It is not disputed that De Ford retained possession of the personal property at the time he attempted to mortgage it to the plaintiff, and that the plaintiff has never since taken possession of it. The plaintiff, therefore, acquired only such title under his mortgage as is made valid by our statutes when personal property is mortgaged without delivery of possession. Gen. St. 1902, § 4132, provides, among other things, that: "When any dwelling house, together with the household furniture belonging to its owner *and used by him in housekeeping* * * * or any of the personal property above mentioned without the real estate *in which it is situated or used*, shall be mortgaged by a deed containing * * * a particular description of such personal property, executed, acknowledged, and recorded as mortgages of land, the retention by the mortgagor of the possession of such personal property shall not impair the title of the mortgage." Respecting the validity of the mortgage, the defendants make two claims: First. That the mortgage is invalid because it fails to properly describe either the parties to the mortgage or the property sought to be mortgaged, inasmuch as it does not state the mortgagee's place of residence, nor the house, town, or state in which the property is situated, nor that it was in a dwelling house, or in any house, nor that it was used or was intended to be used by the mortgagor in housekeeping, and because it has not been found that it was ever used by the mortgagor in housekeeping. Second. That the mortgage was invalid as against these defendants because it was not recorded until November 29, 1910, nor until after the defendants had on the 26th of said November attached the property by the foreign attachment process.

[1] As the questions made by the first of these claims are neither properly presented by the reasons of appeal, nor appear to have been raised in the trial court, we do not discuss them.

[2] The second claim was decided by the

trial court adversely to the defendants upon the ground that no valid attachment was made by the officer by the service of the garnishee process on the 26th of November for the reason, as given by the court, that the furniture sought to be attached was not concealed, but was accessible to the officer for attachment in the ordinary manner by seizure and removal. That the property was not concealed, but was open to attachment, and could have been taken and removed by the officer, and that, therefore, it could not have been reached by the foreign attachment process, were evidently conclusions of the trial court drawn from certain undisputed facts stated in the finding, and based upon its interpretation of our statute regarding foreign attachment.

The facts regarding the situation of the furniture at the time of the service of the foreign attachment process, and from which the inference was drawn that it was not concealed but was open to attachment, are these: The furniture came into the possession of the garnishees by virtue of a lease from De Ford. Whether the lease had expired at the time of the service upon the garnishees is not expressly found. The property was in apartments of which the garnishees were in possession, and constituted the furniture thereof. The defendants knew that the furniture was in said apartments and that it belonged to De Ford. No demand was made by the officer for the delivery of the furniture. It is not found, and apparently it was not the case, that the garnishees offered to deliver the furniture to the officer at the time of the service of the foreign attachment process. What averments respecting the garnishees were contained in the writ of foreign attachment, other than that they were therein described as the agents, trustees, and debtors of De Ford, does not appear.

Section 880 of the General Statutes provides that "when the effects of the defendant in any civil action * * * are concealed in the hands of his agent or trustee so that they cannot be found or attached, or where a debt is due from any person to the defendant, * * * the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint * * * with such agent, trustee, or debtor of the defendant, or * * * at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of such garnishee and any debt due from any such garnishee to the defendant * * * shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover." If we are to assume that at the time of the service of the foreign attachment process the lease to Vonder Brake and Jordan had not expired, and that they still held the furniture as lessees, the officer could not lawfully

have taken possession of it and removed it, even if it was exposed to view. The tenants, as lessees, would in that case have had a property right in the furniture which these defendants could not have deprived them of. In the absence of fraud upon the part of De Ford, the present defendants had no greater right to take the property than De Ford had. Had the officer attempted to attach it by seizure and removal, the tenants could have at once replevied it. No question seems to be made but that a lessee holding, as such, possession of the personal property of his lessors, may properly be garnisheed, provided his rights are not prejudiced thereby. It is the policy of our law "that all the property of a debtor not exempt by law from execution should be subject to the demands of his creditors, and that every facility consistent with the reasonable immunities of debtors should be afforded to subject such property to legal process." *Gager v. Watson*, 11 Conn. 168, 171. Our statute of foreign attachment was originally passed in May, 1726. Statute Laws of Connecticut 1808, p. 61. It did not then contain the word "concealed," but provided for an attachment by garnishment when "no lands, goods, or effects of any absent or absconding debtor, in the hands of his attorney, factor, agent, or trustee, shall be exposed to view or can be found or come at so as to be attached." The language of the original act and its preamble show that the attachment by garnishment was to prevent fraud by the "ill-minded, absconding debtors," and the words "concealed in the hands of his attorney, agent," etc., which appeared first in the act of 1821 (Rev. Pub. St. p. 237), in so far as they refer to an actual attempt to hide the property from attachment, appear to refer to a fraudulent attempt by the debtor who was supposed to have absconded. *Culver v. Hall*, 20 Conn. 409, 415. But attachment by factorizing process, as it is now generally called, has long since ceased to be merely a remedy for the prevention of fraudulent conveyances, or of fraud by absconding debtors. The statute should be liberally construed; and parts of its language more especially adapted to its earlier purposes may properly be regarded as inapplicable to some of its present objects.

In *Treadway v. Andrews*, 20 Conn. 384, 392, this court, in speaking of our foreign attachment statute, said: "The provisions of the statute having been found highly beneficial in their operation, they have been greatly extended by recent statutes, and yet the same simplicity in form has generally been retained in practice," and that the statute had always received a liberal construction. In *Starr v. Carrington*, 8 Conn. 283, Chief Justice Hosmer, speaking for the court, said: "I consider the law of foreign attachment as of great utility, and I would give it a liberal construction to effectuate its object. I should regret extremely the

adoption of principles which would narrow the advantages of that act."

The words of our present statute, "concealed in the hands of his agent or trustee so that they cannot be found or attached," do not mean that personal property can only be reached by foreign attachment when it is hidden from sight by the agent or trustee, so that it cannot be found, and only when it is impossible for the officer serving the process to take the property and remove it. It was held in *Treadway v. Andrews*, supra, that the scire facias in a process of foreign attachment need not allege that the property in the hands of the garnishee could not be found to be attached in the original action; and, further, in that case (page 393 of 20 Conn.), it was held that because the garnishee claimed to be the owner of the property sought to be attached it could be reached by foreign attachment process although accessible to the officer.

[3] What rights the garnishees in the present case claimed in the furniture at the time of the garnishment does not very clearly appear. As we understand the finding, they were not at home when the copies were left in service. They were evidently holding the property either under a lease or after the expiration of a lease from De Ford. The property was in their actual possession. It was in their dwelling house, and was then in use by them as household furniture. They did not offer to surrender it to the officer, nor give permission to the officer to enter their dwelling house to take it. The statute did not require the officer to demand that it be delivered up for attachment. Whether the property could have been secured by foreign attachment process if the garnishees had offered to surrender it to the officer, and there had been no obstacle whatever to an attachment by seizure and removal, it is unnecessary to decide. In *Treadway v. Andrews*, supra, the charge of the trial court that the goods were liable to the process of foreign attachment if they were so situated that an officer would not be bound to take them without indemnity from the attaching creditor was sustained. The facts before us show that there was sufficient embarrassment to the attachment by the ordinary writ to meet the conditions covered by the word "concealed," and to render the attachment of November 26th by foreign attachment valid. *Treadway v. Andrews*, supra; *Swett v. Brown*, 5 Pick. (Mass.) 180; *Burlingame v. Bell*, 16 Mass. 318.

The record justifies us in assuming that on February 10, 1911, the garnishees delivered the goods in question to the officer, Brown, upon demand made by him upon the execution issued in the foreign attachment suit, and that he so held them at the time the defendants were enjoined in this action. That such were the facts was averred in paragraphs 8 and 9 of defendants' amended

answer, which upon the plaintiff's motion were expunged by the court as irrelevant and immaterial.

[4] As the defendants' answer which was demurred to was afterwards amended, and the facts found upon the plaintiff's denial of its averments, a consideration of those reasons of appeal based upon the sustaining of the demurrer to the first answer becomes unnecessary.

There is error and the judgment is reversed, and the case remanded, with direction to render a judgment dissolving the injunction. The other Judges concurred.

DELINKS v. NEW YORK, N. H. & H. R. CO.
et al.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—SUFFICIENCY OF EVIDENCE.

In an action by a motorman for injuries received in a collision, a finding that just before the collision the air brakes failed to work by reason of some defect or injury to some of the parts which were wrecked by the collision *held* to have such support in the testimony that it could not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. MASTER AND SERVANT (§ 281*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action by a motorman to recover damages for personal injuries, received in a collision between his car and another, *held* not to show that plaintiff was negligent in attempting to use a hand brake to stop his car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

3. MASTER AND SERVANT (§ 127*)—APPLIANCES FOR WORKING—BRAKE ON STREET CAR.

Where a street railroad company had an independent system of inspection for its cars and appliances, and it was not the duty of a motorman to inspect a hand brake designed for use in emergencies, the defendant was bound to use reasonable care to keep the hand brake in proper repair and reasonably suitable for the use to which it would be put.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. § 127.*]

4. MASTER AND SERVANT (§ 124*)—APPLIANCES FOR WORK—INSPECTION OF HAND BRAKE ON STREET CAR.

Where a street car company had the duty of providing and maintaining a hand brake suitable and reasonably safe for the work to which it would be put, such duty required an inspection and reasonable care by the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

5. MASTER AND SERVANT (§ 246*)—CONTRIBUTORY NEGLIGENCE—EMERGENCY—ATTEMPT TO AVOID COLLISION OF STREET CARS.

The motorman of a street car which was running about 15 miles an hour on a downgrade, and increasing its speed, found that he was unable to stop by means of the air brake or hand brakes, and while within 175 feet of the car ahead and after having gradually applied the

power to reverse, turned on the full power so that the circuit breaker blew out, and again applied the power, but was unable to stop the car, whereupon it struck the car ahead. *Held*, that plaintiff's act in putting on full power on suddenly seeing his danger, though it might have been a mistake, was not contributory negligence which would defeat a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.*]

6. MASTER AND SERVANT (§ 247*)—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF RULES.

A motorman's disobedience of a rule as to the use of reverse power not shown to have had any proximate connection with his injuries would not defeat his right to a recovery in an action for injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 799; Dec. Dig. § 247.*]

7. MASTER AND SERVANT (§ 276*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—DEFECTIVE APPLIANCES.

Evidence in an action by a motorman for personal injuries sustained in a collision *held* to sustain a finding that the proximate cause of the plaintiff's injuries was defendant's negligence in not furnishing a hand brake in a condition suitable for use in a case of emergency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 959; Dec. Dig. § 276.*]

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Action by Charles J. Delinks against the New York, New Haven & Hartford Railroad Company and another. Judgment for plaintiff, and defendants appeal. No error.

J. F. Berry, for appellants. Nathaniel R. Bronson and Lawrence G. Lewis, for appellee.

RORABACK, J. The record shows that the plaintiff who lived in Union City, on July 3, 1910, had been in the employ of the defendants for about one year as a motorman in the vicinity of Waterbury. His regular run at this time was on the Derby Connection. The plaintiff before his employment by the defendant had operated trolley cars in the capacity of motorman in Providence. At about 2 o'clock in the afternoon upon the date above mentioned, the plaintiff was directed to run a car making an extra trip from the center of Waterbury (Exchange place) to Lake Quassapaug, and to follow the regular car. The car which he was given was No. 104, a double truck, eight wheel, closed car, equipped with Christensen air brakes and hand brake, and equipped electrically with a G. E. No. 800 controller, with nine notches on the same, so that the power handle could be shifted from the "Off" position to the full power, which involved placing the handle around to the ninth notch. The car also had an overhead switch, or circuit breaker, so called, which was located at either end of the car and just above the motorman's head, as he stood in position for running the car. This closed car was not used in the summer except in emergencies, and had been standing outdoors in the weather for some

time, and its hand brakes under the platform had not been inspected and oiled, and were badly rusted and clogged up by rust, sand, and dirt on the day of the accident. The car was taken by Delinks at West Main street and proceeded to Exchange place, at which point he started out behind the regular car for Lake Quassapaug with a few passengers. Upon arriving at Lake Quassapaug he started to follow the regular car back toward Waterbury with no passengers upon his car. From a point about 1,100 feet west of the Middlebury Station to the station there is a drop of about 60 feet. As the plaintiff approached a point 600 or 700 feet west of the station on this downgrade, he applied the air brake for the purpose of decreasing the speed of the car and keeping it under control as he approached the station. He opened the air brake valve gradually in the usual manner, but the air brake, for some unknown reason which could not later be discovered, owing to the partial destruction of the apparatus as a result of the collision, as hereinafter set forth, failed to perform its function and to decrease the speed of the car. He turned the air brake off and on again with the same result. He thereupon directed his attention to the hand brake, but it was rusty and clogged up, as hereinbefore described, and although exerting his utmost strength he was unable to move the handle so as to apply the brake. At a point where he applied the air brake the car was running about 15 miles an hour downgrade, and rapidly increasing its speed. When he was about 150 or 175 feet from the station he found he was unable to use the hand brake and therefore threw the reverse switch and turned on the power and the circuit breaker blew out. He shut off the power, threw the overhead or circuit breaker on, and again applied the power, but he was unable to stop the car, and thereupon it dashed into the regular car then standing at the station. When within about 1,000 feet of the station the plaintiff looked at the indicator on the air gauge, which showed the normal pressure of 60 to 70 pounds in the reservoir. Both the automatic air pump, which pumped the air into the reservoir, and the air brakes worked the entire trip up to this point, and there was nothing then to indicate to the plaintiff that they were not in good condition. This gauge indicated that there was at that moment between 60 and 70 pounds of air in the reservoir, which was the normal and usual condition when the reservoir was full. Whenever the air pressure gives out sufficiently to prevent its use in stopping the car, this failure will always be shown at once in the air gauge. The hand brake had become stiff by reason of failure to oil, and permitting its parts to rust, and dirt and sand to accumulate, and was practically unworkable. If the hand brake had been in good working condition the plaintiff would have been able by its use to have brought the

car to a stop within a distance of 200 feet and avoided the collision. The defendants had negligently failed to inspect the hand brakes and correct their unsafe condition. It was not the duty of the motorman to inspect or try the hand brakes before using them to stop the car, and there was no negligence on his part in not discovering their defective condition, which could not be seen from the platform, but only from beneath. The approximate cause of the injury was the negligence on the part of the defendants in failing to inspect the hand brakes, and in permitting them to become stiff and rusty, and unable to be used, and the defendants were negligent in not providing a hand brake on this car in a condition suitable to be used on this trip in a case of emergency, such as confronted the plaintiff on this occasion.

As the plaintiff proceeded toward Middlebury Station from Lake Quassapaug he knew that there was a regular car ahead, and that he was following on an extra car, and he knew that it was his duty to stop at Middlebury Station. When he crossed the Southbury road he blew his whistle for the Middlebury Station. He was reasonably familiar with the route, knew the grade at the Middlebury Station, and expected to stop at this place. After leaving Waterbury he had had no occasion to use the hand brake at any time until just before the accident as herein stated. Air brakes of this construction are subject to occasional, though rare, trouble and difficulty, and it is possible for some part of the apparatus and appliance in connection with said air brake system to suddenly fail, thereby rendering useless the brake as an appliance for decreasing speed. These air brakes were of an approved type used by almost all the railroads in New England and by other railroads in this country and abroad, and were the most reliable brake known to modern railroad science.

The hand brake is used as an emergency and auxiliary brake, and its purpose is for use in case of trouble with the air brake. If the air brake had been workable at the point of application, the car, traveling at the rate of speed at which it was then proceeding, could have been stopped within a distance of 200 feet. In applying the reverse the brakes were not set. The plaintiff shut off the power, threw the reverse switch, applied the power, and, the car not being checked, turned the power on to the ninth notch, and then the overhead blew out, whereupon he threw on the overhead switch and then applied the power again. The first application of power was gradual—that is, the controller handle being swung from notch to notch—and that the full nine notches were given because the car was not checked by less power. There was no negligence on the part of the plaintiff in applying the

power nine notches at the time and in the way he did apply it. The car had acquired at that time such a momentum that the reverse failed to hold it as it was put on, and it would not have held the car and avoided the collision, substantially as it occurred, if the power had been first applied to the extent of two notches only and held there.

The defendants have pursued the course of procedure permitted by section 797 of the General Statutes, which in part provides that the appellant may have the entire evidence certified, and that if it shall appear from an examination of the record that the finding of the judge does not properly present the facts and rulings it shall correct such facts and rulings.

[1] It is found that just before the collision the air brakes failed to work by reason of some defect or injury to some of the parts which were wrecked by the collision. The defendants attack this conclusion as unwarranted by the evidence, illogical, and contrary to scientific principles. It is also claimed that portions of the finding should be corrected so as to read that "the air brakes were in perfect condition at that time." It is true that the principal evidence relied upon to sustain the plaintiff's contention upon this point is that of the plaintiff, an interested witness. But it is also shown in the testimony that this air brake was out of repair and needed attention only a few days before the accident. It further appears that this car was a closed one, but little used in the summer time, and it is not shown that it had been used between the date of its repair and the time of the accident. It appears in the testimony that it is possible that some part of the apparatus and appliances used in connection with the air brake system may suddenly fail, thereby rendering the brake useless.

The defendants insist with a semblance of plausibility that, by reason of the construction of the air brake and its operation upon the day in question, it necessarily follows that it was in proper condition when the plaintiff had testified that it failed to work. This theory is weakened by the fact that no satisfactory inspection of the car could be made after the accident. It is not impossible that the brake failed to work as the plaintiff has stated. The question presented is one of fact for the trial court, and there is testimony to support its finding. It cannot be said that it appears from the record that the finding upon this branch of the case is so plainly against the weight and preponderance of the evidence that it can be held that the superior court could not have reasonably arrived at the conclusion complained of.

[2] Nothing appears in the case to justify the defendants' contention that the plaintiff was negligent in attempting to use the hand

brake. It appears that the hand brake is used as an auxiliary and that its purpose is for use in case of trouble with the air brake. The evidence and finding show that when the plaintiff attempted to use the hand brake after the air brake refused to work the car was several hundred feet from the point where the accident occurred. If the hand brake had been in good working condition at the latter point the plaintiff would have been able to stop the car within a distance of 200 feet and avoided the collision. It is of no importance that the quickest way to stop the car was by the use of the reverse. One of the rules furnished the plaintiff for his guidance instructed him never to use the reverse except when necessary to avoid an accident. There was no apparent emergency until after the plaintiff realized that he was unable to decrease the speed of the car by the use of either one of the brakes.

It has been found that the plaintiff's injuries were caused by the negligence of the defendants in failing to furnish a suitable hand brake. This defect in the hand brake was under the platform, and when this car was taken by the plaintiff no opportunity or occasion had been given him to know of its condition.

[3] The defendant companies had an independent system of inspection for its cars and their appliances. This hand brake was a mechanical apparatus to assist the plaintiff and his fellow motormen in the work in which they were engaged. Delinks was a motorman, and it was not his duty to inspect the hand brake, the defective condition of which the court has found caused his injuries. He had a right to expect that a proper inspection had been made, and that this instrumentality was in a proper condition to perform the work he had been instructed to perform. Under these conditions it was the duty of the defendants to use reasonable care to provide a hand brake which would be suitable and reasonably safe for the work to which it would be put. This duty was a continuing one and included that of maintenance.

[4] The duty of maintenance necessarily involved that of reasonable care and inspection by the defendant companies. *Rincotti v. O'Brien Contracting Co.*, 77 Conn. 617, and cases cited upon page 620, 60 Atl. 115, 116 (69 L. R. A. 936).

[5] The defendants charge that there was error in the finding of the court below that there was no negligence upon the part of the plaintiff in applying the power to reverse the car to nine notches at the time and in the manner in which he did. The rule under which it is claimed that the plaintiff should have reversed the car was as follows: "Never reverse a car while it is moving except when necessary to avoid an accident. Never reverse with the brakes set, but shut off power, throw the reverse switch.

release brakes and apply power one or two notches." In determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion. *Stedman v. O'Neill*, 82 Conn. 199, 206, 72 Atl. 923, 22 L. R. A. (N. S.) 1229. When the plaintiff ascertained that he was unable to stop the car with either one of the brakes he was within about 175 feet of the car on the track in front of him. His car was then running about 15 miles an hour, on a downgrade, and rapidly increasing in speed. It will thus be seen that the plaintiff suddenly found himself in a dangerous position, and in attempting to avoid such danger, with no time for deliberation, he may have adopted means which he might not have taken with more time for consideration. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence, such as will prevent from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances make. *Karr v. Parks*, 40 Cal. 188; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Frink v. Potter*, 17 Ill. 406; *Cody v. N. Y. & N. E. R. Co.*, 151 Mass. 462, 468, 24 N. E. 402, 7 L. R. A. 843; *Salter v. Utica & Black R. R. Co.*, 88 N. Y. 43, 50, 51, 52. The conduct of the plaintiff in reversing the car might be called a mistake, but it was not carelessness. Furthermore the record shows that the reversal of the car by Delinks had no real connection with his injuries.

[6] It is not enough as the defendants contend that the plaintiff in the operation of the car at the time violated a rule as to the manner in which a reverse should be made, but it must also appear that such violation was the proximate cause to some extent at least, of his injuries. *Smith v. Conn. Ry. & Ltg. Co.*, 80 Conn. 268, 274, 67 Atl. 888, 17 L. R. A. (N. S.) 707; *Case, Adm., v. Clark*, 83 Conn. 183, 192, 76 Atl. 518.

[7] The evidence before us justified the superior court in making the finding which is questioned by the motion to correct. This finding recites a large number of facts upon which the judgment was founded. These facts fairly warranted the conclusion reached by the trial court that the proximate cause of the plaintiff's injuries was the negligence upon the part of the defendants in not furnishing a hand brake in a condition suitable to be used in a case of emergency.

There is no error. The other Judges concurred.

SNELLING & POTTER v. MERRITT et al.
(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. REFORMATION OF INSTRUMENTS (§ 51*)—EFFECT—RELATION BACK.

The reformation of an attachment bond sued on, pursuant to defendant's cross-complaint, related back to the institution of the suit, so that a demurrer to the answer ruled upon after the bond was reformed, so as to obviate the defects in the answer, was properly overruled.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 202; Dec. Dig. § 51.*]

2. REFORMATION OF INSTRUMENTS (§ 37*)—ALLEGATIONS OF CROSS-COMPLAINT—SUFFICIENCY.

In an action upon a bond given in substitution of an attachment against the property of two defendants, the cross-complaint seeking reformation of the bond alleged that defendant L., desiring to sell the attached property began negotiations with plaintiffs' attorney for its release by bond, and that it was agreed between the attorneys that the attachment should be released upon giving bond conditioned that so much of the penalty as might be necessary should be paid to plaintiffs if they obtained judgment to which the attached premises would be subject, and that L.'s attorney submitted a bond to plaintiffs' attorneys, he then believing that the bond would be void if the obligors paid the officer having execution upon any judgment recovered against defendant L. or the other defendant, the actual value of the other defendant's interest in the attached property in case judgment was rendered against him, or the actual value of L.'s interest if judgment was rendered against him or the actual value of the interest of both if judgment was rendered against both; that plaintiffs and their attorney believed that the meaning of the bond was as alleged, and knew that the obligors so understood the bond, and at the time of its execution the obligors believed that plaintiffs and their attorney had the same understanding of its legal effect, and plaintiffs' attorney well knew of such belief by the obligors, who would not have otherwise executed the bond. *Held*, that the cross-complaint sufficiently alleged, as against a demurrer, a cause of action for reformation of the bond on the ground of mutual mistake; the basis of the cross-complaint being the understanding between the parties prior to the execution of the bond.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 147; Dec. Dig. § 37.*]

3. REFORMATION OF INSTRUMENTS (§ 37*)—MUTUAL MISTAKE.

An allegation of fraud was not necessary where the cross-complaint sufficiently alleged mutual mistake.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 147; Dec. Dig. § 37.*]

4. REFORMATION OF INSTRUMENTS (§ 37*)—DEMAND FOR REFORMATION—NECESSITY.

A cross-complaint filed in an action on an attachment bond, seeking reformation of the bond for mutual mistake, need not allege a prior demand upon plaintiff for its reformation; the parties being in court seeking to take advantage of the alleged mistake.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 147; Dec. Dig. § 37.*]

5. REFORMATION OF INSTRUMENTS (§ 32*) — LACHES.

Where defendant did not know of the alleged mistake in an attachment bond sued on until certain rulings made on January 14, 1910, it could not be said, as a matter of law, that he was guilty of laches in seeking to reform the mistake by a cross-complaint filed on March 22, 1910.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

6. PLEADING (§ 221*)—DEMURRER—EFFECT OF RULING.

The overruling of a demurrer to a cross-complaint on the ground of laches did not preclude plaintiffs from raising the question of laches on trial when the facts were brought out.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567; Dec. Dig. § 221.*]

7. PLEADING (§ 17*)—ARGUMENTATIVE PLEADING.

An argumentative denial in the answer was improper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 350; Dec. Dig. § 17.*]

8. PLEADING (§ 365*) — ARGUMENTATIVE PLEADING—REMEDY.

While the court was not bound to expunge an argumentative part of the answer, it could do so upon its own or plaintiffs' motion and order a formal denial, and plaintiffs would be entitled to have it expunged upon proper denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163, 1164; Dec. Dig. § 365.*]

9. REFORMATION OF INSTRUMENTS (§ 44*) — ADMISSION OF EVIDENCE—INTENT OF PARTIES.

In an action on an attachment bond, sought to be reformed by defendant to correct an alleged mutual mistake, evidence of the intent of defendant's attorney in drawing the bond was not admissible if it was not communicated to plaintiff.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156; Dec. Dig. § 44.*]

10. REFORMATION OF INSTRUMENTS (§ 41*) — ADMISSION OF EVIDENCE.

Under an allegation of the cross-complaint seeking to reform the attachment bond sued on, that the real agreement between the parties was for a different bond than that sued on, defendants could show that, when the bond was executed and delivered, the signers understood and believed that it expressed the agreement which defendants claimed was in fact made in order to show that they signed a different bond through mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 153; Dec. Dig. § 41.*]

11. ATTACHMENT (§ 338*)—BOND—EXTENT OF LIABILITY.

A bond executed in substitution for an attachment against the property of two defendants recited that if such defendants, "or either of them, shall pay any judgment that may be rendered against them or either of them in such suit," or if "in default of payment, the obligors should pay to the officer having the execution issued on the judgment the actual value of the interest of defendant W. and defendant L., or either of them, as the case may be, in the attached property at the time of said attachment," then the bond should be void. *Held*, that the bond bound the obligors to pay any judgment which might be rendered against

defendants, or either of them, to the value of their interest, or that of either of them in the attached property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. § 338.*]

12. REFORMATION OF INSTRUMENTS (§ 45*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in a cross-proceeding to reform an attachment bond sued upon *held* not to sustain a finding that before and at the delivery of the attachment bond, the parties had agreed to the execution and delivery of a different bond, so as to show mutual mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

13. ATTACHMENT (§ 338*) — LIABILITY ON BOND.

The actual interest of the defendant against whom judgment was rendered would be the measure of the obligors' liability on a statutory attachment bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. § 338.*]

14. REFORMATION OF INSTRUMENTS (§ 19*) — GROUNDS—MUTUAL MISTAKE.

To reform a contract for mutual mistake, the mistake must have been common to both parties, and have resulted in both doing what neither intended to do.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.*]

15. REFORMATION OF INSTRUMENTS (§ 45*) — MISTAKE—WEIGHT OF EVIDENCE.

The evidence showing mutual mistake so as to authorize the reformation of the contract on that ground must be clear, substantial, and convincing.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

Gager, J., dissenting.

Appeal from Superior Court, Fairfield County; William H. Williams and Milton A. Shumway, Judges.

Action by Snelling & Potter against William J. Merritt and others. From a judgment for defendants, plaintiffs appeal. Reversed, and new trial granted.

Action to recover the amount due upon a penal bond given in substitution for an attachment, after a motion to expunge certain portions of the complaint had been overruled. An answer and cross-complaint was filed, to which motions to expunge and demurrers were filed and overruled, and the case was then tried to the court, and judgment rendered for the defendants.

The bond upon which the action is brought is a joint and several bond for \$5,000, signed by William J. Merritt and Lucius R. Merritt as principals and by the other three defendants as sureties. The condition of the bond is: "The condition of this obligation is such that, whereas the estate of said William J. Merritt and Lucius R. Merritt has been attached by said Snelling & Potter by process directing an attachment to the value of five thousand (\$5,000) dollars, dated July 16, 1906, and returnable to the superior court for Fairfield county on the

first Tuesday of September, 1906, as appears by the officer's return on said process. Now, therefore, if said William J. Merritt and Lucius R. Merritt, or either of them, shall pay *any* judgment that may be recovered against them, *or either of them*, in such suit, or, if in default of such payment, we, the said obligors, shall pay to the officer having the execution issued on said judgment, on demand, the actual value of the interest of said William J. Merritt and Lucius R. Merritt, or either of them, as the case may be, in said attached property at the time of said attachment, not exceeding the amount of this bond, then this bond shall be void, otherwise to remain in full force and effect." The action in which the attachment, referred to in the condition of the bond, was made resulted in a judgment in favor of the plaintiffs for \$3,543 and costs against William J. Merritt and a judgment in favor of the defendant Lucius R. Merritt. It is found by the court that at the time the attachment was made William J. Merritt had no interest in the property attached, and that it was then owned by Lucius R. Merritt. The superior court upon the motion to expunge portions of the complaint above referred to, ruled in effect that the defendants were holden upon the bond to pay to the plaintiffs the actual value of the interest of Lucius R. Merritt as well as of William J. Merritt, in the land attached at the time of its attachment not exceeding the amount of the judgment. No appeal was taken from this ruling. The defendants afterwards filed a cross-complaint asking for a reformation of the bond. The essential allegations of the cross-complaint are substantially these:

"On or about the 1st day of April, 1909, the defendant, Lucius R. Merritt, desiring to make sale of said attached premises, by his attorneys, entered into negotiation with the attorneys for the plaintiffs in said action for a release of the aforesaid attachment on said premises, by giving a bond in substitution for said attachment. It was agreed by and between the attorneys * * * that said attachment should be released by the plaintiffs upon the giving of a bond to them with surety or sureties, conditioned that the penalty thereof or so much of the same as might be necessary should be paid to the plaintiffs in case they should obtain any judgment whereby said attached premises would (had the same remained subject to said attachment) be held to respond to said judgment. In furtherance of said agreement * * * the attorneys for said Lucius R. Merritt prepared and submitted to the attorneys of the plaintiffs a bond by them proposed to effect the purpose set forth in paragraph 4, which said bond was approved by the plaintiff's attorney, and was executed and is the bond in suit. The

attorneys for said Lucius R. Merritt at the time of the giving of said bond believed the meaning of the condition of the same to be that said bond should be void if the obligors therein should pay to the officer having the execution, which should be issued upon any judgment that might be recovered against said William J. Merritt or Lucius R. Merritt, the actual value of the interest of said William J. Merritt in said attached property at the time of the attachment, in case judgment were rendered against said William J. Merritt; or should pay to such officer having such execution the actual value of the interest of said Lucius R. Merritt in said attached property at the time of the attachment, in case judgment were rendered against him, or should pay to such officer having such execution the actual value of the interest of both said William J. Merritt and Lucius R. Merritt in said attached property at the time of the attachment, in case judgment were rendered against both of them—which was, in effect, that they should be holden to respond to such judgment only to the same extent and manner as the interest in said land of the defendants in said action was holden by said attachment. The plaintiffs and their attorney believed and understood that the meaning of the bond was as set forth in said paragraph 8 hereof, and that the plaintiffs could not, under said bond, require the payment of the actual value of the interest in said attached property of a defendant against whom no judgment should be rendered in said suit. The plaintiffs and their said attorney well knew that the said obligors so believed and understood the meaning of said bond to be as set forth in paragraph 8 hereof. At the time of the giving of said bond, the obligors believed that the plaintiffs and their attorney had the same understanding of the effect and legal consequences of said bond as existed in the minds of the obligors, and the plaintiffs' attorney well knew of such belief on the part of the obligors. The said obligors acted upon said belief as set forth in paragraph 12 in the execution by them of said bond, and, except for such belief, they would not have executed the same."

The court, after a hearing upon a substantial denial of all these allegations, found that prior to the execution of the bond the attorneys of the respective parties entered into negotiations for the "release and dissolution of the attachment upon the substitution of a bond in lieu thereof substantially in such form and legal effect as, under the circumstances, ought to be ordered in the premises by a judge of this court, upon a proper application therefor, under and pursuant to the statute in such case made and provided," and that as the result of the negotiations it was agreed in behalf of the plaintiffs and defendants acting

through their attorneys that upon the execution and delivery of "a bond, payable to the plaintiffs, or to their representatives, or assigns, in the penal sum of \$5,000, substantially such in form and legal effect as, under the circumstances, ought to be so ordered in the premises by a judge of this court, upon proper application, as aforesaid; and be so conditioned that if said William J. Merritt, or said Lucius Merritt, defendants in said first action, should pay any judgment which might be recovered against both of them in said action, or in default of such payment said obligors should pay to the officer having the execution issued on such judgment, on demand, the actual value of the interest of either or both of said defendants in the property attached at the time of said attachment, not exceeding the amount of said bond, or in case judgment should be recovered in said first action against one only of said two defendants in said first action, and said defendants, or either of them, should pay such judgment, not exceeding the amount of this bond, or, in default of such payment, said obligors should pay to the officer having the execution issued on such judgment, on demand, the actual value of the interest of the said defendant against whom only such judgment should be so recovered as aforesaid, in the attached property at the time of said attachment, not exceeding the amount of such bond, as aforesaid, then such bond should be void; but otherwise, in full force and effect, that the said attachment should thereupon be released and dissolved." It is found that the bond in suit was afterwards prepared by the defendants' attorney assisted by the plaintiffs' attorney, and executed and delivered; that at the time of its execution and delivery it was mutually understood and believed by all the obligors and by the plaintiffs' attorneys that it was in such form and legal effect as under the circumstances ought to be ordered by a judge of the superior court upon application, and drawn, prepared and conditioned so as to be in all respects fully adapted to and in accord with the agreement of the parties; but that through a natural mistake of the attorneys of the parties as to the legal effect and meaning of the provisions and contents of the bond it was not such in form and legal effect as under the circumstances a judge of the superior court ought to order in the premises and not so conditioned as to accord with the agreement. The court thereupon by an interlocutory judgment reformed the bond to conform to the agreement which it found the parties had made and later overruled a demurrer to the answer and rendered a final judgment for the defendants.

Upon the trial the defendants' attorney who was also a surety upon the bond testi-

fied, against the objection of the plaintiffs that in drawing the bond in suit he intended to have it express the idea that the "obligors were liable the same as the land was liable." The same witness and other signers of the bond also testified against the plaintiffs' objection what was their understanding and belief as to the legal effect of the bond.

Other facts necessary to an understanding of the case sufficiently appear in the opinion.

Stiles Judson and John Keogh, for appellants. John E. Keeler and Frederick W. Huxford, for appellees.

THAYER, J. (after stating the facts as above). [1] The demurrer to the answer was properly overruled. It was not argued or decided until after the bond, which is made a part of the complaint, had been reformed, although both the answer and the demurrer to it were filed prior to the filing of the cross-complaint. The reformation of the bond related back to the institution of the action and made the bond such as the defendants claimed it to be at the time the answer was filed. This change in the bond obviated the objections raised to the answer. As the pleadings stood prior to the reformation of the bond the demurrer was sustainable upon several of the grounds stated in it.

[2] The demurrer to the counterclaim was also properly overruled. The counterclaim sufficiently alleges that the parties made an agreement for the release of the attachment upon the giving of a bond conditioned for the payment of the penalty upon the plaintiffs obtaining a judgment whereby the attached property, had it remained subject to the attachment would have been held to respond to the judgment and the delivery and acceptance, through the mutual mistake of the attorneys of the parties, of a different bond. The "basis of the counterclaim" does not rest solely upon the unexpressed belief and understanding of the attorneys for the defendants, as the plaintiffs contend, but it rests also upon the agreement alleged to have been made prior to the execution and delivery of the bond. The defendants were bound to show the prior agreement, that the bond delivered was not in accordance with the agreement, and that by the mutual mistake of the parties or their attorneys the bond was delivered and accepted as conforming to the agreement. The allegations as to the belief and understanding of the attorneys are in support of the latter proposition only.

[3] As to the other grounds of demurrer to the counterclaim it is sufficient to say:

(1) That as a cause of action upon the ground of mutual mistake is sufficiently alleged an allegation of fraud was unnecessary.

[4] (2) That as it appears that the plaintiffs were prosecuting an action upon the bond it was unnecessary in a cross-complaint filed in such action asking for a reformation of the bond to allege that a demand for its reformation had been made. The parties were in court. The cross-complaint was merely a defensive proceeding. The equity which requires that before a party is brought into court in an action to reform a contract demand for such reformation shall be made does not exist where such party is already in court seeking to take advantage of the mistake. Where demand is made upon him before suit is brought his refusal to correct the mistake is evidence of his intention to take advantage of it. Suit actually brought to enforce the unreformed contract is also evidence of such intention.

[5] (3) It appears in the cross-complaint that the defendants had no apprehension of the alleged mistake in the bond until the ruling of the superior court on the motion to expunge. This was on January 14, 1910. The cross-complaint was filed on March 22, 1910. It cannot be said as matter of law that this shows laches as claimed in one ground of demurrer. "Courts of equity do not impute laches by an iron rule." *Watterman v. Sprague Mfg. Co.*, 55 Conn. 554, 574, 12 Atl. 240, 245.

[8] By the overruling of this ground of demurrer the plaintiffs were not precluded from raising the question of laches upon the trial when all the facts could be brought before the court.

The remaining grounds of demurrer to the cross-complaint need not be noticed as they were not pressed in the brief or argument of counsel. They were properly overruled as was also the motion to expunge portions of the cross-complaint which was based largely upon the same grounds as the demurrer.

[7, 8] It was not error to deny the plaintiffs' motion to expunge a portion of the answer. The portion objected to was an argumentative denial of the portion of the complaint to which it referred and was therefore improper in form. The court was not bound to expunge it, but upon its own motion or upon the plaintiffs' it might have done so and ordered a formal denial. The plaintiffs would have been entitled to such a change upon a proper motion.

[9] The evidence of the defendants' attorney as to his intention when drawing the bond should have been excluded. He had already testified that he had previously, without consultation with the plaintiffs or their attorneys, drawn up a bond which he requested them to accept, and which they had refused to accept unless certain changes were made in it to which he had agreed. The bond in suit is the same as the original bond with those changes incorporated. The evidence did not tend to show that he used

different language than he then intended, but that apart from the language used he had a certain intent in drawing the bond. His intention to make the obligors in the bond liable the same as the land was liable could not affect the agreement which he had already made with the plaintiffs, and it was not admissible to show a modification of that agreement unless it appeared that the plaintiffs knew of the intention and agreed to the modification and accepted it as embodying the agreement as so modified. There is no evidence that the plaintiffs had any notice of the intention or that it was sought to modify the agreement, the terms of which were fixed.

[10] The other evidence which is objected to was properly received. It supported the allegation that the parties believed when they signed the bond that its legal effect corresponded with the agreement previously made. The allegation being that, the real agreement between the parties was for a different bond than that which is in suit, it was competent to show that at the time the bond was executed and delivered the signers understood and believed that it expressed the agreement which they claimed was in fact made for the purpose of showing that through mistake they had signed a different bond than they intended.

[11] The superior court ruled that the bond in suit as originally executed and delivered bound the defendants to pay the amount of any judgment which might be rendered against the Merritts or either of them in the attachment suit to the value of their interest or the interest of either of them, as the case might be, in the attached property. This was the proper construction of the language of the bond. Upon the facts alleged in the complaint and admitted or found true, the defendants under the bond as written were bound to pay the amount demanded of them on the execution against W. J. Merritt to the extent of the value of the attached property although it belonged to Lucius R. Merritt. Under the bond as reformed they were not so liable.

[12] We are asked to correct the finding with respect to the agreement between the parties as to the bond which was to be given as the consideration for the release of the attachment and as to the fact that the bond in suit was executed and delivered, through a mutual mistake of the parties, in the belief and understanding that it was in accord with such agreement. There was no real conflict of testimony as to what occurred prior to the execution and delivery of the bond. It came from the attorneys of the parties and they substantially agree. The Merritts had sold the attached property and to give a clear title desired to have the attachment released. One of their attorneys, without previous conference or negotiation with the plaintiffs or their attorneys, pre-

pared and caused to be signed by the same parties who signed the bond in suit a bond which, to distinguish it, we may call a proposed bond and also a release of the attachment. The proposed bond was in all respects precisely like the bond in suit except that it did not contain in the condition the four words "or either of them" which are italicized in the condition as printed in the statement and did contain the word "the" in place of the italicized word "any." He took the proposed bond and the proposed release of the attachment from his own office in Stamford to the office of the plaintiffs' attorneys in Norwalk, and told them that he wished to give that bond on the release of the attachment. The attorney having special charge of the plaintiffs' case not being present, and his partner not wishing to decide the matter, the papers were left with the latter to be submitted to the attorney in charge of the case upon his return. The latter two days later took the proposed bond back to the defendants' attorney in Stamford, and refused to accept it unless certain changes were made, calling his attention to the fact that it had not been drawn pursuant to the statute in that the word "the" above referred to was used in place of the word "any" in the statutory form in the Practice Book. He insisted that "any" should be there substituted for "the," and that the words "or either of them" should be inserted where they appear italicized in the copy as printed. This was agreed to by the defendants' attorney, and another bond, the one now in suit, was prepared by him in which the proposed changes were made, and it was signed by the same persons who signed the other. The plaintiffs' attorneys then caused the release of attachment to be properly signed and by letter notified the defendants' attorney of that fact and that they would be glad to make the exchange at a time and place named, adding that their clients had made objection to releasing the attachment but that the attorneys had explained to them that the sureties were good and that the bond was such as in all probability the court would order. At the time and place named the release of the attachment was exchanged for the bond. This was the entire transaction as testified by the attorney who drew the papers and who is one of the defendants in the case. He is corroborated as to these facts by the attorneys for the plaintiffs.

The same witness was permitted to testify that in drafting the bond in suit he "intended to have the obligors liable the same as the land was liable, the same as the interests of the respective defendants, William J. Merritt and Lucius R. Merritt—that is, if the judgment was rendered against both, that the interest of both of them, in whosoever name it stood, should be paid by the obligors upon the execution; if the judg-

ment was against William J. Merritt, that the obligors should be liable to pay whatever interest William J. Merritt had to the sheriff on the execution; if the judgment was against Lucius R. Merritt they should be obliged to pay whatever interest Lucius Merritt had in the land to the sheriff." He and other signers of the bond also testified that at the time of signing the bond they believed and understood that it expressed the meaning which was thus testified to have been intended. All this evidence was objected to, and the question of its admissibility is elsewhere considered. It was admitted and is to be considered as in the case upon a motion to correct the finding. There was also evidence tending to show that the plaintiffs' attorneys understood and believed that the bond, after the additions insisted upon had been made, held the obligors to the extent of the interest of either of the defendants in the original action in the land attached for any judgment which should be rendered therein; and that the bond was the same in effect as the court would have ordered in case an application had been made to it to substitute a bond for the attachment.

There was no evidence showing that the plaintiffs or their attorneys prior to the bringing of this action knew or believed that the defendants or their attorneys understood or claimed that the effect of the bond was different than that which the law places upon it. It was in evidence that the plaintiffs' attorney at the time of the negotiations supposed that the defendants' attorney understood the legal effect of the bond.

Does this evidence support the finding of the court that before and at the time of the delivery of the bond there existed an agreement between the parties that a different bond should be delivered? The defendants sought the plaintiffs, and, in their own interest, desired them to release the attachment and accept the proposed bond, both of which the defendants had prepared without a previous conference with or suggestion from the plaintiffs. If that bond had been accepted, and had then contained the words which were afterwards added to it, no serious claim could have been made that the bond had been given pursuant to any such agreement as the court has found. The agreement in that case would be that that bond should be exchanged for that release and the contract would have been executed. And this would be so although it should appear that the bond was prepared by the defendants' attorney with the intention that it should make the obligors "liable the same as the land was liable," and understood that to be its legal effect; and although the plaintiffs at the time of accepting it believed that it was such a bond as the superior court on application would order. The two

mistakes would not make an agreement different from that expressed in the condition of the bond. At most, they would show only that there was no agreement between the parties, in which case, if the defendants were entitled to any relief, it would be the cancellation, not the reformation, of the bond.

What is there in what occurred later to change that situation and warrant a finding that there was such an agreement as the court has found? Instead of accepting the proposed bond, the plaintiffs refused to accept it unless certain changes were made in it. Here was a new proposition. It amounted to an offer to give the release upon the delivery of the bond in suit. This proposition was accepted, and that acceptance made an agreement. The new bond, being the same as the old, with the addition of the five words as agreed, was drawn and the exchange was made. It is not a case where the scrivener has made a mistake in the use of language, or has added or omitted words, and thus failed to express the agreement made. The language of the bond to be exchanged for the release was explicitly agreed upon. It was fully understood by the defendants' attorney, as he repeatedly testified, and it was followed by him in drafting the bond. He may have been mistaken as to the effect of it, but that does not change the agreement. The plaintiffs' pointing to the fact that the word "any" instead of "the" is found in the form of bond contained in the practice act as a model to be followed, where the court orders a bond, was to support his claim that the same word should be used in the bond which the defendants were seeking to have accepted in place of the attachment. But at the same time he was insisting that words not found in the form in the practice book should be added, which made the obligors liable for any judgment which might be rendered to the extent of the interest of either or both the Merritts in the land attached. This was far more significant than the reference to the word "any."

What weight, if any, the court gave to the testimony of the defendants' attorney, that he intended when drawing the bond in suit "that the obligors should be liable the same as the land was," does not appear. That it had no weight as proving an agreement for a different bond than that in suit is clear for several reasons. It is manifest from his own testimony that it cannot be true that he so intended, taking the word "intend" in its ordinary sense; i. e., "to have in mind a design or purpose." It may have been his purpose when he drew the original bond to so frame it that the obligors should be liable only as the land was liable. But his purpose in redrafting it, and making the change and addition insisted upon by the plaintiffs could only have been to make it comply with those demands which he had assented to. He doubtless believed that its

effect remained the same as before the change; he so testified. But he was not rewriting the bond with the end in view of making it limit the obligors' liability as stated. The proposed bond having been executed, the changes could not be made by interlineations without a re-execution of the bond, therefore a new bond embodying the changes was made and executed. Nor can his intention in drawing the instrument after its terms had been agreed upon have any weight in determining what the agreement was (for both parties agree as to that) nor any weight as showing a modification of that agreement unless knowledge of such intent or understanding was communicated to the other party before or at the time of the acceptance of the bond, and there is no evidence that it was so communicated. On the contrary, there was evidence that the plaintiffs believed that the defendants' attorneys understood the legal import of the bond.

The court finds that there was a mutual understanding and belief between the parties at the time the bond was delivered that it was such in form and legal effect as ought to be ordered by a judge of the superior court, and that through their mutual mistake and misunderstanding as to its legal effect and meaning it was not such as such judge would have ordered. It appears clearly from the evidence how the mistake and misunderstanding came about. The mistake in the transaction was as to the different interpretations of the statute concerning the substitution of a bond for an attachment and of the legal significance of the language of the bond.

[13] The defendants' interpretation of the language of the bond was that the actual interest of the defendant or defendants against whom judgment might be rendered would be the measure of liability of the obligors. This would be the measure of their liability under a statutory bond had a proper one been taken upon a proper application to a judge. The defendants thus properly interpreted the purpose of the statute, but were mistaken as to the legal significance of the bond. The plaintiffs, in consenting to release the attachment, relied upon the bond in form as given. It thus appears that the defendants' mistake was solely in their interpretation of the bond which they gave. They supposed its legal effect to be different than it was. The plaintiffs on the contrary insisted and relied upon the bond which was given. They interpreted it correctly, and believed that they were entitled to such a bond upon an application under the statute. But it does not follow from the fact that they supposed that they were entitled to such a bond under the statute that they ever agreed to accept such a bond as a judge ought to order if applied to under the statute. Had they been informed of the defendants' belief and understanding as to the meaning of the statute and the significance of the bond, quite

likely they would have refused to accept the bond, and required that an application should be made under the statute.

The court, it would seem, drew the inference from the fact that each supposed that the bond was such as a judge ought to order that there was an agreement between the parties in those terms for such a bond. This was not warranted, especially in view of the clear and uncontradicted testimony as to the entire transaction. Nor was the court warranted in holding upon the facts found that the mistake was mutual. The mistake of the defendants was not participated in by the plaintiffs. Their action in accepting the bond was in no way affected by it. Nor was their acceptance of the bond due so far as appears to any mistake of their own as to the requirements of the statutory bond, nor was the defendants' delivery of the bond in any way due to or caused by any such mistake of the plaintiffs.

[14, 15] To warrant the reformation of a contract on the ground of mutual mistake, the mistake must have been common to both parties, and it must appear that by reason of it both have done what neither intended, and the evidence should be clear, substantial, and convincing as to both those facts. *Hearne v. Marine Ins. Co.*, 87 U. S. 488, 490, 22 L. Ed. 395; *Moffett, Hopkins & Co. v. Rochester*, 178 U. S. 373, 385, 20 Sup. Ct. 957, 44 L. Ed. 1108; *Bishop v. Clay Fire Ins. Co.*, 49 Conn. 167, 171.

The mistake of one only of the parties inducing him to sign a contract which, but for the mistake, he would not have entered into may be a ground in some cases for canceling the contract, but it cannot be a ground for a reformation of it.

The finding should therefore be corrected by changing paragraphs 14 and 17 thereof in the manner requested, and by making paragraphs 5, 7, 8, and 9, also 19, 20, and 22 of the plaintiffs' draft finding a part thereof. So changed, it does not support the interlocutory judgment, and that judgment is reversed.

The final judgment was affected by the error in granting the interlocutory judgment, and that also is reversed, and a new trial is granted upon the issues raised upon the answer and the demurrer thereto.

GAGER, J. I dissent from the opinion of the majority of the court on the ground that the record does not justify the correction of the finding on which error is based. As I read and understand the evidence, the correction violates the well-established rule that no correction will be made, unless some material question of fact has been found without evidence, or some admitted or undisputed fact has been omitted from the finding. The opinion rendered being substantially the determination of a question of fact limited to this case, a dissenting opinion would serve no useful purpose and is omitted.

TOWN OF MADISON v. TOWN OF GUILFORD.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. PAUPERS (§ 19*)—SETTLEMENT—"RESIDED."

The word "resided," within Gen. St. 1902, § 2469, providing that no inhabitant of any town shall gain a legal settlement in any other town, unless he shall have resided four years continuously in such town, and shall have maintained himself and family during such period, means a fixed, permanent, and established residence, as distinguished from a residence which is merely transient or temporary.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 65-69; Dec. Dig. § 19.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6147-6150; vol. 8, p. 7787.]

2. PAUPERS (§ 52*)—SETTLEMENT—TEMPORARY RESIDENCE—INSTRUCTIONS.

Where, on the issue whether a person had acquired a legal settlement in a town by reason of four years residence therein, within Gen. St. 1902, § 2469, the evidence showed that such person's life in the town was passed in drifting about from place to place, sleeping in unoccupied houses and outbuildings, and in subsisting in part on what was given him in charity, and that he lived in a house as a member of the family of his brother, who obtained aid from the town, a charge that, if such person's stay in the town was merely of a transient nature, and if he had no established residence, he did not acquire a legal settlement in the town, and that the jury in determining whether he had resided in the town should consider the facts, properly submitted the issue.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. § 234; Dec. Dig. § 52.*]

3. PAUPERS (§§ 19, 22*)—LEGAL SETTLEMENT—ACQUISITION—EVIDENCE.

That a person removing from one town to another is of inferior mental capacity does not prevent his acquisition of a legal settlement in the latter town, provided he otherwise satisfies the statutes; but the jury, in determining the question of legal settlement in the latter town, may consider such condition of mind as evidence, together with the manner in which such person lived in the town, to determine whether he resided in the town so as to gain a settlement therein; a change of domicile being a question of act and intention.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 44, 106; Dec. Dig. §§ 19, 22.*]

4. APPEAL AND ERROR (§§ 719, 216*)—QUESTIONS REVIEWABLE — INSTRUCTIONS — ASSIGNMENTS OF ERROR.

Where there is no assignment of error to the effect that the instructions given, for the want of an additional instruction, were not adapted to the issues or sufficient to guide the jury, and there was no request for an additional instruction, the question of the necessity of an additional instruction will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2975; Dec. Dig. §§ 719, 216.* Trial, Cent. Dig. § 628.]

5. PAUPERS (§ 52*)—INSTRUCTIONS.

Where, in an action by a town for supplies furnished a pauper, alleged to belong to defendant town, the evidence showed that plaintiff had furnished supplies to the pauper at various times between July 12, 1909, and January, 14, 1911, and had furnished supplies in 1906 to a brother of the pauper, while a member of the brother's family, and that the pauper left de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendant in 1904; and defendant, which had paid plaintiff a part of the expense incurred, sought to recover the same, on the theory that the pauper belonged to plaintiff, and showed that on the settlement of the estate of the pauper's father, who died a resident of defendant in 1903, \$117.73 remained in the hands of the executor in trust for the pauper, and that the trust was finally closed in August, 1910, a charge that the jury, in determining whether the pauper, when assistance was provided for him by plaintiff, was entitled to receive assistance, should consider the claim of defendant that the pauper had funds in the hands of the trustee available for his support, if necessary, was not objectionable, as leading the jury to consider that the financial resources of the pauper were immaterial on the question as to whether he was to be regarded as a recipient of assistance from plaintiff by reason of assistance furnished to his brother.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 234; Dec. Dig. § 52.*]

6. PAUPERS (§ 22*)—LEGAL SETTLEMENT—EVIDENCE.

A person's intent attending a change of place of abode from that of a then domicile, or continuance in such changed place of abode, is an important factor in determining the question of acquired domicile, within the pauper statutes, and the testimony of the person himself is admissible.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 106, 107; Dec. Dig. § 22.*]

7. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

On the issue whether a person had acquired a legal settlement in a town, a question as to whether he had always made such town his home since a specified time is objectionable as involving a legal conclusion, for, though home is the fundamental idea of domicile, home and domicile do not always correspond.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2170–2185; Dec. Dig. § 471.*]

8. WITNESSES (§ 280*)—CROSS-EXAMINATION—QUESTIONS.

Where, on the issue whether a person had acquired a legal settlement in a town, it appeared that such person was of inferior mental capacity, a question asked him on his cross-examination, as to whether he had always made the town his home since the death of his father, domiciled in another town, was objectionable as vague.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 993; Dec. Dig. § 280.*]

9. WITNESSES (§ 282*)—CROSS-EXAMINATION—LEADING QUESTIONS.

Where, in an action by a town for supplies furnished a pauper, alleged to belong to defendant town, the issue was whether the pauper had a legal settlement in defendant town, and the pauper, testifying as a witness for plaintiff, stated that he had resided in defendant town from his birth to the death of his father, and that he remained on his father's farm several months after his father's death, a question on cross-examination, as to whether he had not always made plaintiff town his home since his departure from defendant town, was objectionable as leading, because defendant town made the pauper its own witness, and the court properly excluded the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 927, 989; Dec. Dig. § 282.*]

10. PAUPERS (§ 22*)—LEGAL SETTLEMENT—EVIDENCE.

In determining whether one has acquired a legal settlement, within the pauper laws, in a town to which he removed, evidence of his

intent attending his acts and of an intent as to the future is admissible; but a letter, written by him after his removal to a town from the town of his residence at the time of the death of his father, residing therein, to the executor of his father, stating that he did not want the executor to save any land for him, was properly excluded as bearing on the pauper's intent.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 106, 107; Dec. Dig. § 22.*]

11. PAUPERS (§ 22*)—LEGAL SETTLEMENT—EVIDENCE.

On the issue whether an alleged pauper had acquired a legal settlement in a town after his removal from another town, evidence of his declaration that he had no place to which to go, made after his coming into the former town, was admissible as bearing on the question of his having a place of residence.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 107; Dec. Dig. § 22.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by the Town of Madison against the Town of Guilford to recover the costs of supplies furnished a pauper, alleged to belong to defendant town. There was a judgment for plaintiff, and defendant appeals. Affirmed.

William B. Stoddard and Robert C. Stoddard, for appellant. Edmund Zacher, for appellee.

PRENTICE, J. Charles A. Spencer had his legal settlement in the defendant town of Guilford at the time of the death, in September, 1903, of his father, with whom he had always lived. He was then 25 years of age, and of inferior mental powers. He continued to live on his late father's farm in Guilford until it was sold, April 5, 1904, and a few days thereafter. At this time he took his few belongings and went into the plaintiff town of Madison, where he thereafter remained continuously until after January 14, 1911, save for three absences, each of a few months duration. On December 3, 1910, the selectmen of Madison furnished him with aid as a person requiring such aid from them under the law regulating the support of the poor, and on that day gave to the defendant, as the town chargeable with his support, the notice prescribed in section 2485 of the General Statutes. December 10, 1910, they rendered to the defendant a bill for the expense thus incurred. Between December 9, 1910, and January 14, 1911, further aid was similarly furnished, and a bill therefor presented on January 14, 1911. Payment of these amounts not having been made, this action was brought to recover them.

Prior to the times mentioned, the Madison selectmen had furnished help for the support of Spencer, by the payment of a weekly sum, from July 10, 1909, to March 1, 1910. The amounts thus expended were repaid to the town of Madison by the selectmen of Guilford, upon notice and presentation of bill. The defendant by its counterclaim seeks to

recover back the amount of these payments. The facts thus far stated are uncontroverted.

The issues joined called for the determination by the jury of two principal questions, to wit: First, Was Spencer, at the time when the aid was furnished him, entitled to it at the hands of the selectmen of Madison? and, second, Was the defendant chargeable with the expenses thus incurred, as being the town of Spencer's legal settlement?

No complaint is made of the conduct of the cause as bearing upon the former of these issues. The latter, under the claims of the defendant and the conceded facts, involved two subordinate issues. One was whether or not Spencer had resided, within the meaning of the statute (General Statutes, § 2469), four years continuously in Madison between about April 8, 1904, and July 10, 1909; the other, whether or not he, having no family, had, while thus residing, maintained himself during the whole of such continuous period without becoming chargeable to the town. Under the evidence presented, the latter question became resolved into an inquiry as to whether help unquestionably given upon one occasion, in January, 1906, to his brother and family, with whom he was then boarding, was, under the circumstances, help given to him. The date upon which this assistance was rendered was such that, if it was to be regarded as rendered to Charles Spencer, that incident would necessarily defeat the defendant's claim that he had gained a settlement in the plaintiff town, with the inevitable result that his settlement in Guilford had not been lost.

The assignments of error pursued before us, aside from those growing out of the introduction of testimony, while stated in several paragraphs, all gather about two matters. One of these relates to the first subordinate issue just referred to as to residence, and the other to the second of such issues as to the effect, under the circumstances, upon Charles Spencer's status of the assistance furnished to his brother Fred and family in January, 1906, as related.

The reasons of appeal which are pertinent to the former of these issues are, adopting the enumeration of the defendant's counsel, five in number. The first in order is the court's failure to charge as requested in a specified request, identified by number. Reference to the request so numbered discloses that it does not deal at all with the subject in question, and we fail to find any other one which does in any way. Evidently this was included by inadvertence. The remaining four are concerned with the charge as made, and take exceptions to recited portions.

Before passing to a consideration of these criticised passages, we ought to prepare the way by calling attention to the general situation with which the jury was called upon to deal. The plaintiff claimed to have shown that Spencer's life in Madison was passed in drifting about from place to place, sleeping

in unoccupied houses, huts, barns, and out-buildings, in doing, from time to time, such odd jobs as he was fitted to do, and in subsisting in part upon what he bought and in part upon what was given him in charity by those who took pity on him. The only period when the evidence of either party disclosed that he lived with any one, or in a house otherwise occupied than by himself, or otherwise furnished than with his few personal belongings, was one in 1906, when he lived in the family of his brother Fred.

[1] The first exception is taken to the court's definition of the word "resided," as used in the statute. Its statement was that, "by 'resided' is meant a fixed, permanent, and established residence, as distinguished from a residence which is merely transient or temporary." This is the precise declaration of this court, and must be true, if the statute is to have a reasonable operation. *Town of Salem v. Town of Lyme*, 29 Conn. 74, 81; *Hartford v. Champion*, 58 Conn. 214, 275, 20 Atl. 471; *Fairfield v. Easton*, 73 Conn. 735, 738, 49 Atl. 200.

[2] The second passage complained of is in effect but a restatement of this same principle through the application made of it to the facts of the case. In it the court told the jury that if it should find that Spencer's stay in Madison "was merely of a transient or temporary nature, and that he had no fixed or established residence or place of abode in Madison," such a finding would be decisive of the case in favor of the plaintiff. This instruction was, under the admitted circumstances attending Spencer's case, clearly correct.

In the next passage objected to, the jury was told that in determining whether Spencer had resided in Madison, within the meaning of the statute, it should take into consideration all of the facts and circumstances presented in evidence, "including the manner in which it has been shown Spencer lived while in Madison, both in respect to with whom he lived, the various places in which he slept, the way in which he obtained his sustenance and his clothes, and the work that he performed, and also whether he had any personal effects, and, if so, what they were, and where he left them, and what he did with them." Here, again, no part of the statement of the court is open to dispute. It embodies observations for the guidance of the jury which were both true and pertinent, and which could not with propriety have been omitted, in view of the peculiar features the case presented.

[3] The court in this connection also instructed the jury that, while the fact that a person removing from one town to another in this state is of inferior mental capacity will not prevent his acquisition of a legal settlement in the town to which he goes, provided he otherwise satisfies the provisions of the statute. It might take into consideration such condition of mind upon the part of

Spencer as a matter of evidence, together with the manner in which he lived in Madison, and such other facts and circumstances in the case, for the purpose of determining whether or not he resided in that town in such manner as to gain a settlement therein. We are unable to discover an error here. In *Plymouth v. Waterbury*, 31 Conn. 515, 516, which held that a person non compos mentis might gain a new settlement by commorancy, it was intimated that it might be true that stronger evidence of a change of domicile might be required in the case of such a person than in the case of other persons. But the passage under criticism does not assert that proposition. It simply asserts that an existing condition of inferior mentality is a circumstance which, if it exists, may properly be considered in connection with the other pertinent circumstances in determining the ultimate fact of change of domicile. A change of domicile is a question of "act" and "intention." *Jacobs on Domicile*, § 125; *Clinton v. Westbrook*, 38 Conn. 9, 12; *Yale v. West Middle School District*, 59 Conn. 489, 491, 22 Atl. 295, 13 L. R. A. 161. In determining these questions, a great variety of facts and circumstances may be pertinent, and it may be necessary "to make a minute inquiry into the habits, character, pursuits, social and domestic relations and indeed the whole history of the person from his youth up." 10 Amer. & Eng. Ency. of Law, 20. Surely mental incapacity is not a fact to be ignored when the acts of the individual are being interpreted and a valuation put upon them, or when intent is to be discovered therefrom.

[4] Defendant's counsel introduce their discussion of this general subject of error touching the matter of residence with the statement that the important question which it was desired to raise was "whether the court was correct in ruling that a person who was living as the finding shows that Spencer was living in Madison—that is, in outhouses and barns, doing his own cooking, boarding with his brother, living in workmen's houses of his employers, etc.—could not gain a legal settlement in Madison." We are unable to discover any ruling or instruction to that effect. Their consideration of this subject is concluded with the proposition that "the court should have stated that a person, living as Spencer admittedly was, could acquire a settlement under the statute, if he complied with the other requirements of the law."

These extracts from the brief, as well as the general tenor of its discussion of this group of assignments of error, indicate that counsel's real complaint is not to be found in what the court charged, but in what it did not charge. The real criticism is that the court stopped where it did, and did not go further and give additional instructions immediately directed to a situation, such as Spencer's life in Madison presented, and such

instructions as would practically compel the jury to find that the circumstances of that life and manner of it were such as to constitute residence, within the meaning of the statute, or at least make it easy for it to so find. But the defendant made no request that the court charge in the manner indicated, or at all, as bearing upon the manner of Spencer's life; and there is no assignment of error to the effect that the charge, for the want of such instruction, was not adapted to the issues, or sufficient for the guidance of the jury in the case before it. *Hartford v. Champion*, 58 Conn. 268, 276, 20 Atl. 471. We have no occasion, therefore, to consider how far the law goes, if at all, in permitting a residence for the purposes of the pauper statutes to be acquired through a kind of life within a town, such as Spencer's confessedly was, or such as the jury, upon the plaintiff's testimony, which went to the verge of characterizing him as at times a vagrant, might have found it to have been.

[5] It appeared in evidence that upon the settlement of the estate of Spencer's father the sum of \$117.73 remained in the hands of the executor in trust for the son. Evidence was offered to show the state of this fund until the trust was finally closed, August 16, 1910, and the trustee's account filed, showing that the fund had been expended. The court, in its instructions upon the issue as to whether or not Spencer, at the several times between July 12, 1909, and January 14, 1911, when assistance was provided for him by the plaintiff, was a person entitled to receive such assistance, told the jury that, as bearing upon it, it should take into consideration the defendant's claims that Spencer had funds in the hands of the trustee, which could have been obtained for his support, if necessary, and that there was an outstanding order, given by this trustee, upon which Spencer could have obtained certain necessities. It was added that these matters were only to be considered, so far as the plaintiff's demand under the complaint was concerned, with reference to the existence of the facts claimed at the times when the aid, for which recovery was sought, was furnished, in December, 1910, and January, 1911, and, so far as the defendant's claim under its counterclaim was concerned, as related to the times when the aid in question was provided.

The defendant does not complain, and could not well complain, of this statement, as related to the subject under discussion, but it urges that the effect of the language here used was to withdraw from the consideration of the jury the matters referred to in their bearing upon the issue later discussed by the court as to whether or not the help given to Frederick Spencer and his family, in January, 1906, was to be regarded as help furnished to Charles. This is a charge, founded upon a too exacting and precise criticism, which loses whatever force

it would otherwise have, by reason of the fact that the court in its instructions upon this latter issue told the jury that, if it should find that Charles did not receive any of the benefit of such assistance, or, if it should find that he personally was not legally entitled to receive support, because he had means of his own at that time that were available for his support, and such that he was not entitled to aid from the town, then it could not be said that he became at such time an actual expense to the town, and the aid furnished his brother under the circumstances would not prevent Charles from gaining a legal settlement in Madison. This was, to say the least, a strong statement in favor of the defendant, and in view of it it is difficult to imagine that the jurymen could have derived from the charge the notion that Charles' possession of available financial resources, sufficient for his reasonable maintenance, through the trust created by his father, would be a matter immaterial and not to be considered as bearing upon the question whether he was to be regarded as a recipient of assistance from the town through the medium of that which was furnished to his brother.

The plaintiff offered Spencer as a witness, and inquired of him as to the town of his birth, the residence of his father in that town, his removal therefrom to Guilford with his father when 16 years of age, his residence in the latter town with his father until the latter's death in September, 1903, when the son was about 25 years old, and his thereafter remaining upon his late father's farm until its sale in April, 1904. Upon cross-examination he was asked, with regard to the period since his father's death, if he had not gone back to Madison whenever he went away to work, and had finished. The answer being in the affirmative, counsel next inquired: "And have always made Madison your home since that time, haven't you?" Upon objection this question was excluded. Complaint is made of this ruling.

[8] One's intent attending a change of place of abode from that of the then domicile, or continuance in such changed place of abode, is a recognized factor, and an important one, in the determination of the question of acquired domicile. Such being the case, evidence to establish it is necessarily relevant, and the testimony of the party himself is admissible. *Wigmore on Evidence*, §§ 1727, 1784; *Jacobs on Domicile*, § 467.

[7] In the present case the question did not directly call for Spencer's testimony as to his intent, as it should have done, if it was desired to obtain from him an expression upon this point. It touched that subject only as an intent to make a place of abode that of domicile is involved in the legal conception of "home." It is doubtless true that

"home" is the fundamental idea of domicile. But it is also true that the home and "domicile" do not always correspond. "The conception of domicile, being a creation of the law, contains within it certain legal fictions established for the purpose of giving greater precision and certainty in the application of various rules of law. But these fictions are not recognized as belonging to the ordinary conception of home, and consequently a person's domicile and home may be in different places." *Jacobs on Domicile*, § 71.

[8, 9] The question propounded to the witness, in so far as it related to the matter of Spencer's intent attending his abiding in Madison, was thus, from the standpoint of the law, one which was objectionable as calling for a legal conclusion upon a matter involving other considerations than intent. It was also objectionable as being vague and uncertain in its purport, when addressed to the average witness, not skilled in the law, not to say one of inferior mental capacity. When so addressed, it was easily susceptible of a misunderstanding of its scope, and might readily elicit an answer which might be misused. Furthermore, the question was decidedly objectionable by reason of its leading character, and especially when put to a witness of limited mentality, such as Spencer was. For the purposes of the line of inquiry counsel was pursuing, he had made the witness his own, and was not entitled to the privileges of cross-examination. An affirmative answer elicited from such a witness by such a question could not in reason have weighed appreciably in a consideration of the testimony. The court was within its rights in excluding the question, and its ruling, even if erroneous, could not have harmed the defendant.

[10] The court, upon the plaintiff's objection, excluded a letter, written by Spencer to the executor of his father's estate about two weeks before the sale of the farm, in which he presented a claim against the estate, and in conclusion used the following sentence, to wit: "I do not want you to save any land or the house for me at all." As bearing upon the matter of domicile, not only is evidence of intent concurring with or attending acts admissible, but evidence of an intent as to the future will also be received. *Wigmore on Evidence*, §§ 1727, 1784; *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311. Any inference, however, which could be fairly drawn from this excluded letter of the witness, to the effect that the writer had formed the purpose of no longer living in Guilford, not to say giving up his domicile there, and establishing it in Madison, or elsewhere, is so remote and unsubstantial that no harm could have come to the defendant from the ruling.

Certain rulings permitted the plaintiff to show the manner of Spencer's life while in

Madison, his habitations, mode of living and means of sustenance. These were clearly correct.

[11] Evidence that Spencer, going to the home of a Mrs. Keach in East Haven, in April, 1908, seeking food and work, which he obtained, and remaining there a little more than two months, said to Mrs. Keach upon his arrival that he had no place to which to go was manifestly admissible as bearing upon the question of his having a place of residence.

The remaining ruling objected to was a wholly immaterial one.

There is no error. The other Judges concurred.

SELECTMEN OF TOWN OF MONTVILLE v. ALPHA MILLS CO.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

EMINENT DOMAIN (§ 238*)—CHANGE OF GRADE OF STREETS—ASSESSMENTS—"PERSON OR PERSONS."

Under Gen. St. 1902, § 2067, authorizing persons interested in altering highways to remonstrate against the report of the committee assessing benefits and damages, and empowering the court to order a jury and "grant relief to the person or persons making such application," when construed in connection with section 2070, providing that, if the report of the jury shall not increase the damages allowed or diminish the assessment of benefits, the court shall order the applicant for the jury to pay the costs of the application, etc., the court, in proceedings to assess damages and benefits for the change of the grade of a highway, may not order a jury to make a reassessment of damages and benefits on the application of the town by its selectmen; the selectmen not being referred to by the words "person or persons," in the quoted clause.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 238.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Application by the Selectmen of the Town of Montville for the appointment of a committee to estimate and assess benefits and damages occasioned by changing the grade of a highway. The court overruled plaintiff's remonstrance to the report of the committee, reporting no benefits to the defendant, Alpha Mills Company, and damages at \$1,000, and granted, over defendant's objection, a motion for a jury of six to re-estimate the benefit and damages. From a judgment on the report of the jury, reporting that the benefits and damages are equal, and from the denial of the motion of defendant for judgment on the report of the committee, it appeals. Reversed and remanded, to be proceeded with according to law.

Donald G. Perkins, for appellant. Charles W. Comstock and Lee R. Robbins, for appellee.

HALL, C. J. The important question presented by this appeal is: Was the superior court, after the report of the committee assessing \$1,000 damages in favor of the defendant company, empowered by statute to order, upon the application of the plaintiffs, a reassessment of benefits and damages by a jury?

The following statutory provisions are relevant to this question:

Section 2051 of the General Statutes provides that: "When the owner of land adjoining a public highway or of any interest in such land, shall sustain special damage, or receive special benefits to his property, by reason of any change in the grade of such highway" the town, city, or borough in which such highway is situated "shall be liable to pay to such owner the amount of such special damage, and shall be entitled to receive from him the amount or value of such special benefits, to be ascertained in the manner provided for ascertaining damages and benefits occasioned by laying out or altering highways."

Section 2054 provides that: "If the selectmen of any town, and any person interested in the layout, opening, grading or altering any highway or private way therein, cannot agree as to the damages sustained by or the benefits accruing to such person thereby, the selectmen shall apply to any judge of the superior court, who, having caused reasonable notice to be given to the parties interested, shall appoint a committee of three disinterested electors, to estimate and assess to such person injured or benefited the damages sustained by him or the benefits accruing to him by such layout, opening or alteration of such way," and such committee, after notice to the parties, "shall under oath make such estimate and assessment, and forthwith report their doings to the superior court. * * *

Section 2055 provides that "any person interested in such estimate or assessment may remonstrate against the acceptance of said report for any irregularity or improper conduct," and that "thereupon the same proceedings shall be had by said court, in accepting or rejecting said report and in ordering a jury to reassess the damages and benefits, or either, as provided in the case of applications brought to said court against towns for the layout or alteration of highways. * * *

Sections 2065 and 2066 provide that: "When the selectmen of any town shall refuse to lay out any necessary highway, or to make any necessary alteration in any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

existing highway, any person may prefer an application therefor to the superior court * * * and unless the parties shall agree as to the judgment to be rendered, such application shall be heard and decided by a committee of three disinterested persons to be appointed by the court;" that "if such committee shall find that such highway will be of common convenience and necessity they shall survey and lay out the same, and estimate the damages sustained by or the special benefits accruing to each person by the layout * * * and report in writing their doings to said court."

Section 2067 contains the following provision: "All persons interested in laying out or altering such highway may appear before said court, and remonstrate against the acceptance of said report for any irregularity or improper conduct on the part of the committee and for that cause the court may set aside said report, but if it shall be of opinion that it ought to be accepted, and if before its acceptance a jury shall be moved for to re-estimate the damages and benefits or either, said court shall order a jury of six * * * and its powers shall be confined to granting relief to the person or persons making such application."

Section 2070 is as follows: "If the report of the jury when accepted shall not increase the damages allowed or diminish the assessment of benefits *to the applicant by the committee* the court shall order the applicant for the jury to pay the costs of the application, but if such jury * * * shall increase such damages or diminish such assessment of benefits the damage so assessed shall be allowed with the costs of the application and paid by the town."

It is evidently immaterial to the question before us whether the damages and benefits sought to be assessed in this proceeding are those described in sections 2051 or 2054, since it is expressly provided that in either case a jury may be ordered to reassess them in the manner provided by section 2067.

The decisive question is whether section 2067 provides that the court may order a jury to make such reassessment upon the application of the town by its selectmen. We are of the opinion that it does not.

First, section 2067 limits the powers of the jury "to granting relief to the person or persons making said application." The selectmen, as individuals, are evidently not referred to by the words "person or persons." As such they have no personal interest in the proceeding. They are merely the representatives of the town. The real parties are the persons who claim to have sustained special damages beyond the special benefits received and the town which is to pay the damages, and to whom the benefits are to be paid. *Baker v. Windham*, 25 Conn. 597, 601.

Second, section 2070, regarding the payment of costs on the report of the jury, very clearly indicates that the property owners only can apply for a reassessment by a jury. The costs are by the provisions of this section to be paid, either by the applicant for the jury, or the town. The only applicant for a reassessment by a jury referred to is the one to whom the committee has assessed benefits or damages. Damages and benefits are not assessed to the town, but only to the property owners.

Again, this section provides that if the report of the jury shall not increase the damages or diminish the benefits the applicant shall pay the costs. This language clearly indicates that the applicant for reassessment by jury is one who seeks to have the damages increased or the benefits diminished or both. Such would be the purpose of an application for reassessment by the property owner, but not of the town, which, if it could ask for a reassessment by a jury, would seek just the opposite, namely, to have the damages diminished or the benefits increased, or both. If the town or the selectmen could properly be applicants for a reassessment by jury, the provision of this section that, as such applicants, they would be required to pay costs, because they failed to increase the damages or diminish the benefits allowed by the committee, would be a very remarkable one.

But practically the same question that is raised in this case was passed upon in the case of *Betts and Others v. Hartford*, 25 Conn. 180, 186, decided in 1856. The law then in force in relation to the assessment of damages from the layout or alteration of highways and to a reassessment by jury was similar to the provisions of our present statutes, excepting that the assessment was first made by the county commissioners, instead of by a committee. In the case cited, the claim having been made that the defendants were under the statute entitled to have the damages, which had been assessed by the county commissioners, and which were claimed to be excessive, reassessed by a jury, this court said: "Persons whose lands are taken alone have this right and privilege, but not the public; for it is the public by its own agents who have taken the land from others at its just value, as fixed by themselves—the legally constituted agents of the government—and certainly the public cannot complain of the judgment of their own agents. This we are satisfied is the theory, and we see nothing in the statute which leads us to form a contrary opinion."

In the case before us, the superior court should have denied the application of the selectmen for a reassessment by a jury.

There is error, and the judgment of the superior court is reversed and the cause remanded, to be proceeded with according to law.

HAWKEN v. DALEY et ux.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. EVIDENCE (§ 355*)—PRIVATE MEMORANDA—ADMISSIBILITY.

In an action by a builder for the value of labor and materials furnished, a statement of items for labor, copied from the time book where the time of the men employed on that and other work was originally entered, the paper being made to be filed with the other bills for material, and being plaintiff's regular and only way of doing business for each job, was admissible in evidence as a memorandum of details of which plaintiff had no independent memory, where plaintiff testified to its accuracy when made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1484-1491; Dec. Dig. § 355.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—REFUSAL—INSTRUCTIONS ELSEWHERE GIVEN.

It was not error to refuse to instruct as to the duty of the jury if there should be an exact equipoise in the evidence, where the court instructed that plaintiff had the burden to establish his claim by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE.

Refusal to charge falsus in uno, falsus in omnibus, was proper where the maxim does not appear to have applied to the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE.

In an action by a building contractor for the value of labor and material furnished, an instruction that plaintiff could not disregard the contract and recover on a quantum meruit was properly refused where it did not relate to the issues as framed and tried, and since it was a self-evident proposition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

5. CONTRACTS (§ 282*)—BUILDING CONTRACTS—SATISFACTION OF OWNER.

Under a building contract requiring the work to be done to the owner's satisfaction, honest dissatisfaction prevents recovery, and hence in an action by the contractor it was error to refuse to so instruct.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. § 282.*]

Appeal from City Court of New Haven; Richard H. Tyner, Judge.

Action by Harry Hawken against John P. Daley and wife. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Walter J. Walsh and Charles F. Mitchell, for appellants. John Elliott, for appellee.

WHEELER, J. The plaintiff sued upon an express agreement on his part to furnish material and render service in the construction of a building for the defendant upon his agreement to pay therefor the reasonable value. The defendant pleaded a general denial, and for a second defense alleged that the plaintiff agreed to do said work for \$450, of which sum he had paid \$300, and tendered the plaintiff the balance; and that the plaintiff agreed to construct said building in a skillful and workmanlike manner, and to the satisfaction of the defendant, and that he did not so construct the building. One ruling on evidence is complained of.

[1] 1. The plaintiff in his own behalf testified he could not tell the amount of labor he furnished the defendant without looking at the bill (Exhibit H) of these items which, upon inquiry, the witness said was an original record of the time of his men on the job. Thereupon the court admitted it in connection with the testimony of the witness over the objection that on its face it appeared that it was not an original record.

Upon cross-examination, the witness testified he kept a time book containing the time of his men on the different jobs he was doing, that at the end of this job he transcribed from the time book the time on the job to the sheet, Exhibit H, and placed this with bills for material used on this job in an envelope duly marked, and that he kept no other book and the method adopted in this case was his regular method of business on each job. The objection that the sheet was not an original record proceeded upon the theory that its admissibility depended upon its containing original entries from a book. The time book, if in existence, or a copy of it, if not in existence, would have been admissible upon proof that it contained a daily account of the plaintiff's business made in the regular course of his business. *Smith v. Law*, 47 Conn. 431, 435. The time book was not in existence, and a sheet of paper, though containing a correct transcript of a page of the time book, is not a copy of the book. It cannot be held to be similar to a sheet from a loose leaf ledger for that is a part of a book kept in sequence, and on its face bears the stamp of trustworthiness, while this sheet never was a part of a book but is independent of relation to any other sheet. *Reilly v. Torkoman*, 78 Conn. 645, 63 Atl. 516. It would be difficult to support its admission upon the facts before the court at the time it was made; the facts subsequently appearing make the exhibit admissible.

The witness was asked to testify as to the details of a transaction which are proper subjects of book entries. He cannot do this without reference to the record of these

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

items as made by him and copied from a time book which he himself kept in the day and time. He does not attempt to use the paper to refresh his recollection. He knows the paper contains an accurate account of the time as kept by him, and in effect he so states. It was therefore admissible in connection with his statement of the accuracy of the account when made.

A memorandum of details may refresh the recollection of the witness who made it or saw it made; if so, the recollection of the witness must be given and the memorandum excluded. *Palmer v. Hartford Dredging Co.*, 73 Conn. 182, 187, 47 Atl. 125. Or, as in this case, it may not refresh his recollection, but if he knows it to correctly state the detailed facts of which he has no present memory, it may, in connection with his testimony, be admitted as a memorandum of details essential to the full proof of the transaction, and in substance this was the basis upon which this was admitted. *Curtis v. Bradley*, 65 Conn. 99, 114, 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177.

The defendants' request that the court charge the jury that if they find Exhibit H was not an original entry they should disregard it as evidence was properly refused.

[2] The defendant complains of the court's failure to comply with his request to charge as to the duty of the jury in case there was an exact equipoise in the evidence.

2. The court instructed the jury that "the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence the essential allegations of his complaint" and it instructed the jury fully as to what it regarded as these elements. There can be no equipoise in the evidence where there is a preponderance of proof and a preponderance in support of the elements essential to a cause of action. A reading of the entire charge makes it reasonably certain the jury must have understood what it was incumbent upon the plaintiff to prove and that no harm resulted, although this request might properly have been given. *City Bank's Appeal*, 54 Conn. 273, 274, 7 Atl. 548; *Wolfe v. Ives*, 83 Conn. 178, 76 Atl. 526.

The defendant claims the court erred in not charging that the plaintiff must establish by the preponderance of the evidence the value of the services and material, but these were plainly stated to be among the elements of proof necessary to the plaintiff's case, and the jury had been told that the plaintiff must establish by a fair preponderance of the evidence the essential elements of his case.

[3] 3. Another claimed error is the neglect of the court to charge, as requested, *falsus in uno, falsus in omnibus*. This request was a mere statement of a principle of law, and neither in the request nor else-

where do we find facts stated from which the application of the maxim might be made. *Allen v. Rundle*, 50 Conn. 9, 33, 47 Am. Rep. 599. The court's duty was to charge the jury as to the principles applicable to the facts of the case, not as to abstract principles of law not supported by the facts of the case. *Morris v. Platt*, 32 Conn. 82; *Sisson v. Stonington*, 73 Conn. 348, 354, 47 Atl. 662.

[4] 4. The defendant's request that the court charge the jury that if the plaintiff made an express contract and found he could not do the work thereunder at a profit he could not disregard the contract and recover on a quantum meruit has no relation to the issues as framed or tried to the jury, and in addition was a self-evident proposition.

[5] 5. As we understand the charge the court left the issues to the jury as follows: If they found proven, the express contract claimed by the plaintiff they should ascertain the reasonable value of the material and services furnished, deduct the payment made by the defendant, and render a verdict for the balance with interest. If they found the plaintiff expressly agreed to construct the building for \$450, and did it, they should deduct the payment made of \$300, and render a verdict for the \$150, with interest if they found no tender to have been made, and without interest if they found legal tender to have been made.

If they found no express contract, but found that the plaintiff furnished material and rendered service they should ascertain their fair and reasonable market value, deduct the payment made, and render their verdict for such sum with interest. The serious objection to the charge is the refusal of the court to comply with the defendant's request that, "If the jury believe and find that the plaintiff agreed to do the work in connection with the erection of the building for the defendant to the satisfaction of the defendant and they further find that the defendant is not satisfied with the work, the plaintiff cannot recover, and it makes no difference whether the defendant fails to be satisfied is reasonable or unreasonable." The defendant made the subject of this request a part of his second defense. The finding is that the defendant offered evidence to prove and claimed that he had proved "that the work was to be performed * * * to the satisfaction of the defendant." And the court in its charge recognized this defense as an issue before the jury by including it among the "principal issues" to be determined by the jury. Nowhere in the charge does the court explain to the jury the legal relation of this issue to the case.

The verdict imports a finding adverse to the contract to build for a stated sum as claimed by the defendant, but it does not necessarily import a finding that the building was not to be constructed to the satisfaction of the defendant, nor that the construction

was in fact to his satisfaction. Such a defense is a complete one. An honest dissatisfaction when proven will prevent a recovery.

In an action on a written contract we said: "It is competent for parties to a contract for sale to agree that the thing which is the subject of the contract shall be satisfactory to the vendee, and that the contract shall not be binding on the vendee unless, after examination of the thing or at the time fixed for delivery and payment, the vendee is satisfied with the thing." *Libernum v. Beckwith*, 79 Conn. 320, 65 Atl. 153; *City of Hartford v. Hartford El. L. Co. et al.*, 65 Conn. 324, 334, 32 Atl. 925; *Zaleski v. Clark*, 44 Conn. 218, 223, 26 Am. Rep. 446. The defendant was entitled to a charge upon this subject. Instead, the jury are told that in the event they find the contract proven as claimed by the defendant they should find a verdict for at least \$150 in favor of the plaintiff, and immediately after adverting to the principal issues to be determined, including the issue of satisfaction, the jury are instructed "and in addition to that, however, the amount, which the defendant owes," thus not only failing to explain the legal aspect of this defense, but practically removing it from their consideration.

Other criticisms of the charge do not require discussion.

There is error, and a new trial is ordered. The other Judges concurred.

ADLEMAN v. BOARD OF HEALTH OF CITY OF HARTFORD.

(Supreme Court of Errors of Connecticut. Dec. 19, 1911.)

MANDAMUS (§ 154*)—PROCEEDINGS—ALLEGATION OF RIGHT TO RELIEF.

Gen. St. 1902, § 4670, provides that no person shall keep a maternity hospital without a license therefor from the officials of the city or town chargeable with the care of the public health, and provides, further, for the conduct and management of such hospitals, for inspection by the health officers of the city or town where the hospital is located, to detect improper treatment of any child therein, or any other improper management or conduct, and for the removal of any articles found therein believed to present evidence of crime committed therein. *Held*, that the section providing that "no person shall keep a maternity hospital," etc., which imposes upon a board of health an implied duty to license such a hospital, must be construed to grant a discretionary power to issue such license, and the right to determine the character and moral fitness of the applicant, so that a petition for mandamus to compel the issue of such a license was insufficient, where it did not allege that the applicant was a suitable person to be licensed, or that the defendants, in refusing a license, did not exercise a reasonable discretion.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

Appeal from Superior Court, Hartford County; William H. Williams, Judge.

Mandamus by Martin F. Adleman to compel the issuance of a license by the Board of Health of the City of Hartford. From a judgment for defendants upon a motion to quash the alternative writ, plaintiff appeals. No error.

Stewart N. Dunning, for appellant. William W. Hyde, for appellees.

THAYER, J. The plaintiff claims that he is entitled to a license to keep a maternity hospital, under section 4670 of the General Statutes, which provides that: "No person shall keep a maternity hospital or lying-in place unless he has previously obtained a license therefor duly issued by the mayor or board of health of the city or health officer of the town wherein such maternity hospital or lying-in place is situated." He made an application for such a license to the defendants, which was refused. He claims that the statute gives the board of health no discretion in the matter, but that they are bound to give a license to every applicant, regardless of character or qualifications. The statute in terms imposes no duty upon the board of health to license any one to conduct such a hospital or place. Any duty which is thereby imposed upon the board is an implied one. Whether such a duty is implied and, if so, the nature, extent, and limitations of the duty are to be determined from the act itself, its language, and the purpose intended to be accomplished by it. The provisions of the act, subsequent to the portion above quoted, show that the purpose of the act was to regulate the business of keeping such places as are therein described. Such business, when properly conducted, is legitimate and of public benefit; but that it affords opportunity for the commission and successful concealment of crime is apparent. The act contemplates this and provides for the visitation and inspection of such places, when licensed, for the purpose of detecting the improper treatment of any child, and the discovery and removal of any article which the visiting authority thinks presents evidence of any crime having been committed therein. It is not to be presumed that the Legislature, contemplating, as it evidently did, the danger and possibility of such places being used for the perpetration and concealment of crime, intended, in impliedly imposing upon boards of health the duty of "duly licensing" persons to carry on the business, that they shall license any and every person who shall make application for such a license. It must have been intended that the board should have some discretion in granting such license, and that the character and moral fitness of the applicant should be considered before granting a license. It

cannot be supposed that it was intended that a license should be granted to a person already under conviction for the violation of this very statute, or for some other offense involving moral turpitude.

It is to be implied from the fact that all persons are forbidden to pursue this occupation, unless they have procured a license from the board of health, and from the other provisions of the act referred to, that it is the duty of that board to issue licenses to suitable persons to conduct the business in suitable places; that it does not lie within the absolute discretion of the board to grant

or withhold a license as it shall see fit, but that it shall exercise a reasonable discretion in the performance of such duty.

There is no allegation in the application or in the alternative writ that the applicant is a suitable person to be licensed, or that the defendants in refusing him a license did not exercise a reasonable discretion. Without the allegation and proof of these facts, the plaintiff was not entitled to the writ prayed for, and the motion to quash was properly sustained.

There is no error. The other Judges concurred.

HARTFORD TRUST CO. v. WOLCOTT et al.
(Supreme Court of Errors of Connecticut.
Jan. 5, 1912.)

1. WILLS (§ 511*)—CONSTRUCTION—BENEFICIARIES—“LEGAL REPRESENTATIVES AS ARE RELATED BY BLOOD.”

By “legal representatives” in a bequest in trust to pay the income to H., nephew of testatrix, and, at his death, the principal to such of his legal representatives “as are related to me by blood,” is meant his heirs at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1107; Dec. Dig. § 511.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

2. WILLS (§ 634*)—CONSTRUCTION—NATURE OF ESTATE—CONTINGENT REMAINDER.

The remainder attempted to be given to the heirs of H. by a will giving money in trust to pay the income to H. during his life, and, at his death, the principal to such of his heirs “as are related to me by blood,” is a contingent one, as it could not be known till his death whether he would leave heirs of such description, and, if so, who and how many they would be.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. PERPETUITIES (§ 4*)—BEQUEST TO CHILDREN OF PERSONS NOT IN BEING.

The attempted gift of the remainder by a will giving money in trust to pay the income to H., testatrix's nephew, during his life, and, at his death, the principal to “such of his heirs as are related to me by blood,” was void under the statute of perpetuities in force when the will took effect, it being possible such heirs might be children of persons not in being at testatrix's death, though it turned out they were his brothers living when she died; it not being reasonable to construe such designation of remaindermen as referring to the time of testatrix's death, rather than that of testator, as this would bar children of H., if any were born to him after death of testatrix, and the use of the present tense “are” being appropriate, though referring to the time of H.'s death.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

4. PERPETUITIES (§ 4*)—GIFT TO A CLASS.

A bequest over after the death of the first taker to “such of his heirs as are related to me by blood” not being to a class existing at the death of testatrix, it being impossible to say, till death of the first taker, who will be in the class, is not within the rule that where a gift is to a class and some of them are competent to take, and others are not competent, under the statute of perpetuities, those eligible can take the entire gift, to the exclusion of the others.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

5. WILLS (§ 858*)—VOID LEGACY—RESIDUARY BEQUESTS.

A bequest over being void under the statute of perpetuities, the fund goes to the residuary legatees, and does not become intestate property, a contrary intention not being shown by the fact that the gift over is to such heirs of the first taker as are of the blood of testatrix, and that the residuary legatees are not such persons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.*]

Case Reserved from Superior Court, Hartford County; William H. Williams, Judge.
Suit by the Hartford Trust Company

against William W. Wolcott and others to determine the construction of the will of Lucy A. Noyes, deceased. Case reserved, on the admitted allegations of the complaint for the advice of the Supreme Court. The superior court advised.

Charles M. Joslyn, for plaintiff. John T. Robinson and Francis W. Cole, for William W. Wolcott and others. John H. Buck, for Henry P. Stearns and others. Edward L. Steele, for estate of Lucy A. Noyes.

THAYER, J. The testatrix died in September, 1884, leaving a will, of which the fifth clause, out of which arise all the questions upon which our advice is sought, reads as follows: “Fifth. I give and bequeath to the children of my sister Emily Wolcott, the sum of thirty thousand dollars (\$30,000.) the same to be equally divided among those living at the time of my decease or paid to the survivor of them, except that I give such portion as would under this bequest go to Horace Wolcott to my executor and executrix in trust to pay the income thereof to him semi annually during his life and at his death to pay and deliver the principal of said trust fund to such of his legal representatives as are related to me by blood.” Horace Wolcott and the defendants William W. and Abiathar R. Wolcott were the three children of the sister Emily Wolcott. They were in life at the time the will was made, and survived the testatrix. Horace died in September, 1910, without issue. His two brothers are his sole heirs at law. By a residuary clause of the will Zayde E. Bancroft, a sister-in-law of the testatrix, and Dr. Henry P. Stearns, who was not a relative of the testatrix, were made her residuary legatees and devisees, and the executor and executrix of the will. The questions for determination are: (1) “Is the trust over under the fifth clause of the will valid, and are the said William W. Wolcott and Abiathar R. Wolcott entitled to receive the principal of said trust fund?” (2) In the event that the trust over is void, does the trust fund go to the administrator de bonis non of the testatrix as intestate estate or as testate estate, to the representatives of the residuary devisees and legatees named in the will?

[1] All parties to this proceeding agree that by the term “legal representatives” the testatrix intended the heirs at law of Horace Wolcott, and not his executors or administrators, and it is apparent that this must be so, for she directs that the trust fund shall be paid to such of them as are related to her by blood. She would not have used this language had she been referring to executors or administrators.

[2, 3] The remainder thus attempted to be given to the heirs of Horace Wolcott was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contingent one. It could not vest until his death. Until that event, it could not be known whether he would leave heirs who were related to the testatrix by blood; and, if he left such heirs, their names and number, and consequently the number and size of the shares to be distributed, could only be determined at his death. It was possible, manifestly, that his heirs might be children of persons not in being at the date of the testatrix's death. This possibility rendered the attempted gift of this remainder void as within the prohibition of the statute of perpetuities in force when the will took effect. *Wheeler v. Fellowes*, 52 Conn. 238, 244; *Tingler v. Chamberlin*, 71 Conn. 466, 469, 42 Atl. 718. The fact that, as things turned out, the heirs of Horace were his brothers, relatives by blood of the testatrix, and persons who were in being at the time of her decease, cannot affect the construction of the will. *Bartlett v. Sears*, 81 Conn. 34, 41, 70 Atl. 33.

It is claimed that the statute of perpetuities is inapplicable to this case, because, as claimed, the term "his legal representatives" is to be taken as referring to those who at the death of the testatrix rather than at the death of Horace would be his next of kin of the blood of the testatrix. This is not the natural construction of the language used. Such a construction might carry the fund to collateral heirs, although there were children of Horace born after the death of the testatrix. There is nothing in the facts appearing in the record to call for or warrant such a construction. On the contrary, it seems clear that the intention of the testatrix was that the fund should after the death of Horace go to his descendants should there be any; if not, then to collaterals of the blood of the testatrix. Cases are cited in support of the construction contended for. The construction given to similar language in those cases was based upon the facts peculiar to them, and have little or no weight as precedents in other cases, unless the facts are precisely similar. Attention has been called to the fact that in the expression "to such of his legal representatives as are related to me by blood" the testatrix used the present tense of the verb. The expression was appropriate whether the reference was to the date of her own death or to that of her nephew. To whichever date reference is made the intention expressed would be that of his then existing heirs the fund shall be paid to such "as are related to me by blood."

[4] It is also said that this is a gift to a class, and that, when some of the members of the class are competent to take and others not, those eligible can take the entire gift to the exclusion of those members who fall within the prohibition of the statute. That rule can only apply to cases where there is a class legally created. The claim overlooks

the fact that in the present case the members of the class attempted to be created were not in existence at the death of the testator; that they can only be ascertained after the death of Horace, when the time comes for distribution; and that, as already pointed out, it is possible that the persons then falling within the class may be those falling within the prohibition of the statute which makes the attempted gift void. The individuals who are to constitute the class being uncertain until the death of the life tenant, and it being possible that the individuals may then be persons coming within the prohibition of the statute, there was no class. *Anthony v. Anthony*, 55 Conn. 256, 259, 11 Atl. 45.

[5] The gift over being void, the remaining question is whether the trust fund becomes intestate estate of the testatrix or goes to her residuary legatees. The general rule is that the residuary legatee under a general residuary clause takes all the personal property not otherwise disposed of by the will, unless it clearly appears from the will that this was not the testatrix's intention. Lapsed legacies and void legacies are included in what "is not otherwise disposed of." *Bristol v. Bristol*, 53 Conn. 242, 255, 5 Atl. 687; *Bartlett v. Sears*, supra, 81 Conn. 47, 70 Atl. 33. It will be presumed ordinarily from the fact that the testator has attempted to make a particular legacy that it was not his primary intention that the property so attempted to be disposed of would become a part of his residuary estate. But this fact does not show that in case the legacy should lapse or be void or fail for any reason the testator did not intend that the property thus attempted to be disposed of should then go to the residuary legatee. It would be easy, if he intended otherwise, to provide for the contingency of the lapsing or other failure of the legacy. The fact that the will contains a general residuary clause shows an intent to avoid partial intestacy. *Warner v. Willard*, 54 Conn. 470, 472, 9 Atl. 136. And such intent is always to be presumed where there is a general residuary clause, unless it appears from the will that he did not so intend. In the present case there is nothing to show that the testatrix intended intestacy as to this trust fund in case the gift over should fail. Our attention has not been called to anything in the will which is claimed to show such intent except the fact that the gift over was to go to persons of the blood of the testatrix, and that the residuary legatees are not such persons. But it cannot be inferred from these facts that she intended intestacy as to this fund if the gift over to the heirs of her nephew who were of her blood should fail. It might have failed because at his death there was a failure of such heirs. It is quite as likely that she intended the fund in that event, or in fact in any other, should go to her residuary lega-

tees under the will, as that through intestacy it should go to her own heirs whom she had excluded by the ineffective provision. The case falls within the general rule.

The superior court is advised that the gift over to the heirs of Horace Wolcott was void, and that the trust fund should be paid to the administrators of Zayde E. Bancroft and the executors of Henry P. Stearns, the residuary legatees, one-half to each. No costs in favor of either party will be taxed in this court. The other Judges concurred.

COMSTOCK v. TOWN OF WATERFORD.

(Supreme Court of Errors of Connecticut.
Dec. 19, 1911.)

1. TAXATION (§ 482*)—ASSESSMENT—ADDITION—NOTICE—WAIVER.

While a property owner by the express provisions of Pub. Acts 1905, c. 154, was entitled to a written notice of addition made to his tax list, failure to give him notice was waived by his appeal to the board of relief from the action of the assessor in making the addition.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 854-857; Dec. Dig. § 482.*]

2. TAXATION (§ 65*)—ASSESSMENT—PERSONALTY OR REALTY—CONTRACTS.

Private contracts between a lessor of land and a lessee as to whether certain cottages erected on the land should be a part of the realty would not bind the town in assessing the property as to whether the cottages were realty or personalty.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 65.*]

3. TAXATION (§ 65*)—ASSESSMENT—REALTY—WHAT IS.

Gen. St. 1902, § 2299, provides that any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town. Plaintiff owned certain town lots which he leased to nonresident summer visitors in the town for a term of years, and they erected permanent cottages thereon for use as summer cottages. *Held*, that the cottages were properly listed as real estate against the owners of the lots, there being nothing to show that the lessor's interest in the cottages would be terminated by their removal by the lessees, even though they retained such right.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 150; Dec. Dig. § 65.*]

4. MUNICIPAL CORPORATIONS (§ 966*)—TAXATION—REALTY—SITUS.

Every municipality is entitled to assess all of the real estate lying within its limits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.*]

5. TAXATION (§ 80*)—REAL ESTATE—INTEREST IN REALTY.

Gen. St. 1902, § 2299, providing that any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town, requires the listing of freehold interest properly termed

"real estate," and not mere chattel interest in land.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 80.*]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Action by James E. Comstock against the Town of Waterford to set aside proceedings by the board of relief adding property to plaintiff's tax list. From a judgment disaffirming the action of the board, the town appeals. Judgment set aside, and cause remanded, with directions to enter judgment affirming the board's action.

Christopher L. Avery and Charles A. Gallup, for appellant. Abel P. Tanner and John J. Lawless, for appellee.

RORABACK, J. The appeal presents two questions: First, whether the assessment in question was void for want of notice to the taxpayer; second, whether the property assessed was for the purpose of taxation real estate.

It appears that the plaintiff, who was a resident of the town of Waterford, filed with the assessors of the town a tax list showing that he was the owner of the land upon which four cottages then stood, but did not include these cottages in the list. Subsequent to the filing of this list the board of assessors of Waterford added these cottages to the plaintiff's tax list. The plaintiff was not notified of this addition, but learned of it, and appealed to the board of relief before whom he was duly heard.

[1] The plaintiff by Pub. Acts 1905, c. 154, was entitled to written notice of the addition made to his list. This defect was waived by his appeal to the board of relief. *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294, 299, 47 Atl. 328. On October 1, 1909, the plaintiff was the owner and had record title to a tract of land situated in the town of Waterford. On that day, and for several years prior thereto, there had been standing on this land four summer cottages, described as the "Arthur Gager cottage," the "Allen Richards cottage," the "Grace Bitgood cottage," and the "Club House." The land on which each cottage stood was leased by the plaintiff to the owner of the building by a written lease for a period of years. These leases all expressed that the land was to be used for summer cottages. The leases of the "Arthur Gager cottage" and the "Allen Richards cottage" were recorded in the land records of the town of Waterford. The other two leases were not recorded. The Gager cottage was built in the year 1903, at a cost of about \$700. The Richards cottage was built in the winter of 1905 and 1906, at a cost of about \$600. The Bitgood cottage was built in the year 1903, at a cost of about \$125. The Club House was built in 1905.

at a cost of about \$700. Each of the houses was built where it now stands of lumber and other materials brought to the place and there assembled and nailed together. They were supported upon chestnut posts set into the ground; the sills of the buildings being nailed to the tops of the posts. They were not built in sections, and were not of the description called "portable houses." None of the described buildings have ever been moved from the place where it was built. Photographs of these houses exhibited in this court indicated that their outward appearance was that of permanent summer cottages.

[2] Evidence was admitted and certain facts found by the trial court based on this evidence as to the mutual understanding and agreement of the parties as to these leases. The purpose of this evidence and the finding of the court thereon was to show that it was not the intention of the parties that these cottages should become a part of the plaintiff's real estate. For the purposes of this case, this evidence and these facts were immaterial. The private contracts and arrangements between the lessor and his lessees as to these buildings were not binding upon the town of Waterford or its assessors. *Milligan v. Drury*, 130 Mass. 428, 430. The question here presented is not whether under the strict rules of the common law these cottages should as between the parties be termed as real estate or personal property.

[3] Our present inquiry is whether these buildings for the purposes of taxation come within the provisions of section 2299 of the General Statutes of 1902, which provides that: "Any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town in which such real estate is situated." These cottages have been permanently located upon the plaintiff's land in the town of Waterford for several years. While it is true that the lessor's interest in this real estate may be terminated, yet there is nothing to indicate that any one of the parties to these arrangements contemplate such a termination. They are attached to the land in the manner adapted for permanent structures, and as such they have been so treated and used. They are not a part of the freehold for all purposes only because of a right which may never be exercised to

sever them. They possess all the physical attributes of real estate. These owners have the right to occupy and use this property the same as though it were real estate. Apparently section 2299 of the General Statutes was intended to apply to a case like the one now under consideration. All of the owners of these cottages are nonresidents of the town of Waterford.

[4] The rule is universal that every municipal jurisdiction is entitled to the benefit of all the real estate lying within its borders for the purposes of taxation. It is well known that in most instances persons owning this kind of property are nonresidents, many of them residing beyond the boundary lines of the state. It is a general rule that personal property liable to taxation follows the domicile of the owner. General Statutes, § 2323. If, as the plaintiff now contends, such buildings are to be treated as personal property, it would often happen that there would be no way in which their owners could be compelled to contribute to the municipality where the buildings are located for the promotion of projects which have for their object the benefit of all. The language of the statute under consideration unmistakably indicates that it was intended to treat this kind of property as real estate for the purposes of taxation. It is concisely stated in the opening language of section 2299 as follows: "Any interest in real estate listed for taxation." This court in discussing this statute stated that it is not a provision for the listing or taxation of personal property. It means that any taxable interest in real estate shall be set in the list in the name of the owner of record of such interest. Such an interest, unless otherwise provided by statute, is generally not taxable separately from the freehold, although there may be exceptional cases where an interest in real estate conveyed by an instrument in the form of a lease for a term of years may for certain purposes be regarded as a fee.

[5] The interest in real estate which section 2299 requires to be listed in the name of the record owner is not a mere chattel interest in land, but a freehold interest properly termed real estate. *Sanford's Appeal*, 75 Conn. 590, 592, 54 Atl. 739.

There is error, and the judgment is set aside and the cause remanded, with direction to enter a judgment affirming the action of the board of relief.

In this opinion the other judges concurred.

ILLUSTRATED POSTAL CARD & NOVELTY CO. v. HOLT.

(Supreme Court of Errors of Connecticut.
Jan. 5, 1912.)

1. CONTRACTS (§§ 2, 144, 325*)—VALIDITY, CONSTRUCTION, AND REMEDIES—WHAT LAW GOVERNS.

The law of the place of a contract determines its validity and construction, unless the place of performance is elsewhere, or the contract has been made with reference to another law; but the form of remedy to be pursued and the judicial proceedings thereunder are prescribed and regulated by the *lex fori*.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145, 724-727, 1558-1562; Dec. Dig. §§ 2, 144, 325.*]

2. SALES (§ § 340*)—REMEDIES OF SELLER—ACTION FOR DAMAGES OR PRICE.

Prior to the passage of the sales act (Pub. Acts 1907, c. 212), a seller was entitled to maintain an action against a buyer for damages for the buyer's breach of his contract to purchase goods to be manufactured, the measure of the damages being the difference between the contract price and the market value of the goods, in case there was a market value, and, if the goods had no market or were worthless, the actual damages recovered might be the entire value of the goods, but no action for the price, under such circumstances, was maintainable.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

3. SALES (§ § 340*)—REMEDIES OF SELLER—ACTION FOR PRICE.

Sales Act (Pub. Acts 1907, c. 212) § 63, 3, provides that although the property in goods has not passed to the buyer at the time of his breach of contract, if the goods cannot readily be resold for a reasonable price, and if the provisions of section 64, 4, are not applicable, the seller may offer to deliver to the buyer, and, if refused, may notify him that the goods are thereafter held by the seller as the buyer's bailee, after which the seller may treat the goods as the buyer's and maintain an action for the price. *Held*, that the elements of an action, under such section, were breach of a contract to purchase; that the title in the goods at the time of the breach had not passed; that the goods could not be sold for a reasonable price; that the seller had offered to deliver to the buyer and been refused; and that the buyer had been notified that the seller thereafter held the goods as the buyer's bailee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

4. SALES (§ § 208*)—PASSING TITLE—SEGREGATION.

Where at the time of a buyer's breach of contract to purchase the goods had been manufactured but had not been segregated or marked for the buyer nor delivered to a carrier for transportation to him, the title had not passed, in the absence of a provision in the contract to the contrary.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 561; Dec. Dig. § 208.*]

5. SALES (§ § 340*)—REMEDIES OF SELLER—ACTION FOR PRICE.

Where a wholesale dealer in post cards breached his contract with a manufacturer to purchase certain cards, and it appeared that the breach occurred at a time when the cards could not be sold for a reasonable price to jobbers and wholesalers, the manufacturer was

under no obligations to sell the cards at retail or to the retail trade, but was entitled to notify the buyer that it held the cards as the buyer's bailee, and, after the buyer's refusal to accept the same, sue for the price, as authorized by Sales Act (Pub. Acts 1907, c. 212) § 63, 3.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

6. SALES (§ § 161*)—TITLE—DELIVERY TO CARRIER.

Where a seller delivered goods to a carrier for shipment for the buyer and gave notice to the latter that the carrier held the goods subject to the buyer's order, the property in the goods passed to the buyer, notwithstanding the shipment was made after notice to the seller of the buyer's intended cancellation of the contract and refusal to accept the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

7. SALES (§ § 345*)—REMEDIES OF SELLER.

Where defendant gave plaintiff an order for a quantity of post cards to be manufactured, and later attempted to cancel a large part of the order for Christmas cards of a particular description, the seller was under no obligation to separate the order or attempt to resell the goods at a time it knew it could not obtain a reasonable price therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 956-961; Dec. Dig. § 345.*]

8. SALES (§ § 161*)—CONTRACT—BUYER'S BREACH—STORAGE OF GOODS.

On a buyer's breach of a contract to purchase goods, the storage thereof with an agent of the seller or their delivery to a carrier for the buyer does not add to the seller's responsibility as the buyer's bailee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by the Illustrated Postal Card & Novelty Company against Clarence D. Holt. Judgment for plaintiff, and defendant appeals. Affirmed.

Ward Church and Harrison Hewitt, for appellant. James D. Hart, for appellee.

WHEELER, J. The plaintiff is a manufacturer of post cards in New York City. The defendant is a wholesale dealer in post cards in New Haven. A salesman of plaintiff procured from defendant in New Haven a verbal order for Christmas post cards, subject to change. Subsequently, the defendant called at plaintiff's place of business in New York, and, after examining plaintiff's catalogue, gave it a written order for 100,000 Christmas post cards No. 438, for the price of \$275, and for other Christmas cards, the price for the whole order amounting to \$321, the same to be shipped, by what method did not appear, on August 1st, and paid for December 1, 1910. The plaintiff in its business manufactured post cards of this character on special order and did not keep them in stock. On July 16, 1910, defendant wrote plaintiff that he was obliged to cancel the order for the 100,000 post cards. After secur-

ing this order, the plaintiff began the manufacture of the cards, and all of the cards so ordered were finished and packed for shipment at the date of receipt of this letter. The plaintiff replied that it could not accept the attempted cancellation as the cards would be left on its hands. Wholesale dealers in Christmas post cards place their orders by April 1st, the retail trade continues usually until the fall, and after July 1st there was no available market for these cards with jobbers and wholesale dealers. The defendant twice again requested plaintiff to cancel the order for card No. 438, which plaintiff declined to do, replying to defendant's last letter of July 29th, on July 30th, and on August 4th shipped defendant's entire order by common carrier, not separating cards 438 from the rest of the order. Upon arrival of the goods in New Haven, defendant refused to receive them and notified plaintiff he would receive balance of order exclusive of No. 438. Thereupon plaintiff notified him the goods were in the hands of the New England Navigation Company subject to his order, where they have since remained.

[1] The law of the place of the contract determines the validity and construction of the contract; in short, the substantial rights under it, unless the contract is to be performed or to have its beneficial operation and effect elsewhere, or it is made with reference to the law of another place. *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306, 317, 33 Atl. 1009; *Beggs & Co. v. Bartels et al.*, 73 Conn. 131, 132, 46 Atl. 874, 84 Am. St. Rep. 152.

The form of remedy to be pursued and the judicial proceedings thereunder are prescribed and regulated by the law of the place of the action, while the merits and rights involved in the action are controlled by the law of the place of the contract, unless the place of performance is elsewhere, or it is made with reference to another law. *Wood v. Watkinson*, 17 Conn. 500, 509, 44 Am. Dec. 562; *Atwater v. Townsend*, 4 Conn. 47, 49, 10 Am. Dec. 97; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 23 L. Ed. 245.

Though it were held upon these facts that the place of this contract and of its performance was New York, the form of the remedy would be governed by our law.

[2] This action was begun to recover for the price of goods sold and delivered. Prior to the passage of the sales act (P. A. 1907, c. 212), our law permitted an action for damages by the seller against the buyer for breach of his contract to buy goods to be manufactured for him, and it sought in such action to put the injured party in the place the contract would have placed him in had it been performed. The actual damage suffered was the recovery upheld. That was, as a rule, measured by the difference between the price of the contract of sale and

the value of the goods made. When there was no market, or they were worthless, the actual damages might even be the entire value of the goods. *Allen v. Jarvis*, 20 Conn. 37, 48; *Jordan Marsh & Co. v. Patterson*, 67 Conn. 473, 480, 35 Atl. 521.

So far as we are aware, no case has ever reached this court where upon breach of contract for the sale of goods an action for the price of the goods was begun.

The English law denied such a remedy, and many of our state courts have followed the English law, while a number under the lead of the New York court have given the seller, upon breach of a contract of sale, a remedy permitting him to store or retain the goods for the buyer and sue the buyer for the entire purchase price.

The theory of this law is that when the seller deposits the goods with a third person for the buyer, or segregates the goods and notifies the buyer that he holds them for him, the title passes, or the rights of the parties will subsequently be adjusted as if it had passed at that time. *Williston on Sales*, p. 945, § 56. Our law was in this condition when the sales act was passed.

[3] The remedies provided by the sales act for the recovery of damages for nonacceptance of goods (section 64), and for the recovery of the price (section 63, 1, 2), when the property in the goods has passed, do not substantially differ from the remedies provided by our law at the time of its enactment.

The remedy (section 63, 3) is an addition to the remedies up to that time known to our law, "although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64, 4, are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

Prof. Williston, who wrote the sales act, says in a note (42 Am. Law Rev. 900): "The rights of the seller are also enlarged as compared with his rights under the English act both by the greater freedom in rescission allowed an unpaid seller with a lien (section 61), and by the allowance of an action for the full price, even though the property in the goods has not passed, if they cannot readily be resold for a reasonable price (section 63, 3)."

The elements of an action under this section are: (1) A breach of the contract to sell goods; (2) that the property in the goods at the time of the breach has not passed; (3) that they cannot be sold for a reasonable price; (4) that the seller has offered to deliver them to the buyer; (5) that he has refused to receive them; (6) that the seller has

notified the buyer that he thereafter holds the goods as bailee for the buyer.

[4] The notification of cancellation by this defendant and his persistence in this course constituted a breach of the contract of sale. At this time the goods had not been segregated, nor marked for the buyer, nor delivered to a carrier for the buyer, and, in the absence of provision in the contract to the contrary, the property had not passed to the buyer. 35 Cyc. 296; *Kost v. Reilly*, 62 Conn. 57, 60, 24 Atl. 510.

[5] The finding that there was no available market for the goods after the breach, and that jobbers and wholesalers place no orders after April for such goods, and that these goods are not goods kept in stock, but are manufactured on special order, fully shows that the goods could not be sold for a reasonable price. There was no obligation upon the manufacturer to sell these cards at retail or to the retail trade—that would have involved the undertaking on its part of a new business.

[6] The further finding that the defendant refused to receive the goods, and that the seller declined to permit him to cancel the order, but shipped the goods by carrier to him, and notified him that they were in the carrier's hands subject to the defendant's order, is full compliance with the statutory requirements and ample notice to the buyer that the seller holds the goods as bailee for the buyer. Upon the plaintiff's delivery to the carrier and notice to the defendant that the carrier held the goods subject to his order, the property in these goods passed to the defendant. The carrier stands in place of the seller as bailee for the buyer to whom the goods now belong.

The fact that the plaintiff shipped the goods to the defendant after notice of cancellation, instead of retaining them, did not change the nature of the bailment. The carrier's possession was the plaintiff's possession—holding the goods for the defendant by the direction of the plaintiff.

The court properly overruled the defendant's claims of law that title to the goods never passed to the defendant, and that because of notice of cancellation of the contract of sale the plaintiff was not justified in shipping the goods nor in shipping the whole order together and in not attempting to dispose of the cards.

[7] The plaintiff was under no obligation to separate the order, nor to attempt to sell goods for which it knew it could not obtain a reasonable price.

[8] It is quite probable that the retention of the goods in the hands of the seller may avoid questions in relation to the carrier's storage charges and as to the manner in which the goods have been kept; but the storage of the goods with an agent of the seller, or their delivery to a shipper for the

buyer, does not add to the responsibility of the seller. He continues to be the bailee for the buyer of the goods for which no reasonable price can be obtained.

There is no error. In this opinion the other judges concurred.

EDWARD KNAPP & CO. v. TIDEWATER COAL CO. et al.

(Supreme Court of Errors of Connecticut.
Jan. 5, 1912.)

1. BILLS AND NOTES (§ 237*)—"ACCOMMODATION INDORSEMENT"—DEFINITION—LIABILITY.

An "accommodation indorser" is defined by Gen. St. 1902, § 4199, to be one who indorses without receiving value to lend his credit to some other person, he being exempt from suit at the hands of the accommodated person, but as to other persons his liability is the same as an indorser for value without reference to the question of notice of the accommodation character of his indorsement.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 563, 564, 567-569; Dec. Dig. § 237.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 74; vol. 8, p. 7561.]

2. BILLS AND NOTES (§ 238*)—ACCOMMODATION INDORSEMENT OR INDORSEMENT FOR VALUE.

In an action on notes given to plaintiff by the T. Company for coal purchased and sold to the S. Company, the S. Company's indorsement, made in consideration of its receiving the coal, was an indorsement for value, and not for the plaintiff's accommodation.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 565, 566; Dec. Dig. § 238.*]

3. BILLS AND NOTES (§ 223*)—TRANSFER—"NEGOTIATION"—"ON OR BEFORE."

In an admission that a note sued on was indorsed by the several defendants "on or before negotiation," the words "on or before" excluded "after," and the word "negotiation" signified delivery, that term being generally descriptive of all those acts by which a note or bill is put into circulation or passed in its circulation, including delivery in issue, transfer by delivery, or transfer by indorsement.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 524; Dec. Dig. § 223.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4772; vol. 6, pp. 4967, 4968.]

4. CORPORATIONS (§ 464*) — POWERS — INDORSEMENT OF COMMERCIAL PAPER.

A corporation engaged in the coal business was a trading corporation and had implied power to become party to negotiable paper in the ordinary course of its business, though it had no implied power to lend its credit to others through the agency of accommodation paper.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1820, 1821, 1828; Dec. Dig. § 464.*]

5. CORPORATIONS (§ 389*) — POWERS — ULTRA VIRES ACTS — BURDEN OF PROOF.

The burden of establishing the defense of ultra vires is on the corporation asserting it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1568-1571; Dec. Dig. § 389.*]

6. BILLS AND NOTES (§ 367*)—BONA FIDE PURCHASERS—CORPORATION NOTES—IMPLIED POWER.

Where a corporation has the general power, express or implied, to become a party to bills and notes, such instruments duly executed by the corporation will be presumed to have been executed in the legitimate course of its business, and, whether so executed or not, will be valid in the hands of a bona fide holder without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 947, 948; Dec. Dig. § 367.*]

7. BILLS AND NOTES (§ 367*)—BONA FIDE PURCHASERS—CORPORATE INDORSEMENT—AUTHORITY OF PRESIDENT.

Whether the president of a trading corporation had authority to execute commercial paper in its name depended, not only on whether he had direct authority so to do, but on whether, in view of his official position, the scope and character of his duties, and his previously known conduct, he had such apparent authority as would justify plaintiff in accepting notes indorsed by him under his official title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 947, 948; Dec. Dig. § 367.*]

8. PLEADING (§ 127*)—ANSWER—ADMISSIONS—EXECUTION OF INSTRUMENT.

Where, in an action on notes indorsed by defendant corporation by its president, the answer expressly admitted that the notes were indorsed by defendant, such admission imported an authorized indorsement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.*]

9. APPEAL AND ERROR (§ 852*)—REVIEW—THEORY OF CAUSE.

The theory on which a cause is tried without objection will be followed on appeal.

[Ed. Note. — For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 852.*]

10. CORPORATIONS (§ 432*)—POWERS—AUTHORITY OF PRESIDENT—IMPLIED POWER.

On an issue as to the apparent authority of the president of a corporation to indorse commercial paper in its behalf, matters bearing on the president's power in fact as between himself and the corporation were irrelevant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1731-1736; Dec. Dig. § 432.*]

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Action by Edward Knapp & Company against the Tidewater Coal Company and others on two notes. Judgment for plaintiffs for \$3,492 against the defendant Stamford Tidewater Coal Company, from which it appeals. Affirmed.

The plaintiffs, as copartners, are wholesale dealers in coal. The Tidewater Coal Company, a New York corporation, buys and sells coal at wholesale. Among its customers is the Stamford Tidewater Coal Company, a Connecticut corporation engaged in selling coal at retail. All of its coal is bought from the New York company. Its capital stock is all owned by four persons, who are its directors. Of these four, one

Bayard N. Cole is a stockholder in and director and president of the New York company. Another, R. V. Matthew, is a stockholder in and director of the New York company. Cole is president of the Stamford Company. About December 15, 1909, the plaintiffs sold to the New York company certain coal, which they, upon its direction, shipped direct to the Stamford Company. The purchase price was charged to the New York company, and the same was paid for with the note of that company. This note was paid in part by cash, leaving a balance of \$995.57 unpaid. August 15, 1910, this balance being still due, the New York company made its 30-day note for that sum payable to the order of the plaintiffs, which note, having first been indorsed by Matthew and the Stamford Company, was delivered to the plaintiffs in payment therefor. Under said date the Stamford Company advised the plaintiffs in writing that its indorsement was in consideration of its receipt of the coal. Upon the maturity of this latter note, it was paid or replaced by another for the same amount and of the same tenor, but bearing the indorsement of one Pinkerton in addition to that of Matthew and the Stamford Company. The latter indorsement was made by Cole as its president. This note is that set out in the first count. On or about June 30, 1910, the New York company purchased of the plaintiffs other coal, and ordered it shipped to the Stamford Company, which received it as the customer of the New York company. Through this purchase the New York company became indebted to the plaintiffs in the sum of \$2,410.17. In payment of this indebtedness, the New York company delivered to the plaintiffs its two months' note for said sum, dated June 30, 1910, payable to the plaintiffs' order, and indorsed by Matthew and the Stamford Company. Under the same date the latter company wrote the plaintiffs that its indorsement was in consideration of the receipt of the coal. September 28, 1910, after the maturity of this note, it was paid or replaced by the second note in suit, which is one payable October 30, 1910, for the like sum and of the same tenor as the former note. When delivered, it bore the indorsements, in the order named, of Matthew, Pinkerton, and the Stamford Company, whose name was placed thereon by its president, Cole. Nearly all of the business done by the plaintiffs with the two Tidewater Companies was done with or through Cole, and the plaintiffs knew no other person in connection therewith. Coal ordered from the plaintiffs by Cole for the account of the New York company and shipped to the Stamford Company was paid for sometimes by check of the former company, sometimes by that of the latter, and sometimes by Cole's personal check.

Homer S. Cummings, Charles D. Lockwood, and Albert Phillips, for appellant. Robert A. Fosdick, for appellees.

PRENTICE, J. (after stating the facts as above). Copies of the two negotiable promissory notes upon which this action, in two counts, was brought, are annexed to the complaint. They show that the Tidewater Coal Company, a New York corporation, hereinafter referred to as the New York company, was the maker, and Edward Knapp & Co., the plaintiffs, the payees, and that the notes bore the indorsement, in order, of the two individual defendants, and of the defendant the Stamford Tidewater Coal Company, hereinafter referred to as the Stamford Company, which last indorsement was made in the name of the company "by Bayard N. Cole, president." The complaint alleges the execution of the notes by the New York company that "on or before" their negotiation they were indorsed by the three defendants whose names appear thereon, that due presentment was made and notice given, that the plaintiffs still own them, and that they have not been paid. Upon the face of the notes and the strength of the averments of the complaint, all of which are admitted by the answer, the plaintiffs would be entitled to the judgment rendered. General Statutes 1902, §§ 4233, 4234. To defeat this result, the Stamford Company, which alone of the defendants appeared, sets up by way of special defense: First, that its indorsements were for the accommodation of the plaintiffs; and, second, that they were made by Cole without authority from the corporation. Upon the trial an additional claim was made, apparently without objection that the pleadings furnished no basis for it, to the effect that the indorsements were ultra vires of the corporation.

[1] An "accommodation indorser" is one who indorses without receiving value therefor, and for the purpose of lending his name to some other person. General Statutes, § 4190. His status as to such other person accommodated, and his liability to him, is very different from that which he enters into and assumes as to the other parties to the instrument. He is exempt from suit at the hands of the accommodated party, whatever their relative positions upon the paper may be. His liability, on the other hand, to other parties, is the same as though he was an indorser for value, and that liability is unaffected by notice to such parties of the accommodation character of his indorsement. General Statutes, §§ 4199, 4234; Daniels on Negotiable Instruments, § 790; Joyce on Defenses to Commercial Paper, § 279.

So in the present case if the appellant put its name upon the paper for the accommodation of the plaintiffs, as charged, the judgment is erroneous. If it did not, it would be none the less liable to the plaintiffs for

the reason that it indorsed for the accommodation of the maker, and they had full knowledge of that fact, save as the accommodation character of the indorsement would bear upon the question of corporate authority, with which we are not now concerned. If the appellant indorsed at the request and for the benefit of the plaintiffs, its act, upon the facts found, was beyond question without consideration, and the indorsement one for their accommodation. The question here at issue thus becomes resolved into one of fact as to whether or not it was so made.

[2] Both notes in controversy were given in renewal of prior notes of like amount and tenor, and bearing the names of the same indorsers save Pinkerton, whose name was not upon the notes taken up. These latter notes were indorsed before delivery, and by the procurement of the maker. They were delivered by the New York company in payment for coal sold by the plaintiffs to it, and by it ordered shipped to the Stamford Company as its customer. In view of the circumstances, it certainly could not be claimed with any semblance of plausibility that they were indorsed by the Stamford Company for the accommodation of the plaintiffs with whom it had never dealt, and to whom it owed nothing, and not for the benefit of the New York company, with which it was closely affiliated in ownership, direction, and business, with whom it had regular business dealings, from whom it had the very coal for which the notes were given in payment, to whom, for aught that appears, it was then indebted therefor, and which procured the signatures. The officers of the appellant confessedly empowered to conduct its business advised the plaintiffs in writing at the time these notes were taken that the company's indorsements were in consideration of its receipt of the coal, and one of the individual indorsers was one of the directors of the two Tidewater Companies.

The appellant relies upon what it conceives to have been a changed situation when the present notes were given by reason of the lapse of time, the circumstances surrounding the renewals, and especially the order of those circumstances, for the maintenance of its position that the party accommodated in these instances was the plaintiffs.

The finding is that both the earlier notes were "paid or replaced" by new notes of the same tenor, and having the same maker and payee. With respect to the note set out in the first count, the finding clearly imports that when it was delivered it bore the indorsements now upon it, and that fact is unquestioned. With respect to the other, it is unequivocally found that when the replacement was made it was indorsed as now. The appellant asks that the finding in relation to this subject be corrected, so that it shall appear that this renewal note was offered for

discount before indorsement by it, that, the cashier to whom it was so offered not being satisfied to accept it, Cole offered to place upon it the appellant's indorsement, and thereupon did so, one of the Knapps being present. We have been unable to find any evidence justifying this statement of fact. But if there were such evidence, and the correction were made in the very language of the draft-finding, it would not suffice to change the statement of the finding that the new note, when delivered, bore the indorsement of the Stamford Company. The two sets of facts are by no means inconsistent, and the result of the correction would not by any means be, as the appellant's counsel assume, to establish that the Stamford Company's indorsement was placed upon the note after it had been given and received by the plaintiffs, and in order to give it bankable character. Counsel for the appellant place great reliance upon this claimed order of events as showing that it was the plaintiffs, and not the New York company for whom the indorsement was made. We have been able to discover no evidence establishing any such order, and it is suggestive that counsel were of the like opinion when they prepared their draft-finding, since they therein asked the court to find that the former note was "paid or replaced" by the present one bearing among other indorsements that of the defendant company as it now is.

[3] It is also suggestive of the appellant's understanding, if not conclusive of the fact, that the answer expressly admits the allegation of the complaint that the note was indorsed by the several defendants on or before negotiation. "On or before" excludes "after," and "negotiation" as here used signifies, and could only signify, delivery. Negotiation is a general term descriptive of all those acts by which a note or bill is put into circulation or passed on in its circulation, and includes delivery in issue, transfer by delivery, or transfer by indorsement. General Statutes, § 4200; *Odell v. Clyde*, 38 App. Div. 333, 334, 57 N. Y. Supp. 126. *Walker v. Bank*, 19 Ind. 247, 250.

The circumstances attending the renewal indorsements thus appear to have been in no manner different from those which surrounded the earlier ones except that a period of one or two months had elapsed. The pertinence of this fact as bearing upon the question of for whom the indorsements were made is not apparent. Clearly the court was justified in reaching the conclusion that the appellant's indorsement was not made for the purpose of lending its credit to the plaintiffs.

The defense of *ultra vires* is one which the court below properly might have ignored, and for aught that appears did. But it was urged upon that court, apparently without objection, and upon us without objection. We will therefore give it consideration.

[4] The appellant was a trading corpora-

tion in the fullest sense of that term. *Marsh v. Wheeler*, 77 Conn. 549, 553, 59 Atl. 410, 107 Am. St. Rep. 40. As such it had the implied power to become a party to negotiable paper in the due and ordinary course of its business, and for the authorized and legitimate purposes of that business. *Morawetz on Corporations*, § 350; *Clark & Marshall on Corporations*, §§ 181, 476; *National Bank v. Young*, 41 N. J. Eq. 531, 535, 7 Atl. 488; *Monument National Bank v. Globe Works*, 101 Mass. 57, 58, 3 Am. Rep. 322; *Jacobs Pharmacy Co. v. Trust Co.*, 97 Ga. 573, 575, 25 S. E. 171. There is no such implied power to lend the credit of such a corporation to others through the agency of accommodation paper. *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 386, 8 Atl. 472, 1 Am. St. Rep. 123. If the present indorsements were in excess of the authority of the corporation, it must have been for the reason that they were for purposes foreign to the due and legitimate conduct of its business, or without consideration.

[5, 6] The burden of establishing this defense of *ultra vires* rested upon the appellant who asserted it. *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 381, 8 Atl. 472, 1 Am. St. Rep. 123. "When a corporation has the general power, express or implied, to be a party to bills and notes, such instruments will be presumed to have been executed in the legitimate course of its business, and, whether so executed or not, will be valid in the hands of a bona fide holder without notice." *Daniels on Negotiable Instruments*, § 386. Consideration will also be presumed. General Statutes, § 4194. It was incumbent upon the appellant to overcome these presumptions, and to establish one of the conditions recited. It altogether failed to do so.

It proved that the coal in payment for which the original notes were given was, upon the order of the purchaser, the New York company, consigned directly to the Stamford Company, as the former company's customer, and that the latter company thereupon became indebted therefor to the New York company; that, at the time the original notes were delivered bearing the appellant's indorsements, it advised the plaintiffs in writing that the indorsements were in consideration of its receipt of the coal; that the two Tidewater Companies had such considerable and regular dealings with each other as was to be implied from the fact that the Stamford Company bought its coal from the New York company, and that payment for this coal to the party from whom it was ordered by the New York company, who was frequently the plaintiffs, was sometimes made by checks of the Stamford Company. Its own evidence uncontradicted was that the New York company financed the Stamford Company's business; the latter company having no credit. There was nothing to indicate that the invoices of coal first referred to had

ever been paid for to the New York company by the Stamford Company, or that as a result of the latter company's purchases it was not largely indebted to the former, or to suggest that some arrangement based upon this indebtedness or relating to the financing of the defendant did not furnish the consideration for the defendant's name being placed upon the notes. Such a consideration would have been sufficient, and well might have existed. General Statutes, § 4195. The appellant left the trial court in a position where it was asked to override a legal presumption by a conclusion of fact for which no substantial foundation was furnished in the evidence. It is equally clear, and for very similar reasons, that the court would not have been justified in finding that the indorsements were not made in the regular course of the appellant's business, and there were no facts upon which bad faith on the plaintiff's part could be predicated. *Craft's Appeal*, 42 Conn. 146, 154.

[7] The third defense, which asserts Cole's want of power to indorse the notes in suit, is one which must rest not only upon the proposition that he was without authority to place the defendant's name upon commercial paper, but also upon the very different proposition that there was not, in view of his official position, the scope and character of his duties, and his previous known conduct, any such apparent authority as to justify the plaintiffs in accepting the notes indorsed by him under his official title, as bearing the indorsement of an authorized agent. *Morawetz on Corporations*, §§ 586, 587; *Daniels on Negotiable Instruments*, § 389; *Frost v. Wood*, 2 Conn. 23, 26.

[8, 9] The answer expressly admits the allegation of the complaint that the notes were indorsed by the defendant. This imported an admission of an authorized indorsement. Then follows the special defense which sets up affirmatively Cole's lack of power. At the beginning of the trial it was stated to the court by counsel that the only issue was whether or not the defendant's indorsement was for the plaintiffs' accommodation, and the plaintiffs, having presented the notes, rested. The defendant then proceeded to present its evidence in support of its defense. It thus voluntarily assumed the burden of proof, and the case was tried throughout upon the theory that it was incumbent upon the defendant to substantiate its freedom from liability for Cole's act. It is unnecessary to inquire whether or not this was the correct

theory. Counsel acted upon it from first to last, and the court doubtless accepted the issue as it was presented, and so decided it. It would manifestly be unfair for us to approach the question from any other point of view.

[10] If the finding be examined to discover how far the defendant succeeded in supporting its position, there will be found no pertinent facts save that Cole was the defendant's president, that the plaintiffs never knew any other person than him in connection with the defendant's business, and that nearly all of their business with it was transacted with or through him. Among the facts which we are asked by the defendant to incorporate in the finding are matters bearing upon Cole's power in fact as between him and his principal, but none relevant to the ultimate inquiry of his apparent power. We cannot, therefore, upon the finding, either as it is, or corrected as asked, hold that the trial court was in error in ruling that the defendant had failed to sustain the burden it had assumed, and in basing its judgment upon the subordinate conclusion involved in it, that Cole's act of indorsement was one for which the defendant was bound. Were we at liberty to utilize, as bearing upon this matter, the evidence which is before us for a correction of the finding, ample justification for an implication of authority in Cole sufficient to warrant the plaintiffs in assuming its existence would be found in his own testimony offered by the defendant, and unquestioned and unqualified by other testimony, as to the character and broad scope of his agency as the defendant's chief executive officer. But the finding is silent upon these matters, and this testimony possesses interest only as it shows that injustice is not done through keeping to the course which counsel marked out for themselves and pursued.

The appellant asks for a correction of the finding in numerous particulars. Many of them involve conclusions of law or fact with which we have dealt. Some of them involve statements of fact, either immaterial or clearly without sufficient foundation in evidence. A few relate to matters which are relevant to the issues. These have been noticed, and the appellant has been given the full benefit which could be claimed from them.

There is no error. In this opinion the other Judges concurred.

POWELL v. CITY OF OLD TOWN.

(Supreme Judicial Court of Maine. Dec. 13, 1911.)

1. TAXATION (§ 462*)—ASSESSMENT—MONEY AT INTEREST—ABATEMENT—PREREQUISITES.

To entitle one to abatement of taxes for money at interest under Rev. St. c. 9, §§ 73-75, it must affirmatively appear that he submitted to the assessors, as required by their written notice, a true and perfect list of all his property not exempt of which he was possessed April 1st, or can make it appear that he was unable to do so; that he made oath to the list if required so to do by the assessors, or any of them; and that he answered all proper inquiries by any of the assessors as to the nature, situation, and valuation of his taxable property, and that he reduced his answers to writing and subscribed them if so requested.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 818-823; Dec. Dig. § 462.*]

2. TAXATION (§ 356*)—ASSESSMENT—MONEY AT INTEREST—DEDUCTIONS.

One should not be taxed for money at interest under Rev. St. c. 9, §§ 73-75, if he owes debts in excess of the amount.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 596; Dec. Dig. § 356.*]

3. TAXATION (§ 318*)—ASSESSMENT—TIME AND DATE.

Under Rev. St. c. 9, §§ 73-75, relating to taxation for money at interest April 1st, inquiry made by assessors on June 10th concerning money which plaintiff had at interest must be referred to the earlier date, especially since plaintiff was a lawyer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 596; Dec. Dig. § 318.*]

4. TAXATION (§ 462*)—ASSESSMENT—CORRECTION—ESTOPPEL TO COMPLAIN.

A taxpayer is estopped to complain of an assessment against him for money at interest under Rev. St. c. 9, §§ 73-75, where he peremptorily refused to make any statement concerning such moneys, though, through owing debts in excess of such investments, he was not taxable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 818-823; Dec. Dig. § 462.*]

5. TAXATION (§ 318*)—ASSESSMENT—TIME AND DATE.

Under Rev. St. c. 9, §§ 73-75, relating to taxation for money at interest April 1st, inquiries made by assessors of plaintiff on June 10th were not too late to charge him with such taxes; it appearing that the current tax lists had not been completed and committed to the collector, and that the assessors had proceeded with due diligence in making up the lists.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 530, 531; Dec. Dig. § 318.*]

6. TAXATION (§ 318*)—ASSESSMENT—TIME AND DATE—"REASONABLE TIME."

"Reasonable time," to which assessors are entitled in making inquiries as a basis for assessment for money at interest April 1st, under Rev. St. c. 9, §§ 73-75, is such period as may be properly allowed, having regard to the nature of the act and to the attending circumstances; the quoted term being flexible.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 530, 531; Dec. Dig. § 318.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5977-5983; vol. 8, p. 7780.]

Report from Supreme Judicial Court, Penobscot County, at Law.

Petition by William H. Powell against the

City of Old Town to abate taxes for money at interest, under Rev. St. c. 9, §§ 73-75.

The assessors of the city of Old Town for the year 1910 assessed the plaintiff for \$1.00 money at interest. The plaintiff then made written application to the assessors for an abatement of the tax on the money at interest, and the abatement was refused. The plaintiff then appealed to the Supreme Judicial Court under the provisions of Revised Statutes, c. 9, § 79. When the case came on for trial, an agreed statement of facts was filed, and the case reported to the law court for determination. Appeal dismissed.

Note.—Under the provisions of Public Laws 1911, c. 179, "all loans of money made by any individual or corporation and secured by mortgage on real estate situated in this state" are exempt from taxation.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and KING, JJ.

W. H. Powell, pro se. F. J. Whiting, for defendant.

CORNISH, J. [1] In order to entitle a person to apply to the county commissioners or to the Supreme Judicial Court for relief from assessment of taxes by abatement under R. S. c. 9, §§ 73-75, it must affirmatively appear:

(1) That he made and brought in to the assessors, as required by their written notice, a true and perfect list of all his property not by law exempt from taxation of which he was possessed on April 1st of the same year, or can make it appear that he was unable to do so.

(2) That he made oath to this list, if required so to do by the assessors or any of them.

(3) That he answered all proper inquiries that were asked him by any of the assessors as to the nature, situation, and valuation of his taxable property, and that he also reduced his answers to writing and subscribed the same, if so requested.

[2] In this case the agreed statement of facts shows that the appellant complied with the first requirement as to bringing in the list, and that the second requirement was not violated because he was not required by the assessors to make oath to the list. The controversy arises over the third requirement.

On this question it is admitted that at the time the list was filed the appellant answered all questions asked him by the assessors respecting the property comprised in his list, but the list did not contain any statement of money at interest, and no questions were asked respecting that class of property.

About June 10th of the same year, the assessors called upon the appellant, stated that they "were going to assess money at interest," and asked him if he cared to make

any statement to them in relation to how much money he had at interest. The appellant refused to make any statement. Thereupon the board assessed him for \$1,000 at interest. It is admitted that on April 1, 1910, he had that sum at interest, but that he was owing debts in excess of that amount. He should not therefore have been taxed for money at interest (*Taylor v. Caribou*, 102 Me. 401, 67 Atl. 2), and this appeal should be sustained unless he is barred by his refusal to make any statement when the assessors made their additional inquiries of him on June 10, 1910.

The appellant does not contend that the inquiries put by the assessors should have been reduced to writing. R. S. c. 9, § 75, provides that the assessors and "either of them may require him to answer all proper inquiries in writing as to the nature, situation and valuation to his taxable property," etc. This more accurately should read, "Either of them may require him to answer in writing all proper inquiries as to the nature," etc., because this section is a condensation of the original act (chapter 138 of the Public Laws of 1862), which reads: "And such lists being exhibited on oath shall be taken as true, unless such person shall refuse to answer all proper inquiries in relation to the nature and situation of his property, and if required subscribe and make oath to the same, to be taken in writing before a majority of the assessors who may act by themselves or counsel in taking the same."

The language of the court in *Levant v. County Com'rs*, 67 Me. 429, would seem to indicate that the questions should also be in writing, but that question was not raised in the case, as both the questions and the answers had been reduced to writing, and the court sent the petition for certiorari back for further hearing at nisi prius because there was a conflict of testimony as to whether the applicant for abatement had in fact refused to answer certain questions. The true construction is stated in *Lambard v. County Com'rs*, 53 Me. 505 (and the applicant in the case at bar does not attack it).

[3] But the appellant, while conceding the general rule that refusal to answer proper inquiries made at a proper time bars the right of appeal, contends that he is not barred in this case for two reasons: First, because the assessors predicated their inquiry on what money at interest the appellant had on June 10, 1910, not on April 1, 1910.

This construction of the interview is too narrow. What took place is to be viewed in the light of the surrounding circumstances. The assessors called upon him in their official capacity, and he well knew the general purpose of their visit. They stated, in effect, that they had concluded to assess money at interest, not simply his, but all money at interest; that is, that class of property, for that current year, and that necessarily meant property held on April 1st. They then ask-

ed him if he cared to make any statement to them in relation to how much money he had at interest. This could not have meant either to the assessors or to the appellant, who is a lawyer, how much he had on the day when the question was asked, but how much he was assessable for that year, which would relate back to April 1st. Both sides knew that that was the subject of conversation and the object of the visit, and, although the question was asked on June 10th, it was understood to relate to property taxable in 1910 and to nothing else. An inquiry as to the property which appellant owned on April 1st was an act of official duty. An inquiry as to the property which he owned on June 10th would have been an act of unofficial impertinence, and all the parties knew this. Such is the reasonable construction of the whole interview. No precise formula need be used by the assessors. No stereotyped language need be employed. They must, of course, make the individual understand the nature and purpose of their inquiry, and that this was accomplished in this case there can be no room for reasonable doubt.

[4] The question put by the assessors was certainly a proper one within the requirement of the statute, and the appellant's absolute refusal to make any statement whatever precluded the necessity of making the further inquiry as to how much he was taxable for on April 1st. He did not object to the form, and say that he would answer proper inquiries, but he declined to answer any. His attitude rendered further questioning futile, and he cannot now complain because the assessors took him at his word and closed the interview without going through a useless formality. *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Bowden v. Dugan*, 91 Me. 141, 39 Atl. 467; *Pitcher v. Webber*, 103 Me. 101, 68 Atl. 593; *Hall v. Trust Company*, 106 Me. 465-474, 76 Atl. 926, 138 Am. St. Rep. 355.

[5, 6] The second objection raised by the appellant is that the inquiry, if proper in itself, was made long after the list was furnished, and he was therefore not obliged to answer it.

The statute (R. S. c. 9, § 75) fixes no time within which such inquiries must be made. This court has held in *Freedom v. County Commissioners*, 66 Me. 172, that the authority of the assessors is not limited to the time and place designated in their written notice, but continues for a reasonable time thereafter. It is often impracticable to make all the examinations in one day, and time should be given the assessors to make careful investigations of the furnished lists which are not conclusive.

The tax lists for the year had not been completed and committed to the collector on June 10th, and the agreed statement shows that the assessors had proceeded with all due diligence in making up the lists, and had not

used more time than was usually required by the assessors of Old Town for a proper performance of their duties. Under these circumstances, it is clear that the reasonable time granted to the assessors had not expired. "Reasonable time" is a flexible term, and, as used in this connection, is such a period as may be properly allowed, having regard to the nature of the act and to the attending circumstances.

Applying this rule, it would seem that the assessors would continue to have the right of proper inquiry at least until, working with reasonable speed, the assessment lists are finished and committed to the collector. Especially is this true in the case at bar, where, as the agreed statement shows, the assessors had started on the track of a class of property which was not embraced in the appellant's original list and concerning which they had not interrogated him.

The conclusion, therefore, is that the appellant's peremptory refusal to make any statement whatever barred his right of appeal. *Lambard v. County Commissioners*, 53 Me. 505.

Appeal dismissed, with costs.

ECKERSON v. CITY OF ENGLEWOOD.
(Supreme Court of New Jersey. Dec. 18, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 129*)—POWERS—APPOINTMENT OF CITY ENGINEER.

The common council of cities incorporated under "An act relating to and providing for the government of cities of this state containing a population of less than twelve thousand inhabitants" (P. L. 1899, p. 96) have no power to appoint subordinate officers under subdivision 34, § 18, except by ordinance, and the appointment of a city engineer by resolution, instead of by ordinance, is not the appointment of a subordinate officer authorized by the act, and such an appointment for a term of years cannot be sustained as a contract, because not made according to the terms of the act authorizing the appointment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 303, 306; Dec. Dig. § 129.*]

Writ of certiorari by Charles H. Eckerson against the City of Englewood to review certain proceedings of the Common Council. Writs dismissed.

Argued November term, 1911, before GAR-RISON, PARKER, and BERGEN, JJ.

Albert I. Drayton, for prosecutor. Edmund W. Wakelee, for defendant.

BERGEN, J. We have before us two writs of certiorari to review certain proceedings had by the common council of the city of Englewood. The first proceedings challenged are certain resolutions and an ordinance by which, without undertaking to remove the prosecutor from the office or position of city

engineer of the city of Englewood, the common council in making public improvements, where the assistance of the city engineer was necessary, designated one Watson G. Clark, as the engineer in charge of the work, thereby relieving the prosecutor from the performance of the duties appertaining to the office or position to which he claims to have been appointed. The ordinances and resolutions producing this condition were removed to this court by the first of the writs of certiorari now under consideration. While the foregoing writ was pending, the common council adopted a resolution, which was intended to terminate the right, if any of the prosecutor to the office of city engineer, and it was to review this proceeding that the second writ was allowed. As practically the same questions were presented in each case, they were argued together and will be so considered and disposed of.

On January 1, 1901, the common council of the city of Englewood, by resolution, undertook to appoint the prosecutor city engineer for the term of three years, which term had not expired when the proceedings challenged by these writs were instituted. The resolution appointing the prosecutor, as it appears on the minutes of the city, reads as follows: "Mr. Watson nominated Charles H. Eckerson for the office of city engineer. Nomination seconded by Mr. Fitch. There being no other nominations it was voted unanimously that Mr. Charles H. Eckerson be appointed city engineer for the term of three years." There was no ordinance creating the office, nor was the appointment made by ordinance with the approval of the mayor. It is not denied that Watson G. Clark was employed to perform the duties ordinarily assigned to the city engineer, and thereafter and on August 11, 1911, the common council adopted a resolution "that the appointment of Charles H. Eckerson as city engineer be and the same is hereby terminated, and the office of city engineer be and the same is hereby declared vacant," and the writ to review the latter resolution was allowed September 16, 1911; the first writ having been allowed July 1, 1911.

The defendant is incorporated under the act relating to the government of cities having a population of less than 12,000 inhabitants. P. L. 1899, p. 96. The charter does not, in express terms, create the office of city engineer. It provides for a mayor, members of the common council, councilmen at large, city clerk, collector of taxes, overseer of the poor, freeholders, commissioners of appeal, and such justices of the peace, constables, and ward officers as may be provided for by law, all of these to be elected by a vote of the people, and a city treasurer to be appointed by the common council for the term of three years; the terms of office of the officers elected being three years, excepting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

those of the mayor and common council, which are fixed at two years.

Section 33 of the charter declares that "the city engineer, surveyor, city solicitor, city sealer of weights and measures and all other officers appointed by the common council shall possess the powers and be subject to the obligations conferred and imposed on them by law or by the ordinances, by-laws, rules and regulations of the common council." As this section follows other sections specifically defining the duties of the officers expressly named as elective as well as of the city treasurer, it manifests the legislative intent to fix the duties of such of the officers named as may be thereafter provided for and appointed by the common council, and not to create such offices without municipal action. Section 39 of the charter prescribes certain duties to be performed by the city engineer or surveyor regarding the city assessment maps, and requires the common council to fix, by ordinance, the compensation of the city engineer or surveyor for the above, and all other duties appertaining to his office, leaving it optional with the city to appoint either a city engineer or surveyor. As subdivision 34 of section 18 of the statute empowers the common council "to appoint from time to time such subordinate officers as may be deemed necessary to carry into effect the powers and duties hereby created or otherwise conferred or imposed," the common council had the right to appoint a city engineer or surveyor, and, when the office was established and appointment made, the appointee was required by section 39 to prepare, keep, renew, and have the custody of the city map or atlas, and when so directed by ordinance or resolution to keep an index of the lots shown thereon, and of the owners thereof, and when directed in like manner to keep in his office an abstract of each and every deed or transfer affecting lands situate in the city, to be properly indexed; and section 41 of the charter requires the assessors to so arrange their duplicates as to specify by letters and numbers, as shown on the city atlas, the several lots or subdivisions assessed with the valuation thereof as shown by the register kept by the city engineer. These extracts from the city charter would seem to indicate that the city engineer has functions to perform with reference to the city government which might constitute him a public officer; but, as this case will be disposed of upon other grounds, it is not necessary to determine that question, because the prosecutor claims that, if he be a public officer, he cannot be removed without charges made and an opportunity to be heard, and then only by the vote of two-thirds of the council, as provided in section 11 of the charter, neither of which privileges was accorded to him, and that, on the other hand, if he is a subordinate, and not a public officer, he has a contract with the city for the term of three years from the date of

his appointment, which the common council cannot abrogate. The defendant, however, claims that the prosecutor was never lawfully appointed to a public or subordinate office, nor engaged as an employé, and is therefore a mere intruder without any rights it is bound to respect. As prosecutor places his right to pursue this writ upon his appointment to an office for a definite term, the first important question to be determined is whether he was appointed in such manner as to acquire any vested rights which are being infringed by the conduct of the defendant. No power to appoint officers except the treasurer is expressly given in the charter except that hereinbefore referred to, viz., to appoint such subordinate officers as may be necessary to carry into effect the powers and duties conferred and imposed by the charter; but the first paragraph of section 18, giving such power, requires it to be exercised by ordinance. The power granted is to "make, establish, publish, modify, amend or repeal ordinances, rules, regulations and by-laws for the following purposes." Then follows a statement of powers delegated, among them being the power to appoint subordinate officers.

It has been recently held in the Court of Errors and Appeals of this state that ordinances, rules, regulations, and by-laws are intended to be synonymous and to be promulgated by ordinance, and cannot be made effective by resolution. *Levy et al. v. City of Elizabeth*, 80 Atl. 498. Giving to this charter the construction adopted by the Court of Errors and Appeals in the case cited, the common council of the city of Englewood could not create an office nor appoint any subordinate officers except by ordinance, and it is admitted that the prosecutor in this case was not appointed by ordinance, and no office created except by inference from the resolution of appointment. The same subdivision (34) requires an ordinance to prescribe and define the duties of city and ward officers when not otherwise prescribed by law, to fix and determine their compensation, the penalty for failure to perform their duties, the bond and securities to be given by the officers of the city, and the time for executing the same when not otherwise provided, and to appoint, from time to time, subordinate officers. It would therefore seem that, if any of these powers must be exercised by ordinance, all must. The duties required, by the charter, of the engineer, take that position out of the realm of an ordinary employé and put it within the class of subordinate officers which the common council may establish, and appoint to by ordinance.

As the common council could not, by resolution, appoint the prosecutor either as a subordinate or public officer, the attempt to do so in the present case was futile and conferred upon the prosecutor no vested right to the position which he claims to hold as

a basis for the relief he seeks, and as the question does not involve the title of the prosecutor to the office of city engineer, but only the legal existence of such an office, his status to attack by certiorari the subsequent action of common council can be determined upon such writ; quo warranto being unnecessary and indeed unsuited for such a purpose.

The writ in each case should be dismissed, with costs.

MAYOR AND COMMON COUNCIL OF CITY OF NEWARK v. LEWIS et al.

(Supreme Court of New Jersey. Dec. 28, 1911.)

(Syllabus by the Court.)

TAXATION (§ 230*)—PROPERTY SUBJECT—SURPLUS FUND OF INSURANCE COMPANIES.

By the act of ascertaining and setting aside annually as a separate fund the amount of surplus to which deferred dividend policies as a class are entitled, and the appropriation by law of such fund to such use and no other, as provided by chapter 71 of the Laws of 1907 (P. L. p. 132), a fixed liability to that class of policies is created, which forms an essential part of the total policy values required to be computed by the commissioner of banking and insurance, and to the amount of which the company's assets are exempt from taxation together with the general liabilities on policies, pursuant to the taxing act of 1906 (P. L. p. 418).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 370; Dec. Dig. § 230.*]

Application by the State, on the relation of the Mayor and Common Council of the City of Newark, for writ of mandamus to Vivian M. Lewis, Commissioner of Banking and Insurance, and the Prudential Insurance Company of America. Rule to show cause why writ of mandamus should not issue discharged.

Argued November term, 1911, before GARRISON, PARKER, and BERGEN, JJ.

Herbert Boggs, for relator. Edmund Wilson, Atty. Gen., for Commissioner of Banking and Insurance. R. V. Lindabury, Carl Lentz, and Edward D. Duffield, for Prudential Insurance Company.

PARKER, J. This application brings up in concrete form the question whether the Prudential Insurance Company of America is taxable in the city of Newark upon such part of its assets as constitutes what is known as the "Fund apportioned to deferred dividend policies as a class pursuant to chapter 71 of the Laws of 1907" (P. L. p. 132). That question was dealt with in the recent case of Mayor, etc., of Newark v. State Board of Equalization, 80 N. J. Law, 258, 77 Atl. 795, affirmed by the Court of Errors and Appeals in 79 Atl. 343, but was not finally set at rest. In this court it was held that the act of 1907 made no change in the

liability or otherwise of this fund to taxation as compared with its status prior to 1907, and that it must be assumed that the commissioner had included it in his general computation of liabilities on policies. In the Court of Errors and Appeals it was held (ubi supra) that no new liability was created by the annual ascertainment and apportionment of this fund in the manner provided by the act of 1907, but that the act simply required that to be made definite which was theretofore uncertain; that the amount ascertained and apportioned to deferred dividend policies pursuant to the act of 1907 was a "liability on policies," but that, assuming that the commissioner in his computation of the total value of policies had failed to include the amount in question when he should have done so, his computation was conclusive on the taxing officers, and could be questioned only by direct attack in this court. This disposed of the tax for 1909, but left it open for the commissioner of banking and insurance to decide in the future whether to include the amount of the deferred dividend fund, in whole or part, in his annual valuation. This question was taken up by him in making his valuation for 1911. In his statement of that valuation the form and plan of computation of policy values are the same as in prior statements, and lead up to a total of \$174,421,973, which corresponds to the total valuation of \$132,138,211 returned in the report for 1909. mentioned in the former decision, the difference representing the growth of the company's business; but, instead of calling this "total net reserve value" as in the former report, he designates it thus:

Total net value (excluding amount apportioned to deferred dividend policies)	\$174,421,973 00
And adds this item:	
Amount apportioned to deferred dividend policies as a class pursuant to chapter 71, Laws of 1907, and held awaiting apportionment between policy holders	23,441,441 15
Grand total	\$197,863,414 15

Pursuant to the taxing act of 1906 (P. L. 1906, p. 418), quoted in the opinion of the Court of Errors and Appeals already cited, the company in making return to the taxing authorities returned this "grand total" as the liabilities on policies, and claimed exemption for all of it. The assessors conceded that the item of \$174,421,973 should be allowed, but declined to allow the amount apportioned to deferred dividend policies, and the city now applies for a mandamus (to quote the language of the rule) "commanding and enjoining the said Vivian M. Lewis, commissioner of banking and insurance, that he forthwith correct his valuation of the outstanding policies of the Prudential Insurance Company of America, as of December

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thirty-first, A. D. 1910, and his certificate thereof, by striking therefrom the item of \$23,441,441.15 and the statement 'Amount apportioned to deferred dividend policies as a class, pursuant to chapter 71, Laws of 1907, and held awaiting apportionment between policy holders,' and the words and figures 'Grand total \$197,863,414.15,' so that the same, when corrected, shall clearly show the total value of the outstanding policies of said Prudential Insurance Company of America on December 31, 1910, to be the sum of \$174,421,973.00." We are by no means clear that mandamus is the proper remedy in such a case as this, and do not wish to be understood as sanctioning a resort to it for the relief desired, which, it will be observed, is not to compel a public officer to do something that he is by law required to do and has failed or refused to do, but to compel him to do in a different way what he has already done. Certiorari would seem to be the proper remedy. But both parties have fully argued the merits and desire a decision thereon, and neither party wishes to raise a question of procedure; so we proceed to a consideration of the main question, which is now squarely presented, and is whether the amount apportioned to deferred dividend policies as a class, with the accretions thereof, is an element to be included in the liability on policies constituting part of the tax exemption allowed by the statute of 1906.

To clear the way for this question, a short résumé of the statutory method of taxation and exemption will not be out of place, though the ground has largely been gone over in the case of *Newark v. State Board of Equalization*, *ubi supra*. The requirements of the statute are these:

(1) Life insurance companies are to be assessed and taxed upon the full amount or value of their property, exclusive of real estate in this state, and of securities to the value of \$500,000, deducting from such amount or value the amount of their debts and liabilities. P. L. 1906, p. 418.

(2) To ascertain such debts and liabilities, a statement is to be made by the company to the taxing officer annually as of December 31st preceding the same. *Id.*

(3) In stating the liabilities on policies the basis of such statement shall be the value of such policies on December 31st, and not the gross amount insured thereby. *Id.*

(4) Such value shall be according to the computation of the same by the commissioner of banking and insurance by such standard of valuation as may be adopted and used by him at the time such computation shall be made according to law. *Id.*

(5) In computing the policy values, the commissioner follows the provisions of section 24 of the insurance act of 1902 (P. L. p. 407) as amended in 1907 (P. L. p. 144), but this act does not prescribe or contain any intimation whether or not the element of a specific reserve to meet deferred dividends

is to be taken into account in calculating policy values. For present purposes, therefore, section 24 in its present form seems to be unimportant. Viewing the taxation of a life insurance company in the chronological order of the steps required to be taken, we must reverse the above order (omitting for the present No. 5), and we have: 1. Computation of value of the policies by the commissioner. 2. This is the basis of the liabilities on policies reported by the company to the assessor; and the Court of Errors and Appeals has held that it is itself the item of "liabilities on policies." *Newark v. Board of Equalization*, *ubi supra*. 3, 4. The company makes statement accordingly, and is allowed deduction for such value of policies, and the other items mentioned, and is taxed on the balance of its total property remaining.

As a result of all this, the question at issue takes this modified form: Does the deferred dividend fund with its accretions properly constitute a part of the total value of the policies to be ascertained by the commissioner? If yea, it is by statute made part of the liabilities on policies, and becomes exempt. It is perhaps inaccurate to say that the fund itself is a liability. What we mean is that when the company in obedience to law ascertains the "amount of surplus to which all such (deferred dividend) policies as a class are entitled" and apportions such surplus to said class, and carries it with its earnings and accretions "as a distinct and separate liability" to that class, and is forbidden to use it for any other purpose, the obligation exists to pay that amount to that class at some time or other, as the units forming the class become entitled to their respective shares therein, and it is, of course, this obligation that constitutes the liability, and not the fund accumulated to meet it. But by statute and by the segregation of the assets the liability becomes precisely equal to the fund reserved to meet it, and in this respect differs from the general assets of the company, which are normally somewhat in excess of the estimated policy liability at large, and not its precise equivalent.

Now it seems to us perfectly clear that, when the deferred dividend policies as a class are entitled in any event except that of a universal catastrophe to have divided among those meeting the necessary requirements this great sum of money, their total value as straight policies or policies without this feature is increased by precisely that amount. It is also clear, for the commissioner has by his report of values expressly so declared, that the "total net value" of \$175,057,505 does not include the additional value conferred by the deferred dividend feature. We do not see how he could have made it plainer. This being so, the proposition seems indisputable, that if the Prudential Insurance Company on January 1, 1911, had desired to go out of business and reissue its

risks, and had applied to another company to take them over, laying before it a statement similar to that of the commissioner of banking and insurance now objected to, such other company would never consent to assume all the obligations on the policies unless assets sufficient to meet the deferred dividend item were included. And it should be remembered that the use of the commissioner's return of policy values for purposes of making up an assessment for taxation is merely an incidental use of a statement required for a far more important purpose, to wit, the safety of the policy holders. It is not the tax act, but the insurance act, which requires this ascertainment of values, as part of the state supervision of insurance companies. Under section 24 of the insurance act as originally enacted in 1872 (P. L. pp. 8 and 30) and re-enacted in 1902 (P. L. 1902, p. 418), the commissioner is to "cause to be computed the value of such" policies and bonds, or what is known as the reinsurance "fund therefor" (according to certain standards) "as he may deem best for the security of the business and the safety of the persons insured." These words are missing from the amended section of 1907, but the general purpose is manifest, and has always been so understood. And from this follows the somewhat startling proposition that this present application, made to settle the question of tax exemption, would, if granted, result in requiring the commissioner of banking and insurance in performing his duty of ascertaining the existence or nonexistence of an adequate reinsurance fund and surplus, and in connection therewith the solvency or insolvency of the company as tested by a comparison of its assets with the net value of its outstanding policies and other liabilities, to omit from his valuation an item of \$23,000,000 and over, certainly payable at some time, to policy holders now unascertained, but ultimately ascertainable.

It should be unnecessary to say more. Our conclusion is that the \$23,000,000 item is properly returned by the commissioner as forming part of the total policy values, that the ultimate obligation to pay that amount is a liability on policies; and the company is lawfully entitled to have it deducted as part of the liabilities on policies from the taxable valuation for 1911.

The rule to show cause will be discharged.

ADAMS et al. v. PAGE et al.

(Supreme Court of New Hampshire. Merrimack. Dec. 5, 1911.)

WILLS (§ 405*)—PETITION FOR INSTRUCTIONS—FEES AND COSTS—RIGHT TO.

Heirs, who unsuccessfully attempted to defeat a testamentary trust and to have the fund turned to themselves, were not entitled

to reimbursement out of the trust fund for their fees and costs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 879-884; Dec. Dig. § 405.*]

Exceptions from Superior Court, Merrimack County; Wallace, Judge.

Bill by Charles W. Adams and another, trustees, against Mary E. Page and another. From an order refusing an allowance of fees and costs, defendants bring exceptions. Exceptions overruled.

See, also, 76 N. H. 96, 79 Atl. 837.

Leach, Stevens & Couch, for plaintiffs. Niles & Upton, for defendants.

BINGHAM, J. In 1899 Sally H. Proctor died, leaving a will in which she bequeathed and devised the residue of her estate, real and personal, to trustees "for the establishment and maintenance of a hospital in Franklin, to be known as the Proctor Hospital." Her executor administered upon the estate, and in January, 1901, turned over the residue to the trustees. In 1910 a hospital association was formed in Franklin, and a hospital was established, known as the Franklin Hospital Association. Shortly after the establishment of this association, the trustees of the Proctor fund petitioned the court for advice as to the residuary clause in the will, and in particular requested information as to whether the trust fund could be transferred to the Franklin Hospital Association, providing the income was used for some purpose connected with the hospital with which the name of Proctor could be associated. The heirs of the testatrix appeared in this proceeding, filed a demurrer and answer, and made the contention that the petitioners were not entitled to the relief prayed for, because the trust was void as impossible of performance, and because the testatrix had manifested no general intention or purpose to be carried out; that she therefore died intestate as to the residue, and the fund passed to them as her heirs. It was ruled and found in the superior court that the general and controlling purpose of the testatrix, as manifested in the residuary clause of the will, was to provide hospital accommodations for people living in Franklin and vicinity; that, although the precise manner provided for carrying out her purpose was impracticable, her general intention could be effected by turning over the fund to the Hospital Association to hold in trust, the income to be used to maintain a ward in the hospital to be known as the "Proctor ward"; and it was so decreed. To this decree the heirs excepted, and the case was transferred to this court, where they again made the same contention and with the same result; the decree of the superior court being affirmed. *Adams v. Page*, 76 N. H. 96, 79 Atl. 837. This decision being certified to the superior court, the heirs, at the April term, 1911, mov-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed that they be allowed their counsel fees and costs out of the trust fund. The superior court ruled as a matter of law that they were not entitled to them, and on that ground denied their motion, and they excepted.

From the foregoing recital it appears that the course taken by the heirs was not for the protection of the trust fund and as an aid to the trustees in carrying out the purpose of the testatrix, but was an unsuccessful attempt on their part to have the bequest to the trustees declared void, the fund turned over to themselves as heirs at law, and to defeat the testator's general purpose to provide hospital accommodations for the people of Franklin and vicinity. Under such circumstances the defeated party is not entitled as matter of law to recover costs of his adversary, or to be reimbursed for costs and expenses out of the trust fund. Indeed, the case presents no legal or equitable ground in support of their contention. *Kimball v. Bible Society*, 65 N. H. 139, 158-163, 23 Atl. 83-85; *Bean v. Bean*, 74 N. H. 404, 68 Atl. 409, 124 Am. St. Rep. 978.

Exception overruled.

PARSONS, C. J., did not sit. The others concurred.

ROGERS et al. v. CLOUGH et al.

(Supreme Court of New Hampshire. Merri-mack. Dec. 5, 1911.)

1. INJUNCTION (§ 261*)—WRONGFUL INJUNCTION—DEFENSES—RIGHT IN ANOTHER.

Defendants, in an action for damages for wrongfully enjoining plaintiffs from cutting timber, must defend in their own right, and cannot defend on the ground that there are persons who might have legally enjoined the cutting of timber.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 609; Dec. Dig. § 261.*]

2. INJUNCTION (§ 260*)—WRONGFUL INJUNCTION—ACTION FOR DAMAGES—AMOUNT.

An injunction was issued against the cutting of timber upon the plaintiffs filing a bond in the sum of \$500, conditioned to save the defendants harmless from all loss, cost, damage, or expense to which they might be subjected by reason of the injunction suit and a suit for the reformation of a deed. Defendants' loss on the timber on account of the injunction was \$400, their reasonable expenses on account of the injunction petition were \$15, and their expenses on account of the proceeding for reformation were \$191. *Held*, on motion by the defendants for the assessment of damages caused by the wrongful injunction and the suit for reformation, that the bond limited both the amount defendants could recover and the items of expense chargeable to the plaintiffs, that the costs of suit were not limited to \$15, and that defendants' damages were limited to \$500.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 608; Dec. Dig. § 260.*]

Exceptions from Superior Court, Merri-mack County; Wallace, Judge.

Action by Harlow T. Rogers and others against Edwin D. Clough and others for reformation of a deed and for an injunction. Injunction was issued on filing of bond by plaintiffs, and the bill for reformation was subsequently dismissed and the injunction dissolved. On motion by defendants for the assessment of damages caused by the wrongful issuance of the injunction against them and the prosecution of the proceeding for reformation of the deed. Judgment for defendants, and plaintiffs except. Exceptions overruled, and case discharged.

In the fall of 1906 the defendants purchased woodland in Loudon, and on February 6, 1907, began cutting the timber thereon. February 7th the plaintiffs filed a bill in equity praying that a deed of real estate in which they were named as grantees be reformed so as to include the tract purchased by the defendants, and also a bill praying that the defendants be enjoined from cutting timber on the land in dispute. After a hearing, an injunction was issued upon the plaintiffs filing a bond in the sum of \$500, conditioned to save the defendants harmless from all loss, cost, damage, or expense to which they might be subjected by reason of the two suits. In January, 1908, the bill for reformation was dismissed and the injunction was dissolved. At a hearing upon the motion for an assessment of damages, the plaintiffs offered to prove that the defendants were not the legal owners of the land at any time while the injunction was in force. The evidence was excluded, and the plaintiffs excepted. The court found that the defendants' loss on the timber was \$400.79, their reasonable expenses on account of the injunction petition were \$15, and their expenses on account of the proceeding for reformation were \$191.85. The plaintiffs' motion to limit the defendants' expenses to \$15 and the defendants' motion to assess their damages at \$607.64 were both denied, subject to exceptions. The court assessed the defendants' damages at \$500.

Elwin L. Page and Streeter, Demond & Woodworth, for plaintiffs. Martin & Howe and Remick & Hollis, for defendants.

YOUNG, J. [1] The plaintiffs concede that as to them the defendants' title is good, but contend that they should not be compelled to pay the loss caused by their unlawfully preventing the defendants from removing the timber, because, as they say, there are persons who might legally have done what they did. They neither defend through these persons nor contend that these persons have any claim against them because of the injunction. If there is a rule which permits a person to do, without incurring liability, whatever any one may legally do (*Jenkins v. Parkill*, 25 Ind. 473), it does not

obtain in this jurisdiction (*Beach v. Morgan*, 67 N. H. 529, 531, 41 Atl. 349, 68 Am. St. Rep. 692). In this state a person must defend in his own right. *Roberts v. Rowe*, 75 N. H. 36, 70 Atl. 1074. He cannot defend in the right of others unless he claims through them (*Fowler v. Owen*, 68 N. H. 270, 272, 39 Atl. 329, 73 Am. St. Rep. 588); and this seems to be the general rule, in so far, at least, as actions of this kind are concerned (*Slack v. Stevens*, 19 Colo. App. 538, 76 Pac. 741; 22 Cyc. 1042). The question whether the plaintiffs might have shown that others were making such persistent claims to the land that it is improbable the defendants would have cut the timber, even if they had not been enjoined, is not raised and has not been considered.

[2] The injunction was granted on condition that the plaintiffs give "a bond with sufficient sureties in the sum of \$500, to answer to said defendants for any loss, cost, damage, or expense to which they may become subject on account of said suit or this injunction." If it were not for this order, the defendants' recovery would be limited to their taxable costs. On the other hand, procuring the injunction bound the plaintiffs to comply with the conditions on which it was issued. Consequently the order limits both the amount the defendants can recover and the items of expense which are chargeable to the plaintiffs. In other words, the amount the defendants can recover in excess of their taxable costs and the items which compose it both depend on the terms of the order. If the language the court used is given its ordinary meaning, or for that matter any meaning of which it is fairly capable, the defendants must have understood that they could not recover more than \$500 in case the plaintiffs failed; for the decree provides that the plaintiffs are to answer to them in that sum—not to pay the defendants whatever "loss, cost, damage, or expense" they may sustain. The decree provides in terms that the plaintiffs are to answer for any expense to which the defendants may become subject on account of said suit. Therefore the court did not err when it refused to limit the costs of suit to \$15, nor when it limited the defendants' damages to \$500.

Exceptions overruled; case discharged. All concurred.

WILCOMB v. MOORE et al.

(Supreme Court of New Hampshire. Rockingham. Dec. 5, 1911.)

WILLS (§ 733*)—CONSTRUCTION—TIME FOR PAYMENTS.

A will giving testator's brother an annuity for life, to be paid by a trustee of testator's "property," directing that "said money" be deposited in a bank and paid to the brother as ordered, the balance to remain in the bank un-

til 1920, giving certain persons \$300 each, and directing that the remainder of the "property" be equally divided among nephews and nieces "then" living, postpones payment of the legacies and distribution of the remainder until 1920.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819–1846; Dec. Dig. § 733.*]

Transferred from Superior Court, Rockingham County; Pike, Judge.

Bill by Arthur H. Wilcomb, executor, against George Moore and others, to construe Melvin B. Moore's will. Transferred from superior court. Case discharged.

The will of Melvin B. Moore provides as follows: "I give and bequeath to my brother, Franklin Moore, one hundred and fifty (\$150) dollars yearly his natural life, the same to be paid him by a trustee of my property. Said money shall be deposited in a savings bank and be paid to Frank Moore as herein ordered, the balance of said money to remain in bank until the year of our Lord, 1920. I give to the children of Frank Moore and Abbie Moore, being as follows: George Moore, Ethel M. Moore, and Lucy B. Moore three hundred dollars each (\$300), the remainder of my property to be equally divided among my nephews and nieces then living."

The estate consists of real and personal property of the value of about \$4,600. Frank Moore is dead. The executor seeks advice as to whether he should pay the pecuniary legacies immediately or wait until 1920, and also whether the distribution of the remainder is postponed to that time. All the parties desiring the opinion of the Supreme Court upon these questions, they were transferred without a ruling.

G. K. & B. T. Bartlett and Herbert L. Grinnell, Jr., for plaintiff. Thomas Leavitt, for children of Frank Moore.

PEASLEE, J. The question in this case relates solely to the time of distribution fixed by the testator. The legatees who are to receive \$300 each, while conceding that the residue of the estate must be held until 1920, claim that their legacies are now due and payable. Whether they are now payable or not is merely a question of the intention of the testator. The will is expressed in a rather confused way, and the intent is not easily ascertained. Following the testator's mental process as nearly as one can, it appears that he first appoints a trustee for "my property." Manifestly, this is a trustee for the whole estate. He next directs that "said money" shall be deposited in a savings bank, be paid to the annuitant as directed, and the balance kept in bank until 1920. "Said money," as here used, appears to mean "my property," just before referred to. There is no other antecedent upon which it can depend. The scheme, then, was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to keep all the money in the bank until 1920, except the annuity. No exception is made as to the legacies. This view is strengthened by the fact that the legacies are given in the same clause with the residue. There seems to be no ground for holding that the distribution period is not the same for all beneficiaries. They cannot have the money until 1920, because the testator directed his trustee to keep it in bank until that time. And the provision that distribution of the residue shall be made to nephews and nieces "then living" strengthens this view. Looking back through the will for the time here referred to, nothing is found but the year 1920. This construction gives a rational meaning to all the language used by the testator, and seems more likely than any other to be the one he intended. The executor is advised that payment of the legacies and distribution of the remainder are postponed until 1920.

Case discharged. All concurred.

MAYNARD v. UNITED STATES HEALTH & ACCIDENT CO.

(Supreme Court of New Hampshire. Hillsborough. Dec. 5, 1911.)

1. INSURANCE (§ 622*)—VALIDITY—TIME FOR BRINGING ACTION.

A provision in a policy of accident insurance limiting the time within which suit must be brought is legal and binding.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544-1556; Dec. Dig. § 622.*]

2. INSURANCE (§ 623*)—TIME FOR BRINGING ACTION—WAIVER OF LIMITATIONS.

An accident insurance policy provided that proof of injuries must be furnished the insurer within 30 days from the termination of disability, and that no action upon the policy should be maintained after six months from the date when proof of injury must be filed. Proof of injury was filed and accepted after it was due, and the insurer admitted a partial liability and continued a correspondence with the insured in an attempt to settle the claim; but no suit was brought within the time limited by the policy, and it was not shown that the insurer was induced by correspondence to believe that the insurer would not insist on the limitation for bringing action. *Held*, that there had been no waiver as to time for bringing the action and that the insured could not recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1551-1553; Dec. Dig. § 623.*]

Exceptions from Superior Court, Hillsborough County; Plummer, Judge.

Action by Herman Maynard against the United States Health & Accident Company. Plaintiff nonsuited, and he excepts. Exceptions overruled.

The policy provided that affirmative proof of any injury must be furnished to the defendant within 30 days from the termination of disability, and that no action at law upon the policy should be maintained after six months from the date when proof of the in-

jury must be filed. The plaintiff was injured December 19, 1906, and his disability therefrom terminated May 15, 1907. He filed his proof of claim July 5, 1907, and brought a suit August 25, 1908. The defendant pleaded that the action could not be maintained because it was brought more than six months from the date of the affirmative proof. The plaintiff replied that the defendant had waived its right to interpose that defense. The plaintiff's evidence upon this issue consisted of certain letters which passed between the parties or their counsel. June 18, 1907, the defendant sent to the plaintiff a set of final proof blanks for him to fill out and return. July 10th the defendant forwarded to the plaintiff a draft for an amount much less than he claimed he was entitled to. This was promptly returned. There was some further correspondence in relation to the amount the plaintiff was entitled to, which terminated August 3, 1907, by a letter from the plaintiff's counsel in which he stated that "some time between now and 1st of September I will bring suit."

James A. Broderick, for plaintiff. John O'Neill, for defendant.

WALKER, J. [1] The provision in the policy limiting the time within which suit must be brought was legal and binding (*Davis v. Insurance Co.*, 73 N. H. 425, 62 Atl. 728; *Johnson v. Casualty Co.*, 73 N. H. 259, 60 Atl. 1009, 111 Am. St. Rep. 609), and the case discloses no evidence that the defendant waived this provision, or that it is estopped to insist upon it.

[2] According to the contract, the plaintiff could maintain no action upon the policy after six months had elapsed from the date when affirmative proof of his disability should be filed. Proof of his disability was due June 15, 1907, but it was not filed with the defendant until July 5th. It is unnecessary to consider whether the defendant had waived the time limit as to the filing of the proof of disability, for there is nothing to show that it waived the provision that suit should be brought within six months after the filing of proof of disability. The policy provided a definite time when the proof should be filed; and the fact that it was not filed at that time had no necessary effect upon the limitation of time for the bringing of a suit. *Davis v. Insurance Co.*, supra.

Although the defendant accepted the plaintiff's proof of disability after the time limited in the policy and may have waived its right to claim that it was not seasonably filed, that fact is not evidence that it also waived the provision as to bringing suit within six months from the filing of the proof. The proof was presented to the defendant July 5, 1907. According to the terms of the policy, it should have been presented June 15th. If the defendant so far modified the

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contract as to be bound by the receipt of the proof July 5th, it is difficult to see why in consequence of that transaction it abrogated the provision that suit must be brought within six months from that date. If the defendant, denying all liability, had waived the filing of proof and none had been filed, a different question would have arisen. See *Norwich, etc., Co. v. Insurance Co.*, 6 Blatchf. 241, Fed. Cas. No. 10,363; *Phillips v. Society*, 120 Mich. 142, 79 N. W. 1. The correspondence between the parties or their counsel, which is relied upon to prove a waiver, was merely an attempt to adjust the matter without litigation and was brought to a close on August 3, 1907, when the plaintiff's counsel stated that he would bring suit before September 1st; and, if he had done so, the action would have been within the prescribed limit. The correspondence did not amount to a waiver. 19 Cyc. 908.

The fact that the defendant admitted in the correspondence its liability for a part of the amount claimed by the plaintiff is no evidence that it intended to waive the limitation of time contained in the policy within which a suit must be brought. If it had in the first instance admitted its liability for the full amount claimed by the plaintiff, it would be illogical to say that it thereby waived this clause of the policy and in effect agreed to respond to a suit brought long after the time specified in the policy. The fact of a waiver, like other facts, must be found from some evidence. Nor does it appear that the plaintiff was induced by the correspondence to believe that the defendant would not insist upon this clause of the policy. Apparently he understood the contract, but for some reason not disclosed did not bring his suit until after the limited time had expired. This delay was not chargeable to or caused by the defendant, as in *Dolsen v. Insurance Co.*, 151 Mich. 228, 115 N. W. 50, cited by the plaintiff. The court properly ordered a nonsuit.

Exception overruled. All concurred.

HORNER et al. v. REYNOLDS et al.

(Supreme Court of New Hampshire. Carroll. Dec. 5, 1911.)

1. HOMESTEAD (§ 138*)—RIGHTS OF SURVIVING HUSBAND—WAIVER.

The right of waiver or release given by Pub. St. 1901, c. 195, § 13, providing that the surviving husband, by waiving the provisions of his wife's will in his favor, if any, and by releasing his estate by the curtesy and his homestead right, shall be entitled to one-half of her property in fee, after the payment of debts, is personal, and does not pass to the husband's representatives, and, to be effectual, the waiver or release must be filed in the probate office within the specified time after the wife's death, and it cannot be filed afterwards except on permission of the judge of

probate for good cause, and the waiver must be recorded as required by section 14.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 138.*]

2. HOMESTEAD (§ 144*)—RIGHTS OF SURVIVING HUSBAND—WAIVER.

Where the husband of an intestate did not release his right of homestead in her real estate, the husband, under Pub. St. 1901, c. 195, § 13, took his homestead right, which, under chapter 138, § 2, expired at his death.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 281; Dec. Dig. § 144.*]

3. HOMESTEAD (§ 138*)—RIGHTS OF SURVIVING HUSBAND—WAIVER.

The amendment, by Laws 1901, c. 113, § 4, which re-enacts Pub. St. 1901, c. 195, § 13, declaring that the surviving husband by releasing his estate by the curtesy and his homestead right shall be entitled to hold one-half of his wife's property in fee, after the payment of debts, and which by amendment adds the proviso that, if the part remaining after the payment of debts does not exceed \$1,500, he shall be entitled to the whole, but if the remaining part exceeds \$1,500, but does not exceed \$3,000, he shall be entitled to \$1,500, does not come into effect except under circumstances under which the husband is entitled to one-half of the estate in fee, dependent on an express waiver filed in the probate court, and the absence of such waiver cannot be supplied by evidence showing the husband's intention to file such waiver or its advantage to him.

[Ed. Note.—For other cases, see *Homestead*, Dec. Dig. § 138.*]

4. HUSBAND AND WIFE (§ 273*)—CONVEYANCES—VALIDITY.

Where a husband and wife owned land in common in equal shares, the surviving husband's deed of a part thereof is, under Pub. St. 1901, c. 137, § 18, good as against his heirs to the extent of his interest, and is valid against his tenants in common on partition, so far as the land conveyed or some part of it is not equitably required to give them their just share.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1008-1024; Dec. Dig. § 273.*]

Transferred from Superior Court, Carroll County; Wallace, Judge.

Petition by Elizabeth A. Horner and others against Lizzie H. Reynolds and others for partition. Facts found, and cause transferred from the Superior Court. Case discharged.

The plaintiffs are the heirs of Ellen J. Canney; the defendants are the heirs of her husband, Wesley. Ellen and Wesley owned in common in equal shares the land of which partition is asked; the value of the whole being less than \$1,500. Ellen died February 26, 1909, intestate. Wesley died June 19, 1909. Neither ever had issue. There was no administration on Ellen's estate. She left no debts, unless her funeral expenses, which were paid by Wesley, were claims against her estate. Wesley had a homestead in his wife's real estate, which he did not release. After his wife's death he was in possession of and claimed to own the whole tract in fee, and conveyed a portion thereof to Josephine

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A. Shute, one of the defendants, by warranty deed dated May 3, 1909.

Sewall W. Abbott (Oscar L. Young, on the brief), for plaintiffs. Leslie P. Snow, for defendants.

PARSONS, C. J. "The husband of a person deceased, testate or intestate, by waiving the provisions of her will in his favor, if any, and by releasing his estate by the curtesy and his homestead right, if any, shall be entitled instead thereof to the following portion of all the real estate of which she died seised, after the payment of debts and expenses of administration: * * * (3) One-half thereof, to hold in fee, if she leaves no issue whatever surviving her." P. S. 1901, c. 195, § 13.

[1] The right of waiver or release given by this statute is personal and does not pass to the representatives of the party entitled. *Penhallow v. Kimball*, 61 N. H. 596. To be effectual, the waiver or release must be in writing and filed in the probate office within one year after the death of the testatrix or intestate, and cannot be filed afterward except upon permission of the judge of probate for good cause shown. The waiver is also to be recorded in the registry of deeds. P. S. 1901, c. 195, § 14.

[2] No release of the right of homestead which the case finds he had in his wife's real estate was recorded, filed, or made by Wesley Canney, and it appears to be conceded that under the foregoing statute he took his homestead right (*Nute v. York*, 66 N. H. 541, 23 Atl. 429), which expired at his decease. P. S. 1901, c. 138, § 2.

[3] In 1901, section 13, chapter 195, Public Statutes, was amended by adding to the clause numbered 3 the following: "Provided, however, that if such remaining portion does not exceed in value the sum of fifteen hundred dollars, then he shall be entitled to the whole thereof; but if such remaining portion shall exceed in value the sum of fifteen hundred dollars, but does not exceed the sum of three thousand dollars, he shall be entitled to the sum of fifteen hundred dollars of the value thereof, and the same shall be assigned to him by the probate court in the same manner as dower is now assigned to a widow." Laws 1901, c. 113, § 4. The first clause, declaring the conditions upon which the husband should be entitled to one-half of the wife's real estate in fee, was at the same time re-enacted.

It is obvious that the amendment does not come into effect except upon the existence of circumstances under which the husband is entitled to one-half the estate in fee. When that appears, the value of the estate may be so inconsiderable as to give him more than the fractional share to which he would

otherwise be entitled. The right to the whole estate in fee is not necessarily superior to the homestead right, because the portion given in fee is only that remaining after the payment of debts and expenses of administration, while the right of homestead would take precedence of the claims of creditors. Until he died not having released it, the husband had a right enforceable against creditors if any should appear. The statute having made his right in fee dependent upon an express waiver filed in the probate court, which should subject the estate to such claims, the absence of such waiver cannot be supplied by evidence tending to show his intention to file such waiver or its advantage to him.

[4] Wesley Canney owned undivided one-half the estate. His deed in fee of a portion to Josephine Shute is good against his other heirs to the extent of his interest. P. S. 1901, c. 137, § 18. His deed is also valid against his tenants in common upon partition, so far as the land conveyed or some portion of it is not equitably required to give them their just share in the whole. *Holbrook v. Bowman*, 62 N. H. 313, 321; *Pickering v. Moore*, 67 N. H. 533, 536, 32 Atl. 828, 31 L. R. A. 698, 68 Am. St. Rep. 695; *Clark v. Parsons*, 69 N. H. 147, 157, 39 Atl. 898, 76 Am. St. Rep. 157.

Case discharged. All concurred.

AMAZEEN et al. v. TOWN OF NEWCASTLE et al.

(Supreme Court of New Hampshire. Rockingham. Dec. 5, 1911.)

1. ESTOPPEL (§ 27*)—SETTING ASIDE BY HEIRS OF GRANTOR—GROUNDS—WANT OF CONSIDERATION.

The heirs of a deceased grantor in a deed reciting a consideration may not impeach the consideration to defeat the conveyance.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 63-67; Dec. Dig. § 27.*]

2. ESTOPPEL (§ 62*)—SETTING ASIDE BY HEIRS OF GRANTOR—GROUNDS—WANT OF CONSIDERATION.

A deed to a town reserved to the grantor the use of the premises for life, and declared that it was given on the condition that the town would pay to the grantor a specified sum per week for life. The deed was delivered to and accepted by the selectmen as officers of the town, and it entered on the execution of the contract of support, took possession of the buildings to repair them, and repaired them and fully performed the consideration by supporting the grantor for life. Held, that the heirs of the grantor were not entitled to a decree setting aside the deed on the ground that it was without consideration and was never delivered as a matter of law, though there was no vote of the town ratifying the action of the officers until after the grantor's death, since the facts justify a finding that the town,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

before the grantor's death, was estopped to deny the acceptance of the deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151-153; Dec. Dig. § 62.* Municipal Corporations, Cent. Dig. §§ 379, 525-529.]

3. ESTOPPEL (§ 62*)—ESTOPPEL.

A town may be estopped by conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151-153; Dec. Dig. § 62.*]

4. PAUPERS (§ 44*)—TRANSACTIONS—VALIDITY.

An aged woman, living alone, conveyed her premises to the selectmen of the town in consideration of the town agreeing to support her for life. There was a possibility that her property might be insufficient to support her through life. The deed was delivered to and accepted by the selectmen as officers of the town, and the town supported her for life. *Held*, that in view of Pub. St. 1901, c. 83, § 1, and chapter 84, § 1, relating to the support of paupers, and Laws 1903, c. 42, authorizing the recovery by a town for aid furnished an alleged pauper, the transaction could be sustained as within the jurisdiction of the selectmen as overseers of the poor with power to accept the conveyance for the town.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 195-197; Dec. Dig. § 44.*]

5. TOWNS (§ 39*)—DEEDS—RATIFICATION.

A grantor conveyed property to selectmen of the town on condition that the town would support her for life. The deed was delivered as a present deed of the grantor, and the town supported the grantor for life. After her death the town voted to ratify the transaction. *Held*, that the ratification was equivalent to an original authority to the selectmen to accept the deed in consideration of the agreement to support the grantor, and the heirs of the grantor could not set aside the deed.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 73, 74; Dec. Dig. § 39.*]

Exceptions from Superior Court, Rockingham County; Chamberlin, Judge.

Bill in equity by Mary O. Amazeen and others, heirs of Mary Elizabeth Martin, deceased, against the Town of Newcastle and others, to set aside a deed of real estate from the deceased to the town, or to declare the deed a mortgage, and for an accounting. The trial court on facts found dismissed the bill, and plaintiffs bring exceptions. Overruled.

Mary Elizabeth Martin lived in the town of Newcastle all her life and died January 4, 1908, in her 85th year. June 11, 1907, for the expressed consideration of "one dollar and other valuable considerations," she executed and delivered to Robert H. Harding, first selectman of the town, the deed in question. The deed contained the following: "The said grantor reserves the right to use the aforesaid premises as her home for and during the term of her natural life.

* * * This deed is given upon the express condition that the said town of Newcastle will pay over to the said grantor a sum not exceeding two dollars per week to be expended for necessaries and to provide suitable medical attendance, clothing, and fuel

for and during the term of her natural life, in such manner as in her mode of life she has heretofore been accustomed." Mrs. Martin had lived on the premises for many years. After the death of her husband, her son, and a relative who had lived with her, she lived alone for five or six years before her death. She was lame, but in fairly good health. Aside from this real estate and household furniture, she had no property except a deposit of \$120 in a savings bank, which she reserved for the expenses of her last sickness and burial. The conveyance of the premises and furniture to the town in consideration of her support was proposed by her. Harding accepted the deed for and in behalf of the town, but without express authority from the town or his associates, and it was deposited with the town papers and duly recorded. The other selectmen, being informed of Harding's action, approved and consented. After receiving the deed, the town immediately assumed the support of Mrs. Martin, paid \$2 a week as long as she lived, and cared for her as was necessary. At the time of the conveyance the buildings were out of repair. The town expended \$263.07 in repairs and \$122.78 for support of Mrs. Martin. The annual report of the selectmen for the year ending February 15, 1908, showing various disbursements for Mrs. Martin made in consideration of the deed, was accepted by vote of the town at the annual meeting in March, 1908. At the same meeting, under an appropriate article in the warrant, the town voted to authorize the selectmen to sell the Mary E. Martin house "now owned by the town" for not less than \$1,000, and they subsequently sold it for \$1,010. The allegations of want of capacity in Mrs. Martin to make the deed, of fraud in procuring it, and of mistake in its form, were found not to be sustained.

Page, Bartlett & Mitchell and Ernest L. Guptill, for plaintiffs. Kelley, Harding & Hatch, for defendants.

PARSONS, C. J. The allegations of want of capacity in Mrs. Martin to make the conveyance, of fraud in procuring its execution, and of mistake in its form having been found against the plaintiffs, the only grounds upon which they now attack the validity of the deed are that the selectmen were not authorized by vote of the town to make the contract for support found to be its consideration, or to accept the conveyance. This means that the deed was without consideration and was never delivered as matter of law.

[1] The first objection is not open to the plaintiffs claiming as heirs of the grantor. "A deed duly executed is conclusive evidence of the consideration against the maker; not indeed as to the amount, but as to the fact of the consideration paid. So that, as be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween the parties and those claiming under them, the consideration cannot be impeached for the purpose of defeating the conveyance." *Prescott v. Hayes*, 43 N. H. 593, 596, 597; *Farrington v. Barr*, 36 N. H. 88; *Graves v. Graves*, 29 N. H. 129, 144; *Runnells v. Bosquet*, 60 N. H. 38, 39.

[2] Moreover, the contract for support found to have been the consideration of the conveyance has been fully performed by the grantee, the town. Mrs. Martin could have made the conveyance without any consideration, and the gift would have been valid as against these plaintiffs. As she made the conveyance for a consideration which she deemed adequate and which was paid her in full, it is immaterial if such consideration has proved to be less onerous to the grantee than it might perhaps have been anticipated it would be. The deed was delivered to and accepted by the selectmen as officers of the town, placed among the town papers, and has ever since remained in the possession of the town. The town entered upon the execution of the contract of support, took possession of the buildings for the purpose of repairing them, and did repair them.

[3] Although there was no vote of the town ratifying the action of its officers until after the death of Mrs. Martin, it could be found that the town before her death was estopped to deny their acceptance of the deed; for corporations, like natural persons, may be estopped by conduct. *Gilbert v. Manchester*, 55 N. H. 298, 302, 303.

[4] Whether the selectmen had authority to bind the town by the agreement to support, they had power to accept the conveyance to the town if of benefit to the town. *O'Donnell v. Smith*, 142 Mass. 505, 510, 8 N. E. 350. The occasion of the transaction was the possibility that Mrs. Martin's small property might not be sufficient to support her through life. If it did not because of insufficiency or waste, the selectmen would have been obliged to support her at the expense of the town. *P. S. 1901, c. 83, § 1; Id., c. 84, § 1*. If at her decease any property remained, the town could have recovered its expenditure therefrom. *Laws 1903, c. 42*. The selectmen, as the prudential officers of the town, would have been authorized to receive payment. They were equally authorized to take payment in advance when offered. Mrs. Martin's application to the town to take her property and furnish her with support was practically an application for aid as a poor person, in making which it was her duty to surrender what property she had to the selectmen. *Moultonborough v. Tuftonborough*, 43 N. H. 316, 319. In this view, the whole matter was within the jurisdiction of the selectmen as overseers of the poor.

[5] But the case need not stand on either of the foregoing propositions, because the town by vote before the commencement of

these proceedings recognized and approved the action of its officers. Subsequent ratification is equivalent to an original authority. *Manchester Street Ry. v. Williams*, 71 N. H. 312, 320, 52 Atl. 461; *Davis v. School District*, 44 N. H. 398, 407. It is true that the votes of the town from which ratification could be found were not passed until after the death of Mrs. Martin. But this is not the case of a deed executed and given into the keeping of a third party for delivery to the grantee at some future time, with a right of recall by the grantor. In such case it has been held that, if the grantor continues until his death to have the right to recall the deed from the depository, there is no delivery. *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Cook v. Brown*, 34 N. H. 460. But the delivery was absolute to the selectmen as agents of the town; and, as it could be found the deed was beneficial to the town, the assent of the town is presumed. *Johnson v. Farley*, 45 N. H. 505; *Frazier v. Perkins*, 62 N. H. 69. The deed was delivered as the present deed of the grantor. *Stockwell v. Williams*, 68 N. H. 75, 41 Atl. 973. No further or other delivery of the deed was intended or could be made. The grantor accepted payment of the consideration from the grantee and permitted expenditure in repair of the premises by the grantee upon the faith of the deed. She was estopped to deny the validity of the delivery or the authority of the town officers to accept the deed and make payment. The grantor had no right to recall the deed, and there was a good delivery. *Baker v. Haskell*, 47 N. H. 479, 480, 93 Am. Dec. 455.

Exception overruled. All concurred.

GLOVER v. BAKER et al.

(Supreme Court of New Hampshire. Merri-mack. Dec. 5, 1911.)

1. APPEAL AND ERROR (§ 308*)—TRANSFER OF QUESTIONS OF LAW—POWER OF LOWER COURT.

The power granted by Pub. St. 1901, c. 204, §§ 11-13, providing for filing exceptions for determination as on writ of error, to transfer to the Supreme Court questions of law without a ruling against the objection of either party, is not interfered with by Laws 1901, c. 78, declaring that questions of law arising at the trial of any case in the superior court may be transferred to the Supreme Court on a case or statement of facts, and the superior court may transfer questions of law arising on a demurrer to a bill in equity, when it believes that the questions of law should be determined before a trial of the facts, and the Supreme Court will consider whether the law should be so determined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1768-1770; Dec. Dig. § 308.*]

2. APPEAL AND ERROR (§ 1195*)—TRANSFER—LAW OF THE CASE.

A decision of the Supreme Court on questions of law transferred to it by the supe-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rior court without a ruling before a trial of the facts is the law of the case, and will not be re-examined in the same case except on motion for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Transferred from Superior Court, Merri-mack County; Wallace, Judge.

Bill in equity by George W. Glover against Henry M. Baker, executor, and another, to which defendants demurred. Questions of law arising on the demurrer were transferred without a ruling from the superior court, and the cause was entered in the Supreme Court and plaintiff then filed the following motion: "The plaintiff moves that the above-entitled action be remanded to the superior court." Denied.

Hannis Taylor (William L. Chambers, William E. Chandler, John W. Kelley, and Dewitt C. Howe, on the brief), for plaintiff. Streeter, Demond & Woodworth (Elder, Whitman & Barnum, William A. Morse, and Leon M. Abbott, on the brief), for defendants.

PARSONS, C. J. [1] The questions of law arising upon the defendants' demurrer are transferred to this court without ruling. The plaintiff moves to remand the case without consideration of any of the questions presented. This motion is not based upon the ground that as matter of convenience the facts should be found before any attempt is made to settle the law, but upon the claim in the brief that as matter of law the superior court, against the objection of either party, has no power under existing law to transfer, and this court no jurisdiction to determine, questions of law, except after final trial and settlement by the superior court of all questions involved. Upon argument the claim appeared to be reduced to the contention that against the objection of a party questions of law could not be considered here except upon exceptions to rulings made in the superior court.

The administration of the law is probably as little hampered here by subservience to form in procedure as in any common-law jurisdiction. Here in the vindication of "contested rights in civil cases each party has such remedy, including form, method, and order of procedure, as justice and convenience require." *Owen v. Weston*, 63 N. H. 599, 600, 4 Atl. 801, 802, 56 Am. Rep. 547. The power of the superior court to transfer in some way a question for determination and the jurisdiction of this court to determine it being conceded, the form in which the question is presented is not usually thought entitled to consideration. *Petition of Moebus*, 73 N. H. 350, 351, 62 Atl. 170; *Hutchinson v. Railway*, 73 N. H. 271, 277, 60 Atl. 1011; *Claggett v. Simes*, 31 N. H. 58. When the facts are in dispute, it is not the

practice to consider difficult questions of law which may not arise when the facts are found; but, the case being before the court, questions that are necessarily involved in the controversy, the decision of which will aid in the trial, are generally considered, although the form in which they are presented is criticised. *Conn. Valley Lumber Co. v. Monroe*, 71 N. H. 473, 474, 52 Atl. 940; *State v. Stevens*, 36 N. H. 59, 61. Moreover, it appears from the record that the defendants' motion to dismiss the bill was denied subject to exception. Other exceptions are reported taken by both parties and by the plaintiffs to the order of transfer. The case cannot, therefore, be summarily remanded because of the absence of ruling and exceptions in the superior court.

It has been the practice here, as far back as the memory of any member of the bar can go, when important questions of law were involved in a controversy the decision of which might shorten the trial of the facts, to settle such questions first. Whether this should be done if the parties did not agree has been determined by the trial court. Their settlement has been effected by a transfer of the questions to the law court for determination. As the ruling of the trial court was of no importance, the case being held without further action until the settlement of the questions by the law court, it has not been usual to waste time or energy in argument and decision in the trial court. By this method the parties may be saved a prolonged struggle over facts which in the end might be found entirely useless. The theory that questions of law could be finally determined only by a writ of error after final judgment has been so long abandoned as to be practically unknown to practitioners at this bar. The convenience and advantages of the existing system appear from its statement. It is as well known in practice as it is useful in doing justice. But it is said that the procedure is peculiar to this jurisdiction; and it seems to be urged that the plaintiff has been deprived of some rights because, at the expenditure of much time and labor of counsel on both sides and of the trial court, that court has not elaborately heard, considered, and decided the questions raised, although there is no possibility that the party against whom the decision might run would abide by it. It may therefore be useful to examine the origin and growth of the practice. "Until 1813 there were no 'law terms' as contradistinguished from 'trial terms.' Each session of the court was required to be held by a majority of the judges; and questions of law and fact were 'blended together on the docket.' By the statute of June 24, 1813 [1 Laws 1815, p. 73], which remained in force until June 27, 1816, all the terms, except those commencing in November and December, were permitted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to be held by a single judge; and all actions in which exceptions were allowed to his rulings were to be continued to the November and December terms in the respective counties, there to be determined by a majority of the judges. This statute also provided that 'all motions and petitions for new trials, and all appeals from judgments or decrees of judges of probate, and all questions of divorce and alimony, questions of law on statement of facts agreed by the parties, or special verdicts, and all issues in law,' should be 'heard, tried, and determined, exclusively' at the terms to be holden in November and December. Sections 2, 3, 5, and 6. In the subsequent statute of November 5, 1813 [1 Laws 1815, p. 81, §§ 3, 4], the expression 'law term' is applied to these November and December terms, as it is also in the index of the edition of New Hampshire Laws printed in 1815." Smith, N. H., prefatory note, p. 7. The act of June 27, 1816 (Laws 1816, c. 34), repealed the act of 1813 which established the Supreme Judicial Court, revived the superior court of judicature, and restored the former practice under which law terms were unknown.

The act of December 29, 1832 (Laws 1831-32, Nov. Sess. c. 89), made a great and radical change in procedure. It was adopted, it is said, upon the written approval of Richardson, then chief justice, while its authorship is ascribed to Parker, almost immediately thereafter a judge of the court and later its chief justice. Shirley, Reporter's Note, 55 N. H. 7; Bell's Bench and Bar, 1815; Sargent's Dartmouth Memorial Addresses, 86, 87. This act created a separate tribunal for the determination of questions of law. Section 7 from its phraseology doubtless drafted with the law of 1813 in mind effected this purpose as follows: It gave the right of exception to any party aggrieved by any "opinion, direction, or judgment" of the court of common pleas (the court of fact), and directed the allowance by the presiding justice of exceptions if "conformable to the truth of the case," and then enacted: "And the said action, matter, process, or proceeding may thereupon, if the presiding justice shall so direct and order, be transferred to the superior court of judicature." If such transfer were not ordered, the exceptions were to be filed in the court of common pleas as the foundation of a writ of error. The section further provides: "In like manner any issue of law, motion for a new trial, question arising from any special verdict, and any other question or matter of law arising at any such term may by the presiding justice present, if he think fit, be reserved and assigned and referred to the superior court of judicature. And the action, cause, motion, petition, or matter * * * shall in such case be transferred to the superior court of judicature." There was also a provision for a transfer upon an agreed statement of facts signed by the parties, "if

the presiding judge shall deem it proper." Under this section the questions which the presiding justice may reserve, assign, and refer include those of which under the act of 1813 the "law terms" were given exclusive jurisdiction to hear, try, and determine. If under the law of 1832 he had been expected to hear and determine them before assigning and referring them to the superior court, his conclusion thereon would have constituted an opinion, direction, or judgment open to exception, and the whole matter would have been covered by the provisions as to exceptions. The whole of the section, after the subject of exceptions is disposed of, is unnecessary, useless, and absurd, except upon the theory that questions which the presiding judge thought fit to reserve, assign, and transfer to the superior court were those upon which he did not think fit to rule. The section provides for the two classes of cases: One in which the judge ruled, and then the party had his exception; and those upon which he did not rule, but which he reserved and referred. This result would be reached without considering all the terms employed, but the word "reserve" cannot be rejected. It must have been understood to have some meaning. To reserve an "issue of law, motion for a new trial," or "any other question," is not to decide such issue, motion, or question, but the contrary. It is "to defer the discussion or determination of" such matter. Webster, New Int. Dict. "Reserve," 2. The synonyms of the word "reserve" are "to keep, hold, retain, withhold." It is not synonymous with "determine, conclude, make a decision." Soule, Eng. Syn. 102, 336. At the December term, 1833, the superior court, when Richardson and Parker were both members, under authority of the statute adopted rules for the conduct of business in the two courts, one of which (rule 34) prescribed procedure in the superior court applicable "whenever any question of law shall be raised in the common pleas * * * by demurrer, * * * and the cause shall be transferred." 6 N. H. 582. In the same volume (Jones v. Winchester, p. 497) the statement of the case contains only the pleadings and the fact that there was a joinder in demurrer. The record is the same in Hill v. Loomis, 6 N. H. 263. This was the form in State v. Varney, Smith, 322, Webster v. Edson, Smith, 370, and New Hampshire v. Stratford Bank, Smith, 385, in 1814 and 1815, when the law term had exclusive jurisdiction to hear, try, and determine "all issues of law." It is demonstrable, therefore, that in 1833 the law was understood to authorize the reference to the law court of questions of law arising in the trial court without their prior decision by the latter court.

Section 7 of the act of 1832 is a substantial statement of the provisions to be found in Public Statutes 1901, c. 204, §§ 11, 12, 13, as modified by section 6, c. 172, Revised Statutes 1842, which provided for the transfer

of the questions of law raised instead of the action itself (*Wingate v. Haywood*, 40 N. H. 437), and by section 17, c. 1059, Laws 1855, which authorized the party taking exceptions in case the presiding judge declined to reserve and transfer the questions arising thereon to enter the exceptions at once in the law court, instead of leaving them in the trial court as a foundation for a writ of error. These provisions with the modifications mentioned have been re-enacted in 1842, 1855, 1867, 1878, and 1891, and no question has ever been raised as to their meaning. Laws 1831-32, Nov. Sess. c. 89, § 7; R. S. c. 172, § 8; Laws 1855, c. 1659, § 17; G. S. 1867, c. 139, § 11; G. L. 1878, c. 208, §§ 5, 11; P. S. c. 204, § 13. The rule of court referred to has been twice reissued in substance. Rule 34 (1833) 6 N. H. 582; Rule 51 (1859) 38 N. H. 593; Rule 55 (1875) 56 N. H. 591.

Doubtless the facts that at first all questions both of law and fact were determined at the same terms by the same court, that the first provision in 1813 merely continued questions of law to a single term, and that in 1832 the action itself was transferred when the determination of a question of law was desired may have influenced the practice when, after 1842, only the question raised was transferred. After the change in 1842, the statute enacted in 1855 enumerated with great detail the questions that might be reserved, and recognized the existing practice by providing that the Supreme Judicial Court (the law court then established) should upon consideration of questions reserved and assigned by the presiding justice "render or order such judgment, or make and certify such decisions as they think required by the circumstances of the case." Laws 1855, c. 1659, § 17. This section is a trifle more extended in form, but the effect of the language is precisely that found in Public Statutes, c. 204. Section 11 of that chapter provides for the taking of exceptions and their preservation as part of the record; section 12, for filing such exceptions in the law term by the party taking them, there to be considered and determined as upon writ of error or other proper process. Section 13 is: "Questions arising upon such exceptions, upon a special verdict, an issue of law, motion for a new trial or in arrest of judgment, or other motion or proceeding, or upon a statement of facts agreed to and signed by the parties, may be reserved and assigned by the presiding justice or by any justice of the court in vacation, if he think fit, to the determination of the court at the next law term." The substance of the language used by Judge Parker in 1832 and approved by Richardson, then chief justice, still survives in the statute.

Not only is the trial judge not required to decide questions reserved, but he never does so. The question arising upon exceptions which he reserves is the validity of the

exceptions—whether in spite of them there is to be judgment on the verdict, or whether because of them the verdict should be set aside. The question decided at the law term reserved upon exceptions is whether the exception should be sustained or overruled. This question the presiding judge is no more required to rule upon than upon other questions which he is also authorized to reserve, and in practice he does not rule upon it. It is true that no decision upon argument is to be found holding that questions of law may be transferred without ruling thereon by the trial justice. This is doubtless due to the fact that since the various statutes expressly give the power to transfer questions of law raised in various ways for the determination of the law court, without limitation of such power by requiring their previous determination by the trial court so as to be subject to exception, no one has hitherto understood such limitation could by construction be inserted in the statute; and in *State v. Sawtelle*, 66 N. H. 488, 503, 32 Atl. 831, 833, it was expressly held that "the trial court of its own motion and without the suggestion of either party may, if it think fit, reserve a question of law for consideration at the law term." The question so reserved in that case was vital to the validity of the verdict, and was given great consideration. If an opposite conclusion to that in the opinion had been reached, a long and expensive trial in a capital case would have been invalidated. The only exception to this power in the trial court is found in the inferior exclusive jurisdiction of the court of common pleas under the statute of 1855. In that case questions of law could be transferred only upon exception. Laws 1855, c. 1659, § 5.

Reliance is placed upon *Claggett v. Simes*, 31 N. H. 56, to support the proposition that only questions arising upon exceptions can be transferred. The original case, reported 25 N. H. 402, was a petition to the court of common pleas to vacate a judgment in that court. There was a transfer to the superior court of judicature and an order from that court under which the petition was dismissed in the common pleas. The Revised Statutes then in force provided for the reservation of questions arising upon exceptions or upon a special verdict, and any issue of law, motion for a new trial, or agreed statement of facts (R. S. c. 172, § 8), and it was objected that, as in the previous transfer it did not appear that the common pleas had made any ruling, or that any exception had been taken, the transfer did not appear to have been made in any of the cases defined in the statute; i. e., it was not upon exception or special verdict, nor was the petition to vacate the former judgment an issue of law a motion for a new trial, or an agreed statement of facts. The court disposed of the question by the conclusion that the transfer im-

plied an exception. Whether a ruling or an exception was necessary to authorize the transfer of an issue of law was not in question. So far as the case implies that a ruling and exception is necessary in any case, it is overruled by *State v. Sawtelle*, above cited. See, also, *Perkins v. Langmaid*, 36 N. H. 501, 506. *Fellows v. Fellows*, 68 N. H. 611, 44 Atl. 752, so far as it relates to the technical point relied upon in support of the motion, is authority against it. Counsel are not alone in thinking that this case decides that as matter of law questions arising upon the pleadings in equity are not considered until the facts are found. The same error appears to have been made by another presumably equally unfamiliar with the local practice. See 2 Cyc. 746. But the case does not so decide. Upon the pleadings in that case, which were of great length and disclosed that the facts were nearly all in dispute, the presiding justice reserved without ruling seven questions for the determination of the law term. If such action were not permissible, a sufficient reason for the discharge of the case would have been found therein. But the discharge of the case without consideration was put upon the ground that in that particular case it was clear the most convenient procedure required that the facts should first be determined. There was no novelty in this procedure. *State v. Morin*, 65 N. H. 667, 23 Atl. 529; *Winnipiseogee, etc., Co. v. Gilford*, 66 N. H. 621, 34 Atl. 154; *State v. Lewis*, 66 N. H. 623, 32 Atl. 151. The practice has since been followed. *State v. Railroad*, 70 N. H. 421, 435, 48 Atl. 1103; *Laton v. Bacom*, 70 N. H. 635, 50 Atl. 100. As has been suggested, in some cases questions of law may lie at the bottom of the whole controversy or of particular branches of it. The determination of such questions in advance may prevent a useless, prolonged struggle over evidence; in others, the determination of the facts may greatly simplify or remove all controverted questions of law. Whether the facts or the law should be first ascertained is determined by questions of expediency and convenience in each case. In support of the motion, our attention has not been directed to the facts or legal questions involved in this controversy. In the absence of a thorough examination of the record, with the aid of an explanation by counsel of the several claims, the question whether all or some of the questions of law ought not to be determined in advance of a trial of the facts cannot be satisfactorily settled. A cursory examination seems to indicate that the action might be advanced in the superior court by a final decision now of some of the legal questions involved, but no decision upon that point is now intended.

But it is urged that, conceding the transfer made was permissible prior to 1901, the legislation of that year (chapter 78) creating

two courts abolished the convenient procedure under which the law had been administered for 69 years. The purpose of this act, as declared in its title, was to establish "a judiciary system consisting of two courts." It was plainly modeled on the judiciary acts of 1874 (chapter 97) and 1876 (chapter 25), the one creating two courts in place of one, and the other restoring one in place of the two. Like the first act, it confers upon the law court all the jurisdiction of the existing court at the law term and upon the trial court all the powers belonging to the court at the trial term. Like both acts, it continues in force all existing legislation not inconsistent with the change, making it applicable to the new courts in their respective capacities. The existence of two courts instead of one in 1874 did not change the procedure under discussion. See *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Rice v. Holden*, 55 N. H. 398. It cannot be inferred that the same change was intended to have that effect in 1901. This legislation was not hastily adopted. It was the subject of very careful scrutiny, much discussion, and considerable controversy. It is safe to say that, if a purpose to alter existing procedure had been deducible from the language of the act, such purpose would have been speedily discovered, and its detection would have defeated the legislation. The judges of this court did not understand any change had been made. See rule 6 of the Supreme Court. 71 N. H. 669, 59 Atl. vii. The practice since 1901 shows that the members of the court and the bar all understood in 1901 that the legislation of that year did not disturb existing procedure. But the inference often drawn from contemporary construction of expressions otherwise obscure need not, however, be appealed to. There is nothing in the act in conflict with the language conferring all power under existing law pertaining to the court at the law and trial terms upon the Supreme and Superior Courts, respectively. Section 5—"Questions of law arising in the trial of any case in the superior court may be transferred to the Supreme Court for final decision, upon a case or statement of facts reserved by the trial justice"—makes no change. If the statute, as in the law of 1832, provided for the transfer of the action, it might be argued that there could be no final decision of the action until the facts were determined. But there is no provision for the transfer of the action, but only of the question. As has already been said and as the plaintiff contends, such has been the rule since 1842. The section makes no change in this respect.

[2] There is no difficulty in regarding as finally adjudicated a question of law determined before the facts are found. *Veazie v. Wadleigh*, 11 Pet. 55, 9 L. Ed. 630. The provision is merely an enactment of the judicial rule repeatedly announced, that a question of law once decided will not be

again re-examined in the same case, except upon a motion for rehearing. *Olney v. Railroad*, 73 N. H. 85, 91, 59 Atl. 387, and cases cited. That this court has the same power over questions of law that the whole court had prior to 1901 was expressly held in *Bath v. Haverhill*, 73 N. H. 511, 63 Atl. 307, though in that case no question was presented as to the form of transfer. The fundamental purpose of the act of 1901 was to disassociate the judges of law from the judges of fact. It was not intended to hamper the existing jurisdiction of either, and no language was used from which such intent can be inferred.

The superior court appears to entertain the opinion that in this case the law should be determined before proceeding to a trial of the facts. To the ruling based upon this conclusion the plaintiff has an exception. This exception will be considered when the case is more fully presented.

Motion denied.

WALKER, J., did not sit. The others concurred.

DOUGLASS v. BELKNAP SPRINGS LAND CO. et al.

(Supreme Court of New Hampshire. Belknap. Dec. 5, 1911.)

1. DEDICATION (§ 19*)—SALE OF LOTS WITH REFERENCE TO PLAT.

As against a purchaser of lots forming part of a tract subdivided according to a recorded plan, the vendor is estopped to deny the existence of ways shown upon the plan so far only as the ways would be material to the purchaser.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

2. DEDICATION (§ 19*)—SALE OF LOTS WITH REFERENCE TO PLAT.

As against a purchaser of lots forming part of a tract subdivided according to a recorded plan, the vendor is not estopped to deny the existence of ways lying between lots which the purchaser was informed were held in one body by a family who could do with the ways as they should see fit.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 61*)—INCUMBRANCE OF STREETS—INJUNCTION.

By deeding lots with reference to a plan recorded by its predecessor, defendant represented that the ways shown by the plan existed, and the purchaser can enjoin incumbrance of such ways to his prejudice.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 116, 120; Dec. Dig. § 61.*]

4. BOUNDARIES (§ 3*)—SURVEYS—CONTROLLING LINES.

A definite boundary such as a line of a lake takes precedence over mere courses and distances.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

5. DEDICATION (§ 19*)—SALE OF LOTS WITH REFERENCE TO PLAT.

The right of a purchaser of lots forming part of a tract subdivided according to a recorded plan to have an avenue shown by the plan as following a lake line left unobstructed is not affected by any mistake as to the quantity of land lying between the lake and another point.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

6. DEDICATION (§ 19*)—SALE OF LOTS WITH REFERENCE TO PLAT.

Nor is such right affected because part of the avenue can be used only for a footpath, the tract having been laid out for a summer colony.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

Transferred from Superior Court, Belknap County; Pike, Judge.

Bill by Walter B. Douglass against the Belknap Springs Land Company and another. Transferred from the superior court. Case discharged.

In 1889 the Winnepesaukee Land Company owned a tract of land on the lake shore in Alton, and made a plan of the same, dividing it into house lots with appropriate streets, including one following the shore line the entire length of the tract and called Lake Shore Avenue. The company caused the plan to be recorded in the registry of deeds and sold some lots by reference to it, several of which are now owned by the plaintiff. In a short time the unsold balance of the land was taken on execution; and in 1897 that part of the land so taken lying north of the railroad and bordering on the lake was owned by the defendants William H. and Louis D. Russell, and that part lying south of the railroad by the defendant company. The purchasers of certain lots on Lake Shore avenue have erected buildings across the avenue. There was a mistake in the survey, and in one place there is some 200 feet less width of land than is shown on the plan. Some lots sold, which are shown on the plan as inside ones, in fact border on the shore or the avenue, and buildings extending to and over the water have been erected on these lots. All the building before mentioned has been done with the knowledge of the plaintiff, who made no objection until this proceeding was begun. As to these, he now concedes he is estopped to claim the way. Lake Shore avenue has never been wrought. It is rocky and precipitous in places, and it would not be practicable to use it except for a footway. A large part of the land has not been sold by the lot, and there are but few houses on the tract.

After the execution sale, the plaintiff bought two more lots (Nos. 2 and 46) of the defendant company. Lot 2 bounds upon a public highway, and lot 46 is separated from the same highway by one lot which is owned by the plaintiff. The deeds describe the lots

by courses and distances, and "as shown on the plan of the Winnepesaukee Land Company, recorded in Belknap County Records." Being doubtful as to the title to lot 2, the plaintiff obtained a confirmatory deed thereof from the Russells; and, when he took this deed, he was informed by them that they owned the land between the railroad and the lake, and would do as they saw fit with the proposed streets and avenues. It was understood between them that the conveyances of these two lots "had no effect upon the land below." If the plaintiff has rights in the streets which the defendants cannot deprive him of, the prayer of the bill is to be granted.

Arthur A. Folsom and Stephen S. Jewett, for plaintiff. Frank M. Beckford and Charles B. Hibbard, for defendants.

PEASLEE, J. The proposition that the plaintiff has rights in the streets which the defendants cannot deprive him of is well established. *Walker v. Manchester*, 58 N. H. 438; *Bartlett v. Bangor*, 67 Me. 460; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261; *New England, etc., Co. v. Everett Distilling Co.*, 189 Mass. 145, 75 N. E. 85; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *Lord v. Atkins*, 138 N. Y. 184, 33 N. E. 1035; *Lenning v. Association*, 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16. *Riedinger v. Railroad*, 62 Mich. 29, 28 N. W. 775. Thus far the authorities are unanimous. As the case is transferred, this entitles the plaintiff to the injunction as prayed for. But it is manifest that other questions are involved in this controversy. They have been argued by counsel, and their consideration is necessary in an equitable determination of the rights involved. These questions are: (1) To what streets do the plaintiff's rights extend? (2) To what lots are they incident? (3) Does a right exist along the shore line where the land is narrower than is shown upon the plan?

[1] 1. The plaintiff insists that as incident to each lot he purchased by the plan he acquired a right to use every street shown upon the entire tract. While cases are to be found which support this hard and fast rule, it cannot be sustained upon principle. The right is not based upon a covenant that the ways exist. *Howe v. Alger*, 4 Allen (Mass.) 206. It arises merely by way of estoppel. The time came when the grantor could no longer deny that streets existed as represented on the plan. "That time was when purchasers of lands, upon a consideration enhanced by the inducements held out by the proclamation of these landholders, acquired such rights with reference to their house lots thus purchased, and the convenient and indispensable enjoyment of them, as would render it fraudulent on the part of the vendors to revoke their agreement by changing or abolishing the location of the streets laid

down on their recorded plan, with reference to which their sales and conveyances had been made." *Walker v. Manchester*, 58 N. H. 438, 441. Since this is the foundation of the right here involved, it follows that all the elements of an estoppel by conduct must exist. One of these elements is that the representation made must be material to the action about to be taken. If the representation is immaterial, there is no estoppel. *Comings v. Wellman*, 14 N. H. 287, 292; *Stevens v. Dennett*, 51 N. H. 324, 333. The true rule, then, is that there is an estoppel to deny the existence of the ways shown upon the plan so far, and so far only, as the existence of the ways would be material to the owner of the land purchased. "In some cases it is held that the purchaser of a lot described as bounded on a street or way is entitled to have it kept open for the whole distance shown by the plat or description; but the decision in every case has been based upon substantial equities. It could not have been otherwise; for estoppels arise upon equities, and are enforced for their protection." *Cooley, J., in Bell v. Todd*, 51 Mich. 21, 16 N. W. 304. How far the lay-out of the whole tract into some 200 lots concerns the purchaser of an individual lot is a question of fact, to be settled in the superior court. In the language above quoted the relation must be such as to create substantial equities before the relief here sought can be granted.

[2] 2. As the rights in the streets may extend further for one lot than for another, it is necessary to determine whether the plaintiff can maintain this proceeding as to lands purchased from the defendant company, the deeds to which refer to the Winnepesaukee Company's plan. At the time the confirmatory deed to lot 2 was given, the plaintiff was told that the Russells owned all the unsold lots lying between the railroad and the lake, and that they would do with the proposed streets as they saw fit. The parties then understood the deeds of lots 2 and 46 did not affect the title to "the lands below." It is understood that this refers to the land north of the railroad. In view of these facts, it seems plain that as to lots 2 and 46 no case for equitable relief is made out so far as the streets north of the railroad are involved. What the result might be if the plaintiff conveyed to an innocent third party, who relied upon the representations contained in the deeds from the defendants to the plaintiff, is a question not involved here. The plaintiff could not have relied thereon, and as to him there is no estoppel.

[3] 3. The land south of the railroad was not owned by the Russells; and, unless it appears that they purpose to interfere with the plaintiff's rights therein, no case is made against them as to that tract. This land was, however, owned by the defendant land company. By its reference thereto in its deeds as "shown on the plan of the Win-

nipesaukee Land Company, recorded in the Belknap county records," it represented that the lands were laid out according to that plan as effectively as though it had also caused the plan to be made and recorded in the first instance. Having made this representation, it is equitably bound to refrain from doing any act in contradiction of the inducements to the contract. As the company denies the right to use the ways as laid out, the plaintiff is entitled to his injunction so far as his interest is established.

The question whether the original laying out of the tract, recording the plan, and selling lots thereby constituted an incipient dedication of the streets to public uses is not involved in the present proceeding. If an offer of these streets to the public has been made and is still outstanding, it has not as yet been accepted by those who represent the public. P. S. 1901, c. 67, § 1. The most that could be said would be that an offer is open, and may be accepted or rejected:

[4, 5] 3. The plan delineates Lake Shore avenue as following the marginal line of the lake. This line is a definite boundary, and takes precedence over mere courses and distances. *Kent v. Taylor*, 64 N. H. 489, 13 Atl. 419, and cases cited. The lines of the interior lots shown upon the plan are of the latter class. There was no such land as these lines, or a part of them, indicate. The way is not affected by the fact that a mistake was made as to the quantity of land lying between the lake and the railroad. The

plaintiff's lots in right of which a decree is to be entered were all sold before there was any attempt to sell by descriptions which conflict with the existence of the avenue. The most casual inspection of the plan shows an intent that there be a continuous way along the lake front. It would so appear to prospective purchasers of lots. Whether this intent might have been abandoned by a sale of the shore before private rights in the avenue had attached is a question not presented in this case.

[6] The fact that a portion or the whole of the avenue can be used only for a footpath is not necessarily fatal to the plaintiff's claims therein. This tract was laid out for a summer colony, and a footpath along a rugged shore might well be thought to be of value to each cottager. It might even be considered to be of greater value from the fact that it could never be intruded upon by vehicular travel.

It follows from all these considerations that the decree to be entered may not be as broad as the prayer of the bill. It is a question to be settled by a consideration of all the equities of the situation. How far each lot is affected must be determined in the superior court. So far as the plaintiff's lots which were purchased in reliance upon the plan (or any of them) are found to be affected by the general scheme or by particular ways shown upon the plan, he is entitled to be protected by a decree.

Case discharged. All concurred.

DU PONT v. STANDARD ARMS CO.

(Court of Chancery of Delaware. Jan. 20, 1912.)

1. CORPORATIONS (§ 559*)—EFFECT—PRE-EXISTING CONTRACTS FOR PERSONAL SERVICE.

On termination by the receiver of an insolvent corporation of a pre-existing contract for the services of another as general manager, the latter is entitled to no damages therefor; the possibility of such termination being impliedly within the contemplation of the parties when the contract was made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252; Dec. Dig. § 559.*]

2. CORPORATIONS (§ 559*)—DISSOLUTION—RECEIVERS.

The appointment of a receiver for a corporation does not dissolve it, or terminate its legal existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252; Dec. Dig. § 559.*]

3. CORPORATIONS (§ 560*)—POWERS—TERMINATION OF CONTRACTS.

A receiver is not bound by the executory contracts of the corporation over whose property he is appointed, and subject to the control of the court he may abandon and repudiate them, if in his opinion it would not be profitable or desirable to adopt and perform them, and he is entitled to a reasonable time within which to make his election.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260; Dec. Dig. § 560.*]

Action by Pierre S. Du Pont against the Standard Arms Company. On exceptions to a claim by J. H. Hartley for damages for breach of contract of service. Exceptions sustained.

Robert H. Richards, for receiver. Reuben Satterthwaite, Jr., for claimant.

THE CHANCELLOR. On June 13, 1911, a receiver for the Standard Arms Company was appointed on the ground of its insolvency, and the general statutory powers were conferred upon the receiver without direction to carry on the business. A few days later the receiver was authorized to carry on the business for a short time, in order to complete certain work. At the time of the appointment Hartley was serving the company as general manager under a contract of service, without definite period, made by the company, whereby either party could terminate the contract upon giving to the other three months notice. On June 20, 1911, the receiver notified Hartley that his services would not be needed after July 1, 1911, and having worked to that date was paid by the receiver for his services to that time. Hartley claims damages for breach of the contract of employment by the termination thereof by the receiver without three months notice. His claim is for \$888.88, being for three months, less the amount paid by the receiver, for services rendered by Hartley between June 20, 1911, and July 1, 1911. It will be

seen that the breach of contract occurred subsequent to the appointment of the receiver, and was not, therefore, a right of action existing against the company at the time the receiver was appointed.

[1] By the exceptions a question is squarely raised in this state for the first time, so far as the reported cases show. It is claimed by the receiver that the appointment of the receiver of the company on the ground of insolvency, was such an intervention of the law as to terminate existing contracts to render service to the company as that neither party could be liable to the other for breach of contract, for the reason that the intervention made it impossible for either party to perform the contract, such intervention being in the eye of the law within the contemplation of the parties to the contract when they made it, and, therefore, rightly deemed to be an unexpressed condition of their agreement. The legal foundation for this position, with respect to this particular kind of a claim, being one based on a contract for personal services, is that contracts for personal service for a stated period is terminated by the death or sickness of the employer or the employed. On behalf of the creditor, Hartley, it is contended that the receiver could not cancel an executory contract for personal services made with the corporation prior to the appointment, without rendering the receiver liable therefor in damages payable like other debts of the company from the assets of the company.

The issue is well defined and the authorities differ radically.

Control of the fund arising from the conversion of the property into money furnishes the opportunity and imposes the duty on the court to recognize every substantial equity and every existing right in making distribution of the fund. Claims should be allowed upon principles of equity and good conscience which underlie receiverships. But in so doing, rights should be determined on legal principles where such exist.

Though the contract of Hartley was made with the corporation prior to the appointment of the receiver, the cause of action, if any, arose after the appointment of the receiver. The breach of the contract was the discharging of Hartley by the receiver. If he had been discharged by the company before the appointment of the receiver, he could have maintained a claim against the assets of the company which came to the receiver though his claim be then unliquidated.

[2] The appointment of the receiver did not dissolve the corporation, or cut short its legal existence. *Chemical Bank v. Hartford, etc., Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. Being a statutory receiver, the effect of it was to suspend the right and power of its officers to continue business. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
81 A.—69

effect of the Delaware statute of 1891, enlarging the jurisdiction of the Court of Chancery over the appointment of receivers for corporations to include cases where insolvency is the sole ground for the appointment, is to transfer to the receiver so appointed the functions of the corporation and the corporation is therefore necessarily deprived of all management of its property and affairs, except, perhaps, the doing of acts necessary to the perpetuation of its corporate existence, such as elections of officers, for by the Delaware act, unless limited by the order of the Chancellor, the receiver so appointed, in addition to conserving and collecting the assets of the company, and prosecuting and defending suits, is given in general language power "to do all other acts which might be done by such corporation and may be necessary and proper." Chapter 181, vol. 19, Laws of Delaware. This is also the legal consequence of the appointment. But even without this statutory or legal consequence, that was in this, and in almost all cases will be, the natural result of the taking possession of all the property and assets of a corporation for the purpose of converting them into money for the payment of its debts and other legal demands.

. If it be a legal consequence of the appointment of a receiver of an insolvent corporation, that the officers of the company are thereafter without power or right to deal with, use or dispose of the property of the company, the effect on the rights of both parties to the original contract is the same as though the officers had by a judicial order been expressly prevented from dealing with, using or disposing of the assets of the company. *Lenoir v. Linville Improvement Co.*, 128 N. Car. 922, 36 S. E. 185, 51 L. R. A. 146, 151.

[3] The right of the receiver to terminate all unfulfilled contracts made by the company before his appointment is clear. He may choose to continue one and terminate another. A receiver is not bound by the executory contracts of the corporation over whose property he is appointed, and subject to the control of the court he may abandon and repudiate them, if in his opinion it would not be profitable or desirable to adopt and perform them, and he is entitled to a reasonable time within which to make his election. *Wells v. Manila Paper Co.*, 76 Conn. 27, 38, 55 Atl. 599, and cases cited. See also 34 Cyc. 259.

Whether the receiver's termination of unfulfilled contracts gives a right to damages for the breach against the assets of the corporation which has come into the hands of the receiver, may depend on the character of the subject of the contract. If the contract is one of personal service, it is settled that as between individuals, the death of the employer discharges or terminates a contract for personal service. *Clark on Contracts*, 683,

and citations; *Yerrington v. Green*, 7 R. L. 589, 84 Am. Dec. 578; *Chitty on Contracts*, 1076. So it is held that the death of each party to a contract for a term of service is an implied condition of it which effected a legal termination of it, and, therefore, the death of either party did not give a right against the other for damages for such termination.

The appointment of a receiver for an insolvent corporation is in effect the laying of an equitable execution on all its assets for the benefit of all such creditors as may be found to have valid claims against it.

For the purpose of this case, the appointment of a receiver of a corporation has the same result as the death of a natural person as employer. This is the view taken by the American courts, with few exceptions. *People v. Globe Mutual, etc., Co.*, 91 N. Y. 174; *Lenoir v. Linville, etc., Co.* (1900) 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146; *Eddy v. Co-operative Dress Ass'n*, 3 N. Y. Civ. Proc. Rep. 442; *Louchheim v. Clawson, etc., Co.*, 12 Pa. Super. Ct. 55; *Law v. Waldron*, 230 Pa. 458, 79 Atl. 647 (1911).

It is said, however, that inasmuch as the assets of a corporation constitute a trust fund for the benefit of the persons who deal with it, and there may be a possibility that the assets of what appears to be an insolvent company may yet be more than sufficient to pay its debts, and so make a return to the stockholders, and, therefore, the claim should be allowed. This is held in New Jersey. *Spader v. Mural Decoration, etc., Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Rosenbaum v. U. S., etc., Co.*, 61 N. J. Law, 543, 40 Atl. 591. But this possibility does not affect the question. From a legal point of view the contract is terminated by a vis major, the state by its representative, as by the death of a natural person, and the assets of the company are not applicable to payment of damages for the breach of the contract of service resulting from such termination, any more than the assets of a decedent natural person is liable in the hands of the executor or administrator under like circumstances.

The receiver is the arm of the court, the powers of the officers of the company to deal with its affairs are suspended, and the receiver may rightly suspend the executory contracts made by the company. When a receiver so elects, the situation is the same as when by death the individual employé is stripped of his power to further continue the contract. This possibility of a termination of contracts made with corporations was contemplated by the parties to the contract and was made an unexpressed but implied condition of it. It is the suspension, temporary or permanent, of corporate activities by the act of the court in taking possession of the property and affairs of the company, which operates to at least suspend the right to continue the service or recover compensa-

tion for a termination of the service from the assets which the court has taken into its charge through its receiver.

Here the contract of Hartley was one for personal service as general manager, and his claim was based on his discharge without having received three months notice. As he was not entitled to serve unless so permitted by the receiver, he cannot recover for compensation for services not rendered.

It should be clear, however, that no opinion is here expressed concerning the right of creditors with claims other than for personal services. Nor is any opinion expressed as to the enforcing of the rights of creditors of a company against its assets in the hands of the receiver not needed for the payment of such debts and obligations as existed at the date of the appointment. Neither of these questions are before the court in this case, for there is admittedly an insufficiency of assets to pay all the other claims.

The exceptions to the payment of the claim in whole, or in part, from the assets in the hands of the receiver will be allowed.

Let an order be entered accordingly.

EDGECOMB v. JENNEY.

(Supreme Judicial Court of Maine. Dec. 13, 1911.)

AGRICULTURE (§ 11*)—LIENS—RIGHT TO.

The right to a lien for cutting or harvesting hay, under Rev. St. c. 93, § 54, must rest upon a contract, express or implied, with the owner of the hay; and hence one who is forbidden by the owner to cut hay cannot rely upon a contract made with another who was known to have no legal or equitable title.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15-30; Dec. Dig. § 11.*]

Report from Supreme Judicial Court, Androscoggin County, at Law.

Assumpsit on account annexed, by Cyrus F. Edgcomb against George H. Jenney, to recover the sum of \$51.75 for the services of the plaintiff and his team in cutting and harvesting certain hay on which the plaintiff claimed a lien under the provisions of Rev. St. c. 93, § 54. The defendant Jenney was defaulted, notice was ordered to the owners of the hay, and Oscar Storer appeared and claimed the hay. An agreed statement of facts was filed, and the case was reported to the law court for determination. Judgment for plaintiff, without lien.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, and BIRD, JJ.

B. Emery Pratt, for plaintiff. Isaac B. Clary, for claimant.

SPEAR, J. This is a case in which the plaintiff seeks to enforce a lien against George H. Jenney and certain hay cut upon a farm, the legal title of which was in the

name of Frank W. Dutton, trustee; the beneficiary interest being in Mrs. Lamertine Taylor Jenney. As the case is presented, it seems to be immaterial whether the title was in Dutton or Mrs. Jenney, so far as the rights of the plaintiff are concerned, as the correspondence shows that the plaintiff knew that the title of the farm was not in George H. Jenney. On the 13th of July the plaintiff wrote F. W. Dutton as follows: "George Jenney has hired me to cut the hay on the Jenney farm, but I have been told that the farm belongs to you. Now I want to know if George Jenney has a right to hire the hay cut. Please let me know by return mail, as the hay needs cutting." To this letter on the same day Dutton replied: "I am in receipt of your letter of the 13th, and in reply would say that the farm in Livermore Falls stands in my name, but is leased under agreement to Mrs. Jenney. Consequently I do not know who has authority regarding the management." On July 19th Oscar Storer, an attorney in Boston, representing Mrs. Jenney's interests, to whom had been forwarded the above letter of the plaintiff for answer, wrote as follows: "In reply to this letter I will state that the title stands in Mr. Dutton's name, but the property is Mrs. Jenney's, and Mr. Jenney has no right to hire the hay cut, or do anything else on the place. If you cut the hay under his hiring, you will be a trespasser, and liable to her for damages. Mr. Jenney has no authority to act for Mrs. Jenney in any way, shape, or manner." The plaintiff had been working two days when he received this letter. He, however, ignored the letter and proceeded to cut the rest of the hay. The record shows that as early as July 2, 1909, Mrs. Jenney had revoked all authority which George H. Jenney prior to that time might have had in the management of the farm. It is obvious, therefore, that on July 13th when the plaintiff wrote to Dutton with reference to the right of George H. Jenney to "hire him to cut the hay," George H. Jenney had no authority whatever to make such contract. Consequently the plaintiff was in no way misled as to the authority of George H. Jenney from the fact that the latter was apparently occupying the farm.

But notwithstanding this knowledge on the part of the plaintiff, and the letter forbidding him to cut the hay and warning him against trespass, he invokes R. S. c. 93, § 54, as a peremptory statute giving him a lien upon the hay for his services. Section 54 is as follows: "Whoever labors in cutting or harvesting hay has a lien on all the hay cut or harvested by him and his collaborators for the amount due for his personal services and the services performed by his team."

This contention cannot prevail. The theory of the lien law is based upon the as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

sumption of a contract, expressed or implied, with the owner of the property against which the lien is sought to be enforced, as stated by Chief Justice Shaw in *Hollingsworth v. Dow*, 19 Pick. (Mass.) 228. "Again, a lien is a proprietary interest, a qualified ownership, and, in general, can only be created by the owner, or by some person by him authorized." See, also, *Small v. Robinson*, 69 Me. 425, 31 Am. Rep. 290, which is analogous in principle. Innholders and a few others are excepted from the general rule. The above statute, although peremptory in its language, must be construed with reference to common-law rules. *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476, 21 L. R. A. 489, 36 Am. St. Rep. 486. It is apparent that section 54, if construed precisely as it reads, would authorize the taking of property without due process of law. If A., without a contract, express or implied, could, in invitum, enter the field of B., harvest his hay, and appropriate to his own use so much of it as was necessary to pay for his services, it would constitute a direct violation of B.'s constitutional right that no person shall be deprived of his life, liberty, property, or privileges, but by judgment of his peers or by the law of the land. But this seems to be precisely what the plaintiff has undertaken to do. We find ourselves unable to assist him.

Lien claim denied. Personal judgment for plaintiff against George H. Jenney for \$51.75 and interest from the date of the writ.

MCGOWN v. INHABITANTS OF TOWN OF WASHINGTON.

(Supreme Judicial Court of Maine. Dec. 13, 1911.)

1. HIGHWAYS (§ 213*)—DEFECTIVE CULVERT—NOTICE TO AUTHORITIES—EVIDENCE.

In an action against a town for injuries caused by a defective culvert, whether the authorities had actual notice of the defect held, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

2. HIGHWAYS (§ 193*)—DEFECTS—NOTICE TO AUTHORITIES.

If a road commissioner, being notified of a defective culvert, delegated to another performance of his duty to repair, under Rev. St. c. 23, § 76, as amended by Laws 1903, c. 108, and such person failed to make the culvert safe, his knowledge of the defect remaining was the knowledge of the commissioner, the same as if the latter had performed the work himself; and no further notice was necessary to charge the town with liability for a resulting injury.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 487-490; Dec. Dig. § 193.*]

3. HIGHWAYS (§ 193*)—DEFECTS—NOTICE TO AUTHORITIES.

Notice to a road commissioner of a defect in a culvert continues until the defect is repaired.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 487-490; Dec. Dig. § 193.*]

Exceptions from Supreme Judicial Court, Knox County.

Action by Fannie B. McGown against the Inhabitants of the Town of Washington. From a nonsuit, plaintiff brings exceptions. Exceptions sustained.

Action on the case to recover damages for personal injuries, alleged to have been received by the plaintiff while travelling with a horse and wagon along a highway in the defendant town, and caused by an alleged defect in a culvert or causeway in said highway. Plea the general issue.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, and HALEY, JJ.

Williamson, Burleigh & McLean, for plaintiff. Lindley M. Staples, for defendant.

SPEAR, J. This was an action against the defendant town to recover for injuries alleged to have been received by the plaintiff by reason of a defect in a culvert or causeway located in the defendant town, which it is admitted it was the duty of the town to keep in repair, so that it should be safe and convenient for travelers. At the conclusion of the plaintiff's evidence, the presiding justice ordered a nonsuit, and the case is here upon exceptions to the order. The only question involved in the exceptions, which contain a full report of the testimony, is whether the defendant had 24 hours actual notice of the alleged defect, as required by statute, as a prerequisite to the maintenance of her action.

[1] There are two grounds upon which the plaintiff contends the defendant had the notice required: First, she claims that, having had notice of the defective condition of this causeway some months before, and having authorized and directed one Hubbard to repair it, the road commissioner, William W. Light, in person, in June, about two months before the accident and after Hubbard had repaired it, inspected the causeway as repaired, had an opportunity to discover the conditions constituting the alleged defect, and therefore had notice of the actual condition of the causeway which the plaintiff claims was a defect. It is the opinion of the court that the evidence in the case might warrant a jury in finding all these facts in favor of the plaintiff. Therefore, inasmuch as it is not for the road commissioner to determine whether the actual condition which he saw or ought to have seen was a defect, but a question of fact for the jury, we feel clear that the case upon the evidence should be submitted to the jury to determine whether the road commissioner, in June, when he inspected the causeway, was charged with notice of the conditions which caused the plaintiff's injury, and whether these conditions constituted a defect. If upon this question the jury's finding should be in the affirma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tive, the plaintiff would not be barred for want of notice.

[2] Second, the plaintiff contends that, the road commissioner having personally received notice of a defect in the culvert in question, and having authorized George Hubbard "to fix that causeway," George Hubbard was appointed "to act as a substitute for" the commissioner in making the repairs, under R. S. c. 23, § 76, as amended in 1903, chapter 108. Section 76, with the amendment in brackets, provides that a notice is sufficient "if the commissioners of such county, or the municipal officers or road commissioners of such town [or any person authorized by any commissioner of such county or any municipal officer, or road commissioner of such town, to act as a substitute for either of them], had twenty-four hours actual notice of the defect or want of repair." It is the opinion of the court that, independent of the amendment, Hubbard represented the commissioner upon the question of notice, as hereafter discussed. It is contended, however, that this question must be declared *res adjudicata*, under the decisions of the court in *Rich v. Rockland*, 87 Me. 188, 32 Atl. 872, and *Emery v. Waterville*, 90 Me. 487, 38 Atl. 534. After these decisions, the statute was amended (Laws of 1903, c. 108) by inserting the above quotation. Whether the amendment of the statute authorizing notice to a substitute would affect the conclusion of the opinions in the cases cited, it is unnecessary to determine, as these cases have no application whatever to the facts in the case at bar. In both the *Rockland* and *Waterville* Cases, there was no defect which the employes or agents were sent to repair. In each case they were directed to do a safe thing by way of constructive work, and did just the contrary. Each was ordered to construct a safe and convenient place, but instead created a defect, of which the commissioner had not actual notice. In the *Waterville* Case, the court say: "A crosswalk in itself is not a defect. To know of a crosswalk is not to know of a defect."

Not so, however, in the case at bar. The case starts with an alleged defect. The road commissioner had notice of it. Under the statute, he was charged in the premises with an obligation to the public. It was his positive and imperative duty, after 24 hours notice, to know that the defect was repaired. The statute must be regarded as mandatory upon the strict performance of this duty, for upon its full and complete execution may depend the life or limb of a lawful traveler. In the case of the defect in question, the road commissioner did not direct Hubbard to construct anything new, as was done in the *Waterville* and *Rockland* Cases, but to repair what had become unsafe and dangerous. He did not send Hubbard to build a new piece of work which he might assume would be con-

structed in accordance with his orders; he sent him, without specifications, to make the repairs necessary to overcome the danger. He left the efficiency of the work to be done entirely to the judgment of Hubbard. It was the performance of a duty which the statute imposed upon the commissioner. When he delegated that duty to the discretion and judgment of Hubbard, he made him his agent to do the work. If, therefore, the commissioner was notified of this alleged defect, and relied upon the judgment of Hubbard to repair it, and Hubbard failed to make it safe and convenient, as required by statute, then the act and knowledge of Hubbard was, independent of the amended statute, the act and knowledge of the commissioner precisely as if the latter had performed the work himself, and no further notice was necessary. *Holmes v. Paris*, 75 Me. 559; *Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912.

[3] There is another phase of the case which requires that it should be submitted to the jury. Some eight or nine months before the date of the accident complained of, the commissioner admits he received notice of an alleged defect in the identical causeway upon which the plaintiff was injured. It also appears that Hubbard was directed to repair it. It is claimed that what he did, whatever it was, failed to accomplish the purpose; that the identical defect of which the commissioner was notified continued unabated, and was the one upon which the plaintiff was injured. If the jury should find affirmatively upon these questions, then the notice to the commissioner would continue to be valid until it was shown that the defect was so repaired that the causeway was safe and convenient.

Exceptions sustained.

WOOD v. PRICE et al.

(Court of Chancery of New Jersey. July 29, 1910.)

1. *LIS PENDENS* (§ 3*)—ACTION FOR ALIMONY—SEQUESTRATION—EFFECT.

The actual execution of a writ of sequestration, authorized by Divorce Act (P. L. 1907, pp. 481, 482) §§ 25, 26, in an action for alimony against a nonresident by the entry of the sequestrator, places the property in the custody of the law and is constructive notice to all the world.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

2. *VENDOR AND PURCHASER* (§ 229*)—BONA FIDE PURCHASER—NOTICE.

Where actual notice of the execution of a writ of sequestration, authorized by Divorce Act (P. L. 1907, pp. 481, 482) §§ 25, 26, in an action for alimony against a nonresident, was given to the tenant in possession, a subsequent purchaser taking without making inquiries of the tenant was chargeable with constructive notice of the execution of the writ.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 477-494; Dec. Dig. § 229.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. LIS PENDENS (§ 22*)—NOTICE OF PENDENCY OF ACTION—NECESSITY—STATUTES.

P. L. 1902, p. 477, § 1, providing that the filing of notice of lis pendens constitutes notice to any bona fide purchaser, does not override the effect of an actual sequestration of real estate, authorized by Divorce Act (P. L. 1907, pp. 481, 482) §§ 25, 26, in an action for alimony against a nonresident, and a subsequent purchaser may not rely on the failure to file a lis pendens.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 31, 34-37; Dec. Dig. § 22.*]

4. DIVORCE (§ 266*)—ACTIONS FOR ALIMONY—SEQUESTRATION—LIEN ACQUIRED.

Chancery Act (P. L. 1902, pp. 524, 525) §§ 44, 46, providing that no decree shall, as against a person not a party, become a lien on lands other than those specifically mentioned in the decree, until an abstract of the decree shall have been filed, and providing that, after the decree is obtained, it shall be lawful to issue process for the sequestration of real and personal estate to satisfy it, refers solely to money decrees rendered in personam, and does not affect Divorce Act (P. L. 1902, p. 508) § 20, enacted on the same day, and re-enacted by P. L. 1907, p. 482, § 26, authorizing sequestration in an action for alimony against a nonresident, and providing for a decree for alimony enforceable out of the estate that has been sequestered.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 266.*]

5. CONSTITUTIONAL LAW (§ 300*)—DUE PROCESS OF LAW—PROCEEDINGS IN REM OR QUASI IN REM.

The purpose of Divorce Act (P. L. 1907, p. 482) § 26, providing for the sequestration of the property of a nonresident defendant in a suit for alimony, is to impose a lien on the property at the inception of the suit, which lien commences when the writ of sequestration is executed, and persists for the benefit of the wife until it has been discharged by order of court or by defendant's performance of the decree, and the proceeding is in rem or quasi in rem, and is permissible notwithstanding the necessity for service of process within the state in an action in personam in consequence of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 940; Dec. Dig. § 300.*]

6. DIVORCE (§ 331*)—ACTION FOR ALIMONY—SEQUESTRATION—ABANDONMENT.

Where a wife, who filed a bill for alimony against her nonresident husband and sequestered his real estate in New Jersey, as authorized by Divorce Act (P. L. 1907, pp. 481, 482) §§ 25, 26, subsequently appeared and answered in a suit for divorce brought by the husband in the court of a sister state, and merely asked for the dismissal of the suit and for alimony incidental to the making of a defense to the suit, and the suit was dismissed on the merits, she did not waive or abandon the rights acquired by her alimony suit pending in New Jersey.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 841, 842; Dec. Dig. § 331.*]

7. DIVORCE (§ 266*)—ALIMONY—LIEN ACQUIRED.

Where a wife, in a suit for alimony against her nonresident husband, acquired a lien on his real estate by the execution of a writ of sequestration, as authorized by Divorce Act (P. L. 1907, pp. 481, 482) §§ 25, 26, and the property was thereafter sold under judicial process to satisfy an underlying incumbrance, her lien was transferred to the surplus money

arising on the sale, and the surplus money must be treated as property sequestered in the alimony suit and held to abide the event thereof.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 266.*]

Suit by Caroline Wood, guardian, against Robert A. Price and others, for the foreclosure of a mortgage. Heard upon petition of Jacob C. Price for the surplus money. Denied.

See, also, 81 Atl. 664, 983.

Vreeland, King, Wilson & Lindabury, for petitioner. Charlton A. Reed, for defendant Alice C. Price.

PITNEY, C. The main cause was a suit for the foreclosure of a first mortgage made by Robert A. Price and Alice C. Price, his wife, upon improved lands in Morristown. The parties defendant are Robert A. Price and wife, Anderson M. Guerin, tenant of the mortgaged premises, and Martha E. Struble, a judgment creditor of Robert A. Price. A final decree was made therein July 20, 1908, providing for a sale of the mortgaged lands in order to pay to the complainant the amount of the mortgage debt with interest and costs, and to the defendant Struble the amount of her judgment and costs, and requiring the surplus money to be brought into court. Pursuant to this decree, a writ of fieri facias was issued to the sheriff of Morris county on July 31, 1908, and the property was duly sold on October 12th for an amount sufficient to satisfy the mortgage and judgment and yield a substantial surplus. The sale was confirmed by order bearing date October 26, 1908.

The successful bidder was Dr. Jacob C. Price, a brother of the mortgagor. After the confirmation of the sale, but before the sheriff's deed had been accepted by the bidder, the latter filed his petition herein setting up that Robert A. Price, by deed of conveyance bearing date August 12, 1908, and recorded in the Morris county clerk's office on August 20th, had sold and conveyed to the petitioner, Jacob C. Price, the mortgaged lands in question, by virtue of which sale and conveyance the petitioner claimed to be entitled to receive the surplus money, and prayed the court to make an order directing the sheriff to accept the petitioner's receipt as payment to that extent of the purchase money. An order of reference was made to a special master to ascertain the truth of the allegations of the petition and make report thereon.

Mrs. Price, the wife of the mortgagor, who did not join in the deed to Jacob C. Price, appeared by counsel before the special master, and afterwards before me, setting up a claim upon the surplus money by virtue of her inchoate right of dower, and also and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

especially by virtue of the sequestration proceedings presently to be mentioned.

In order to facilitate the determination of the matter, counsel for the petitioner and for Alice C. Price consented that the testimony taken before the special master should be returned to me without the formality of a master's report upon the facts, and the matter was then brought on to hearing before me upon the testimony taken before the master and other testimony submitted to me in open court.

From the evidence it at once appeared that Alice C. Price, by virtue of her inchoate right of dower, was entitled to have some portion of the surplus money set apart to secure her dower interest in the event of her surviving her husband. And it further appeared that her claim to priority over the title of Jacob C. Price by virtue of a suit that she had brought in this court against her husband for alimony under P. L. 1907, p. 482, § 26, and in which (the husband being out of the state) a writ of sequestration had been issued and executed upon the mortgaged lands prior to the foreclosure sale, raised at least so serious a doubt of Jacob C. Price's right to the proceeds of that sale that the question ought not to be summarily decided before the conditions of sale were complied with by the purchaser and the money paid by him to the sheriff.

For these reasons, Dr. Price, under advice of his counsel, waiving so much of his petition as prayed that the sheriff might be required to accept his receipt, paid the balance of the purchase price to the sheriff in money, and the sheriff has paid into court the sum of \$5,280.34, which includes what is due to Mrs. Struble upon her judgment and an overplus of approximately \$2,700, which latter is the subject-matter of the controversy as between the petitioner and Mrs. Price.

In the determination of that controversy the following are the important facts and dates:

Mrs. Price filed her bill for alimony against her husband on July 27, 1908. The defendant being then and at all times since out of the state and not to be found herein to be served with process, the subpoena ad respondendum was returned non est, and, upon proofs submitted to the court, an order was made on July 30th (under P. L. 1907, p. 482, § 26) that a writ of sequestration should issue against the said Robert A. Price directed to the sheriff of the county of Morris, directing him to sequester the defendant's estate, property, and effects within this state and the rents and profits thereof, to compel his appearance and the performance of any decree or order which might be made in that suit. The writ of sequestration was issued accordingly, tested August 1, 1908, and delivered to the sheriff, who, on August 5th, entered upon the mortgaged lands in question and sequestered the same and the rents and profits thereof, and at the same time

delivered to the tenant, Mr. Guerin, a copy of the writ. Guerin recognized the right of the sheriff under the sequestration by paying to him on August 24th the sum of \$156.60 as rent for said premises. The sheriff returned, with the writ, a statement of what he did in execution of it.

An order of publication was duly taken in the alimony suit, followed by a decree pro confesso, and an order for proofs under which evidence was taken, and the case is now awaiting decision. Decision has been reserved pending the determination of the present controversy, because, if it were found that Jacob C. Price is entitled to the proceeds of the sale of the land sequestered, there would be nothing beyond the small amount of rent just mentioned out of which to award alimony.

By deed dated August, 12, 1908, acknowledged in South Dakota on August 17th and recorded in the Morris county clerk's office on August 20th, Robert A. Price undertook to convey the lands in question to his brother, Jacob C. Price, for "one dollar and other good and valuable considerations."

As already mentioned, the lands were brought to sale under the foreclosure on October 12th, and purchased by Jacob C. Price, the present petitioner.

On or about September 9, 1908, Robert A. Price, who was in South Dakota, and claiming to be an actual and bona fide resident there, instituted an action against his wife in one of the courts of that state for a divorce. On October 9th a summons in that action was served upon Mrs. Price at Morristown, in this state, where she was then, and long before that had been, residing. The wife filed an answer in the South Dakota action denying that her husband was then, or had been for more than six months preceding the commencement of his action, an actual resident in good faith of the state of South Dakota and domiciled therein as he had alleged, and averring that his actual residence was in New Jersey. The answer also denied the allegations of his petition upon which he based his claim for divorce, prayed that he be required to furnish her with means sufficient for her support and maintenance and with proper expense money to defend the action, and that his complaint be dismissed. On November 4th the South Dakota court made an order requiring the plaintiff, Robert A. Price, to pay to the wife's attorneys \$200 attorney's fees, \$50 for expenses in paying witnesses, notaries, etc., and also \$10 a month as alimony to Mrs. Price; the first payment to be made on November 10th, and subsequent payments on the 10th of each month following, during the pendency of the action, or until the further order of the court. Robert A. Price complied with this order to the extent of paying the \$200 attorney's fees, \$50 of expense money, and alimony for two months at \$10 per month. The action came on to be

tried on March 3, 1909, whereupon the court, finding that none of the material allegations of the complaint were sustained by the evidence, and that all the material averments of the answer were sustained, rendered judgment denying the husband's prayer for divorce, and dismissed his complaint on the merits and awarded costs to Mrs. Price.

The principal question now raised before me is whether by virtue of the writ of sequestration a lien was acquired upon the land that takes precedence over the title acquired by Jacob C. Price under the deed made to him by Robert A. Price. As already mentioned, the writ was executed on August 5th, while the deed is dated August 12th, and certainly was not delivered prior to its date. The legislative authority for such a writ of sequestration originated in the divorce act of 1902 (P. L. 1902, p. 508, § 20), and is now contained in section 26 of the act of 1907 (P. L. 1907, p. 482).

In the divorce act of 1874, the nineteenth and twentieth sections (Gen. Stat. p. 1270) provided for the enforcement of orders touching the alimony and maintenance of the wife and touching the care and maintenance of the children by the husband, by the sequestration of the defendant's personal estate and the rents and profits of his real estate. Similar process and for the like purposes was provided by sections 19 and 20 of the divorce act of 1902. Thus far the reference was to suits in personam. To the twentieth section of the act of 1902 this new provision was appended, viz.: "In cases where a husband cannot be found within this state to be served with process, his estate, property and effects within this state and the rents and profits thereof may be sequestered to compel his appearance and performance of any decree or order which may be made in the suit; but the process of sequestration shall be issued only upon special order therefor, to be made upon proof of the claim alleged in the bill, and that the defendant cannot be found within the state for the service of process; upon process of sequestration a bond as provided in cases of ne exeat may be given in discharge of the writ, and the sum in which the party shall give bond, with sufficient surety or sureties, shall be indorsed upon the writ in words at length; where the proceedings are by process of sequestration and defendant does not appear, the decree shall be enforceable only out of and against the estate sequestered."

Similar provisions are in sections 25 and 26 of the act of 1907.

Plainly it is the legislative purpose to place in the custody of the law the corpus of the real estate as well as the rents and profits thereof, where the defendant cannot be found within this state to be served with process, and to retain the property thus sequestered either to compel his appearance and the giving of a bond as provided in cases of ne exeat, or, if he does not appear,

then to provide for the enforcement of the decree out of the corpus of the estate and the rents and profits thereof.

The proceeding is analogous to the familiar proceeding by foreign attachment in the common-law courts. That it is within the power of the Legislature to thus provide that the property of an absconding or nonresident husband situate within this jurisdiction shall be devoted to the support of his wife and children admits, I think, of no question. This point will be dealt with below.

[1, 2] It is, however, argued that the sequestration was of no effect as against Jacob C. Price, because, as alleged, he was a bona fide purchaser for value of the equity of redemption without notice of the sequestration.

I overrule this contention: First, because the actual execution of the writ of sequestration by the entry of the sequestrator amounted to a placing of the property in the custody of the law, which on familiar principles must be held to be constructive notice to all the world; and, secondly, because it was clearly proved, and without dispute, that actual notice was given to the tenant in possession, Mr. Anderson M. Guerin; and a subsequent purchaser taking without making inquiries of Guerin must be held charged with constructive notice of what he would have ascertained if inquiry had been made, viz., that the writ of sequestration had been executed. Dr. Price was not safe in relying upon his previous knowledge that Guerin was in possession as tenant of Robert A. Price. He was bound to continue his inquiries down to the time that he took his title, or submit to be charged with notice of what he would have learned if such inquiries had been made.

[3] It is next argued that no notice of lis pendens had been filed in the alimony suit at the time the deed from Robert to Jacob Price was made and recorded. The act respecting notice of lis pendens (P. L. 1902, p. 477, § 1) provides that neither the issuing of a summons or subpoena, or other process or writ, nor the filing of a declaration or bill in any suit relating to or affecting the possession of or title to lands, nor any proceedings had thereon prior to final judgment or decree, shall be taken as constructive notice to any bona fide purchaser or mortgagee until a written notice of lis pendens has been filed in the office of the clerk or register of the county where the land lies. It is, I think, quite doubtful whether the pending suit for alimony is a suit relating to or affecting the possession or title of lands, within the meaning of this statutory provision respecting lis pendens. But, whether so or not, Mrs. Price relies, not upon the issuing of the process, but upon its execution by the open and notorious entry of the sequestrator upon the property. And, in my opinion, the section just referred to has no such force as

to override the effect of the actual sequestration of real estate in an alimony suit against a nonresident.

[4] Reference is next made to sections 44 and 46 of the chancery act (P. L. 1902, pp. 524, 525), the former of which provides that no decree of the Court of Chancery shall, as against any person not a party, become a lien upon lands other than those specifically mentioned in the decree, until an abstract of the decree shall have been filed in the office of the clerk of the Supreme Court; and the latter of which sections provides that, after decree obtained, it shall be lawful for the court to issue process for the sequestration of the real and personal estate of the defendant to satisfy the demand of the complainant in the decree specified. These provisions are found in a revision that concerns the general practice of the Court of Chancery. The context shows that they have reference to money decrees rendered in personam. They do not, I think, limit at all the effect of that portion of section 20 of the divorce act of 1902 (enacted on the same day and re-enacted in 1907) which provides for a decree for alimony against a nonresident, enforceable only out of the estate that has been sequestered, for the very purpose of compelling defendant's appearance and the performance of any decree or order which may be made in the suit.

[5] It seems to me the plain object and effect of section 26 of the divorce act is to impose a lien upon the defendant's real estate at the inception of the alimony suit, where defendant cannot be found here to be served with process, that this lien commences when the writ of sequestration is executed, and persists for the benefit of the wife until it has been discharged either by the order of the court or by the defendant's performance of the decree of the court. It is, of course, quite true that in ordinary cases a decree for alimony or maintenance is a judgment in personam, not to be obtained without service of process upon the defendant within the state. *McGuinness v. McGuinness*, 72 N. J. Eq. 381, 68 Atl. 768. The necessity for such service arises from the operation of the fourteenth amendment to the federal Constitution, as construed in *Pennoy v. Neff*, 95 U. S. 714, 24 L. Ed. 565; but there is here no limitation upon the authority of the state to subject property within its jurisdiction to the payment of the debts or performance of the obligations of nonresident owners. As was observed by Mr. Justice Field in delivering the opinion of the court in the case just cited (95 U. S. at page 723 [24 L. Ed. 565]): "The state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state

owes protection to its own citizens, and when nonresidents deal with them it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresident to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligation to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate."

Section 26 of the divorce act (P. L. 1907, p. 482), in providing for the sequestration of the property of a nonresident defendant in a suit for alimony in order to "compel his appearance and performance of any decree or order which may be made in the suit," at the same time declares that, where the defendant does not appear, the decree shall be enforceable only out of and against the estate sequestered. This renders it a proceeding in rem, or quasi in rem, such as is permissible under the decision in *Pennoy v. Neff*. The decree that was under consideration in *McGuinness v. McGuinness*, 72 N. J. Eq. 381, 68 Atl. 768, was made prior to the act of 1902, which established this mode of procedure. That decree, so far as it awarded alimony, was a decree purely in personam. The decision in the *McGuinness* Case and the reasoning of the opinion do not bear at all against the validity of a proceeding and decree in rem, such as I am dealing with.

The decision of Chancellor Zabriskie in *Vreeland v. Jacobus*, 19 N. J. Eq. 231 (followed by the Court of Errors in *Hervey v. Hervey*, 56 N. J. Eq. 424, 428, 39 Atl. 762), to the effect that the conveyance of real estate before sequestration issued, although after the decree on which it is founded, is valid in the absence of mala fides, has no bearing upon the present question. Those cases had reference to decrees in personam, and the query was whether a sequestration out of chancery differed from an execution, so that any alienation made after the decree on which it was founded would be void. This query was answered in the negative. The present case is the very different case of a writ of sequestration both issued and executed prior to the alienation; the writ being issued prior to final decree, and issued by virtue of a valid enactment for the very purpose of rendering the final decree efficacious.

[6] Finally, it is argued that the appearance and answer made by Mrs. Price in the South Dakota suit brought by her husband against her for a divorce was a waiver of her rights in New Jersey and an abandonment of her suit brought here for alimony. This argument is rested upon the ground that Mrs. Price was not entitled to relief in both jurisdictions at the same time, that she

must elect between them, and that she elected to secure her rights in South Dakota.

Whether the bringing of an action in personam by Mrs. Price against her husband in South Dakota should be deemed an election to abandon her pending action in rem or quasi in rem to enforce the payment of alimony out of his property here is a question that I do not feel called upon to consider; for, as I read the record of the South Dakota divorce suit, Mrs. Price did not seek there any affirmative relief against her husband excepting only such as was incidental to the making of her defense to his action for divorce. The pleading filed by her purports to be an answer. It denies the allegations of her husband's complaint upon which his prayer for divorce was founded; it denies his alleged bona fide residence in South Dakota; avers that his residence is in New Jersey, and that he went to South Dakota for the sole purpose of obtaining a divorce against her, leaving her destitute of means, so that she would be unable to make any defense to the pretended action brought by him for divorce in the state of South Dakota. The answer then recounts the steps alleged to have been taken by the husband to place his property out of his wife's reach; avers that he is a man of means, and that his abandonment and desertion of her was without her consent and without any just cause. It concludes by demanding judgment as follows: "(1) That the plaintiff be required to furnish defendant means sufficient for her support and maintenance and with proper expense money to defend this action; and also a sufficient amount to pay attorney's fees in defending said action for her. (2) That plaintiff's complaint be dismissed. (3) And for such other, further, or different relief as defendant may show herself entitled to in equity and good conscience upon the trial of this action."

The prayer that plaintiff be required to furnish defendant with means sufficient for her support and maintenance seems to have been intended only to provide for her maintenance while defending the action. So it was construed by the parties and by the court. The answer, with accompanying affidavits, was made the basis of an application for an order that the plaintiff, Robert A. Price, be required to pay to the defendant "a reasonable alimony, counsel fees, and suit money during the pendency of this action." The order of the court made thereon recited that application was made "for counsel fees, temporary alimony, and expense money"; and the order provided for the payment of \$10 per month only during the pendency of this action, or until the further order of the court. The final decree, after reciting that upon the trial it appeared that all the material averments of the answer were sustained by testimony, decreed that the plaintiff

was not entitled to a decree of divorce as prayed for by him, that his complaint should be dismissed on the merits, and that the defendant should recover from him her costs to be taxed.

It is quite plain that Mrs. Price made no application for alimony in the South Dakota court except such as was incidental to the making of her defense to the suit for divorce brought against her. Such an application cannot be deemed a waiver or abandonment of her alimony suit pending in this state.

No doubt the \$20 that was paid to her under the order of the South Dakota court should be taken into consideration in determining how much should be allowed to her in her pending alimony suit, in the event of a final decree going in her favor. But this does not enlarge the present rights of Jacob C. Price.

[7] Upon the whole, therefore, I conclude that by the writ of sequestration, and by the execution of that writ as above mentioned, a lien was acquired upon the land in favor of Mrs. Price that has priority over the title acquired by Jacob C. Price under the deed made to him by Robert A. Price. The land having then been converted into money by a sale under judicial process for the satisfaction of an underlying incumbrance, Mrs. Price's lien is, of course, transferred to the surplus money. It results that the whole of the money paid into court by the sheriff (save what is due to the judgment creditor) must be treated as property sequestered in the alimony suit and be held to abide the event of that proceeding.

Besides this, it is conceded that Mrs. Price is entitled to have her inchoate right of dower protected in the usual way.

The application of Jacob C. Price to have the surplus money now paid to him as purchaser will therefore be denied, with costs; reserving, however, his rights as against all other parties than Mrs. Price, and his right to the fund or to so much of it as may remain, if and when her rights are terminated or otherwise disposed of.

BENNETT v. ASSOCIATION TO PROVIDE AND MAINTAIN A HOME FOR THE FRIENDLESS.

(Court of Errors and Appeals of New Jersey. March 6, 1911.)

WILLS (§ 601*) — CONSTRUCTION — ESTATES CREATED—LIMITATION REPUGNANT TO DEVISE IN FEE.

Where land is devised to the "namesake and beloved and adopted daughter" of the testatrix, to her heirs and assigns forever, with authority to otherwise sell or dispose of the whole or any part of it, the provision that if the devisee should die without children, leaving the estate devised "or any part or portion of the same, then it is my will that so much thereof or such part or portion of said estate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

as she may leave at her decease, shall go to the Home for the Friendless," gives the daughter a fee simple with absolute power of disposition, and the limitation over being void as inconsistent with the rights of the devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350; Dec. Dig. § 601.*]

Appeal from Court of Chancery.

Bill by Esther M. A. Bennett against the Association to Provide and Maintain a Home for the Friendless. Decree for complainant, and defendant appeals. Affirmed.

The following is the opinion of Vice Chancellor Stevens in the court below:

"I think this case plainly falls within the principle of *Annin's Ex'r v. Van Doren's Adm'r*, 14 N. J. Eq. 136, *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269, *Rodenfels v. Schumann*, 45 N. J. Eq. 383, 17 Atl. 688, *Tuerk v. Schueler*, 71 N. J. Law, 332, 60 Atl. 357, and *McCloskey v. Thorpe*, 74 N. J. Eq. 413, 69 Atl. 973, rather than within that of *Wilson v. Wilson*, 46 N. J. Eq. 322, 19 Atl. 132, *Wooster v. Cooper*, 53 N. J. Eq. 682, 33 Atl. 1050, and *Tooker v. Tooker*, 71 N. J. Eq. 513, 64 Atl. 806. No one can read the will without being impressed with the conviction that the testatrix intended to give to her 'namesake and beloved and adopted daughter' an estate in fee simple with absolute and unlimited power of disposition. She gives the estate to complainant, not for life nor indeterminately, but to her heirs and assigns forever, and she adds in another clause an authority to sell or otherwise dispose of the whole or any part or portion of it.

"It is true that she provides that 'if the said Esther May Anderson Bennett (the complainant) should die without children, leaving the estate hereby bequeathed to her, or any part or portion of the same, then it is my will that so much thereof or such part or portion of said estate as she may leave at her decease, shall go to the Home for the Friendless,' but in thus attempting to give to the Home, she runs counter to that rule which declares that, 'If the testator either expressly or by implication manifests an intent to vest in the first legatee the uncontrolled power of disposing of the property, such power involves the idea of absolute ownership and the limitation over is void as inconsistent with the rights of the first legatee' (*Annin's Ex'r v. Van Doren's Adm'r*, supra). In *Wilson v. Wilson* and *Tooker v. Tooker*, supra, the court did not find in the expression used any clear indication that the life tenant could consume the principal of the estate at his pleasure. Here what is given to the Home is not 'what remains' an expression that, taken in connection with the context, may often be construed as 'remainder,' but 'so much' or 'such part or portion of said estate as she (my daughter) may leave at her decease.' In this there is no

ambiguity. It is unmistakably indicated that the testatrix desired her daughter to have the unrestricted power to dispose of principal. It was not the whole estate that was to go over, but only such part as the daughter might see fit to leave.

"As to the annual subscription of \$5 it seems to me that its payment is discretionary with complainant and not obligatory. Pom. Eq. Jur. § 1014; *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510."

Frank Benjamin, for appellant. Leo Stein, for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Stevens.

VAN SCHAICK et al. v. BOARD OF RIPARIAN COM'RS.

(Supreme Court of New Jersey. Dec. 18, 1911.)

(Syllabus by the Court.)

1. CERTIORARI (§ 4*)—NATURE OF REMEDY—EXISTENCE OF OTHER REMEDIES.

The Court of Chancery upon a bill in the nature of an information filed by the Attorney General at the relation of a private party has jurisdiction to annul a grant of lands under water made by the riparian commissioners to a person not the owner of the shore front. This survival of the most ancient common-law office of the Chancellor is a legal remedy administered in equity. The existence of this complete legal remedy renders it an exercise of sound discretion to deny the allowance of a writ of certiorari to review in a like case the proceedings of the riparian commissioners on which a grant by them of the state's land was based.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. FORMER CASE DISTINGUISHED.

The case of *Shamberg v. Riparian Commissioners*, 72 N. J. Law, 132, 60 Atl. 43, explained, and distinguished.

Application by Julia A. Van Schaick and others for certiorari to the Board of Riparian Commissioners. Denied.

Argued November term, 1911, before GARRISON, PARKER, and BERGEN, JJ.

Cortlandt Parker, for the motion. Gilbert Collins, contra.

GARRISON, J. This is an application for a writ of certiorari. The objects sought to be obtained by such writ as set forth in the brief of applying counsel are as follows: "The writ is sought to review proceedings of the riparian commissioners in adopting a map, resolving to grant and making a grant of lands in the waters at the junction of the Navesink or North Shrewsbury river and the South Shrewsbury river."

It will be observed that it is not even definitely assumed that the riparian grant can be canceled upon certiorari, but only that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the proceedings of the commissioners can be reviewed.

The private grounds upon which the present application is based are that the grantee of the riparian deed was not the owner of the ripa, and that of the six islands included therein one was owned by the prosecutors' predecessor in title. The fact, if true, that the other five islands were the property of the state, and that the public was deprived of its right to fish, clam, and oyster on the lands conveyed, seems to state public, rather than private, grievances.

[1] The riparian grant that the prosecutors seek to undermine is regular in form, and contains the customary proviso that, if the grantee is not the owner of the land adjoining the land under water thereby granted, the grant shall, as regards the state, be void. That a riparian grant, if such a false suggestion appear upon its face, may be attacked collaterally in an action of trespass or ejectment, is established by the case of *Polhemus v. Bateman*, 60 N. J. Law, 163, 37 Atl. 1015, and the cases in which that decision has been followed.

Ejectment will also lie to test the title of the island of which ownership is claimed. Hence apart from the exclusively public grievances there appears to be no necessity for the use of our prerogative writ in aid of any private right.

This circumstance, combined with the probable futility of a judicial review that could only animadvert upon the proceedings of a state agency, without undoing what had been done, might well lead us to deny the allocatur for which application is made even if a more direct and cogent reason did not exist.

Such a reason does, however, exist. In the case of *Attorney General v. Central R. R. Co.*, 61 N. J. Eq. 267, 48 Atl. 347 (1901), which was a bill filed by the Attorney General ex rel., the Chancellor (Magie), after citing the cases of *Elizabeth v. Central R. R. Co.*, 53 N. J. Law, 491, 22 Atl. 47, and *Polhemus v. Bateman*, said: "It follows that an attack upon the grant before us can only be made directly and in a proceeding such as that under consideration."

In *Attorney General v. Morris & Cummings Dredging Co.*, 64 N. J. Eq. 555, 55 Atl. 59 (1903), the jurisdiction of chancery on the information of the Attorney General at the relation of a private party to annul a state grant of lands under water was considered at length by Emery, V. C., and expressly declared. This case was affirmed by the Court of Errors and Appeals. 169 N. J. Eq. 829, 63 Atl. 985.

In *Attorney General v. Central R. R. Co.*, 68 N. J. Eq. 198, 59 Atl. 348, this same jurisdiction was entertained (Emery, V. C., 1904). In *Attorney General v. Sooy Oyster Co.*, 78 N. J. Law, 394, 407, 75 Atl. 211, it was pointed out that this jurisdiction of chancery was a legal, and not an equitable, one, and that

its exercise by the Chancellor was in fact more ancient than the Court of Chancery itself. It was further pointed out that in this country this legal jurisdiction has continued to reside in the courts of equity as an established method of direct attack upon grants improperly or improvidently made by the United States or by a state government.

The existence of this ancient and established legal remedy has a direct bearing upon the discretion we are now asked to exercise, one of the integral elements of which is that there is no other adequate legal remedy. Here, however, there is another remedy as strictly legal as is the remedy by certiorari and far more adequate, since it can annul by its decree where certiorari can only undermine by its judgment, if, indeed, it can render any effective judgment at all. If the adequacy of the remedy in chancery be denied upon the ground that the private relator must first obtain the consent of the Attorney General to the filing of the bill, the answer is that he must do substantially the same thing before he is allowed by this court to proceed by certiorari, of which this present application is a practical illustration. There is no essential difference between an application to the Attorney General for leave to file a bill in the nature of an information and an application to this court or one of its justices for an allocatur in certiorari. Either case is an application addressed to sound judicial discretion.

I am not suggesting that the existence of an adequate legal remedy in chancery deprives the Supreme Court of the power to permit the use of its writ as a concurrent remedy. What I am suggesting, and indeed what we are deciding, is that in the exercise of a sound discretion such use should not be allowed in view of the existence of a more complete legal remedy.

[2] The sole authority for the allocatur for which application is now made is the case of *Shamberg v. Riparian Commissioners*, 72 N. J. Law, 132, 60 Atl. 43, in which the grounds upon which the writ was allowed are not stated or the propriety of its allowance challenged. It is true that Mr. Justice Fort in his opinion says incidentally that a grant made without notice would be vacated upon certiorari. An examination of the printed case will show, however, that the matter sub judice was the consent of the riparian commissioners to the construction of a railroad over lands of the state executed in conformity to Act 1873 (P. L. p. 105) § 36.

It was this consent or license that was made the subject of judicial review, and not a riparian grant such as that now before us. Whether, therefore, that case be treated as one in which the question we are called upon to decide was not under consideration, or as one that should not be extended to absolute grants of riparian lands, it does not in either case control the exercise of the dis-

cretion reposed in us in dealing with the allowance of the prerogative writ of this court.

For the reasons stated, the application for an allocatur is denied.

DUFFY v. McKENNA.

(Supreme Court of New Jersey. Jan. 12, 1912.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 127*)—COMPUTATION OF LIMITATIONS—COMMENCEMENT OF ACTION—AMENDMENT OF PLEA.

An amendment of the declaration after the statute of limitations has run *held* not improper, so long as a new cause of action is not introduced thereby.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. TRIAL (§ 314*)—MISCONDUCT OF OR AFFECTING JURY.

The circumstances found to have existed in this case, with regard to the custody and deliberations of the jury, *held* not to be such as to vitiate the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 747, 748; Dec. Dig. § 314.*]

3. FRAUD (§ 59*)—ACTIONS—MEASURE OF DAMAGES—SUFFICIENCY OF EVIDENCE.

The action was for deceit in the sale of certain stock and bond privileges. Plaintiff did not receive the property, but paid part of the purchase price on account in exchange for a broker's receipt, agreeing to deliver the privileges on payment of the balance, with interest. Before the balance was paid, he discovered that false representations as to the bonds had been made, and demanded his money back, and, not receiving it, brought suit for damages on account of the false representations. *Held*, that the measure of damages was the difference between what he had paid and the value of what he had at the time of discovering the fraud, and, in the absence of all evidence as to the value of the broker's receipt, a verdict for nominal damages should have been directed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62; Dec. Dig. § 59.*]

(Additional Syllabus by Editorial Staff.)

4. PLEADING (§ 248*)—AMENDMENT—DECLARATION—NEW CAUSE OF ACTION.

In an action for deceit, an amendment of the declaration, branding as false an additional one of the representations of the defendant set forth in the original declaration, did not set forth a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

Action by Joseph A. Duffy against Thomas P. McKenna. Verdict for plaintiff. Heard on defendant's rule to show cause. Rule made absolute.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

Roe & Runyon, for plaintiff. Collins & Corbin, for defendant.

PARKER, J. This is an action of deceit. The plaintiff has twice had a verdict, the second time by a struck jury.

The declaration was originally in three

counts, but the third count was struck out, and at the second trial, the proceedings at which are now before us, the case under the second count was withdrawn from the jury. The verdict under review, therefore, rests on the first count alone.

[1, 4] Two questions of practice are presented. It is urged, in the first place, that there was error in permitting an amendment of the first count shortly before the trial, and that this introduced substantially a new cause of action after the period of limitation had expired. The representations averred to have been made by defendant, according to the first count in its original form, are (1) that the North American Lumber & Pulp Company was a New Jersey corporation; (2) that defendant was its president; (3) that it was possessed of 255,000 acres of land in Canada, (4) bringing in a revenue of \$40,000 a year over expenses; (5) that said company had issued 200 bonds of \$1,000 each, secured by mortgage covering said property, (6) which bonds were valid, existing obligations of said company and worth their face value; (7) and that defendant was going to invest \$14,000 in these bonds, and his father \$5,000 in them. The representations averred to have been false by the count as originally drawn were those relating to the ownership of land and the revenue therefrom, numbered 3 and 4 above. By the amendment, that numbered 5 was also traversed as false.

We think it is plain that no new cause of action was introduced by this additional matter. The basis of the plaintiff's suit was that he had been induced by this series of representations to invest \$10,000 of his money in partial payment for 20 "allotments," each consisting of 1 bond and 20 shares of the stock of the said company, which he would not have done, unless he had relied on these representations as true. The fact that one more representation is branded as false by the amendment would seem merely to strengthen the plaintiff's case, without adding any further cause of action.

[2] It is further urged that there was misconduct on the part of the jury, or of the clerk and officers in charge of them, which vitiates the verdict. There is some little conflict as to the facts, but we find that what occurred was about this: When the jury was sent out, a constable was sworn in open court. The judge left for the day, after directing the clerk to take the verdict. Then the constable was relieved by another one sworn in the clerk's office. This was irregular, but furnishes no sufficient reason for setting aside the verdict. Afterwards the jury sent out word that they wished further instructions, and word was sent back that the judge was gone. It was then after 6 o'clock, and the clerk, through the constable in charge, notified the jury that he was going to supper, and that if they were not

ready with the verdict they would not be able to report until his return at 7:30; thereupon the foreman sent out word that they were nearly ready, and asked if he would wait 10 or 15 minutes after 6:30, to which he assented, and in a few minutes the jury came in. There is nothing in all this to show intentional misconduct on the part of either the jury or the court officers, or that any improper influence was exerted to induce a verdict. In *Baizley v. Welsh*, 71 N. J. Law, 471, 60 Atl. 59, members of the jury were allowed to leave the jury room and telephone to their families, but this was held no cause for setting aside the verdict. We see none in the present case, so far as the custody and conduct of the jury are concerned.

[3] This brings us to the merits of the case. Duffy, McKenna, one O'Reilly, McKenna's brother-in-law, and a broker named Meyer had been more or less intimate, both socially and in a business way. Duffy held receipts entitling him to stock in a corporation called the "Dominion Securities Company." His testimony, which the jury evidently believed, is that on March 27, 1902, McKenna telephoned him to bring over his receipts to New York, and he did so; that McKenna then told him to sell out and buy bonds and stock of the North American Lumber & Pulp Company; that he asked what it was all about; and that the representations were then made. Accordingly Duffy sold out his Dominion Securities stock for about \$13,000, paid \$10,000 of the proceeds to Meyer, and received a receipt, as follows: "New York, March 27, 1902. This is to certify that I have this day received from Joseph A. Duffy, ten thousand dollars on account of the purchase of twenty allotments of the stock and bonds of the North American Lumber & Pulp Company, each allotment consisting of one bond and twenty shares of stock of said company, which said allotments are deposited with me subject to the payment of the balance of the purchase thereof of ten thousand dollars with interest. A. L. Meyer."

This receipt is all that Duffy ever got for his money. It turned out afterwards that, because of legal difficulties connected with the holding of Canadian real estate by a New Jersey corporation, the promoters (McKenna et al.) had arranged that the title should be vested in, and the bonds issued by, a Canadian corporation, called the "United Lumber Company, Limited," that the North American Company was the holding company for these bonds, and that it was the bonds of the United Lumber Company that Duffy was expected to take when he should pay the balance on his "allotments." There are prospectuses in evidence which indicate that this arrangement was perfected before Duffy came into the matter at all, but he denies that he knew anything about it. According to his story, he waited until October, after trying ineffectually to get his bonds from

Meyer, and, being offered instead bonds of the South Elberon Land Company, and then demanded his money back from McKenna, but failed to obtain it.

The defendant urges that the court should have nonsuited or directed a verdict for defendant, but the case was clearly not one for either of these dispositions. It is obvious from what has been said that it was open to the jury to find that Duffy was induced to pay out his money for something that he did not get, and in the nature of things could not get, because it was not in existence, to wit, bonds of the North American Lumber & Pulp Company. It is no answer to say that the United Lumber Company bonds were just as good; for, irrespective of the reason that they were not what were bargained for, Duffy might well refuse to take bonds of a Canadian company, of whose rights and powers he knew little or nothing, instead of bonds of a New Jersey corporation, with respect to whose validity he, being a New Jersey lawyer, could judge for himself. It is said that the receipt may be construed to call for United Lumber bonds. This would be a very strained construction, to say the least, but, conceding it could be so construed, the meaning of the receipt was left to the jury, as requested by defendant.

We find nothing in the various arguments made by counsel and elaborated in the brief to lead to the conclusion that any harmful legal error was committed at the trial, except in the refusal of one of the defendant's requests to charge. As has already been noted, Duffy, having paid in \$10,000 on account of a \$20,000 purchase, received Meyer's receipt, calling for stock and bonds of the North American Lumber & Pulp Company, deliverable on payment of the other \$10,000 and interest. The stock was obtainable, but not the bonds, because such bonds did not exist. On discovery of the fraud, Duffy might have tendered back the receipt and sued for the return of his money as money had and received to his use. This, however, he did not do, but retained the receipt, without paying in the balance called for thereby, until it was made worthless by an enforced sale of his privileges thereunder in the following January, and his present suit is for the damage done him by the false representations. The rule of damages in such case, as laid down by the Court of Errors and Appeals, is that the damage is the difference between the price paid by the purchaser and the real value of the property that he has acquired. *Crater v. Binniger*, 83 N. J. Law, 513, 516, 97 Am. Dec. 737; and the time as of which this difference is to be ascertained is when the fraud ceased to be operative. *Smith v. Duffy*, 57 N. J. Law, 679, 690, 32 Atl. 371. That juncture, in the case at bar, was in September or October, 1902, when Duffy learned the bonds were not forthcoming. Hence the damages would be the difference between the \$10,000 paid and

the value of his Meyer receipt at that time, disregarding questions of interest. But there is not a particle of proof in the case as to the value of this receipt held by Duffy, or that he made any effort to dispose of it then or thereafter. That the allotment privileges which it represented were of some value is indicated by the sale of 20 allotments in the following January for a total of \$11,800, after the securities had greatly depreciated—a sum that would have covered the unpaid balance called for by Duffy's receipt, with the interest (about \$450), and have repaid him some \$1,350 on account of his claim.

It is true that Duffy did not have the formal allotment privileges, but only Meyer's receipt for \$10,000 and agreement to deliver them on payment of the balance. But this was a contract with a broker in active business, and presumably solvent and responsible. It is not intimated that the allotments would not have been forthcoming on payment of the balance; and the sale of stock privileges in financial districts is so common that in all likelihood the Meyer receipt, at the time in question, had some value. The trial court substantially recognized this in laying down the measure of damages, but failed to observe that there was no evidence at all as to the value of the receipt. Such evidence it was the duty of Duffy to provide, in order to prove his case; and without it there was no means of applying the proper rule of damages. The court was requested to charge that the verdict should be only for nominal damages. The request, in view of this failure of evidence, should have been granted. Without this evidence, the verdict rests on no lawful foundation, and cannot stand.

For this reason, the rule to show cause will be made absolute.

KOHLREPP et ux. v. RAM et ux.

(Court of Chancery of New Jersey. Dec. 27, 1911.)

1. SPECIFIC PERFORMANCE (§ 95*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR SALE AND PURCHASE OF REAL ESTATE.

Equity will not compel a purchaser to specifically perform his contract of purchase, where there is a doubtful question of law or fact affecting the title of the vendor.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

2. VENDOR AND PURCHASER (§ 129*)—CONTRACTS ENFORCEABLE—SUFFICIENCY OF TITLE.

A deed executed by an attorney in fact began with the recital, "between [names of grantors] by their attorney in fact," followed by his name and followed by the name of the grantee, "party of the second part." The testatum clause read, "In testimony whereof the said [attorney in fact] hath by virtue of two certain letters of attorney given to him by said party of the first part * * * hereunto set the hands and seals of his principals, the parties of

the first part;" and was signed by the attorney in fact individually, and as attorney in fact for the grantors. *Held*, that the validity of the deed was so doubtful that equity would not at the suit of a vendor relying on the deed in his chain of title compel the purchaser to specifically perform his contract of purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244; Dec. Dig. § 129;* Specific Performance, Cent. Dig. § 273.]

3. VENDOR AND PURCHASER (§ 129*)—CONTRACTS ENFORCEABLE—SUFFICIENCY OF TITLE.

Where a purchaser's objection to the title of the vendor related to the existence of outstanding interests arising under declarations of sale for taxes, equity would not compel the purchaser to specifically perform his contract of purchase because the title of the vendor would rest on facts in an issue between himself and a third person not a party to the suit for specific performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244; Dec. Dig. § 129;* Specific Performance, Cent. Dig. § 273.]

Suit by Henry Kohlrepp and his wife against John Ram and his wife to compel specific performance of a contract for the sale of real estate. Bill dismissed.

E. M. Wight, for complainants. John D. Pierson, for defendants.

GARRISON, V. C. This is a suit for specific performance of a contract for the sale of real estate. The complainants are the vendors and the defendant the vendee. The vendee refuses to perform because of alleged defects in the complainants' title. Two objections are made: The first relates to the manner of execution by an attorney in fact of a deed which is in the chain of title of the complainants. The second objection relates to the existence of certain alleged outstanding interests arising under declarations of sale for taxes.

As to the execution of the deed by the attorney, the following are the essential facts: The premises in question belonged to Jacob Newkirk in his lifetime. He died intestate in the year 1888, leaving his widow, Elizabeth Newkirk, and the following children, his heirs at law: Abraham, Jacob B., William E., John H. Newkirk, and Jane E. (Newkirk) Birdsall, Gertrude R. (Newkirk) Schanck, and Mary C. (Newkirk) Vanderbeek. At the time of the execution of the powers of attorney hereinafter referred to Abraham was married to Mary C., Jacob B. was married to Kate M., William E. was married to Gannie, and John H. was married to Emma. Gertrude R. Schanck was a widow. Jane E. Birdsall's husband's name was George W., and Mary C. Vanderbeek's husband's name was Abraham. The above-named persons, the widow and the heirs at law of the said Jacob Newkirk, with their respective spouses then living, executed two certain powers of attorney to George W. Birdsall, one dated June 9, 1888, and one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dated May 12, 1891, both of which were recorded in the office of the register of Hudson county, in which county the lands are situated. It is not denied that these powers of attorney were sufficient to authorize the said George W. Birdsall to execute in the names and on behalf of the principals a proper deed of conveyance for their interests in the premises in question. The question is whether he did properly exercise the power. On the 12th day of May, 1892, the deed to which objection was made was signed, and subsequently recorded in the proper office. This deed begins by the recital: "Between Elizabeth Newkirk (widow of Jacob Newkirk, deceased), Abraham Newkirk and Mary C., his wife, Jacob B. Newkirk, and Kate M., his wife, William E. Newkirk, and Fannie, his wife, John H. Newkirk, and Emma, his wife * * * George W. Birdsall and Jane E., his wife, and Gertrude R. Schanck, widow, parties of the first part, by George W. Birdsall, their attorney in fact, and Mary C. Vanderbeek, * * * party of the second part." The testatum clause is as follows: "In testimony whereof, the said George W. Birdsall hath, by virtue of two certain letters of attorney given to him by the said party of the first part, the one bearing date the 9th day of June, A. D. 1888, and duly recorded in the Hudson county register's office in Book 461 of Deeds, on page 56, etc., the other bearing date the 11th day of May, A. D. 1891, and duly recorded in the register's office of Hudson county aforesaid, in Book 532 of Deeds, on page 12, etc., hereunto set the hands and seals of his principals, the parties of the first part, the day and year first above written. George W. Birdsall, Individually. [Seal.] George W. Birdsall, Attorney in fact for the heirs of Jacob Newkirk, Deceased. [Seal.]"

Of course, some of the grantors were, and some were not, heirs of Jacob Newkirk, deceased, but I am informed by counsel that deeds have been procured from all of the persons named in the deed as grantors who were not in fact heirs of Jacob Newkirk, deceased. The insistence of the defendants is that this is not a proper execution of the deed by the attorney in fact, and does not serve to convey the title of his principals. Whether it should properly be held to be a proper execution by the attorney of the power, and whether it should properly be held that the deed does convey the interests of the principals, I do not propose to determine for reasons to be hereafter stated.

The other objection urged by the defendants arises out of the following circumstances: It appeared that in the year 1861 the mayor and common council of Hudson city, within which the premises in question were then situated, sold the two lots in question for unpaid assessments for the improvement of Warren or Centre street,

for a term of 3,000 years, to one Carl Struber. Two declarations of sale were issued, one dated February 7, and the other February 17, 1861. With respect to the latter objection the complainants rely upon the decision of Vice Chancellor Howell in the case of Beatty v. Lewis, 68 Atl. 95 (1907). This was a suit under the act to quiet title, and, in effect, held that the declarations of sale for taxes under which possession was not taken within 20 years after the 2 years allowed for redemption had passed were useless thereafter as instruments of title, as entry under them was barred. It will be seen that the latter question rests upon the doctrine of adverse possession, and that in a case where the issue was squarely between the parties claiming paper title as against adverse possession the court held against the paper title. In the case at bar there has been enough said to show that there are questions of two kinds to be considered: The first, relating to the execution of the deed, is a question of law; the second, relating to the declarations of sale and the question of adverse possession, is an issue of fact. They are both properly characterized as "doubtful."

[1] The Court of Chancery in a line of specific performance cases has been dealing with the question of how far it should go in deciding doubtful questions of law, holding that upon a question of fact it would not force the title upon an unwilling purchaser, unless the facts to be established to make his title good were provable by public records, or by other evidence obtainable by a holder of the title at any time thereafter when needed. But the various judges who have dealt with the matter in the Court of Chancery have seemed to be of the opinion that they could not escape the responsibility of determining the proper decision of a doubtful question of law. *Lipincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305 (Emery, V. C., 1895); *Zane v. Weintz*, 65 N. J. Eq. 214, 55 Atl. 641 (Grey, V. C., 1903); *Fahy v. Cavanagh*, 59 N. J. Eq. 278, 44 Atl. 154 (Pitney, V. C., 1900); *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483 (Stevenson, V. C., 1902); *M. E. Church v. Roberson*, 68 N. J. Eq. 431, 58 Atl. 1056 (Bergen, V. C., 1904); *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048 (Stevens, V. C., 1909); *Deseuneur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703 (Garrison, V. C., 1909). I incline to the opinion that in view of two recent decisions in the court of Errors and Appeals the Court of Chancery has gone farther than it should go in deciding doubtful questions of law; and, of course, is fully vindicated and justified in not attempting to decide an issue of fact affecting the title where proof of the facts is not of record or always available to us. The two cases to which I refer are *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25 (1910), and *Doutney v. Lambie*

(1911) 78 N. J. Eq. 277, 78 Atl. 746. Under the language of these cases, this court should not force a title upon the defendant where there exists a legitimate question or doubt, either of law or of fact, affecting the title.

[2] Undoubtedly, in the case at hand there is a doubt as to the proper decision of either of the questions. As to the execution of the deed, each side has furnished me with briefs of many pages, containing numerous citations; and the courts of other jurisdictions have varied from a requirement that the execution in the name of the principal is not good unless his name appears followed by that of the attorney to those in which the court has stated that it might draw an inference from the whole document, irrespective of the technical way in which it was executed. The cases in New Jersey have not decided this matter because it has never squarely been raised. The nearest approach to it is in the following cases, and they certainly do not tend to settle the question definitely as to whether an execution of a deed in which the name of the principal does not appear as a signatory at all would be good. *Howe v. Van Winkle*, 18 N. J. Eq. 495 (Zabriskie, Chan., 1867); *Borcherling v. Katz*, 37 N. J. Eq. 150 (Van Fleet, V. C., 1883); *Connely v. Haggarty*, 65 N. J. Eq. 597, 56 Atl. 371 (Grey, V. C., 1903); *Sheldon v. Dunlap*, 16 N. J. Law, 245 (Sup. Ct., 1837); *Kean v. Davis*, 20 N. J. Law, 426 (Sup. Ct., 1845); *Den v. Hay*, 21 N. J. Law, 174 (Sup. Ct., 1847); *Dayton v. Warne*, 43 N. J. Law, 659 (Ct. of Err., 1881); *Woodbridge v. Hall*, 47 N. J. Law, 391, 1 Atl. 492 (Sup. Ct., 1885); *Loeb v. Barris*, 50 N. J. Law, 382, 13 Atl. 602 (Sup. Ct., 1888); *Villet v. Simanton*, 63 N. J. Law, 458, 43 Atl. 738 (Sup. Ct., 1899). Unquestionably, therefore, there is great doubt as to whether or not this was a proper execution of the power, and whether the deed conveyed the land of the principals.

[3] With respect to the question of the declarations of sale, while it has undoubtedly been settled in this court (*Brady v. Lewis*, supra) that in a direct issue between those presently entitled to the declarations of sale and the occupiers of the land in a suit to quiet title a failure to prove entry as against adverse possession will defeat the holders of the declarations of sale, there is still open in this suit, where the holders of the declarations of sale are not represented or bound, all the questions of facts which must rest for their proof in the memory of witnesses, and must proceed either from the mouths of witnesses or from written documents even the existence of which is not now known. In other words, as I have pointed out in the case of *Sulk v. Tumulty*, 77 N. J. Eq. 97, 75 Atl. 757 (1910), each case of title by adverse possession must of necessity rest upon its own facts, and every fact entitling the party to adverse possession

must be made out by clear proof and proper inference, and therefore it is improper, where the parties between whom such an issue would be raisable are not present, to decide that a title by adverse possession is made out, and it is certainly improper in a specific performance case; the opinion in *Doutney v. Lambie*, supra, 78 N. J. Eq. 279, 78 Atl. 747, saying it was elemental and fundamental that "the court cannot satisfactorily or conclusively settle a title in the absence of the parties who are not before them in the suit to assert their estate or interest in the lands."

For these reasons, I am constrained to deny the prayer for specific performance, and the bill must be dismissed, with costs.

JOHNSON v. ATLANTIC CITY et al.
(4 cases).

(Supreme Court of New Jersey. Dec. 18, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 330*) — CONTRACTS—COMPETITIVE BIDDING.

Where proposals under a city charter that calls for competitive bidding are purposely so framed that under the circumstances they deter rather than invite bona fide competition, an award to the intentionally favored bidder will be set aside.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.*]

Four writs of certiorari by David C. Johnson against the City of Atlantic City and the United Paving Company to review as many awards of the city of Atlantic City for contracts for paving certain streets with a patented article, because the entire proceedings prevented competition. Contracts set aside.

Argued November term before GARRISON, PARKER, and BERGEN, JJ.

John B. Slack, Charles C. Babcock, and Robert H. McCarter, for prosecutor. Bourgeois & Coulomb and Harry Wootton, for defendants.

GARRISON, J. From the testimony laid before us we find that the United Paving Company, to which the contracts to lay bitulithic pavements were awarded, had a secret arrangement with Warren Bros., the proprietors of that patented article, that gave, and was intended to give, to the United Paving Company a controlling advantage over all other bidders, provided the proposals were so framed that the advantages accruing from such arrangement were made available for the securing of the awards of the contracts. We find that the proposals were so framed, and that certain officials of the city were interested in having the proposals so framed and in having the contracts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
81 A.—70

so awarded. We find that the relations of these officials to this transaction and to the United Paving Company were of such a character that they would be known to probable bidders for these particular contracts which together with the fact that the proposals were manifestly drawn to deter rather than to invite competitive bidding rendered it obviously futile for an outside bidder to compete with the only bidder, who was, so to speak, on the inside.

From these facts we draw the inference, and find the fact to be, that, owing to these machinations, the competitive bidding required by the amended charter of Atlantic City (P. L. 1905, p. 50) has not taken place, and from this it results that the awards brought up by these writs should be set aside.

The testimony upon which the foregoing findings are based is very voluminous, and comprises a mass of circumstantial and corroborating evidence which we have carefully examined with the result that we have announced.

With respect to the point raised by the defendants that the writs were issued in contravention of the city charter (P. L. 1906, p. 523), we think that a reasonable construction of this statute is that, where the review of a contract and ordinance are in legal effect one and the same thing, the 30 days runs from the date of the contract. The opposite view would lead to an unreasonable result that ought not to be needlessly imputed to the Legislature.

This renders it unnecessary to decide the point raised by the prosecutor, viz., that the title, "An act, etc., for the government of cities," does not express as its object the placing of a limitation upon the practice of this court with respect to its allowance of its prerogative writ of certiorari, if such power resides in the Legislature.

The several resolutions awarding the contracts to the defendant the United Paving Company are set aside with costs to be paid by that defendant, unless otherwise ordered.

HAMMELL v. BARRETT.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1911.)

1. WILLS (§ 487*)—CONSTRUCTION—EXTRINSIC FACTS—STATEMENTS BY TESTATOR.

While in construing a will the court may look to the circumstances of testator when the will was executed to determine his intent, statements made by testator as to his meaning and purpose cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1026-1032; Dec. Dig. § 487.*]

2. WILLS (§ 826*)—CHARGE ON LAND—ENFORCEMENT IN EQUITY.

A will creating a charge on land in favor of testator's sister may be enforced in equity

by requiring the devisee to give security to perform the duties with which he is charged.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2128-2138; Dec. Dig. § 826.*]

Appeal from Court of Chancery.

Action by Mary K. Hammell against Henry R. Barrett. From a decree for complainant as stated, defendant appeals. Affirmed.

The following is the opinion of Vice Chancellor Leaming in the court below:

[1] "The law of this state appears to be well settled to the effect that in construing a will this court may entertain extrinsic evidence of the circumstances, situation and surroundings of the testator at the time the will was executed to the end that the court may be placed as nearly as possible in the position of testator, and thus better comprehend the meaning and application of the language used by him; but statements made by the testator touching his meaning and purpose cannot be entertained. That portion of the testimony will, therefore, be excluded from present consideration.

"Testator does not specifically direct that any money except \$100 shall be paid to or for the use of his sister. His expressed desire is that she shall be looked after by her brother, and that her brother shall see that she has a home and is properly provided for and has a decent burial. It is entirely plain that the will casts upon the brother the duty to see that the sister has these things, and it is also clear that the residuary estate of testator is devised to the brother in such manner that the duties thus imposed upon him are made a charge upon the property received by him. The question for determination, therefore, is whether the duty thus imposed upon the brother is discharged in accordance with the wish of testator so long as the sister has a home and is properly provided for and is given a decent burial, or is the brother directed by testator to provide these things at his own expense, irrespective of the ability of the sister to provide them from her own exertions and estate? It seems to me entirely clear that the language used by testator is wholly inadequate to disclose the purpose last suggested. Had testator desired to charge his brother with the primary duty to support his sister at his own expense, and to thus relieve his sister from the burden of contributing to her own support from her own estate or from her own exertion, the language which was adopted in the will could not have been chosen. The evidence is ample to disclose that testator well knew the resources of his sister. He necessarily knew that she might or might not need assistance. Should the former condition arise it was his purpose that his brother should supply whatever assistance was necessary.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The circumstances and surroundings existing at the time the will was made make this reasonably apparent, and the language of the will clearly imports it.

"It is also apparent from the evidence that the sister is not at this time enjoying a suitable home or surrounded by reasonable comforts. It may be that 10 years ago, when the will was made, she could have lived alone with reasonable safety and comfort in one room, and in that room attended to her own cooking; but it is certain that her present age and condition of health render such a life upon her part at this time improper. The reason she lives in that manner is manifest. Her income is insufficient to enable her to live better, and she appropriately fears to spend any part of the money from which receives an income. These conditions should not longer exist. Her brother is not performing the duty imposed upon him by the will unless, or until he sees that she is surrounded by conditions suitable to her age and infirmities. That duty can be performed by him by either supplying to her such additional money as may be necessary to enable her to live with comfort and safety, or by supplying her with adequate security against future want, and thus enable her to spend her principal for her support with entire safety to herself.

[2] "As the will creates such a charge against the brother in favor of his sister, it is clearly within the power of this court to require security in behalf of the sister for the performance of the duty thus imposed.

"I will advise a decree to the effect above stated; but, before a decree is made, unless the parties can agree upon an allowance to be made by the brother to the sister, a further hearing may be had on Monday, July 11th, to determine the amount and character of the security to be given by the brother to secure to the sister adequate support at any time she is unable to support herself."

William Harris, for appellant. Carrow & Kraft, for respondent.

PER CURIAM. So much of the decree as is involved in this appeal will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

BRADLEY v. UNITED WIRELESS TELEGRAPH CO. et al.

(Court of Chancery of New Jersey. Oct. 28, 1911.)

1. BANKRUPTCY (§ 214*)—ADJUDICATION IN BANKRUPTCY—EFFECT ON JURISDICTION OF STATE COURT.

An adjudication in bankruptcy does not impair the jurisdiction of a state court in a pending suit for the enforcement of a specific lien against assets of the bankrupt, where

such lien was acquired more than four months before the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 214.*]

2. CREDITORS' SUIT (§ 36*)—BILL TO SET ASIDE FRAUDULENT CONVEYANCES—CREATION OF LIEN IN EQUITY.

The filing of a judgment creditor's bill to set aside a fraudulent conveyance, and to subject the property conveyed to the payment of a judgment and the service of process thereunder, create a lien in equity on the equitable estate of the debtor.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 146-153; Dec. Dig. § 36.*]

3. BANKRUPTCY (§ 216*)—PROCEEDINGS IN BANKRUPTCY—EFFECT ON LIEN CREATED BY SUIT IN STATE COURT.

The lien created by the filing of a judgment creditor's bill to set aside a fraudulent conveyance, and subject the property conveyed to the judgment and by the service of process thereon, is unaffected by the bankruptcy of the debtor more than four months after the entry of the judgment, and the state court will enforce the lien against the property; the trustee in bankruptcy merely administering claims in personam and not succeeding to the rights of secured creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 216.*]

4. CORPORATIONS (§ 561*)—INSOLVENCY—RECEIVERSHIP—CREATION OF EQUITABLE LIEN.

A receiver of an insolvent corporation appointed by the court of chancery may file a bill as the representative of the corporation to set aside a fraudulent transfer of corporate property, and thereby subject the assets to the payment of the creditors of the corporation, and the suit creates an equitable lien similar to that created by a creditor's bill by a judgment creditor to set aside a fraudulent conveyance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2261-2264; Dec. Dig. § 561.*]

5. BANKRUPTCY (§ 216*)—PROCEEDINGS IN BANKRUPTCY—EFFECT ON LIEN CREATED BY SUIT IN STATE COURT.

A trustee in bankruptcy takes the property of the bankrupt subject to an equitable lien asserted by a receiver of an insolvent corporation suing the bankrupt to set aside a conveyance by the corporation to the bankrupt as fraudulent to creditors, and the adjudication in bankruptcy does not impair the jurisdiction of the state court to enforce the lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 216.*]

Suit by Floyd H. Bradley, receiver of the International Wireless Telegraph Company, against the United Wireless Telegraph Company and another. Motion to stay suit and discontinue further proceedings on the ground that the trustees in bankruptcy of defendant named are exclusively entitled to administer the assets. Denied.

The bill in this suit was filed by the receiver of the International Wireless Telegraph Company in behalf of its creditors to set aside a certain conveyance of property made by that company to the American De Forrest Wireless Telegraph Company, and also a conveyance of the same property by

the last-named company to the United Wireless Telegraph Company, upon the ground that the conveyance first named was made without consideration and in fraud of the creditors of the first-named company, and that the conveyance secondly named was also made without consideration and with knowledge on the part of the United States Wireless Telegraph Company of the facts stated touching the first conveyance. The bill seeks to enforce against the property thus fraudulently transferred the rights of creditors of the corporation first named. That corporation, at the time of the filing of the bill, had become insolvent, and complainant had been appointed by this court as its receiver in insolvency. The United Wireless Telegraph Company has answered, and the case has been set for final hearing in this court.

Pending this suit the United Wireless Telegraph Company has been adjudged a bankrupt by the United States District Court for the district of Maine, and trustees in bankruptcy have been appointed by that court; these trustees now specially appear in this court in this suit and petition this court to stay the pending suit and discontinue further proceedings therein, upon the ground that the trustees in bankruptcy are exclusively entitled to administer the assets of the bankrupt.

William S. Darnell, for petitioner. French & Richards, opposed.

LEAMING, V. C. (after stating the facts as above). [1] Whatever doubts may have formerly existed touching the effect of the bankrupt of a defendant pending certain classes of actions in a state court, it is now settled that an adjudication of bankruptcy is not operative to destroy or impair the jurisdiction of a state court in a pending suit for the enforcement of a specific lien against assets of a bankrupt, when such lien has been acquired more than four months before the filing of the petition in bankruptcy. *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128.

[2, 3] It is also well settled that the filing of a judgment creditor's bill for the purpose of setting aside a fraudulent conveyance, and thereby subjecting the property to the payment of the judgment of the creditor, and the service of process thereunder, creates a lien in equity upon the equitable estate of the debtor in the property so conveyed, and that a lien of that nature is unaffected by bankruptcy of the debtor pending the suit and more than four months after the date of the entry of the judgment. The state court appropriately enforces the lien against the res. The trustee in bankruptcy administers all claims which are in personam, but does not succeed to the rights

of secured creditors. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440.

[4] It has also been determined in this state that a receiver of an insolvent corporation appointed by this court may file a bill as the representative of the insolvent corporation to set aside illegal or fraudulent transfers of property of the corporation of which he is receiver, and in that manner subject the assets to the payment of creditors of the insolvent corporation, and that such a suit is operative to create an equitable lien similar to that created by a creditor's bill filed by a judgment creditor. *Receiver Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571, affirmed 50 N. J. Eq. 796, 27 Atl. 1033.

[5] Under the authorities above cited, and the several cases there reviewed, it is manifest that the adjudication of insolvency of the United Wireless Telegraph Company is not operative to destroy or impair the jurisdiction of this court for the enforcement of the equitable lien asserted by complainant; on the contrary, the trustees in bankruptcy take the property of the bankrupt subject to the equitable lien asserted by the present bill should such lien be established in the suit now pending in this court.

I am obliged to deny the stay sought by the petition filed in behalf of the trustees in bankruptcy.

MEALEY v. HOWARD.

(Court of Errors and Appeals of New Jersey. Nov. 20, 1911.)

MORTGAGES (§ 88*)—ABSOLUTE CONVEYANCE—EVIDENCE—LACHES.

In proceedings to establish a claim to property as having been conveyed as security for a loan, held that, in view of the long delay in bringing suit after demand, and refusal and the uncertainty of complainant's evidence, and the increased value of the property, complainant had not sustained the burden of proof.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

Appeal from Court of Chancery.

Bill by Elizabeth Mealey against Edward F. Howard. From a decree for defendant, plaintiff appeals. Affirmed.

The following is the opinion of Vice Chancellor Leaming in the court below:

"Our Court of Appeals in *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625, has made it clear that this court should not enforce a claim which has not been diligently prosecuted when it is apparent that the delay of complainant may have caused a loss of evidence to the injury of defendant. In the present case complainant allowed over five years to transpire before filing the present bill, after defendant had absolutely re-

fused to recognize the transaction as a loan. The present difficulty in ascertaining the trust arises from this long delay. The memory of complainant and her husband is wholly unreliable touching many important features of the transactions which must have occurred. The bill asserts that prior to the execution of the assignment complainant's husband borrowed from defendant \$750, and that complainant borrowed at that time \$25, and that the assignment was executed to secure those loans. The direct testimony of complainant and her husband was substantially to the same effect. It soon became manifest, however, that neither complainant nor her husband knew what money they had received, or when or under what circumstances they had received it. They were admittedly in ignorance of the \$450 payment made by defendant to another person on their account in September, and yet that was the largest single amount they had received. That payment and the \$50 payments of September 24th and October 6th, respectively, were admittedly made subsequent to the execution of the assignment in question, yet the bill charges that all payments were made at and before the execution of the assignment. It is entirely manifest that complainant and her husband had entirely forgotten these details of the transaction, and simply entertained a general idea that \$750 had been received by them. When the husband of complainant was asked to state how he made up the \$750 which he claimed had been paid, he specified six several payments aggregating that amount, and did not include the \$450 item. The inability of complainant and her husband to remember these facts, which would be of prime importance in the event of an accounting being decreed pursuant to the prayer of the bill, discloses the difficulties which naturally and almost inevitably arise from delay in the assertion of claims of this nature. The injurious effect of delay is not alone manifest in the difficulties which would arise in an accounting. A court of equity is now asked to set aside a written instrument which by its terms is an absolute sale, and to declare it to have had a purpose contrary to its expressed terms, and to base that decree upon the testimony of witnesses whose recollections of almost all other features of the transactions are manifestly unreliable. It may be that complainant and her husband could forget all the details which they have manifestly forgotten, and yet remember well and accurately the general fact that the transaction was a loan and not a sale. I can see how that might be possible. But it is nevertheless manifest that the long delay is largely the cause of the present difficulty in the ascertainment of this important fact. Had the bill been filed promptly I cannot believe that any court would have found it difficult to ascertain the exact truth touching this central issue.

There are circumstances which are consistent with the claim of complainant that the written assignment of August 19, 1902, was intended as a security for a loan or proposed loan, and not as an absolute sale. The facts that no specific consideration is named in the assignment, and that no obligation was given for the balance of the money to be paid are consistent with complainant's claim that the assignment was to secure a loan for an amount which had not at that time been definitely agreed upon. These features also measurably indicate that the transaction was not an absolute sale for an agreed amount. But these features are in no sense conclusive. In transactions of this nature between parties who share confidence in each other, the borrower may trust the lender with an instrument which defines the transaction as a sale when in fact it is only a loan, or he may trust the purchaser for the balance of an agreed purchase price. The testimony of defendant is to the latter effect. He says that the contract which complainant held was sold to him at the agreed price of \$1,000, and that he made two payments on account, aggregating \$400, before the assignment was made to him, and declined to make further advance payments until the assignment was executed and a search of the records made to show that he would receive a clear title, and that when the search was returned he paid the \$450 to complainant's use, and subsequently paid the remaining balance. Whether two \$200 payments were made on one day—one to complainant and one to her husband—is also a subject of dispute. The truth as to that will probably never be known. The great lapse of time renders the certain ascertainment of that fact impossible. It may also be appropriately observed that complainant's present claim has undoubtedly been asserted by reason of the increase in value of the premises in question; and it may also be reasonably assumed that had the premises depreciated in value complainant would not have sought to recompense defendant for his expenditures.

"My conclusion is that complainant has not sustained the burden of proof with that clearness or certainty which entitles a court of equity to award the relief here sought; and that the long delay of complainant in the assertion of her claim has rendered it impossible to accurately ascertain, at this time, the facts and must in consequence be deemed operative to render it inequitable to deny to defendant, in view of such uncertainty at this time, the benefits of the purchase which he claims to have made."

George J. Bergen, for appellant. Wescott & Wescott, for respondent.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

COOK et al. v. JACK et al.

(Court of Errors and Appeals of New Jersey.
June 19, 1911.)

1. MORTGAGES (§ 156*)—RIGHTS OF MORTGAGEES—CONSTRUCTIVE NOTICE.

Where a deed by executors recited a valid power of sale conferred by will, and purported to be made by virtue of the power, and in consideration of a substantial sum paid by the grantee, and the grantee, in fact paying no consideration, executed mortgages to third persons who had no actual notice of the fraud, and who relied on the deed and loaned money to the grantee on the security of the mortgages, the third persons acquired title as mortgagees with the right to enforce the mortgages against the property described therein.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 360-365; Dec. Dig. § 156.*]

2. TRUSTS (§ 102*)—CONSTRUCTIVE TRUST.

Where executors and trustees, with power to sell, conveyed land to a grantee without consideration, to enable one of the executors and trustees to raise money on the property for his own use, which was in fact done, the conveyance was fraudulent, and the grantee would be compelled to execute a quitclaim deed to the substituted trustees under the will.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 153; Dec. Dig. § 102.*]

Appeal from Court of Chancery.

Suit by Charles G. Cook and another, substituted trustees under the will of James Brook, deceased, and others against Charles Jack and others to set aside a deed and mortgages. From a decree of the court of chancery granting relief in part, and denying relief in part, defendants appeal. Affirmed.

The following is the opinion of Vice Chancellor Walker:

The bill in this case was filed by Charles G. Cook and Charles H. Holcombe, substituted trustees under the will of James Brook, deceased, to set aside a deed made by John Sykes and Anna M. Hendrickson, former executors and trustees under said will, to Charles Jack, and also two mortgages made by Jack, one to Theodore S. Stryker, which has been assigned, and one to Thomas and Rebecca Rowland.

The contention of the complainants, two of whom are the substituted trustees, and the others of whom are beneficiaries under the will of the late James Brook, is that the deed to Jack is a fraud, having been made to Jack without consideration and for the purpose of enabling Sykes to raise money upon the property for his own use, which was in fact done. It should be remarked that Sykes' cotrustee, Mrs. Hendrickson, now deceased, and who was a daughter and beneficiary of the late Mr. Brook, was in nowise involved in the fraud, having joined in the execution of the deed at the behest of Sykes and with confidence in him. If the deed to Jack is valid, then the mortgages are valid.

[1] If that deed be void as to complainants, the mortgages founded upon it are

void, unless the mortgagees are bona fide holders for value and without notice of the fraud. It is undisputed that the mortgagees had no actual notice of the fraud perpetrated by Sykes, and the only remaining question, therefore, is whether they had constructive notice. The facts adduced in evidence indicate that the mortgagees loaned their money upon a title and upon securities regular in form and valid upon their face. The deed from the executors to Jack recites a valid power of sale conferred to them by the testator in his will, and the conveyance purports to be made by virtue of that power and in consideration of the sum of \$3,500 paid by the grantee Jack, the receipt whereof is by the deed acknowledged. The deed, moreover, contains covenants for title, and purports to convey all of the estate at law and in equity which the testator had in his lifetime and at the time of his decease, and which the grantors had by virtue of the will, and covenants that neither of the executors had done or suffered any act whereby the premises or any part thereof should or might be impeached, charged or incumbered in any manner whatever. The deed was duly executed and acknowledged April 26, and recorded May 8, 1905. Jack mortgaged the premises to Theodore S. Stryker May 8, 1905, for \$2,000, a consideration which actually passed on the strength of the mortgage, which mortgage was recorded on the day of its execution. Jack made another mortgage upon the premises May 15, 1905, to Thomas Rowland and Rebecca Rowland for \$1,500. This consideration also passed. I repeat, the moneys were loaned by these mortgagees on the faith, strength, and security to be afforded by the mortgages, which were predicated upon a perfect paper title created by the representatives of the Brook estate under ample powers. The Theodore Stryker mortgage has been assigned to Margaret A. and Lavinia A. Stryker.

The mortgages have not only answered, asserting the validity of the instruments in question, but have filed cross-bills praying for the foreclosure of their respective mortgages. The facts in reference to the loans on these two mortgages differ somewhat each from the other, but not in a way which makes any difference as to the legal aspects of the case. Nothing outside of the record is relied upon by the complainants as matter putting the mortgagees upon inquiry as to the bona fides of the transaction between the executors and Jack, and nothing in the record is, to my mind, indicative of any fact which would put them upon inquiry. In this posture of the affair, the equities of the mortgagees are superior to those of the complainants, whose equities, as against every one except a bona fide purchaser for value without notice, are, of course, conceded. To overthrow these mortgages would

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be to make mortgage loans upon record title a thing so precarious as to render every such transaction unsafe without the most searching inquiry in every case into facts which are never presumed to exist. No consideration of public policy, nor any authority, of which I am aware, requires the avoiding of these securities.

[2] One prayer of the bill will be granted, namely, that Jack be decreed to execute a quitclaim deed of the premises in question to the substituted trustees under the will of the late James Brook. The other prayers will be denied. The prayers in the cross-bills of the defendants Stryker and Rowland will be granted, and there will be appropriate decrees for foreclosure, with costs, in the case of both mortgages. The complainants are entitled to costs as against Jack.

Malcolm G. Buchanan, for appellants.
John H. Backes, for respondents.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Walker.

MOYER v. MOYER.

(Court of Errors and Appeals of New Jersey.
June 19, 1911.)

DIVORCE (§ 129*) — ADULTERY — EVIDENCE — SUFFICIENCY.

Evidence held to show adultery by defendant wife, entitling plaintiff to divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441; Dec. Dig. § 129.*]

Appeal from Court of Chancery.

Divorce suit by Albert Moyer against Flora H. Moyer. Decree for complainant, and defendant appeals. Affirmed.

See, also, 75 N. J. Eq. 439, 72 Atl. 965.

The following is the opinion of Vice Chancellor Howell:

"The complaint made in this case is that the defendant is guilty of the matrimonial offense of adultery, and a divorce a vinculo is prayed. The parties were married on September 3, 1898, in New York City. They removed to this state in 1905, and lived together here until 1907. The petitioner (and perhaps the defendant also) was a bona fide resident of this state at the time of the commission of one of the offenses specified in the petition and at the time of the beginning of this suit. There are two correspondents. The petition charges the defendant with having committed adultery with William R. Jamison, a physician now practicing medicine at Torreon, Mexico, on November 19, 1904, at No. 504 West 112th street, in the city of New York, and later with one William R. Kip, an artist, who has a studio in the city of New York, on the steamship Romanic on December 5, 1907, and the week following, and at Paris, in France, in Jan-

uary, 1908, and at Biarritz, in France, in May, 1908. The testimony is voluminous, but is directed wholly to the facts alleged and denied, and is of such a character as to leave no doubt in my mind as to the course the decree should take. The parties have one child, Margaret Bergen Moyer, who was born January 28, 1901, and who is now by the order of this court in charge of her grandmother, the mother of the petitioner.

"The evidence shows conclusively that of late years Mrs. Moyer had little or no affection for her husband. The relations between them were strained for several years before they finally separated. The situation became acute at the time of the Jamison incident, which is said to have happened in 1904. From that time on the wife manifested an inclination to leave her home as frequently and to stay away as long as it was possible for her to do so. She was little under the control of her husband, for the reason that she had some independent means, and she was therefore not obliged to have recourse to him for money. In May, 1907, she went unaccompanied to Europe under the pretense of seeking better health conditions, leaving her child in the custody of the petitioner and his mother's family. She returned in September, 1907, and about the only incident of this trip which came out in the evidence is the isolated fact that on her return voyage she became acquainted with the correspondent Kip. From August, 1907, until December of that year, she remained in this country, but, as I gather from the evidence, she was not at her home very much, and in December of the same year she, with only a few days warning to her husband, without his permission and without his aid or connivance, again departed for Europe under circumstances which will be commented on later, and again leaving her infant child in the custody of its grandmother. She did not return to this country until August of the following year. These two trips to Europe are main events in her married life, but they are by no means the only evidences of her wandering disposition. The case shows that she was away from her home more or less during the whole period of their married life, and it demonstrates to my mind the fact that she was not satisfied with her home and its surroundings. She was wayward, peevish, exacting, and apparently completely devoid of a sense of the obligation which rested upon her by virtue of the marital relation.

"I will take up first the charges of adultery with Kip. There is no evidence to show what Mrs. Moyer's relations with Kip were on her first return voyage in September, 1907; neither is there any evidence touching their relations after their arrival in this country, except that between her re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

turn in September and her departure in December of 1907 they lunched together in New York once, at which time she visited him at his studio. It is important to note that Mrs. Moyer and Mr. Kip were domiciled in or near to the city of New York, and that, so far as appears in the case, neither of them ever had any business which would carry them to Boston or lead them to make that port a port of departure for Europe. Mrs. Moyer, however, had a brother who was in Boston in December, 1907. When she announced to her husband that she intended to go to Europe within a few days, she did not seek his aid in obtaining money for her expenses or accommodations on the steamship. She herself arranged in New York with the Cook Tourist Company to provide her with accommodations on a steamship sailing from Boston on December the 5th. She went to Boston a day or two before, met her brother, who accompanied her to the ship. When she got on board, she says she found Mr. Kip there; that they were greatly surprised at meeting each other in that casual and unexpected manner. This condition of surprise was likewise testified to by her brother, who was with her at the time. It was said on behalf of Mrs. Moyer that this was a mere coincidence, that there was no proof of prearrangement, nor any evidence that she and Mr. Kip had at any time previously agreed to meet on that particular vessel on that particular day. Granting the fact and giving that argument its full force, let us see what happened afterward. It turned out that their rooms on the vessel had been so selected as that they were exactly opposite each other on the same corridor, and that they were the last rooms on that corridor, and therefore could not be passed by other passengers in going to their various apartments. This may have been a coincidence, also, but it will strike one, I think, as a very singular fact that they should be thus early in their voyage doubly surprised, first, in finding themselves upon the same ship together; and, second, in finding that they were accommodated with quarters which were in such close proximity. Mrs. Moyer evidently saw the danger of the situation, and she modestly requested Mr. Kip to change his room. This Mr. Kip absolutely refused to do. It does not seem to have occurred to her that she might have asked the authorities on the vessel to change her room; at any rate, they severally occupied the rooms to which they had been assigned during the voyage. These may all have been coincidences and be consistent with entire innocence, but they fit into a general scheme and plan of travel which throws the burden of proof upon Mrs. Moyer to clear herself of the suspicions which accompany these circumstances.

"The coincidences, however, continue. They find themselves booked for the same port in

Italy. They find themselves staying together at that port for a few days, and then traveling together to Paris. They continue their acquaintance and familiarity in that city. She becomes his 'artist's model.' His automobile is at her command. They make a five-day motor car trip to Southern France. They remain in Biarritz together for two months, and return together to Paris and remain together there until her departure for home in the latter part of July. During all of this period she wrote some of the most remarkable letters that were ever written by a decent and innocent woman. She purposes a life of shame in order to get rid of her husband and to avoid her married tie, and she puts it on the ground that her income is insufficient for her to live on, and that she cannot live with her husband. Under date of January 11, 1908, about 10 days after she had reached Paris, she writes to her husband's mother: 'If I eat my lunch and dinner here it costs me eight francs extra. I can't always afford that, but I am going into business as an artist's model. I see your hands go up in holy horror. Mr. Kip is going to paint me for the salon, and a regular model gets ten francs a day, or two dollars, but I will probably tire myself out in half a day and only get one dollar; however, that will help greatly. If you are shocked at my going to his apartment to pose, just kindly remember that this is the Latin quarter and one does what one pleases without the least comment and that if I can help myself in such a way I shall not hesitate. He has an excellent couple, a man and woman, always there. He is so nice to me that I can scarcely believe he is human; his automobile is always at my disposal, and he has helped me tremendously to get settled. * * * Between you and I, I think they will feel a lot worse when I take still further steps. You may or may not think I am right, mother dear, but to exist in this non-existent way and to be neither married or single does not appeal to my common sense, and I am almost decided to get a divorce and at least appear respectable in the eyes of the world. I can better my position in many ways if I am unincumbered, but I can only be open to more and more criticism and suspicion if I am married and still have no visible husband. It isn't as tho I were acting singly in this. I left home not because I wanted to but because it was mutually agreed that I could not live there, and I assure you if my husband cannot support me with money nor morally by giving me my child, I shall not consider myself bound to him in any way, and if he is a gentleman he will give me a divorce readily and in so doing protect his child. I did not mean to speak of this so soon, but some how it came out this morning. Every day I am more convinced that I must do it.' Two weeks later

she writes to her husband: 'I have found that I cannot live on my income; if I had more I should not now ask you for what it is my right to have; as long as I could support myself I asked for nothing. * * * You know as well as I that I have left home not because I wanted to but because we cannot live together. You promised last spring to let me have Margaret in the fall. You broke that promise, and as a result I am alone, unprotected either morally or socially or financially, and Margaret is without her lawful heritage. If you will get your wits together you will know that this condition cannot go on much longer. I can't live with you or you can't live with me. I know of no way to earn my own living, and, furthermore, since I have been your wife my health has been so undermined as to make that an impossibility. Up to this time we have managed things in a fairly decent way. I implore you now as you love your daughter, your own good name and mine, to assist me in a divorce and to give me enough alimony to make it possible to live with the necessary comforts of life. I don't say this to threaten you, but only as an inevitable fact that if you neglect to help me in this request that you will regret it, for I shall be obliged to take steps that are considered disgraceful and for which you will be responsible. Up to this time you have laid all blame on my shoulders. I did not care—I could take it without it hurting others. Now it is different, my actions now will forever reflect on my child, and those acts will be inevitable. I claim the right to map out my own life under the circumstances and although I shall go home to see my child I shall never stay in your house again and I consider all obligations to you as a wife are ended. A divorce in France is not the nasty thing it is in N. Y. I have obtained expert advice and know that it can be done easily and quietly but a cause must exist and at present there is none. This must be given your immediate attention for I have not the money to go along blindly as I must now until my health is again regained. * * * I hope you will see this the way it is meant, i. e. in the light of self-protection. Certainly it must be plain to you that I need support to live and to be respectable I need my freedom. If you are coming over here it will be so much easier to handle.'

"All the above-recited facts are admitted by Mrs. Moyer. She denies the fact of adultery or wrongdoing of any character, and claims that this whole series of events is consistent with chastity and innocence. Her manner on the witness stand was itself a refutation of her denial and a confession of her guilt. She was impudent, flippant, and apparently regardless of the gravity of the situation and its effect on her future.

"The room steward who had charge of the

apartments of Mrs. Moyer and Mr. Kip on the *Romanic* was sworn as a witness to their acts on the vessel. His name is John G. Young. He testified that he first saw Mrs. Moyer on the ship on its sailing day about half an hour before its departure, and that she asked him if Mr. Kip was on board. He says that he looked at his list and found that Mr. Kip's room was directly opposite Mrs. Moyer's, and he described minutely relation of the rooms to each other; that about an hour after the ship sailed he saw Mr. Kip in Mrs. Moyer's room; and that on the following morning after Mr. Kip had taken his bath the witness saw him in Mrs. Moyer's room dressed in his pajamas and bathrobe, at which time Mrs. Moyer was still in her berth. On a number of occasions he saw Mr. Kip in Mrs. Moyer's room, and occasionally he saw Mrs. Moyer in his room, and he usually saw them together when he had finished his work each night about 11 o'clock, and that on some occasions Kip would stay in her room as long as an hour in the morning; that he saw him go to her room about half past 7 in the morning every morning of the voyage, 13 mornings as he counted them. These statements cannot be denied by any one except Mrs. Moyer. She does deny them, and her case depends upon her *ex parte* testimony. An attempt was made to impeach the statements of this witness by Mrs. Moyer's counter statement as to the Italian port at which they debarked, she declaring that it was at Naples, and the witness stating that it was at Genoa. In the absence of other testimony, I am inclined to believe the statement of the steward, not only on account of his disinterestedness and of his clear statement of the fact, but also on account of the probabilities. At any rate, at whatever port they did disembark, they left that port together and went to Paris together therefrom. Of this fact there can be no doubt.

"The absence of her paramour from the witness stand must count against the truth of her statements and denials. The amended petition was filed November 12, 1908. I assume that Kip lives in New York. During the whole period of the pendency of this suit his deposition could have been placed on the files of the court. So far as appears, he was not further away than New York City, but no attempt was made on the part of Mrs. Moyer to procure his testimony or to get in any form the benefit of any denials that he might choose to make. It was held in *Bibby v. Bibby*, 33 N. J. Eq. 56, that the absence of the testimony of the paramour when it could have been produced was of much significance in reaching a conclusion as to the guilt of the defendant. In my opinion these facts and circumstances prove the charge of adultery with Kip made in the petition. They are susceptible of no other construction. No decent, self-respecting, in-

noent woman would permit all the things to happen that did happen to Mrs. Moyer, and her conduct is therefore capable of but one construction.

"The charge of adultery with Dr. Jamison stands upon the testimony of Miss Carrol; and, although it is denied by both Mrs. Moyer and Dr. Jamison, I am constrained to believe that Miss Carrol's statement is true. In *Derby v. Derby*, 21 N. J. Eq. 38, it was held that the testimony of a single witness might be sufficient to prove adultery in a divorce proceeding, although denied by the defendant upon oath; that whether the disinterested witness was believed or not must depend upon the probability of his story, his own character, the consistency of his evidence, and perhaps somewhat on the character of the defendant. In a proceeding of this character it certainly would not be expected that the parties at fault would admit their guilt, but, on the contrary, it is to be expected that they both would deny the allegation, however true it might be. It must, therefore, be apparent that, if a prima facie case is made, something more than the mere denials of the guilty parties will be needed to meet the burden. I do not find any circumstances in the evidence relating to the charge of adultery with Dr. Jamison which has this effect. In fact, all the circumstances corroborate Miss Carrol's story. The fact that Dr. Jamison, although he came from Mexico to New York for the purpose of taking a postgraduate course in medicine, which he must have contemplated would have occupied several months, two or three days after the alleged matrimonial offense deserted his medical studies and returned to his home, a circumstance concerning which there is not a word of explanation. The correspondence which followed must be held to obliterate the last scintilla of truth in the denials made by these guilty parties. Mrs. Moyer apparently had a strong affection for Dr. Jamison. He was a former sweetheart, and they had at one time been engaged to be married. She declared at one time to her husband that she never had any affection for any man except Dr. Jamison. The case on this head falls within the ruling of the court in *Berckmans v. Berckmans*, 16 N. J. Eq. 122, and *Black v. Black*, 30 N. J. Eq. 228.

"My conclusion therefore is that Mrs. Moyer is guilty of adultery with both Jamison and Kip, as is charged in the petition, and a decree of divorce will be advised accordingly."

Pitney, Hardin & Skinner, for appellant.
Samuel Kallsch, Jr., for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Howell.

PEOPLE'S BREWING CO. OF TRENTON: LEVIN et al.

(Court of Errors and Appeals of New Jersey,
June 19, 1911.)

1. INJUNCTION (§ 128*)—BREACH OF CONTRACT—SUFFICIENCY OF CONTRACT—SUFFICIENCY OF EVIDENCE.

In a suit to restrain defendants from breaching a contract to sell complainant's beer exclusively for five years, evidence held sufficient to show that the defense that complainant's beer had deteriorated was untrue.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 128.*]

2. INJUNCTION (§ 16*)—ADEQUACY OF REMEDY AT LAW.

Whether complainant, in a suit to restrain the violation of a contract to sell complainant's beer exclusively for five years, which contract has more than two years to run, has an adequate remedy at law, is not to be determined by defendant's solvency alone, but the difficulty of ascertaining complainant's damages, the multiplicity of suits, and the continuing character of the injury are to be considered.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 15; Dec. Dig. § 16.*]

3. PARTNERSHIP (§ 242*)—BREACH OF CONTRACT—PARTIES LIABLE.

Where a partnership enters into a contract, and before it is performed the partnership is dissolved, and the business of the partnership continued by one of the partners, if injunction lies to restrain breach of the contract, it may be brought against all the partners.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 242.*]

4. INJUNCTION (§ 23*)—BREACH OF CONTRACT—DEFENSES.

In a suit to enjoin defendants from breach of a contract to sell complainant's beer for five years, the fact that defendants have contracted to take the beer of another brewing company, to whom they will have to respond in damages, if obliged to perform the contract with complainant, is no defense.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 22; Dec. Dig. § 23.*]

5. INJUNCTION (§ 159½*)—COSTS.

Where, in a suit to enjoin breach of a contract, many more affidavits are taken by complainant in rebuttal of new matter introduced by defendants than were necessary, costs to cover those affidavits will not be given complainant on granting the injunction.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 159½.*]

Appeal from Court of Chancery.

Suit by the People's Brewing Company of Trenton against Harris Levin and Samuel Levin to restrain violation of a contract. Injunction granted, and defendants appeal.

The following is the opinion of Vice Chancellor Walker:

"My examination of this matter has led me to the conclusion that the order to show cause should be made absolute and that a preliminary injunction should issue.

"The case is practically on all fours with that of *Feigenspan v. Nizolek*, 71 N. J. Eq. 382, 65 Atl. 703, and is, in my judgment, governed by it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

[1] "The principal defenses relied on were that the beer furnished by the complainant to the defendants under the contract, whereby they obligated themselves to purchase and sell the complainant's product exclusively for five years from the date of the agreement—that is, five years from December 17, 1906, at their place of business No. 167 South Broad street, Trenton, N. J.—was of poor and unmarketable quality and had deteriorated to such an extent as to be practically unfit for use. Upon the coming in of the defendant's affidavits on the return of the order to show cause, this exploitation being new matter, leave was given to the complainant, as is quite usual in such cases, to answer it.

"On the adjourned day complainant produced affidavits of more than 75 retail dealers in its beer, who testified that the product was good and wholesome, and also the affidavits of over 500 consumers of the beer, who deposed that it was pure, wholesome, palatable, and nourishing, and as good as any on the market. Besides this, the complainant's beer was submitted to chemical analysis, and the analyst has deposed that the results of the analysis indicate that the specimens submitted have been produced according to proper methods and have been properly fermented and treated, and that, generally speaking, the beer possessed a good composition and had evidently been produced from sound material. The complainant prevails by the clear weight of the evidence on the question of the quality of the beer; and this, quite aside from the chemical analysis.

[2] "The other point strenuously insisted upon by the defendants was that the complainant had an adequate remedy at law, and that therefore an injunction would not lie negatively to enforce the covenant made by the defendants with the complainant, and they relied upon the case of *Sperry & Hutchinson Co. v. Vine Bros.*, 68 N. J. Eq. 339, 57 Atl. 1036. A perfect answer to this contention is found in the fact that this court decided the *Feigenspan* Case after the decision of the *Sperry & Hutchinson* Case by the Court of Errors and Appeals, not passing the latter sub silentio, but distinctly asserting that it could not be considered as governing the *Feigenspan* Case, which case was affirmed on appeal in *Feigenspan v. Nizolek*, 72 N. J. Eq. 949, 68 Atl. 1116. Therefore we have the Court of Errors and Appeals, which made the law in the *Sperry & Hutchinson* Case, affirming the *Feigenspan* Case, in which it was held in this court that the *Sperry & Hutchinson* Case did not apply. These decisions are entirely dispositive of the objection that there exists in the case at bar an adequate remedy at law, and I am not at liberty to disregard those decisions, but must apply them.

"Although they assert the contrary, it clearly appears that the defendants fully understood the nature and effect of the agreement which they made to purchase and sell the

complainant's beer exclusively for a period of five years, a little more than two years of which has yet to run. Even if Vice Chancellor Pitney's remark in *Feigenspan v. Nizolek*, concerning the case of *Sperry & Hutchinson v. Vine Bros.*, to the effect that, if the contract in the *Sperry & Hutchinson* Case was for one year, that feature alone would distinguish it from the *Feigenspan* Case, I do not understand him to decide that he would not have issued an injunction in the *Feigenspan* Case to protect the complainant in the fruits of the contract for its last year, if only one year, instead of nearly the five for which it was drawn, had then yet to run; but, whether so or not, it cannot, I think, be inferred from *Feigenspan v. Nizolek* that a contract of the kind under consideration, which had as much as two years to run, would not have been protected. While Vice Chancellor Pitney in the *Feigenspan* Case remarked that presumably the defendants in the *Sperry & Hutchinson* Case were able to respond in damages, he does not decide that, if the defendant in the *Feigenspan* Case was financially responsible, that fact alone would disentitle the complainant to an injunction. On the contrary, he holds that pecuniary responsibility is only one element to be considered upon the question of adequate remedy at law, and that the difficulty of ascertaining and proving the amount of the commodity sold and the profit at which it might be sold and the multiplicity of suits for damages are elements also to be taken into consideration in deciding this question. He remarks that to say that the complainant must not only accomplish the difficult task of keeping account and preserving the proof of the amount of beer sold by the defendant for the full period of five years, or even for one or two years, and then sue to recover its damages, seems to be a mockery; that the continuing character of the injury seems to be of itself, according to well-settled principles, a sufficient ground for the interference of the court. Here is a pointed intimation that the injunction would have been awarded in the *Feigenspan* Case if the contract would have expired in one year instead of five.

[3] "The contract here involved was founded upon adequate consideration, and, having been kept by the complainant, the defendants will be obliged to keep it. It is contended on their behalf that they have dissolved partnership, and that the defendant Samuel Levin conducts the business concerning which the agreement was made, and that the defendant Harris Levin is disassociated from him in that business. The complainant disputes the bona fides of dissolution and claims that it was made with the covert purpose of relieving Harris, who appears to have property, from responsibility under the agreement. Deciding nothing with reference to this question, I hold that the injunction may properly go against both defendants, and thereby the

complainant will be protected in its enjoyment of the fruits of the contract made by both of the defendants concerning the business at No. 167 South Broad street, Trenton, although only one of them may now be carrying on that business.

[4] "Notwithstanding their agreement with the complainant, the defendants have entered into a contract to take the beer of another brewing company, to whom they have become heavily involved financially, and to whom they may have to respond, if they are obliged to keep faith with the complainant. It would appear that they are between Scylla and Charybdis. They ask the court to save them from themselves. It cannot be done.

[5] "This application has been sharply litigated, and the complainant is entitled to costs, which should not, however, include all of the affidavits taken by complainant in rebuttal of new matter, as many more affidavits were taken on that score than were necessary to countervail and outweigh the affidavits submitted by the defendants. I will hear counsel on the question of the extent to which the taxation should be allowed to go."

Franklin W. Fort, for appellants. John H. Backes, for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Walker.

HORNUNG et al. v. TOWN OF WEST NEW YORK et al.

(Supreme Court of New Jersey. Dec. 19, 1911.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 333*)—CONTRACTS—"CERTIFIED CHECK."

The requirement that bidders on a contract for public improvement shall submit certified checks to the order of the town treasurer with their bids is substantially fulfilled by the submission of a cashier's check on an accredited bank, to the order of the town, indorsed by the bidder.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 859; Dec. Dig. § 333.*

For other definitions, see *Words and Phrases*, vol. 2, p. 1034.]

2. MUNICIPAL CORPORATIONS (§ 332*)—CONTRACTS—REGULARITY OF BID.

An advertisement for bids under section 64 of the Town Act of 1895, p. 218, as amended in 1906 (P. L. p. 325), required bidders to bid a percentage of a standard price and also to state the number of working days required for completion, which with the allowance provided for inspector's wages would figure as an item in the bid. *Held*, that a statement of such number of working days was an essential element in the ascertainment of the lowest bid, and that its omission by a bidder rendered his bid irregular and the award of the contract to such bidder invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 332.*]

Certiorari, on the prosecution of Marietta Hornung and others against the Town of West New York and Joseph Roscitt, to review a resolution of the Municipal Board of such town. Award of contract set aside.

Argued November term, 1911, before GAE RISON, PARKER, and BERGEN, JJ.

Collins & Corbin, for prosecutors. Maria A. Sullivan, for defendant town of West New York. Pierre P. Garven, for defendant Roscitt.

PARKER, J. Prosecutors attack the legality of a resolution of the municipal body of West New York, awarding to Joseph Roscitt the contract for a street improvement. The original prosecutors were competing bidders; but two taxpayers were admitted as additional prosecutors and have assumed the burden of the litigation. The grounds argued are two: That Roscitt, to whom the contract was awarded, was disqualified because he did not deposit with his bid a certified check as required by the conditions; and that he was further disqualified by failing to state in his bid the number of days that he would require to complete the work, which was also required by the conditions.

[1] The first ground is not well taken. Although Roscitt did not deposit a certified check as the term is generally understood, he did deposit a cashier's check upon a bank of unimpeached standing for solvency, to the order of the town, and with his own signature on the back. This made him an indorser. Negotiable Instruments Act (P. L. 1902, pp. 583, 594) §§ 63, 64. Consequently the town had the bank's own promise to pay, indorsed by Roscitt, and was at least in as advantageous a position to enforce compliance with the bid as if the check had been signed by Roscitt and certified by the bank at his request; both being then liable thereon. *Times Square Automobile Co. v. Rutherford National Bank*, 77 N. J. Law, 649, 650, 73 Atl. 479, 134 Am. St. Rep. 811. There was no substantial distinction between the cashier's check so indorsed, and a certified check, for the purpose of qualifying Roscitt as a bidder. The check was made to the order of the town, instead of the town treasurer, as required in the advertisement; but the requirement was manifestly for the benefit of the town, and the treasurer's authority to collect such a check is unquestionable. P. L. 1895, p. 230, § 29.

[2] But we reach a different result on the second ground of attack. By section 64 of the town act of 1895 as amended (P. L. 1906, p. 325), the town must advertise for proposals for doing the work and furnishing the materials for a street improvement, which proposals shall be presented in such form and manner and under such regula-

tions as the council may prescribe, and "upon the coming in of such proposals the council may enter into contract with the lowest responsible bidders on the terms of their proposals." The council is authorized to reject all the bids and readvertise, but no such action was taken. What happened was this: Bids were advertised for, to be submitted on blank forms furnished by the town, and based on plans and specifications filed in the office of the town clerk. The bids were to be in the form of a percentage of a standard of cost stated in the specifications. In the advertisement it is stated that bidders will also state the number of working days they will require to complete the work, and the specifications contain this clause: "In submitting their bids or estimates, bidders will bid a percentage of the above standard of prices, and will also state the number of working days they will require to complete the work, which statement, based upon the wages due the inspectors, will figure as one of the items."

There were a number of bidders, but we are concerned at present only with the two lowest in percentage. Roscitt bid 68 per cent., but stated no time of completion. Henry & Emmer, the original prosecutors, bid 69 per cent. and offered to complete in 200 working days. This was on June 6th. On June 15th Roscitt sent in a communication stating that his omission to state the number of working days was due to his being misled by the blank form, and stating 175 days as the time required for completion, and on the 20th the contract was awarded to him.

It is urged that the requirement of number of working days was an immaterial one and should not affect the validity of a bid; but we think differently. What the town wanted was the lowest total cost; and it is plain from a reading of the clause quoted from the specifications that this is made up of two elements, viz., percentage of engineer's standard, and cost of inspection, and that a lower per cent. might well make a higher bid when combined with a larger number of working days. The engineer's figures constituting the base of the percentage calculation are not before us; but it is safe to say that Roscitt would not have taken the trouble to specify 25 days less than Henry & Emmer after the bids were opened, unless the difference in inspector's fees would more than offset the 1 per cent. margin in their favor. It is obvious to us that the requirement that the number of working days be stated was material. If so, and if the award of the contract was not discretionary, the award to Roscitt was irregular and must be set aside; for, if the requirement is complied with in one case and may be disregarded in another, the bidders are

not on the same footing. *Case v. Trenton*, 47 N. J. Law, 696, 74 Atl. 672.

But it is further urged that the town was not required, under the terms of section 64 as amended, to award the contract to the lowest responsible bidder, or upon the terms and conditions prescribed for bidders. The argument seems to be that, because the council may enter into contract, with the lowest responsible bidders "on the terms of their proposals," it is authorized to accept a proposal varying materially as to performance of the work provided the amount of the bid be satisfactory. But we can draw no such meaning from this language. The effect of so doing would be to enable each bidder to draw his own contract and specifications and make competitive bidding a farce. It is not seriously claimed that an absolute discretion to award contracts is vested in the council, or that the word "may" is not imperative rather than permissive. We have no doubt that it is tantamount to "shall," and that, as the act requires the bids to be presented "in such form and manner and under such regulations as the council shall prescribe," the adoption of a standard contract and specifications as a basis for bidding is not only proper but necessary, and the terms of the proposals must necessarily conform to those of the contract and specifications, and the only terms that could be varied by bidders under the evidence in this case were the percentage of standard and number of working days.

We conclude, therefore, that the bid of Roscitt was irregular, and the award of the contract to him was illegal and must be set aside.

PUBLIC SERVICE RY. CO. v. BOARD OF PUBLIC UTILITY COM'RS et al.

(Supreme Court of New Jersey. Dec. 28, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 12*)—REGULATIONS—STREET RAILROADS—TRANSFERS.

An ordinance granting to a company the right to construct and operate a street railway along the public streets of a city which provides for a system of transferring passengers, "subject to any future regulations of the board," does not estop the municipality from subsequently requiring that a transfer ticket be given, upon request, to any passenger who has paid his fare, entitling him to a continuous ride, in either direction, on any railway intersecting or connecting with the line upon which such transfer is to be given.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

Certiorari prosecuted by the Public Service Railway Company against the Board of Public Utility Commissioners and another to review an order requiring the prosecutor to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

transfer passengers to intersecting or connecting points. Order affirmed.

Argued November term, 1911, before GARRISON, PARKER, and BERGEN, JJ.

Frank Bergen, for prosecutor. Joseph G. Wolber and Frank H. Sommer, for defendants.

BERGEN, J. This writ is brought to review an order of the board of public utility commissioners, requiring the prosecutor to comply with an ordinance of the municipal authorities, and in particular to desist, within the city of Newark, "from refusing to give transfers upon any street railway line intersecting or connecting with the line upon which such transfer was originally given." The order then proceeds to enumerate certain connecting points at which a refusal to make transfers shall cease. From the findings of the commission and the language used in the order, it seems that transfers had been theretofore given, and the complaint is based upon the refusal to longer continue the giving of transfers at certain points.

The precise question argued was: Must a passenger wait for a particular car which will carry him to his destination without change; or can he take any of prosecutor's cars, with the right to a transfer, at any connecting or intersecting point, to another of prosecutor's cars which will carry him to the same point he would have reached by taking a car not requiring him to transfer?

The first point made by the prosecutor is that the questions relating to transfers had been dealt with by previous ordinances which became contracts, not subject to future regulations relating to transfers, although such ordinances contain the condition, "subject, however, to any future regulations of the board."

The first ordinance relating to transfers was adopted December 29, 1892, which required the predecessors of the prosecutor to establish and maintain a system of transfers for a continuous ride, within the city limits, for a single fare, and to give and receive like transfers from the lines of other railway companies, and also provided that the ordinances should not be construed to require transfers to be given to or from lines running in the same direction and substantially parallel.

If we assume that the ordinances are contracts between the city and the prosecutor, it is nevertheless subject to "any future regulations of the board," and the point is made by the prosecutor that such reservation is not broad enough to cover any change in the transfer requirements, and this contention is said to be supported by the case of *Detroit v. Detroit Citizens' Railway Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

In this case the question at issue was the right of the city to reduce the fare to be charged, which was fixed by the contract and the court in its opinion limited the power to make further rules or regulations to matters incident to the construction and operation of the road, the repair of pavement, the removal or limitation of the number of tracks, the frequency with which cars should be run, the stopping of cars at street crossings, the sale of tickets, "and generally to details of the conduct or operations of the railway which experience might show to be necessary," and for, among other things, the accommodation of the public and the avoidance of injury to private property.

I am of opinion that the requirement relating to transfers is a regulation which appertains to the sale of tickets and the operation of the railway, concerning its method of carrying passengers to their destination for a single fare of five cents. What the prosecutor claims the right to do in such operation is to compel passengers to enter only such cars as would carry them to their destination without change, and this order requires it to so operate its railway as to allow passengers to take any car going in the required direction, with the privilege of transferring at intersecting points; and this is no invasion of any contract right, but a further regulation of the system of transfers. The objection that the stopping of the cars at intersecting points to permit these transfers results in unnecessary cost and waste of power is more fanciful than real, for in practice these cars usually stop at intersecting points.

The order under review does not violate any contract right of the prosecutor, because the giving of transfers and the efficiency to be given them was within the reservation, "subject to any future regulations of the board."

The order will be affirmed.

WILLIAMS v. YOUNG.

(Court of Errors and Appeals of New Jersey.
Nov. 21, 1910.)

1. LANDLORD AND TENANT (§ 95*)—TERM FOR YEARS — TRANSFER OR TERMINATION OF LANDLORD'S ESTATE.

Where a lessor conveys land to an innocent purchaser for value without notice of a tenant's leasehold estate, the leasehold estate in the land is necessarily destroyed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 800-304; Dec. Dig. § 95.*]

2. LANDLORD AND TENANT (§ 48*)—LANDLORD'S CONVEYANCE OF LEASEHOLD—RECOVERY OF RENT PAID.

Upon a landlord's wrongful conveyance to a bona fide purchaser without notice, of lands subject to a tenant's term for years, the tenant was entitled to recover in an action at law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

based upon the landlord's implied contract to pay over the amount received for the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 116; Dec. Dig. § 48.*]

3. LANDLORD AND TENANT (§ 48*)—TERM FOR YEARS—TERMINATION—BREACH OF COVENANT.

Where a landlord extinguishes his tenant's term by a wrongful conveyance of the premises, the tenant can maintain an action against him for breach of the engagements in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 114-116; Dec. Dig. § 48.*]

4. LANDLORD AND TENANT (§ 48*)—TERM FOR YEARS—LANDLORD'S CONVEYANCE OF TERM.

Where a landlord extinguishes a tenant's term by a wrongful conveyance, the tenant has an action against him for damages to the value of the term, based upon the wrongful destruction of his term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 114-116; Dec. Dig. § 48.*]

5. TRUSTS (§ 105*)—CONSTRUCTIVE TRUSTS—LESSOR'S WRONGFUL CONVEYANCE OF TERM.

Where a lessor extinguishes his tenant's term by a wrongful conveyance of the premises and receives as consideration for the conveyance any property or money which can be so identified, a court of equity will entertain a bill to impress a trust upon such property by declaring the lessor a trustee ex maleficio of the property so held by him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 156; Dec. Dig. § 105.*]

6. EQUITY (§ 15*)—JURISDICTION—INJURIES TO PROPERTY RIGHTS.

Where a landlord extinguishes his tenant's term by a wrongful conveyance of the premises and receives specific property or profits therefrom, a court of equity may enforce an accounting, but, in the absence of specific profits or assets to be sequestered, will not assume jurisdiction to ascertain the quantum of damages suffered by the tenant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 27-36; Dec. Dig. § 15.*]

7. SPECIFIC PERFORMANCE (§ 13*)—DEFENSES—PERFORMANCE IMPOSSIBLE.

Where it appears from the averments of a bill against a landlord who has wrongfully conveyed and extinguished his tenant's term that specific performance of the contract of lease is then impossible, the bill will not be entertained.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32; Dec. Dig. § 13.*]

8. LANDLORD AND TENANT (§ 95*)—LESSOR'S CONVEYANCE OF TERM—EFFECT OF LESSEE'S SUBSEQUENT PAYMENTS.

Payments made by the lessee of a term after its extinguishment by the lessor's wrongful conveyance are ineffectual to charge the land with the burden of the term, or for any purpose.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 95.*]

9. LANDLORD AND TENANT (§ 48*)—LESSOR'S WRONGFUL CONVEYANCE OF TERM—ACTION—LACHES.

Where a landlord wrongfully conveyed land in which a tenant has a term to a bona fide purchaser for value and without notice of the term, thereby extinguishing the term and the relation of landlord and tenant, the ten-

ant's right of action against the landlord for the wrongful extinguishment of his term is to be regarded as accruing at the time of the conveyance in determining the question of laches.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 48.*]

Appeal from Court of Chancery.

Bill by Mary Williams against John L. Young, her lessor, to recover the value of a term wrongfully conveyed by him. Demurrer sustained, and plaintiff appeals. Affirmed.

The following is the opinion of Vice Chancellor Leaming:

"I am unable to conclude that a court of equity can properly entertain this bill.

[1-7] "When defendant wrongfully conveyed the land in question to an innocent purchaser for value without notice of complainant's leasehold estate, the leasehold estate in the land was necessarily destroyed. The absolute and unrestricted title of such purchaser rendered the further existence of a leasehold estate impossible. The conveyance to the innocent purchaser was, in effect, a conveyance of the term, and the reversion. Complainant thereby became entitled to recover from defendant in an action at law, based upon the implied contract of defendant to pay to complainant the money had and received for his use, such amount as was received by defendant for the term. Or complainant could have maintained against defendant an action for breach of the engagements in the lease, or for damages based upon the tort consisting of the wrongful destruction of complainant's term, and thus recovered the value of the term. Had defendant received as consideration for the conveyance of the term any property or money which could be so identified, a court of equity would have entertained a bill to impress a trust upon such property by declaring defendant a trustee ex maleficio of the property so held by him. But, in the absence of specific property to be sequestered, I am unable to discern the propriety of a court of equity assuming jurisdiction for the purpose of merely ascertaining the quantum of damages suffered by complainant by reason of the wrongful conduct of defendant. See 3 Pomeroy's Equity Jurisprudence, § 1051. I am aware of no infirmity in the rule of procedure of the courts of law for the accomplishment of that purpose. The theory of the bill appears to be that the equitable doctrine that defendant may be charged as a trustee includes the obligation on his part to render an accounting in a court of equity. Where a defendant in possession of property as an equitable trustee derives profits from its commercial operation, a court of equity might appropriately enforce an accounting touching such profits; but the averments of the present bill disclose that the leasehold

estate of complainant was in effect destroyed by a conveyance from defendant to innocent purchasers for value without notice. It is not claimed that defendant received any profits from the enjoyment or operation of complainant's leasehold estate, other than such amount of money as he may have received by the absolute conveyance in excess of the amount that could have been obtained by a conveyance of the reversion only. Nor does the bill suggest the existence of any present assets which are the fruits of the conveyance. The alternative prayer that defendant be required to furnish to complainant a similar leasehold estate in some other similar location cannot be entertained. Such a decree could not be enforced. By the averments of the bill it fully appears that the specific performance of the contract of lease is now impossible.

[8, 9] "I also incline to the view that the bill presents a stale claim. If the leasehold estate of complainant in the land was extinguished by the conveyance made by defendant to an innocent purchaser for value without notice, complainant's right of action against defendant arising from the wrongful act of extinguishment accrued at that time, or at the time that defendant's conduct rendered it impossible for him to perform his contractual obligations arising from the lease. The subsequent payments or tender of payments to defendant of the annual rentals called for by the lease could not be operative to charge the land with the burden of the term. Assuming complainant's right to elect to keep the contractual obligations of defendant arising under the lease alive by making or tendering the annual payments and constantly demanding of defendant an enjoyment of the term, it seems manifest that after the estate of complainant in the land became extinguished as an estate, and after it became admittedly impossible for defendant to discharge the contractual obligations of the lease, future payments and demands were ineffective for any purpose. The leasehold estate of complainant in the land was destroyed and could not be restored. As between complainant and defendant the relation of landlord and tenant existed in form only. The conception of the relation of landlord and tenant without a term or reversion is impossible. Defendant had broken all of his obligations arising from the lease and had rendered it impossible for him to discharge them. Under these conditions the right of action of complainant against defendant for such injuries as resulted from the wrongful destruction of the leasehold estate accrued, and relief should be sought with reference to the period when the conditions above stated arose. The theory of the bill is the recovery of the value of the lease as of the date of the 'wrongful usurpation and disposing of said Young (defendant) of her (com-

plainant's) property rights.' The lease was not under seal.

"I will advise an order sustaining the demurrer."

John J. Crandall and Herbert A. Drake, for appellant. Clarence L. Cole, for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Leaming.

TAYLOR PROVISION CO. v. EDWARDS.
(Court of Errors and Appeals of New Jersey.
Nov. 20, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 95*)—IMITATION—PRELIMINARY INJUNCTION.

Defendant having been restrained by preliminary injunction from selling his food product as "Rolled Pork," in imitation of plaintiff's product, plaintiff put out a new brand, under a label corresponding with that which he had been using, and labeled it "Trenton Pork Roll." Defendant, closely copying this label, put forth a brand labeled "Trenton Style Pork Roll." Held, on supplemental bill, that plaintiff was entitled to preliminary injunction as to this product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 81*)—IMITATION—INJUNCTION.

There is no arbitrary period during and over which a brand must be sold and advertised to entitle the complainant to an injunction against imitators, but the question of time is always one to be considered in connection with all the facts of a given case.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 67*)—IMITATION—INJUNCTION.

Complainant had established a reputation for its "prepared ham" for years before the defendant entered the trade; and therefore, when the complainant was obliged to change the name of its brand from "prepared ham" to something else, under the federal pure food law, such change was equivalent to putting out a new brand, concerning which he was entitled to be protected from simulation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

Appeal from Court of Chancery.

Bill by the Taylor Provision Company against Andrew H. Edwards. From a decree for plaintiff, defendant appeals. Affirmed.

The following are the opinions of Walker, V. C., in the court below:

"On Application for Preliminary Injunction.

"My examination of this matter has led me to the conclusion that the complainant is entitled to a preliminary injunction according to the prayer of its supplemental bill.

[1, 2] "The defendant was restrained by

preliminary injunction issued on the original bill, and was ordered to desist from selling and advertising his food product as 'Rolled Pork,' in a style and manner similar to the labeling of the packages containing the complainant's product. After the issuance of the injunction the complainant put a new brand on the market, and labeled it 'Trenton Pork Roll.' The defendant, within two weeks after the complainant's new brand appeared, put out a new brand himself, which he labeled 'Trenton Style Pork Roll.' He claims not to have copied the complainant's label, but that he has closely copied it 'seems too plain for argument. He may have thought that by labeling his packages 'Trenton Style Pork Roll' he had closely enough copied 'Trenton Pork Roll' to deceive the public into the belief that his goods were those of the complainant, but by the use of the word 'style' had sufficiently departed from the complainant's label so as not to bring himself within the ban of the law. But in this he is, to say the least, mistaken. The adjudications are clearly against him. In many instances in which injunctions have gone to restrain unfair competition, the dissimilarity in names and style of advertising have been far greater than in the case at bar. The matter now under consideration is not one in which the complainant has put an entirely new article upon the market, with a distinctive label, but one in which he has simply put out a new brand under a label corresponding with that which he has used for years, with a proper and apt word to distinguish it from the older and original brand which the defendant has already been enjoined from imitating. There is no arbitrary period during and over which a brand must be sold and advertised to entitle the complainant to an injunction against imitators, but the question of time is always one to be considered in connection with all the facts of a given case; and in this case, as the label under consideration is only an appropriate label for a new brand of an old article, its piracy must be restrained.

"On Final Hearing on Pleadings and Proofs.

"My examination of this case has led me to the conclusion that the complainant is entitled to a permanent injunction against the defendant in the combined form of the preliminary injunctions heretofore issued in this cause, one on the original bill, and the other on the supplemental bill.

"The following cases are particularly apposite, and, in my judgment, sustain the complainant's position: *American, etc., Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263; *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 Fed. 73, 101 C. C. A. 565; *William Wrigley, Jr., & Co. v. Grove Company*, U. S. Circuit Court, Southern District of New York, April

22, 1910, affirmed, with modification; s. c., U. S. Circuit Court of Appeals, Second Circuit, 183 Fed. 99, 105 C. C. A. 391.

[3] 'The doctrine that a trader is to be protected from unfair competition is one which fully obtains in this state, and it is upon this principle, and not for the protection of a registered trade-mark, that the injunction will go in this case.

"Although the complainant may not have been in the market with its brand, labeled 'pork roll,' for a sufficient length of time, if at all, before the defendant marketed his product as 'rolled pork' to entitle it to enjoin the defendant for that reason, nevertheless the proofs show that the complainant had established a reputation for its 'prepared ham' for years before the defendant entered the trade; and therefore, when the complainant was obliged to change the name of its brand from 'prepared ham' to something else, under the federal pure food law, such change was equivalent to putting out a new brand, concerning which the trader is entitled to be protected from simulation by another dealer. *Florence Mfg. Co. v. J. C. Dowd & Co.*, supra, at page 75 of 178 Fed.

"The complainant is entitled to costs."

Linton Satterthwait, for appellant. Scott Scammell, for respondent.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Walker.

PHILLIPSBURG HORSE CAR R. CO. v. STATE BOARD OF ASSESSORS et al.

(Supreme Court of New Jersey. Dec. 19, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 394*)—ASSESSMENTS—STATUTORY PROVISIONS.

Sections 4 and 5 of chapter 290 of the Laws of 1906 (P. L. pp. 645, 646) require the state board of assessors to levy an annual franchise tax upon such proportion of the annual gross receipts of a street railroad corporation as the length of its line in this state upon any street, highway, road, lane, or other public place bears to the length of its whole line.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 394.*]

2. COMMERCE (§ 70*)—MEANS OF REGULATION—FRANCHISE TAX.

The annual franchise tax which sections 4 and 5 of chapter 290 of the Laws of 1906 (P. L. pp. 645, 646) require the state board of assessors to levy upon such proportion of the annual gross receipts of a street railroad corporation as the length of its line in this state upon any street, highway, road, lane, or other public place bears to the length of its whole line is not levied on the gross receipts of the corporation, nor on the business of the corporation, but is merely an excise tax on the franchises of the corporation, viz., the fran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chise to exist and the franchise to occupy the streets, which is measured in part by the gross receipts, and therefore such franchise tax is not a regulation of interstate commerce, and the act under which it is levied is not in conflict with the clause of the Constitution of the United States giving to Congress power to regulate commerce among the several states.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 70.*]

Certiorari prosecuted by the Phillipsburg Horse Car Railroad Company to review an assessment of franchise taxes by the state board of assessors. Tax affirmed.

Argued November term, 1911, before GARRISON and TRENCHARD, JJ.

W. H. Walters, Gilbert Collins, and Henry J. Steele, for prosecutor. Josiah Stryker and Edmund Wilson, Atty. Gen., for State Board of Assessors. J. I. B. Reiley, for Town of Phillipsburg. S. C. Smith, for Township of Pohatcong.

TRENCHARD, J. This writ of certiorari brings up for review the assessment of franchise taxes in the year 1910 on the prosecutor, the Phillipsburg Horse Car Railroad Company, under chapter 290 of the Laws of 1906. P. L. p. 644. The return shows that, pursuant to section 4 of that act, the prosecutor sent to the state board of assessors a statement showing (1) the gross receipts from its business in this state for the year ending December 31, 1909; (2) the entire mileage of prosecutor's railroad in this state; and (3) the mileage of such road upon the streets, highways, roads, lanes, or other public places in this state. It further shows that the tax in question was determined as required by section 5 of the act by calculating 4 per cent. upon such proportion of its gross receipts as the length of the line upon the streets, highways, roads, lanes, and other public places in this state bears to the length of the whole line. It appears that the prosecutor in its report to the state board attempted to apportion the receipts between intrastate and interstate traffic, and insisted that the franchise tax in question should be ascertained by taking 4 per centum of the receipts derived from intrastate traffic only. It further appears that the only road owned by the prosecutor is located in the township of Pohatcong and the town of Phillipsburg in this state; that the two divisions of the line meet at Union Square in Phillipsburg, near the Delaware bridge; that cars from both divisions cross the Delaware bridge on tracks owned by the bridge company and then proceed on tracks owned by the Easton Transit Company to Centre Square in Easton, in the state of Pennsylvania; that the distance from the easterly end of the Delaware bridge to Centre Square is forty-nine hundredths of a mile.

It also appears that the prosecutor owns no franchises of any kind in the state of

Pennsylvania; that it operates the track located on the Delaware bridge under a lease, paying rent therefor; and that the tracks from the western end of the Delaware bridge to Centre Square are operated by the prosecutor under an agreement with the Easton Transit Company, under which the prosecutor pays an annual sum to the latter company. This agreement contains a clause requiring the prosecutor to honor transfers issued by the Easton Company, and an agreement by the Easton Company to accept over a portion of its line transfers issued by the prosecutor. These transfers in no way affect the gross receipts, as the transfers honored by each company are considered as offsetting those issued by it. It also appears that the prosecutor is a corporation of this state.

By stipulation it appears in effect that 70 per cent. of the cash fares received by the prosecutor were received for the carriage of passengers either from New Jersey to Pennsylvania or from Pennsylvania to New Jersey, and that 30 per cent. of such cash fares were received for the carriage of passengers wholly within the state of New Jersey.

[1] The sole question raised by the reasons for reversal is whether prosecutor can be required to pay a franchise tax of 4 per cent. on such proportion of its gross receipts as the length its line on the streets, highways, etc., in this state bears to the length of its whole line, or whether, before such proportion is taken, the amount of gross receipts received from interstate traffic must first be deducted from the total of gross receipts. Sections 4 and 5 of the act of 1906 (P. L. pp. 645, 646), under which the tax was assessed, are as follows:

"Sec. 4. Every street railroad corporation subject to taxation under the provisions of this act, shall, on or before the first Tuesday in May in each year, return to the state board of assessors a statement showing the gross receipts from its business in this state for the year ending December 31st, next preceding, and any such corporation having part of its road in this state and part thereof in another state or states, or having part of its road on private property and part on any public street, highway, road, lane or other public place shall make a report showing the gross receipts on the whole line, together with a statement of the length of the whole line and the length of the line in this state upon any street, highway, road, lane or other public place, and the franchise tax of such corporation for the business done in this state shall be levied by the state board of assessors upon such proportion of its gross receipts as the length of the line in this state upon any street, highway, road, lane or other public place bears to the length of the whole line," etc.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Sec. 5. An annual franchise tax upon the annual gross receipts of every street railroad corporation or upon such proportion of such gross receipts as the length of its line in this state upon any street, highway, road, lane or other public place, bears to the length of its whole line, shall be assessed by the state board of assessors as follows: For the year nineteen hundred and six, two and one-half per centum upon such gross receipts; for the year nineteen hundred and seven, three per centum; for the year nineteen hundred and eight, three and one-half per centum; for the year nineteen hundred and nine, four per centum; for the year nineteen hundred and ten, four and one-half per centum; for the year nineteen hundred and eleven, and annually thereafter, five per centum."

These sections plainly require the levying of the tax in the manner pursued by the state board. They require that the franchise tax shall be levied upon such proportion of the gross receipts as the length of the line in this state upon any street, highway, road, lane, or other public place bears to the length of the whole line.

[2] But the prosecutor contends that the act of 1906, as applied to the prosecutor, is a regulation of interstate commerce in conflict with the exclusive powers of Congress under the Constitution of the United States. Of course, the determination of this question depends upon the character of the tax imposed, and upon what such tax is levied.

What, then, is the character of the tax in question, and upon what is it levied? This question must be considered in the light of the following matters:

(a) The act of 1906, as will be seen by its title, applies only to street railroad corporations using or occupying public streets, etc., in this state. It contains a complete scheme for taxing all the property and franchises of such corporations. Section 2 provides that all property of such companies, whether located upon a street or highway or not, shall be assessed and taxed at local rates as now provided by law. This section evidently applies only to tangible property. Sections 4 and 5 provide, as above stated, for an annual franchise tax upon the annual gross receipts or upon such proportion of such gross receipts as the length of line upon the streets, etc., in this state bears to the length of the whole line. This tax is called a franchise tax wherever referred to in the act. Section 8 provides that the franchise tax, and the tax on real and personal property shall be in lieu of all other taxes.

(b) Prior to the passage of the act of 1906, such street railroad corporations were taxed under chapter 195 of the Laws of 1900 (P. L. p. 502). That act, so far as street railroads were concerned, provided for substantially the same system of taxation as is provided for by the act of 1906, except that the earlier act took the entire gross receipts

from the business of the street railroad company in the state of New Jersey, and contained no provision for apportionment as is contained in section 5 of the act of 1906. The act of 1900 also provided that the taxes imposed thereunder should be in lieu of all other taxes. Prior to the enactment of the act of 1900, street railroad corporations were taxed under the general provisions of section 4 of chapter 59 of the Laws of 1884 (P. L. p. 235), which provided "that all other corporations incorporated under the laws of this state, and not hereinbefore provided for, shall pay a yearly license fee or tax of one-tenth of one per cent. on the amount of the capital stock of such corporations." That was a tax upon the franchise of the corporation to exist as a corporation. *Marsden Co. v. Assessors*, 61 N. J. Law, 461, 39 Atl. 638. It appears, therefore, that the tax measured by gross receipts, which was first imposed on street railway companies under the act of 1900, and continued by the act of 1906, was imposed in lieu of the tax upon the franchise to exist as a corporation assessed under the act of 1884.

(c) The act of 1906 applies only to corporations which have a franchise to occupy the public streets, and the act of 1900 is similar to it in this respect. The fact that the tax is calculated upon the proportion of gross receipts which the mileage of the tracks of the corporation on public streets, etc., in this state bears to its entire mileage, thus excluding mileage on private rights of way, as well as mileage out of the state, shows that it was intended by the Legislature to consider in providing for this tax the value of the franchise of the company to occupy the streets, etc., with its tracks, and to impose a tax upon such franchise which should bear a relation to its value. This is indicated by section 7, which provides that money payable by a street railroad company to a taxing district, pursuant to any contract, "shall be paid notwithstanding this act," but that the amounts so paid shall be deducted from the tax assessed under the act and apportioned to such district under its provisions. Moneys paid under such contracts are usually agreed to be paid in consideration of the granting by the municipality of the franchise to occupy its streets. Such provision is tantamount to an expression that the privilege upon which this tax is levied and the privilege for which such moneys are paid under such contracts are to some extent at least similar.

(d) Section 6 of the act provides for an apportionment of the franchise taxes in proportion to the value of the tangible property of any such corporation located in or upon any public street, etc., and for the collection of such taxes by such taxing districts. It provides that this tax so assessed and certified shall be a first lien on the property and franchises of such corporations in such taxing district until paid, and that the proceed-

ings available for the collection of other taxes shall be "applicable to the collection of the franchise tax hereby authorized."

Since the tax in question was imposed in lieu of the prior tax under the act of 1884 on the franchise to exist as a corporation, and since it is imposed only on corporations that have a franchise to occupy the public streets, and, further, since its amount is made to depend upon the proceeds from the use of such streets and thus bears a relation to the value of the franchise, the conclusion is irresistible that this tax is levied on both the franchise to exist and the franchise to occupy the streets. It is the result of an effort by the Legislature to measure the value of the franchises of the corporation and to tax such value by a method fair at once to the corporation and to the state. The tangible property is taxed at a fair valuation without regard to the franchises and the tax on the franchises is measured by the gross receipts and the proportion of the road occupying public streets, etc. We hold, therefore, that the tax in question is not levied on the gross receipts of the corporation nor on the business of the corporation, but is merely an excise tax on the franchises of the corporation, viz., the franchise to exist and the franchise to occupy the streets, which is measured in part by the gross receipts. In *Newark v. State Board of Taxation*, 67 N. J. Law, 246, 51 Atl. 67, the Court of Errors held that, though the franchise of a street railroad company to maintain and occupy its road over the public highways was property and taxable as such, yet under legislation in force at that time, by which was undoubtedly meant the act of 1900, the right to tax it had been reserved by the state to itself, through its state board of assessors, and not delegated to the several municipalities through which the company's road passes. In *North Jersey Street Railway Company v. Jersey City*, 74 N. J. Law, 761, 67 Atl. 33, the Court of Errors, in speaking of the tax assessed under the act of 1900, said: "We agree with the Supreme Court that this tax on gross receipts is not a property tax, but a license fee imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend." Since the tax levied upon the prosecutor is a tax upon the prosecutor's franchises, and not upon its business, nor upon its receipts therefrom, it in no way conflicts with the clause of the United States Constitution empowering Congress to regulate commerce among the states, and cannot be said to be in any sense a tax upon interstate commerce.

It was held by this court in *Lumberville Bridge Company v. Assessors*, 55 N. J. Law, 529, 26 Atl. 711, 25 L. R. A. 134, that a tax amounting to one-tenth of 1 per cent. on the entire capital stock of the company imposed upon the bridge company was not void as an interference with interstate commerce, although the company was incorporated by the

concurrent acts of the Legislatures of New Jersey and Pennsylvania for the purpose of building and operating a toll bridge over the Delaware river between those two states. In that case Mr. Justice Garrison classifies the cases in which state legislation has been set aside as an unwarrantable regulation of interstate commerce into three general classes: (1) Those in which the state law has made discriminations adversely to other states. (2) Those in which the impost was upon the subject of transportation. (3) Those in which the state tax was in effect a tax upon the business engaged in interstate commerce, because imposed upon its agencies.

In the opinion a number of cases are cited in which state legislation has been sustained by the United States Supreme Court, although incidentally affecting interstate commerce. Among others are *Maine v. Grand Trunk Railway Company*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, and *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601. In *Tidewater Pipe Co. v. Assessors*, 57 N. J. Law, 516, 31 Atl. 220, 27 L. R. A. 684, a question very similar to the question involved in the case at bar was decided by this court. The *Tidewater Pipe Company*, for the purpose of taxation, was considered a corporation within the meaning of our corporation tax act. Its entire business consisted of the transportation of oil from points without to points within New Jersey, and of matters incidental to such transportation, and was admitted to be engaged solely in interstate commerce. A tax was levied on the corporation under section 4 of the act of 1884 (P. L. p. 234), and was designated by the statute as "an annual tax for the use of the state by way of a license for its corporate franchises," and consisted of eight-tenths of 1 per centum of the gross amount of its receipts from the transportation of oil in this state during the year preceding the levy. The gross amount was fixed by the statute as such proportion of its gross receipts for transportation of oil over its whole line as the length of its line in this state bears to the length of its whole line. It was insisted by the prosecutor that the imposition of the tax was an unconstitutional interference with interstate commerce. On this question the court said: "The question thus raised is one to be decided according to the views of the Supreme Court of the United States. Those views have been recently expressed in a case which appears to be on all fours with the present case. I refer to *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994], which is so apposite for present purposes as to preclude the need or the utility of further investigation." This case was subsequently affirmed by the Court of Errors on the opinion in the court below. 59 N. J. Law, 269, 39 Atl. 1114.

In *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, an act of the Legislature of the state of Maine provided that the buildings of every railroad corporation, whether within or without the located right of way, and its lands and fixtures outside of the located right of way, should be subject to taxation by the several cities and towns in which such buildings, lands, etc., were situated, as other property therein was taxed, and further provided that every corporation operating any railroad in that state should pay for the use of the state an annual excise tax for the privilege of exercising its franchise in that state, which with the tax above mentioned should be in lieu of all taxes upon such railroad, its property and stock. The amount of the franchise tax was ascertained by taking the gross transportation receipts for the year next preceding the levy of the tax, and dividing such transportation receipts by the number of miles of the railroad operated. In the case of railroads lying partly within and partly without the state, or operated as a part of a line or system extending beyond the state, the entire gross receipts were divided by the entire number of miles of such line or system, and then multiplied by the number of miles of railroad operated within the state. It will be seen that this method was substantially the same as that followed in the statute now under consideration in the case at bar. The Grand Trunk Railway Company, the defendant in the case above mentioned, was a corporation created under the laws of Canada. Its railroad was constructed partly within and partly without the state of Maine. The opinion of the court delivered by Mr. Justice Field held that the tax in question was an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine.

As has been stated, this case has been cited by this court in the cases of *Lumberville Bridge Company v. Assessors*, and *Tide-water Pipe Company v. Assessors*, and by the Supreme Court of the United States in many cases, among which are *Ficklen v. Shelby County*, 145 U. S. 23, 12 Sup. Ct. 810, 36 L. Ed. 601, and *Galveston, etc., Railroad Company v. Texas*, 210 U. S. 224, 28 Sup. Ct. 638, 52 L. Ed. 1031. In *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601, Chief Justice Fuller said: "Again, in *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994], we decided that a state statute which required every corporation, person, or association operating a railroad within the state to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that when applied to a railroad lying partly within and partly without a state, or to one operated as a part of

a line or system extending beyond the state, the tax should be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia Steamship Company v. Pennsylvania*, 122 U. S. 326 [7 Sup. Ct. 1118, 30 L. Ed. 1200], where the specific gross receipts for transportation were taxed as such, taxed 'not only because they are money, or its value, but because they were received for transportation.' " In *Galveston, etc., Railroad Co. v. Texas*, 210 U. S. 224, 28 Sup. Ct. 638, 52 L. Ed. 1031, the decision in *Philadelphia & Southern Mail Steamship Company v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, is followed, and the Maine case is distinguished.

The distinction drawn in this case rests upon the character of the tax imposed. In a review of the Maine case in the case last cited, Mr. Justice Holmes, speaking of the Maine case, uses the following language: "In *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994], 'an annual excise tax for the privilege of exercising its franchise' was levied upon every one operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company Case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax was to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 23 [12 Sup. Ct. 810, 36 L. Ed. 601]; *Postal Telegraph Cable Co.*

v. Adams, 155 U. S. 688, 697 [15 Sup. Ct. 268, 360, 39 L. Ed. 311]; McHenry v. Alford, 168 U. S. 651, 670, 671 [18 Sup. Ct. 242, 42 L. Ed. 614]."

We are of opinion that the provisions of the act of 1906 now under consideration bring the case at bar within the ruling of the United States Supreme Court in the case of Maine v. Grand Trunk Railway Company, supra. It is apparent from the provisions of the act that the tax in question is levied on the franchises of the corporation, and that the reference to the gross receipts is made for the purpose of estimating the value of such franchises, that the value of a franchise to occupy the public streets rests largely upon the extent to which such franchise is used, and that the gross receipts are an index to this user. Such franchise tax, therefore, is not a regulation of interstate commerce, and the act under which it is levied is not in conflict with the clause of the Constitution of the United States giving to Congress power to regulate commerce among the several states.

The tax under review will be affirmed, with costs.

CLARK v. CLARK et al.

(Court of Errors and Appeals of New Jersey.
March 6, 1911.)

1. DIVORCE (§ 49*)—ADULTERY—CONDONATION.

Divorce will not be granted for adultery, where, after commission of the offense, the offending wife is received by her husband, who lives with her for over a month.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.*]

2. DIVORCE (§ 129*)—ADULTERY—SUFFICIENCY OF EVIDENCE.

Evidence of adultery held sufficient to warrant a decree for divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 129.*]

3. DIVORCE (§ 189*)—COSTS—LIABILITY OF CO-RESPONDENT.

Where a co-respondent in a divorce suit brought for adultery causes himself to be made a party, and the evidence establishes his guilt, he is liable for all the husband's costs and counsel fees under a statute providing that any one charged as particeps criminis shall be made a party upon application, subject to such terms as the court may prescribe.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 577; Dec. Dig. § 189.*]

Appeal from Court of Chancery, Howell, Vice Chancellor.

Suit by George W. Clark against Maggie A. Clark and another for divorce. From a decree granting the divorce, defendants appeal. Affirmed.

The following is the opinion of Howell, V. C., in the Court of Chancery:

"The parties to this controversy are residents of New Jersey, and have been since

their marriage, which took place on April 30, 1885. For many years they and John E. Flannery, the co-respondent, boarded with Mrs. Mary Fisher, the petitioner's sister, in Plainfield. The defendant is charged with having committed adultery with Flannery on May 15 and June 25, 1909. Flannery applied under the statute to be admitted as a defendant to the suit. He filed an answer in which he denied the charge of adultery made against him. He appeared at the final hearing by counsel who were heard on his behalf. I do not find it necessary to decide whether the charge that the defendants committed adultery on May 15th is true or not.

[1] "If adultery was committed at that time, it was subsequently condoned, and whatever cause of action the petitioner is entitled to arising out of the circumstances which are in evidence as to the actions of the defendants on that day is lost because the petitioner received his wife again, and continued to live with her until June 25th of the same year. Yet I find that the events which took place on that occasion, while they are not sufficient to found a decree upon, are useful for the purpose of illustrating the character and the inclination of the defendant Mrs. Clark to commit the act which is really the substance of this action.

[2] "The real charge, therefore, is that on June 25, 1909, Mrs. Clark and Flannery committed adultery in Flannery's bedroom in Mrs. Fisher's house. This charge I think is sustained by the evidence. The event happened early in the morning. The petitioner says that he came downstairs rather early to go to work, as he was going out of town; that he asked his sister to put up his lunch for him, and, after breakfast, mistrusting his wife, he went quietly upstairs, and looked into Flannery's room; that he saw Mrs. Clark there, that Mr. Flannery had only his flannel shirt; that he had his arm around her neck, and their mouths and their stomachs were close together; that he immediately upbraided them, and that Flannery turned sideways, they both dropped their hands, and, as they did so, his wife's clothing dropped toward the floor. This event happened on Friday. On the following Sunday Mrs. Clark went home to her mother. The petitioner has refused all communication with her since.

"On the following Sunday the petitioner had a conversation with Flannery, in which Flannery told him that he had done him (the petitioner) great wrong, that he had caught him dead in the act, and desired to know if money would straighten it out, to which Clark replied that nothing would straighten it out. These facts are corroborated by Mr. Bodine, Mrs. Bodine, Mr. Oliver, and Mrs. Fisher. Mr. Bodine saw Mr. Clark go upstairs and heard him upbraiding Mrs. Clark

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and Mr. Flannery, heard him tell his wife to pack her trunk and get out, saw him come downstairs pale and excited and trembling, and saw him lie down a while, and then go out to his work. Mrs. Bodine saw him go upstairs and heard him speak in a very excited manner to his wife and Flannery when he reached the head of the stairs, and heard him order his wife out. Mr. Oliver tells practically the same story about the events which happened on that occasion. In the evening of that day he met Flannery on the street. Flannery said to him, speaking of the affair, that it was awful; that it had to be hushed up, but that it was not his fault; that the woman had followed him up; that he knew he had been a fool, and he wanted Mr. Oliver to help hush it up; that he would not even stand on a money consideration if it could be fixed up. And subsequently he talked with Mrs. Clark, to whom he said that he had been expecting trouble, and asked her how long her amours with Flannery had been going on, and she replied between six and seven years. Mrs. Fisher, with whom they boarded, tells substantially the same story. The actions of the defendants and their statements in court amount to an admission of the facts charged against them and to a confession of their guilt. About July 1, 1909, Mrs. Clark wrote a letter to her husband, in which she expresses her sorrow over the event that had happened, and asks her husband to forgive her for the past, and love her just a little again. She says she will commence all over again, that she cannot stop worrying for thinking what her husband will do, with this expression, 'and to think I could not see you any more or do for you as I did try to do if I did do wrong.' And subsequently she wrote a letter to Mrs. Fisher in which she says: 'I have suffered day and night over this trouble. Oh, how I wish it had never happened, I would give all I had. To think, Mary, of not having George again. * * * I get all the blame, I suppose, but Mr. Flannery should get some, for he was the one to blame, and not have it all put on me.'

"It is true that no one saw these parties commit adultery, or saw them in a position in which they might have done so, except the husband; but the circumstances sworn to by him and disclosed by the evidence of Mrs. Clark and Mr. Flannery, together with the corroborations above mentioned, and the circumstances hereinafter referred to, leave no doubt in my mind as to the fact of their guilt; and in this connection I cannot refrain from commenting on the manner in which they gave their testimony. They appeared to me to be persons who were half admitting and half denying the guilt of which they were inwardly conscious. The circumstances appearing in the evidence which tend to expose the inclination of the parties to commit the offense are quite numerous, and are testified to by quite a large

number of witnesses. About two years before the hearing, Mrs. Clark and Flannery were sitting in Flannery's room face to face on small chairs with their knees locked, as the expression was. On another occasion he put his hand under her clothes as she was going upstairs. She made visits to his blacksmith shop, in one corner of which he had an office which was capable of being curtained, so that outsiders could not see in. They had what was called loving talk, and were frequently seen to hug each other. There were undue familiarities at the table. They ignored the petitioner as far as was possible. She took care of Flannery's linen, and not that of her husband. She was seen in Flannery's room one day dressed in a loose wrapper called a kimono, while Flannery was in the bathroom. Another important event is testified to by Mrs. Fisher. It happened on May 28, 1909. As she was lying on a sofa downstairs she could see through a hole in the ceiling and floor above which led into Flannery's room, the top of which was covered by an ordinary register grating. She heard Flannery call for Mrs. Clark, who was in her own room to bring him a drink of water. He was dressed in his nightshirt. Mrs. Clark got the water and took it in Flannery's room. They hugged and kissed each other, then went to a lounge in Flannery's room where such noises were occasioned by them as to induce Mrs. Fisher to believe that they were committing adultery. I must say that this testimony struck me very unfavorably as it was being brought out, but the ability to see through the register and hear what was going on in the room above was corroborated by Mr. Oliver, Mr. Rice, Mr. Bodine, and a civil engineer named Hubbard, who went to the house for the express purpose of qualifying himself to testify as to the physical ability to see and hear what Mrs. Fisher had testified to. I think that Mrs. Clark's testimony standing alone is a flat admission of her guilt; and, while it could not be used standing by itself as the foundation of a decree, I think that the surrounding circumstances are corroborative of the charge and corroborative of the commission of the offense, and that the charge against her is fully sustained. I will therefore advise a decree in favor of the petitioner.

[3] "This also established the guilt of the correspondent, who has caused himself to be made a party to the litigation; and it likewise renders him liable for all the husband's costs and counsel fees in the proceeding. *Duke v. Duke*, 72 N. J. Eq. 515, 73 Atl. 837. That was an interpretation of the act of 1902 which provided that the Chancellor in his discretion might allow any person charged with adultery with a party to intervene for the purpose of defending himself. The words of the present statute are not dissimilar. It provides any one charged as a particeps criminis shall be made a party

upon application, subject to such terms as the court may prescribe. The defendant Flannery must, therefore, be charged with the costs of the proceeding, and with a counsel fee, the amount of which will be fixed at the time of the settlement of the decree."

George W. V. Moy, for appellants. Reed & Coddington, for respondent.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of Vice Chancellor Howell.

The **CHIEF JUSTICE**, and **GARRISON**, **SWAYZE**, **REED**, **TRENCHARD**, **PARKER**, **BERGEN**, **VOORHEES**, **MINTURN**, **BOGERT**, **VREDENBURGH**, **VROOM**, **CONGDON**, and **SULLIVAN, JJ.**, concur.

GORDON et al. v. DEAVITT et al.

(Supreme Court of Vermont. Washington. Jan. 8, 1912.)

1. APPEAL AND ERROR (§ 1201*)—MANDATE—EFFECT.

Where the Supreme Court after trial on the merits, reversed and remanded a case with directions to enter a foreclosure, the trial court cannot permit the defendant to amend his pleadings so as to have a new trial on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

2. MORTGAGES (§ 479*)—FORECLOSURE—REFERENCE—NECESSITY.

Where the amount of the redemption payment to be made upon foreclosure was a matter of record, the trial court need not refer the cause to a master.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1395-1398; Dec. Dig. § 479.*]

3. MORTGAGES (§ 624*)—FORECLOSURE—REDEMPTION—PAYMENT—EFFECT.

Where a wife who had joined her husband in executing a mortgage upon their homestead redeemed it after foreclosure, the redemption while arresting the operation of a foreclosure decree obtained under such mortgage, both as to the wife and her husband, did not have the effect of putting her into possession of the premises so that she would be liable to a second mortgagee for the rents and profits thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1878-1888; Dec. Dig. § 624.*]

4. APPEAL AND ERROR (§ 1078*)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.

Points of error in appellant's brief unsupported by any stated grounds, reasons, or argument will not be reviewed, for the appellate court will not search for grounds to reverse a decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal in Chancery, Washington County; Alfred A. Hall, Chancellor.

Bill by John W. Gordon and Hattie M. Gordon against Thomas J. Deavitt and another. From a decree of foreclosure and denial of defendant's motion for leave to

answer, made in pursuance of the mandate of the Supreme Court in 84 Vt. 59, 78 Atl. 113, modifying, affirming, and remanding with directions, a former decree for orators, defendants appeal. Affirmed.

Argued before **ROWELL, C. J.**, and **MUNSON, WATSON, HASELTON, and POWERS, JJ.**

J. W. Gordon and **R. M. Harvey**, for orators. **T. J. Deavitt** and **Edward H. Deavitt**, for defendants.

WATSON, J. [1] The mandate from this court (84 Vt. 59, 78 Atl. 113) directed that the homestead be set out in accordance with the provisions of the statute, and that the remainder of the premises be appraised, and that the defendants pay for the benefit of the orators the amount of said appraisal, or a part thereof equal to the amount of the redemption payment and interest, with costs, by a day to be fixed by said court, or be foreclosed. These directions were obligatory upon the court of chancery, and proceeding under them it was not within the power of that court to allow further proceedings on the merits involved in the main issue determined on the demurrer. This being so, the refusal by the chancellor to permit defendant Deavitt to file answer was not error. *Sheldon v. Clemmons*, 82 Vt. 169, 72 Atl. 657.

[2] It is further urged that it was error not to refer the cause to a master, or to have a hearing before the chancellor, to ascertain the sums due in equity. But such a reference or hearing (certainly without request, and none is shown in this case) was unnecessary; for the amount of the redemption payment was a matter of record in the case, and to find the interest thereon was a mere matter of computation.

[3] It is said, however, that the rents and profits of the mortgaged premises should have been taken into consideration in fixing the sum due in equity. It is not claimed that the orator has had any of the rents and profits, and the claim that the oratrix has is without foundation. Before and at the time of the foreclosure proceedings on the bank mortgage, *Truman R. Gordon*, the husband of the oratrix, was, and ever since has been, in possession of the entire premises, and occupying the same with his family. The oratrix, a party defendant in that case, paid the decree within the period allowed therefor, to protect her homestead interest. This payment had the effect to arrest the operation of the decree as to all the defendants, of whom *Truman R.* was one (*Wheeler v. Willard*, 44 Vt. 640; *Phelps v. Root*, 78 Vt. 493, 63 Atl. 941), but it did not have the effect to put the oratrix into possession of the premises. It follows that the rents and profits could not properly be considered in the assessment of the sum due in equity.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[4] The points in defendant Deavitt's brief, not in effect covered by the foregoing holdings, are without any stated grounds, or reasons, and not supported by argument. The court will not search for grounds upon which to reverse the decree.

Decree affirmed and cause remanded. Let a new time of redemption be fixed.

DOYLE v. MELENDY.

(Supreme Court of Vermont. Windham.
Dec. 18, 1911.)

1. MASTER AND SERVANT (§ 168*)—FELLOW SERVANT—COMPETENCY—LIABILITY OF MASTER.

A master is not an insurer of the competency of his employes, but is only bound to exercise reasonable care in their selection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 334-340; Dec. Dig. § 168.*]

2. PLEADING (§ 9*)—ANSWER—ALLEGATIONS—CONCLUSIONS OF LAW FROM FACTS ALLEGED.

A plaintiff need not allege defendant's legal duty, but must allege facts from which the court can see that a legal duty existed, and, when such facts and the defendant's failure in respect to that duty are sufficiently alleged, an incorrect or incomplete statement of the legal duty will not vitiate the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

3. MASTER AND SERVANT (§ 259*)—ACTION FOR INJURIES—PLEADING—EMPLOYMENT OF INCOMPETENT FELLOW SERVANT.

A mere statement that the defendant did not provide competent fellow servants will not be sufficient, for he may have failed to do so and yet not be liable; and where counts in an action for personal injuries, after averring that defendant did not provide fellow servants competent for the work, alleged, further, "all of which was then and there well known to the defendant," there is a sufficient allegation of knowledge which necessarily negatives the exercise of reasonable care in their selection.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 259.*]

4. APPEAL AND ERROR (§ 231*)—PRESENTATION OF GROUNDS FOR REVIEW—DEMURRER.

Where the specification of grounds of demurrer was directed to all the counts, a special objection to one of the counts made on appeal will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

5. PLEADING (§ 21*)—INCONSISTENT ALLEGATIONS.

A pleading which contains inconsistent allegations is bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.*]

6. PLEADING (§ 21*)—CONSISTENCY.

Plaintiff, in an action for personal injuries, described a fellow servant in some of his counts as a fellow servant and in others as the foreman in charge of the work. *Held* that, as the use of the several counts to allege one cause of action was to meet the various possibilities of the proof, the nature of his relation depended thereon, and hence that the allegations were not inconsistent.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 44; Dec. Dig. § 21.*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action by Daniel F. Doyle against Charles F. Melendy. Demurrer to counts of plaintiff's amended declaration overruled, and defendant excepted. Judgment and cause remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Gibson & Waterman and Chase & Dracy, for plaintiff. Clarke C. Fitts and Hermon E. Eddy, for defendant.

MUNSON, J. The first, second, and fourth counts of the amended declaration allege in substance that it was the duty of the defendant to provide competent fellow servants to work with the plaintiff, and that the defendant was negligent in that he failed to provide such servants.

[1] It is claimed that these counts are defective in that they make the defendant an insurer of the competency of the plaintiff's fellow servants, when reasonable care in their selection is all that the law requires of him. If good pleading requires that the plaintiff allege with accuracy the legal duty wherein the defendant's failure subjects him to liability, the counts are clearly insufficient; for the law is as the defendant claims.

[2] But the rule is that the plaintiff need not allege the legal duty, but must allege facts from which the court can see that a legal duty existed. When the facts which show the legal duty and the defendant's failure in respect to that duty are sufficiently alleged, an incorrect or incomplete statement of the legal duty will not vitiate the count.

[3] It is claimed, however, that the allegations of fact are not sufficient to show that the duty which the defendant owed the plaintiff and failed to perform was the duty to exercise reasonable care in providing competent fellow servants, instead of the duty to provide such servants, as set forth. Stated in general terms, it is the duty of the master to provide competent fellow servants; but this statement is to be taken in connection with the rule of law which holds that this duty is discharged by an exercise of reasonable care in that behalf. If the facts alleged are sufficient to charge the defendant with the duty of providing competent fellow servants, the count will be sufficient, in whichever form the duty is set up, provided the failure to perform the duty is properly charged.

A mere statement that the defendant did not provide competent fellow servants will not be sufficient, for the defendant may have failed to provide competent fellow servants and yet not be liable. The first and second counts, after averring that the defendant did not provide fellow servants competent for the

work, allege, further, "all of which was then and there well known to the defendant." We think this is a sufficient allegation of knowledge; and an allegation that the defendant employed men whom he knew to be incompetent necessarily negatives the exercise of reasonable care in selecting them.

[4] The frame of the fourth count, as regards the allegation of knowledge, differs from that of the first and second; and the defendant contends that this count, at least, contains no allegation that he had knowledge of the incompetency of the fellow servants. The specification of grounds of demurrer directed the lower court's attention to this subject only in an aspect applicable to all the counts, and the special objection now made to the fourth count will not be considered.

[5, 6] One Fellows is described in some of the counts as a fellow servant of the plaintiff, and in others as the foreman in charge of the work. The defendant claims that these are inconsistent allegations, which neutralize each other, and vitiate all the counts. The general rule is that a pleading which contains inconsistent allegations is bad. Here the allegations claimed to be inconsistent are found in different counts of the declaration. If the declaration were to be treated as one pleading it would be within the rule as stated. But each count is supposed to be complete in itself, and to set up a distinct cause of action. The use of several counts, where there is in fact but one cause of action, is ordinarily for the purpose of meeting the various possibilities of the plaintiff's proof. The special objection here is that both allegations treat of Fellows in the discharge of the same piece of work, and that he could not be, for the purpose of that one piece of work, both foreman and fellow servant. But, assuming that the counts must be taken to describe the same transaction, the nature of Fellows' relation to the work is to be determined by the proof; and we see no reason why the plaintiff may not have the advantage of counts that will enable him to recover on either ground.

Judgment and cause remanded.

COVEY v. ROGERS.

(Supreme Court of Vermont. Chittenden. Jan. 8, 1912.)

1. WORK AND LABOR (§ 30*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Testimony of plaintiff that defendant, who on the death of their father, had bought the home place, where she continued to do the housekeeping, said to her, two months thereafter, that he thought he could not afford to pay her for staying there; that she told him she could not afford to stay for nothing, that she must have some wages; that he said if he had to pay her, he would have to sell the place; that she told him he might sell it or give it away,

she did not care, but that she must have some pay; that about a year later they had another talk, and she asked him for some money, and he gave her \$10 towards buying a coat, and said he was a little short, and that would have to do then, and perhaps later he could spare more; and that every time there was any talk between them about her being hired there for regular wages he said practically the same thing, that he could not afford to pay wages—does not authorize the direction of verdict against her, as showing that she had explicit notice from him that if she remained she would receive no wages.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 80.*]

2. WORK AND LABOR (§ 7*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

To entitle one to recover for housekeeping for her brother, it need not appear she was at work under an express agreement to pay, but it is enough to show facts and circumstances from which can be properly found a mutual expectation that she was to be paid.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.*]

3. WORK AND LABOR (§ 28*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Evidence in an action for services by one as housekeeper for her brother, held to warrant a finding of mutual understanding that she was to be paid, especially in view of his letting her have money from time to time, which might be found to have been payments, and not gratuities.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 55; Dec. Dig. § 28.*]

4. TRIAL (§ 312*)—INSTRUCTIONS.

Giving additional instructions, without their being asked for, when the jury came in disagreed, cannot be complained of.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 744, 745; Dec. Dig. § 312.*]

5. TRIAL (§ 314*)—INSTRUCTIONS—DUTY OF JURY.

Telling the jury, on returning them with further instructions, on their coming in disagreed, that neither party could well afford the expense of another trial, and unless it was necessary, they should not be subjected to it, was in the discretion of the court, and could not reasonably have been understood to have meant that they ought to agree whether rightly or wrongly, they having been repeatedly told to adhere to the testimony.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 472, 473, 747, 748; Dec. Dig. § 314.*]

Exceptions from Chittenden County Court; Fred M. Butler, Judge.

Action by Addie Covey against Marshall H. Rogers. Plea, the general issue. There was verdict and judgment for plaintiff, and defendant brings exceptions. Affirmed. See, also, 78 Atl. 792.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

C. S. Palmer, for plaintiff. R. E. Brown and V. A. Bullard, for defendant.

ROWELL, C. J. This is assumpsit by a sister against her brother to recover for work and labor done and performed by her in keeping his house for about six years and a half. The defendant moved for a verdict (1) because the only legitimate tendency of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the plaintiff's evidence was that during the time aforesaid she was living with the defendant under an express understanding that she was to do so without compensation other than what she received; (2) because there was no evidence tending to show that in what she did for the defendant she was at work under an express agreement for pay, nor to show such a state of facts and circumstances as to establish that at the time of the services both parties expected and understood that she was to be paid therefor; and (3) because the evidence did not tend to show such a state of facts and circumstances as would warrant the jury in finding an implied contract on the part of the defendant to pay her for her services.

[1] The motion was overruled, and the defendant now claims that it should have been granted because the plaintiff's testimony does not tend to show an express contract to pay, nor such a state of facts and circumstances as fairly establish a mutual understanding between the parties that the services were to be paid for, but that her testimony quoted in the brief clearly shows the contrary, and that she had explicit notice from the defendant that if she remained with him she would receive no wages, and that with such notice and understanding no contract to pay could be implied from the facts and circumstances disclosed.

Her testimony thus quoted is this, in substance: That about two months after their father died the defendant said he thought he could not afford to pay her for staying there; that she told him she could not afford to stay for nothing, that she must have some wages; that he said if he had got to pay her he should have to sell the farm; that she told him he might sell it if he was a mind to or give it away, she did not care, but that she must have some pay; that about a year after that they had another talk, and he gave her a little money and she asked him—she was going to Burlington—and he gave her \$10 to go into a coat she was going to buy, and said he was a little short, and that would have to do then, and perhaps later he could spare more than that. On cross-examination she said that every time there was any talk between them about her being hired there for regular wages he said practically the same thing, that he could not afford to pay wages. But it cannot be said that this testimony shows, as claimed, that the plaintiff had explicit notice from the defendant that if she remained with him she would receive no wages, and it would have been error to rule the case against her on that ground.

[2, 3] It is not necessary that it should appear that she was at work under an express agreement for pay, but if the evidence tended to show a state of facts and circumstances from which the jury could properly find a mutual expectation that she was to be paid, it is enough; and when the case was

here before (84 Vt. 151, 78 Atl. 792), it was held that the evidence did tend to show that, and we think it tends to show that now, especially in view of the defendant's testimony quoted in the plaintiff's brief, not in the case before, relative to letting the plaintiff have divers sums of money from time to time, which he said he did because of the work she was doing and the services she was rendering to him, and concerning which the court left it to the jury to say, and rightly we think, whether they were payments as the plaintiff claimed, or gratuities, as the defendant claimed.

The defendant excepted to what is called the first charge, because, he said, the court used the expression that his testimony tended to show that he did not expect to pay the plaintiff anything for her services, whereas, he claimed, it tended to show that she was to receive no more than she did receive from the sale of small things from the farm; that those things were to go to pay for her services. But the plaintiff says the court did not say that. We do not find that it said that, and the defendant does not point out where it said it. The same is true of the other exceptions to that part of the charge, namely, because the court said that the plaintiff's evidence tended to show that the defendant ought to have known that he was expected to pay.

The jury came in disagreed and were returned, and came in again disagreed, and, on being inquired of, said it had no questions to ask about the law, whereupon the court, without being requested by any one, proceeded to charge it further, and said, among other things, that if the defendant permitted the plaintiff to work there and render valuable services, expecting that she was going to get some pay for it, knowing, as she had said, that she would not stay there—could not afford to, without pay, and knowing that she expected pay, and permitted her to render those services knowing she expected pay—then it might presume from those circumstances, and the other circumstances, that he expected to pay her (that is, expected to pay her something); and therefore that it must examine all the testimony on both sides and say from all the circumstances whether there was a mutual expectation that he was to pay her for her services. The defendant excepted to this part of the charge, and now claims that it was wholly unwarranted by the evidence and absolutely inconsistent with that given to the jury before it was returned the first time; that upon the evidence and under the circumstances disclosed, the fact that the plaintiff continued to live with the defendant afforded no presumption against him, but, on the contrary, he had a right to assume that if she remained she did so on the terms and conditions under which he had told her she might remain; and that this evidence not only does not tend to show any understand-

ing, nor afford any basis for any presumption of a mutual understanding, that she should receive pay, but, on the contrary, that its only legitimate tendency is to show an express understanding that she was to remain without pay.

But we think that this part of the charge was correct, and that the circumstances stated were supported by the evidence, and therefore that the jury might well infer and find a mutual expectation of reasonable compensation. The exception to what the court charged about the payments made from time to time, and the submission of the question whether they were payments under any agreement, etc., is disposed of by what we said about those payments in disposing of the motion.

[4] The exception to the court's giving additional instructions to the jury without being asked is frivolous.

[5] At the close of the charge the court court urged upon the jury the importance of agreeing, and said, among other things, that neither party could afford the expense of another trial very well, and, unless it was necessary, they should not be subjected to it. On exception being taken to this, the court at once told the jury not to consider it at all as of any importance in their further deliberations. It is now claimed that this language could have had no other effect than to give the jury to understand that it ought to arrive at some kind of a verdict right or wrong, and that the court's retraction did not cure the error.

But it is the duty of the trial court to do what it properly can to procure an agreement, and in the performance of that duty it should be allowed a liberal discretion, but which, of course, must be exercised according to law, as all judicial discretion must be; and this the defendant does not deny, but says that the court abused its discretion in going the length it did. But we do not think so, but that it was well within its discretion to call the attention of the jury to the matter of expense as one reason for agreeing, but not whether right or wrong, which it could not reasonably have understood, for the court had repeatedly told them to adhere to the testimony.

Judgment affirmed.

MEMORANDUM DECISIONS

HAYFORD v. DAVIS. (Supreme Judicial Court of Maine. July 15, 1911.) Action by William P. Hayford against Verner H. Davis. Verdict for plaintiff, and defendant moves for a new trial. Sustained on condition. Frederick R. Dyer, for plaintiff. Tascus Atwood, for defendant.

PER CURIAM. Motion sustained, unless plaintiff remits all of the verdict in excess of \$500.

MORAN v. SOUTHARD. (Supreme Judicial Court of Maine. July 25, 1911.) Action by Annie L. Moran against Frank Southard. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled. Louis C. Stearns and Louis C. Stearns, Jr., for plaintiff. Martin & Cook, for defendant.

PER CURIAM. A majority of the qualified justices are of opinion that the verdict, which was for the plaintiff, was warranted by the evidence.

TRUSTEES OF DUMMER ACADEMY v. BANKS. (Supreme Judicial Court of Maine. July 14, 1911.) Assumpsit by the Trustees of the Dummer Academy against Charles E. Banks. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled. John H. Pierce, for plaintiff. Eaton, Keene & Gardner, for defendant.

PER CURIAM. The record in this case shows sufficient undisputed testimony to warrant a jury in finding for the plaintiff. Therefore the verdict, which was for the plaintiff, cannot be disturbed. Motion for a new trial overruled.

ATLANTIC CITY R. CO. v. WOOD et al. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Suit by the Seacoast Railroad Company and the Atlantic City Railroad Company against R. Francis Wood and others. Decree for complainants (65 N. J. Eq. 530, 56 Atl. 337), and the Atlantic City Railroad Company appeals. Affirmed. Gilbert Collins, for appellant. Robert H. McCarter, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Reed. Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337.

ATLANTIC REFINING CO. v. STOKES. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by the Atlantic Refining Company against Josiah Stokes. Decree for defendant (77 N. J. Eq. 119, 75 Atl. 445), and complainant appeals. Affirmed. French & Richards, for appellant. Wilson & Carr, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Vice Chancellor Leaming.

BAYVIEW CEMETERY ASS'N et al. v. COLE et al. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by the Bayview Cemetery Association and others against Margarette B. Cole and others. Decree for complainants, and defendants appeal. Affirmed. Edward A. S. Man, for appellants. Gilbert Collins and John J. Treacy, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Vice Chancellor Garrison.

BIJUR v. STANDARD DISTILLING & DISTRIBUTING CO. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by Nathan Bijur against the Standard Distilling & Distributing Company. Decree for defendant (74 N. J. Eq. 546, 70 Atl. 934), and complainant appeals. Affirmed. Benjamin N. Cardozo, for appellant. Levy Mayer, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Emery.

CUMBERLAND LUMBER CO. et al. v. CLINTON HILL LUMBER & MFG. CO. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by the Cumberland Lumber Company and others against the Clinton Hill Lumber & Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed. Frank E. Bradner, for appellant. Coult & Smith, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Emery.

DEUBEL et ux. v. MILLARD CONST. CO. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Error to Supreme Court. Action by Frederick Deubel and wife against the Millard Construction Company. Judgment for plaintiffs in the Supreme Court (80 N. J. Law, 98, 77 Atl. 611), and defendant brings error. Affirmed. Joseph M. Noonan, for plaintiff in error. R. L. Lawrence, for defendants in error.

PER CURIAM. The judgment under review is affirmed, for the reasons stated in the opinion of Mr. Justice Reed in the Supreme Court. 80 N. J. Law, 98, 77 Atl. 611. In order to guard against an implication that might be drawn from the language of the opinion that the case of *Beseman v. Penn. R. R. Co.*, 50 N. J. Law, 235, 13 Atl. 164, affords any justification for a direct invasion of private property, we desire to cite the case of *Costigan v. Penn. R. R. Co.*, 54 N. J. Law, 233, 23 Atl. 810, in which the distinction between injuries necessarily incident to the operation of a steam railroad and the direct invasion of private property is pointed out by Mr. Justice Depue.

EDWARDS v. OAKES. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Frank C. Edwards against Edward Oakes. Decree for complainant, and defendant appeals. Affirmed. Edward Oakes, for appellant. Albert C. Pedrick, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Stevenson.

FRASER v. FRASER. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Mary Fraser against James K. Fraser. Decree for complainant (77 N. J. Eq. 205, 75 Atl. 979), and defendant appeals. Affirmed. Scott Scammell, for appellant. Roberson & Demarest, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Walker.

GOELZ v. CARLOW. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by Herman Goelz against Benjamin W. Carlow. Decree for defendant, and complainant appeals. Affirmed. William S. Stuhr, for appellant. Lum, Tamblin & Colyer, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Stevenson.

In re HIBBLER'S ESTATE. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Appeal from Prerogative Court. Proceeding to fix the compensation of William S. Voorhies, executor and trustee under the will

of Nelson S. Hibbler, deceased, on his resignation from office and the appointment of his successor. From an order denying application for further allowance (78 Atl. 188), the trustee appeals. Affirmed. Collins & Corbin, for appellant. James A. Gordon, for respondent.

PER CURIAM. The order appealed from will be affirmed, for the reasons stated in the opinion delivered in the court below by Walker, Vice Ordinary, 78 Atl. 188.

PARKER, BERGEN, and VOORHEES, JJ., dissent.

JOHNSON et al. v. SCHMITT. (Court of Errors and Appeals of New Jersey. Nov. 22, 1911.) Error to Supreme Court. Action by John W. Johnson and others against John Herman Schmitt. There was a judgment for plaintiffs, and defendant brings error. Affirmed. Peter W. Stagg, for plaintiff in error. J. Emil Walscheid, for defendants in error.

PER CURIAM. The assignments of error and bill of exceptions do not, in our opinion, disclose any error, nor present any question requiring discussion. The judgment under review should be affirmed.

JOURDAN v. BURSTOW et al. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by Robert Jourdan against Walter Burstow and others. Decree for defendants (76 N. J. Eq. 55, 74 Atl. 124, 139 Am. St. Rep. 741), and plaintiff appeals. Affirmed. Frank Sommer, for appellant. Riker & Riker, for respondents.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Stevens.

KAYHART v. WHITEHEAD et al. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by Edward Kayhart, executor, against Adeline Whitehead and others. Decree for complainant (77 N. J. Eq. 12, 76 Atl. 241), and defendants appeal. Affirmed. Harrison P. Lindabury, for appellants. Charles A. Rathbun, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Emery.

KRAH v. RADCLIFFE. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Jacob L. Krah against Henry Radcliffe. Decree for complainant (75 N. J. Eq. 109, 71 Atl. 404), and defendant appeals. Affirmed. Frank E. Bradner, for appellant. Osborne & Astley, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Vice Chancellor Howell.

LIONEL C. SIMPSON PLUMBING & HEATING CO. v. GESCHKE. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Lionel C. Simpson Plumbing & Heating Company against Edward Geschke. Decree for complainant (76 N. J. Eq. 475, 79 Atl. 427), and defendant appeals. Affirmed. Ralph W. E. Donges, for appellant. Howard L. Miller, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Vice Chancellor Leaming.

LOUDENSLAGER v. ATLANTIC CITY. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Error to Supreme Court. Certiorari by William B. Loudenslager to review a resolution of the common council of Atlantic City. From a judgment setting aside such resolution (80 N. J. Law, 658, 77 Atl. 1060), defendant brings error. Affirmed. Harry Wootton, for plaintiff in error. John B. Slack, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons set forth in the opinion delivered by Mr. Justice Voorhees in the Supreme Court. 80 N. J. Law, 658, 77 Atl. 1060.

McNULTY v. MCCARTHY et al. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Action by John R. McNulty against Eugene J. McCarthy and others. From a decree of the Chancery Court (81 Atl. 568) for complainant, defendants appeal. Affirmed. Edward J. Luce, for appellants. Charles H. Hartshorne, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Stevenson. 81 Atl. 568.

MARTER v. REPP et al. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Error to Supreme Court. Action by Ezra B. Marter against Alfred B. Repp and others. Judgment for plaintiff in the Supreme Court (80 N. J. Law, 530, 77 Atl. 1030), and defendants bring error. Affirmed. John Boyd Avis, for plaintiffs in error. A. H. Swackhamer, for defendant in error.

PER CURIAM. The judgment under review herein affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

MAYOR & ALDERMEN OF JERSEY CITY v. JERSEY CITY WATER SUPPLY CO. (Court of Errors and Appeals of New Jersey. Nov. 21, 1911.) Appeal from Court of Chancery. Suit by the Mayor and Aldermen of Jersey City against the Jersey City Water Supply Company. From a decree confirming a master's report and an order supplemental thereto, the Jersey City Water Supply Company appeals. Order and so much of the decree as is involved in the present appeal affirmed. Collins & Corbin, for appellant. James J. Murphy and James B. Vredenburg, for respondent.

PER CURIAM. So much of the decree as is involved in the present appeal will be affirmed, upon the opinion delivered by the Vice Chancellor in the court below. We think that the petition of the appellant, praying that the making of the final decree in this cause be withheld until the determination of the question whether the \$500,000, authorized by the third item of the contract between the parties to be retained by the city until the performance by the contractor of one or the other of the conditions therein recited, is now due and payable to the contractor, was properly refused; and we rest this conclusion upon the grounds set forth in the memorandum opinion of the learned Vice Chancellor delivered in disposing of the application. The order denying the application will also be affirmed.

PARKER, J., dissenting.

PARTRIDGE v. MECHANICS' NAT. BANK OF BURLINGTON. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Harvey K. Partridge against the Mechanics' Na-

tional Bank of Burlington. Decree for complainant (77 N. J. Eq. 208, 77 Atl. 410), and defendant appeals. Affirmed. Ernest Watts for appellant. Bleakly & Stockwell, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Walker. 77 Atl. 410.

ROCKWELL v. AMERICAN LAW BOOK CO. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Error to Supreme Court. Action by W. Locke Rockwell against the American Law Book Company. Judgment for plaintiff in the Supreme Court (76 Atl. 334), and defendant brings error. Affirmed. Randolph Perkins, for plaintiff in error. Hartshorne, Inaley & Leake, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Swayze in the Supreme Court. 76 Atl. 334.

ROGERS v. BAILEY. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Court of Chancery. Bill by Frederick M. Rogers against Alice C. Bailey. Decree for defendant (76 N. J. Eq. 29, 73 Atl. 243), and complainant appeals. Affirmed. Frank Benjamin, for appellant. Benjamin G. Demarest, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of Vice Chancellor Stevens.

SCHOENFELD v. WINTER. (Court of Errors and Appeals of New Jersey. Nov. 21, 1911.) Appeal from Court of Chancery. Suit by Abraham Schoenfeld, surviving partner, against Michael Winter. From a decree of the Court of Chancery, overruling a demurrer to the complaint (74 Atl. 975), defendant appeals. Affirmed. See, also, 73 Atl. 42. William A. Lord, for appellant. Osborne & Astley, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Howell. 74 Atl. 975.

TAYLOR v. PUBLIC SERVICE CORPORATION OF NEW JERSEY. (Court of Errors and Appeals of New Jersey. March 6, 1911.) Appeal from Court of Chancery. Bill by Alexander M. Taylor against the Public Service Corporation of New Jersey. Decree for complainant (75 N. J. Eq. 371, 73 Atl. 118), and defendant appeals. Affirmed. L. D. Howard Gilmour, for appellant. George P. Rust, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Vice Chancellor Garrison.

WOODRUFF et al. v. WHITE et al. (Court of Errors and Appeals of New Jersey. Nov. 20, 1911.) Appeal from Court of Chancery. Suit by Philemon Woodruff and others, executors and trustees, against Dora De W. White and others, for instructions as to the duties of the executors and trustees. From a decree of the Chancery Court (79 Atl. 304), defendants appeal. Affirmed. John H. Reynolds, J. W. De Yoe, F. Scott, Robert Williams, and G. A. Hunziker, for appellants. W. I. Lewis and Humphreys & Sumner, for respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the Court below by Vice Chancellor Garrison. 79 Atl. 304.

WOOLSEY v. WOOLSEY. (Court of Errors and Appeals of New Jersey. June 19, 1911.) Appeal from Prerogative Court. Bill by Virginia M. Woolsey against Eugene Woolsey. Decree for complainant (76 Atl. 1076), and defendant appeals. Affirmed. See, also, 71 N. J. Eq. 609, 71 Atl. 408. Charles L. Carrick, for appellant. Sherrerd Depue, for respondent.

PER CURIAM. The decree appealed from is affirmed, for the reasons stated in the opinion of the ordinary. 76 Atl. 1076.

ZABRISKIE v. SULLIVAN. (Court of Errors and Appeals of New Jersey. Oct. 19, 1911.) Error to Supreme Court. Action by Augustus Zabriskie against John Sullivan. Judgment for plaintiff, and defendant brings error. Affirmed. For opinion of Supreme Court, see 80 N. J. Law, 673, 77 Atl. 1075. James R. Bowen, for plaintiff in error. Herrmann & Steelman, for defendant in error.

PER CURIAM. The judgment under review herein should be affirmed, for the reasons stated in the opinion delivered by Mr. Justice Voorhees in the Supreme Court.

COMMONWEALTH v. HUSTON. (Supreme Court of Pennsylvania. May 25, 1911.) Appeal from Superior Court. John H. Sander-son and others were convicted of conspiracy to defraud the Commonwealth, and Joseph M. Huston appeals. Affirmed. Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOS-

CHZISKER, JJ. George S. Graham, Samuel M. Clement, Jr., and A. S. L. Shields, for appellant. J. E. B. Cunningham, Deputy Atty. Gen., James Scarlet, John Fox Weiss, Dist. Atty., John E. Fox and John C. Bell, Atty. Gen., for the Commonwealth.

PER CURIAM. The order allowing this appeal, limited the argument to the assignments of error which relate to the action of the court of quarter sessions in sending the jury back for further deliberations, after a verdict of "guilty of defrauding the commonwealth" had been presented to the court, and the foreman of the jury had attempted an explanation of the verdict, in a colloquy between himself and the trial judge. After a consideration of the whole colloquy, as it appears in the reporter's notes of the case, a majority of the court are of opinion that the judgment appealed from should be affirmed, on the opinion of the Superior Court. Judgment affirmed.

UNITED STATES, for Use of LANHAM et al., v. CARPENTER et al. (Superior Court of Delaware. New Castle. June 16, 1905.) Action by the United States, for the use of James C. Lanham and Galbreith B. Lanham, trading as James C. Lanham & Bro., against Joseph L. Carpenter, Jr., and others. Verdict for defendants. See, also, 4 Pennewill, 487, 60 Atl. 863. Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ. T. Bayard Heisel, Alex. B. Cooper, and E. S. Douglass, for plaintiffs. J. Harvey Whiteman and William B. Prentiss, for defendants.

PENNEWILL, J. (charging the jury). Gentlemen of the jury: The court instruct you in this case to return a verdict in favor of the defendants. (Verdict for defendants.)

END OF CASES IN VOL. 81

*

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABANDONMENT.

See Divorce, § 331; Easements, § 26.

ABATEMENT.

See Taxation, § 462.

ABATEMENT AND REVIVAL.

See Corporations, § 672; Courts, § 79; Parties, § 75.

III. DEFECTS AND OBJECTIONS AS TO PARTIES AND PROCEEDINGS.

§ 22 (Del.Super.) Certain facts *held* to be matter in abatement.—Trustees of Mutual Loan Ass'n v. Tyre, 81 A. 48.

V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) Abatement or Survival of Action.

§ 54 (Pa.) Husband's action for loss of services through injuries to wife *held* not for wrongs done to the person within Act Feb. 24, 1834 (P. L. 78) § 28, relating to the survival of causes of action.—Smith v. Lehigh Valley R. Co., 81 A. 554.

ABSTRACTS.

See Appeal and Error, § 589.

ACCEPTANCE.

See Dedication, § 35; Deeds, § 54; Sales, §§ 161-182.

ACCIDENT.

See Insurance, §§ 145, 379, 452, 455, 622, 623.

ACCOMMODATION PAPER.

See Bills and Notes, §§ 237, 238.

ACCOMPLICES.

See Criminal Law, §§ 753, 780.

ACCORD AND SATISFACTION.

See Payment.

ACCOUNT.

See Attorney and Client, § 124; Brokers, § 87; Corporations, § 610; Costs, § 32; Equity, § 39; Evidence, § 271; Executors and Administrators, §§ 70, 109, 507, 513; Guardian and Ward, § 163; Names; Parties, § 97; Partnership, §§ 304, 321, 344; Patents, § 219; Receivers, §§ 192, 193.

ACKNOWLEDGMENT.

See Execution, § 315; Limitation of Actions, § 148; Records.

ACQUIESCENCE.

See Pleading, § 418.

ACTION.

See Abatement and Revival; Dismissal and Nonsuit; *Lis Pendens*.

II. NATURE AND FORM.

§ 27 (Md.) A declaration in two counts *held* to charge causes of action in tort for trespass, under Code, art. 75, § 3, and was not defective for failure to sufficiently disclose whether the causes of action were in tort or for breach of contract.—Lapp v. Stanton, 81 A. 675.

§ 35 (Pa.) Act March 21, 1806 (4 Smith's Laws, p. 332) § 13, *held* to apply to ordinary civil suits, so that special remedy provided by act of assembly must be pursued.—Lewisburg Bridge Co. v. Union County, 81 A. 324.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 41 (N.J.) Under Supreme Court rule 16, counts in debt and in assumpsit may be joined in the same suit.—Dayton v. Boettner, 81 A. 726.

§ 41 (Vt.) Under P. S. 1503, a count for trespass to the person *held* properly joined with a count for maliciously suing out a body writ, and causing the arrest and imprisonment of the plaintiff thereon.—Slayton v. Davis, 81 A. 232.

§ 60 (Pa.) Severance in ejectment *held* properly refused.—Citizens' Gas Co. of Port Allegheny v. Whitney, 81 A. 804.

ACT OF GOD.

See Adjoining Landowners, § 7.

ADEQUATE REMEDY AT LAW.

See Municipal Corporations, § 697; Specific Performance, § 86; Taxation, § 453.

ADJOINING LANDOWNERS.

See Boundaries; Corporations, § 493; Highways, § 85.

§ 7 (Vt.) A high wind blowing boards from defendant's property against plaintiff's house *held* not so unprecedented as to constitute an act of God.—Bishop v. Readsboro Chair Mfg. Co., 81 A. 454.

In an action for injuries to plaintiff's house by boards from defendant's property being blown against it, evidence of a conversation between plaintiff's husband and defendant's manager *held* admissible.—Id.

Where plaintiff's husband made repairs on her house, made necessary by defendant's trespass, an instruction that plaintiff could not re-

cover any sum for the repairs performed by her husband was properly refused.—*Id.*

An adjoining landowner *held* bound to pile or secure lumber on his own land so as to guard against its being blown on to and against plaintiff's adjoining property.—*Id.*

In an action for trespass, an instruction that failure of defendant's officers to come to look at plaintiff's property as requested was insufficient to show willfulness *held* properly refused.—*Id.*

Where snow fell from defendant's roof on to plaintiff's adjoining property, an instruction that she could not recover for the accumulation on the ground of snow which fell from defendant's roof was properly refused.—*Id.*

Where defendant permitted snow to slide against plaintiff's house, and did nothing to prevent it, defendant was guilty of an actionable trespass.—*Id.*

In an action for injuries to plaintiff's real property by boards being blown from defendant's piles against plaintiff's house, evidence *held* to warrant a finding of defendant's negligence.—*Id.*

§ 8 (N.H.) The rights of adjacent proprietors of land *held* reciprocal, and determinable by the doctrine of reasonable user.—*Elliott v. Town of Mason*, 81 A. 701.

An owner unreasonably interfering with the correlative rights of an adjacent owner *held* not entitled to justify the maintenance of a nuisance by proof of the exercise of due care.—*Id.*

ADMINISTRATION.

See Executors and Administrators.

ADMISSION.

See Evidence, §§ 220, 264; Pleading, §§ 127, 214.

ADULTERATION.

See Food.

ADULTERY.

See Divorce, §§ 49, 129.

ADVERSE CLAIM.

See Quieting Title.

ADVERSE POSSESSION.

See Appeal and Error, § 1066; Ejectment, § 109; Limitation of Actions.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 8 (Pa.) Railroad right of way *held* to include, as against claim of adverse possession, only land acquired by condemnation, or under circumstances, warranting its condemnation.—*Delaware, L. & W. R. Co. v. Tobyhanna Co.*, 81 A. 132.

Title to land outside of railroad right of way purchased for general prospective railroad purposes may be acquired by adverse possession as against the company.—*Id.*

(B) Actual Possession.

§ 24 (Me.) Acts *held* insufficient to show adverse possession.—*Smith v. Sawyer*, 81 A. 868.

(F) Hostile Character of Possession.

§ 71 (Vt.) A deed may aid a claim of title by adverse possession, though no title in the grantor therein is shown.—*Lang v. Clark*, 81 A. 625.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

§ 96 (Pa.) Party in possession of lots owned by railroad company *held* to have acquired title only to so much thereof as was actually occupied by its structures.—*Delaware, L. & W. R. Co. v. Tobyhanna Co.*, 81 A. 132.

(B) Title or Right Acquired.

§ 104 (Pa.) Grant to person whose title has not been challenged through a great lapse of time *held* presumed, not only against intruder, but also against one claiming under color of title.—*Dougherty v. Welshans*, 81 A. 997.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 116 (Vt.) A request to charge in ejectment that since plaintiff, or any one through whom he claimed, had never erected any definite and noticeable monuments or marks, he could only recover to the limits of his actual occupation, *held* properly refused.—*Lang v. Clark*, 81 A. 625.

ADVERTISING.

See Newspapers.

AFFIDAVITS.

See Attachment, § 89; Bills and Notes, § 473; Injunction, § 159½; Innkeepers, § 4; Motions.

§ 18 (N.J.Sup.) The practice of taking ex parte affidavits to be used on argument of a motion is peculiar to the Chancery Court.—*Peer v. Bloxham*, 81 A. 659.

Under Practice Act, §§ 196, 197, affidavits on which a rule to show cause was founded cannot be used after the rule is made to support a motion not of course, or read on the hearing of a rule depending on facts extrinsic to the record.—*Id.*

AFFIRMANCE.

See Appeal and Error, § 1135.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

AGRICULTURE.

§ 11 (Me.) Contract with owner *held* essential to a lien for cutting hay, under Rev. St. c. 93, § 54.—*Edgecomb v. Jenney*, 81 A. 1091.

ALIENATING AFFECTIONS.

See Husband and Wife, § 333; Trial, § 216.

ALIMONY.

See Divorce, §§ 214, 268, 331.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

AMENDMENT.

See Appeal and Error, §§ 1175, 1201; Equity, § 330; Limitation of Actions, § 121; Parties, § 95; Pleading, §§ 237, 248, 418; Scire Facias.

ANCILLARY ADMINISTRATION.

See Executors and Administrators, § 519.

ANIMALS.

See Criminal Law, § 429; Indictment and Information, § 111; Trespass, § 40.

§ 4 (Conn.) A kennel license issued under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, *held* not vitiated because part of the dogs are kept at the owner's house.—*State v. Tripp*, 81 A. 247.

A kennel license under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, *held* not vitiated because not taken out on time.—*Id.*

§ 42 (N.J.Sup.) A conviction under Act March 11, 1880, § 11 (P. L. p. 217; 1 Gen. St. 1896, p. 35, § 27), for general violation of the act, can be had only when such violation occurs in presence of persons or officers named in amendment to said act, approved March 16, 1893 (P. L. p. 361; 1 Gen. St. 1896, p. 41, § 46), and the arrest was made by one of such persons or officers.—*New Jersey Society for Prevention of Cruelty to Animals v. Rosen*, 81 A. 496.

§ 45 (Conn.) In a prosecution under Pub. Acts 1907, c. 167, § 15, for killing registered dogs, *held* unnecessary to show that they wore the tags or plates required by Pub. Acts 1909, c. 55, § 2.—*State v. Tripp*, 81 A. 247.

ANNULMENT.

See Marriage, § 60.

ANSWER.

See Pleading.

APPEAL AND ERROR.

See Certiorari, § 70; Costs, § 240; Courts, §§ 202, 207, 208; Criminal Law, §§ 351, 656, 1011-1137; Eminent Domain, § 271; Exceptions, Bill of; Insane Persons, § 27; Judgment, § 159; Mandamus, § 187; New Trial, § 168; Taxation, §§ 305, 482, 493, 496; Wills, § 423.

I. NATURE AND FORM OF REMEDY.

§ 3 (N.H.) Under Pub. St. 1901, c. 204, § 2, right to review of proceedings by inferior courts, etc., *held* not to depend upon technical accuracy in designating the form of proceeding.—*Dinsmore v. City of Manchester*, 81 A. 533.

III. DECISIONS REVIEWABLE.**(D) Finality of Determination.**

§ 66 (N.J.) An alleged error in refusing a change of venue is not reviewable by writ of error, under 2 Gen. St. 1895, p. 1391, § 1, where no final judgment has been rendered.—*New Jersey Imperial Road Co. v. Freeholders of Gloucester County*, 81 A. 725.

§ 66 (N.J.) Review by writ of error is limited to final judgments.—*Allair v. Hickman*, 81 A. 752.

§ 66 (Pa.) An appeal in an equity case will be quashed, in the absence of a final decree.—*Griffiths v. Monongahela R. Co.*, 81 A. 713.

§ 76 (Md.) Docket entries *held* to show a final, and hence appealable, judgment.—*Wilkin Mfg. Co. v. Melvin*, 81 A. 879.

§ 78 (Md.) An order sustaining a demurrer to the petition in proceedings to review an assessment *held* not final, so as to be appealable.—*Chesapeake & Potomac Telephone Co. of Baltimore v. Board of County Com'rs*, 81 A. 520.

§ 78 (Pa.) An order overruling a demurrer is interlocutory, and no appeal lies from it.—*Stegmaier v. Keystone Coal Co.*, 81 A. 187.

§ 78 (Pa.) A decree referring back report to auditor with directions to distribute estate *held* interlocutory, and not appealable.—*In re Hoyt's Estate*, 81 A. 203.

(E) Nature, Scope, and Effect of Decision.

§ 87 (N.J.Sup.) A writ of error will not lie to review the refusal of a writ of certiorari to review an order annulling the appointment of commissioners to adjust unpaid taxes.—*Voorhees v. Borough of North Wildwood*, 81 A. 264.

An order dismissing a writ of certiorari as improvidently allowed is not reviewable on writ of error.—*Id.*

§ 103 (N.J.) Refusal to strike out pleading *held* not reviewable on writ of error, under Practice Act, § 110.—*Dayton v. Boettner*, 81 A. 726.

IV. RIGHT OF REVIEW.**(A) Persons Entitled.**

§ 143 (Md.) Under Code, art. 5, § 26, appellant *held* not entitled to appeal from an order in a receivership proceeding to which he was merely a special intervener.—*Preston v. Poe*, 81 A. 178.

§ 147 (Md.) A stockholder cannot appeal from a judgment against the corporation.—*Preston v. Poe*, 81 A. 178.

§ 150 (Md.) An executrix *held* without authority to appeal from an order restraining a sale of real estate under a specified notice on a specified date.—*Smith v. Warrenfeltz*, 81 A. 276.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**(A) Issues and Questions in Lower Court.**

§ 169 (Conn.) A question not raised in the trial court will not be considered.—*Sutherland v. Brown*, 81 A. 1033.

§ 169 (Md.) No question can be considered or passed upon by the Supreme Court which does not appear by the record to have been raised or passed upon by the court below.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 885.

§ 179 (Md.) Reference to pleadings contained in requested prayers *held* sufficient to permit an examination of the pleadings.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 885.

(B) Objections and Motions, and Rulings Thereon.

§ 192 (Vt.) A ground of demurrer, not specified and not passed upon by the court below, will not be considered on appeal.—*Slayton v. Davis*, 81 A. 232.

§ 192 (Vt.) A demurrant will, on appeal, be confined to the grounds of demurrer assigned below.—*Williams Mfg. Co. v. Insurance Co. of North America*, 81 A. 916.

§ 194 (Pa.) Judgment for demurrer on plea in bar, treated as demurrer without objection from plaintiff, *held* not to be disturbed.—*Yoder v. Cole*, 81 A. 546.

§ 204 (N.J.Sup.) Admission of testimony *held* not ground for reversal, where there was no objection thereto at the time of reception.—*United States Transfer Advertising Co. v. Young*, 81 A. 262.

§ 204 (Vt.) Reception of evidence without objection is not reviewable on exceptions.—*Bishop v. Readsboro Chair Mfg. Co.*, 81 A. 454.

§ 207 (N.J.Sup.) Remarks by counsel, though improper, *held* not ground for reversal, in absence of request for instructions relating thereto.—*See v. Public Service Ry. Co.*, 81 A. 745.

§ 211 (Pa.) Plaintiff cannot complain of compulsory nonsuit, where no objection to alleged

premature closing of case or rejection of any evidence is shown.—*Wentz v. Blair*, 81 A. 144.

§ 215 (Pa.) That testimony was misquoted by the trial judge in his charge cannot be complained of on appeal, where the court's attention was not called to it.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 215 (Vt.) An objection to an instruction not raised below will not be considered.—*Cramton v. Chapman*, 81 A. 231.

§ 216 (Conn.) Where there was no request for an additional instruction, the court will not determine the necessity of an additional instruction to properly submit issues.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

§ 216 (Pa.) The sufficiency of a charge cannot be questioned on appeal, where no request was made for more specific instructions.—*Dougherty v. Briggs*, 81 A. 201.

§ 216 (Pa.) Failure to give instruction cannot be complained of on appeal where not called to attention of trial court.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 219 (Vt.) In chancery certain objections which could not have been obviated at the trial may be considered though made for the first time on appeal.—*City of Montpelier v. McMahon*, 81 A. 977.

§ 231 (N.J.) An objection to evidence stating no ground raises no legal question for review.—*Prout v. Prout*, 81 A. 757.

§ 231 (Vt.) A general objection to an answer to a question asked in an action against a railroad company for damages by fire, *held* not available on appeal, the objection not being obvious.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

§ 231 (Vt.) Where the specification of grounds of demurrer was directed to all the counts, a special objection to one of the counts will not be considered on appeal.—*Doyle v. Melendy*, 81 A. 1129.

§ 232 (N.J.) Reasons in favor of the competency of testimony not disclosed to the trial court will not be heard on appeal.—*Phelps v. Fuchs & Lang Mfg. Co.*, 81 A. 728.

§ 232 (Vt.) An objection to evidence, made on appeal, *held* different from that made below, so that it will not be considered.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

§ 237 (Md.) A motion to strike out an answer, which the court admitted, subject to objection, must be followed by a later motion for its exclusion, to permit its assignment as error.—*Goodman v. Saperstein*, 81 A. 695.

§ 237 (N.J.) An objection to a question after the witness answered *held* unavailable on appeal, in absence of a motion to strike or request for an instruction.—*Prout v. Prout*, 81 A. 757.

§ 241 (Vt.) Statement in motion for verdict *held* insufficient to bring evidence before Supreme Court for review.—*Rand v. Bordo*, 81 A. 251.

§ 241 (Vt.) It being capable thereof, a motion will be construed by the Supreme Court as by both parties in the trial court and by that court in rendering its decision.—*Bixby v. Roscoe*, 81 A. 255.

(C) Exceptions.

§ 260 (Pa.) Appellant cannot complain of a ruling sustaining objections to evidence, where no exceptions were taken at the trial, and the errors were not assigned for error on appeal.—*Pierce v. Lehigh Valley Coal Co.*, 81 A. 141.

§ 266 (Vt.) P. S. 1794, requiring exceptions to the report of a referee in the trial court, while applicable to trials before a commissioner, does not preclude the review of questions submitted by the referee without exceptions.—*McKane v. Gordon & Hoar*, 81 A. 637.

§ 267 (Vt.) In an action against attorneys for money received, plaintiff *held* not entitled to review the propriety of a deduction from an overcharge where he did not except to the judgment on that ground.—*McKane v. Gordon & Hoar*, 81 A. 637.

§ 273 (N.J.) Exception that is too broad, as including the whole charge, and too narrow, as giving no notice of error, will not support an assignment.—*Gannon v. Brady Brass Co.*, 81 A. 727.

§ 274 (Vt.) Error of court in finding erroneously on report of referee *held* reached by exception to rendition of judgment.—*C. H. Eddy & Co. v. Field*, 81 A. 249.

(E) Cases and Questions Reserved or Certified.

§ 308 (N.H.) Under Pub. St. 1901, c. 204, §§ 11-13, and Laws 1901, c. 78, the superior court *held* authorized to transfer without ruling questions of law arising on a demurrer to a bill in equity against the objection of either party.—*Glover v. Baker*, 81 A. 1081.

§ 308 (R.I.) Under Gen. Laws 1909, c. 298, § 5, *held*, that a certification of questions may be made only after a question has been formally raised on the record and in some appropriate proceeding presented to the trial court, so as to make a ruling of that court thereon requisite.—*Fletcher v. Board of Aldermen of City of Newport*, 81 A. 193.

Under Gen. Laws 1909, c. 50, § 43, *held*, that the allowance by the superior court of amendments to an appeal from a decree of a town council was an adjudication, and that its judgment on that question could not thereafter be certified for determination of the Supreme Court.—*Id.*

§ 316 (Pa.) Reservation as to the sufficiency of evidence *held* good.—*Wells v. Erie R. Co.*, 81 A. 330.

VI. PARTIES.

§ 324 (Md.) Where one of two or more defendants desires to appeal, he should apply to the court of appeals for a writ of summons and severance.—*Firor v. Taylor*, 81 A. 383.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 361 (Md.) An appeal from an order striking a fiat judgment merely by an order directing the clerk to enter an appeal in the case *held* insufficient.—*Palmenberg v. Turk*, 81 A. 221.

§ 362 (Pa.) Filing of statement of errors required by equity rule 92 allowed nunc pro tunc.—*King v. Ambrose*, 81 A. 714.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 371 (Md.) The clerk of the court in a suit in equity *held* not required to forward the record to the Court of Appeals until it is paid for, and he need not demand payment from appellant.—*Wilmer v. City of Baltimore*, 81 A. 685.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 515 (N.J.Sup.) P. L. 1905, p. 259, relating to appeals from district courts, *held* not to supersede provisions of P. L. 1902, p. 565, as to rulings entirely outside of the scope of the stenographer's transcript.—*Hauser v. Squire*, 81 A. 263.

(B) Scope and Contents of Record.

§ 526 (N.J.Sup.) Report of referee and depositions and evidence taken before him *held* not

part of the record on which error can be assigned.—*Delaware, L. & W. R. Co. v. Joseph English Co.*, 81 A. 436.

(E) Abstracts of Record.

§ 589 (Pa.) Supreme Court rule 26, limiting the space allowed in paper books on appeals for statement of the questions involved, is mandatory.—*Buckman v. Philadelphia & R. Ry. Co.*, 81 A. 332.

(F) Making, Form, and Requisites of Transcript or Return.

§ 607 (Md.) Where counsel fail to agree on the record, it must be made up as provided by Code Pub. Gen. Laws 1904, art. 5, § 34.—*Wilmer v. City of Baltimore*, 81 A. 685.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 627 (Md.) An appeal *held* properly dismissed for the failure of appellant to file the record in time or to explain the delay.—*Wilmer v. City of Baltimore*, 81 A. 685.

§ 627 (N.J.Sup.) On failure of appellant in the district court to file the stenographer's transcript with the clerk of the Supreme Court within 15 days after judgment, as provided by P. L. 1905, p. 259, it will be dismissed.—*Hausser v. Squire*, 81 A. 263.

§ 633 (Md.) An appeal would not be dismissed for appellant's failure to pay for the printing of the record within the time prescribed by rule 34 (80 Atl. xii), where the record was printed and ready when the cause was called for argument.—*Turner v. Egan*, 81 A. 877.

(I) Defects, Objections, Amendment, and Correction.

§ 635 (N.J.) A writ of error will be dismissed, where the printed book does not show that return has been made to the writ of error.—*Riva v. Jersey City, H. & P. St. Ry. Co.*, 81 A. 847.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 663 (Pa.) Assignment of error that a point submitted was not answered will not be considered, if the point was substantially covered by the general charge.—*Kaufman v. National Lumber Ins. Co.*, 81 A. 53.

(K) Questions Presented for Review.

§ 679 (Md.) The action of the trial court in refusing to permit defendant to plead after the time prescribed by Acts 1902, c. 409, *held* not reviewable on appeal, in view of the record.—*Betz v. P. Welty & Co.*, 81 A. 382.

§ 688 (Md.) The fact that a judge furnished security for costs for a party will not reverse on exception to his competency to make any order in the case, where the docket entries and record show no order made by such judge.—*Goodman v. Saperstein*, 81 A. 695.

§ 690 (Vt.) Rulings on admission of testimony *held* not reviewable.—*Rand v. Bordo*, 81 A. 251.

§ 694 (N.H.) The Supreme Court cannot consider whether there was any evidence to sustain the court's finding, where the evidence was not transferred.—*Ferguson v. O'Brien*, 81 A. 479.

§ 695 (Vt.) Where the evidence is not in the record on appeal, the Supreme Court cannot consider whether a finding is sustained thereby.—*Whitcomb v. Whitcomb*, 81 A. 97.

§ 704 (Pa.) Assignments of error complaining of rulings on requests for findings and conclusions of law not shown by record *held* not to be considered.—*In re Rhodes' Estates*, 81 A. 643.

§ 706 (Vt.) Where neither the declaration nor a copy thereof is in the record, an exception to the overruling of a motion in arrest will not be considered.—*Rand v. Bordo*, 81 A. 251.

(L) Matters Not Apparent of Record.

§ 712 (Vt.) An objection that an attorney's account included charges for services rendered on Sunday was not reviewable, in the absence of a finding to that effect.—*McKane v. Gordon & Hoar*, 81 A. 637.

§ 713 (Vt.) Statement of account by attorneys *held* not a part of a referee's report, so that it could be noticed on the hearing of exceptions in the Supreme Court.—*McKane v. Gordon & Hoar*, 81 A. 637.

§ 714 (Pa.) In suit by bondholder for receiver and sale of corporate property secured by mortgage, the court cannot consider mortgage not referred to in the bill but made an appendix to the paper book.—*Wagner v. Philadelphia, B. & T. St. Ry. Co.*, 81 A. 944.

XI. ASSIGNMENT OF ERRORS.

§ 719 (Conn.) A question not properly presented by the reasons of appeal will not be considered.—*Sutherland v. Brown*, 81 A. 1033.

§ 719 (Conn.) Where there is no assignment of error that the instructions given were not sufficient, the court will not determine the necessity of an additional instruction to properly submit issues.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

§ 719 (N.J.Sup.) Action of trial judge must be assigned as ground for reversal, to be considered on appeal.—*United States Transfer Advertising Co. v. Young*, 81 A. 262.

§ 719 (Pa.) Where all the assignments of error on an appeal in equity are directed to findings of fact, and not one to the decree, the decree will be affirmed.—*Standard Soap & Oil Co. v. Printz Degreasing Co.*, 81 A. 129.

§ 724 (Pa.) Under equity rules 65, 67, assignments of error *held* required to show exceptions taken, and to be made to final determination on exceptions.—*New Cumberland Borough v. Riverton Consol. Water Co.*, 81 A. 799.

§ 728 (N. J.) An assignment of error on admission of testimony *held* insufficient to require consideration.—*Semkin v. Hollander*, 81 A. 980.

§ 742 (Pa.) Assignments of error complaining of rulings unrelated to statement of question involved *held* to be dismissed on appeal.—*Smith v. Lehigh Valley R. Co.*, 81 A. 554.

§ 743 (Pa.) Assignment of error to the exclusion of evidence will not be reviewed, where the assignment did not refer to the page of the paper book.—*Kaufman v. National Lumber Ins. Co.*, 81 A. 53.

§ 748 (N.J.Sup.) Demurrer to assignment of error *held* a motion to strike out assignment as frivolous.—*Delaware, L. & W. R. Co. v. Joseph English Co.*, 81 A. 436.

§ 750 (Conn.) Assignments of error are limited to the claims of law made in the trial court.—*Hartford Trust Co. v. Town of West Hartford*, 81 A. 244.

XII. BRIEFS.

§ 760 (Vt.) An exceptor *held* not, as is necessary, to have stated in his brief the precise point on which he relies as reversible error.—*Bixby v. Roscoe*, 81 A. 255.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Md.) Where an order prohibited the sale of real estate by an executrix on February 14, 1911, and no such sale was had on that date, but the executrix appealed from the

order thereafter, the appeal will be dismissed.—*Smith v. Warrenfeltz*, 81 A. 275.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 837 (Conn.) Where all the facts are before the Supreme Court, it is unnecessary to rule on the effect of a decision on a demurrer.—*In re Thomas*, 81 A. 972.

§ 837 (Md.) The Court of Appeals is not bound by the allegations of a bill, whether they be of fact or conclusions of law, but may inquire into all questions of law or fact presented by the pleadings or evidence.—*Preston v. Safe Deposit & Trust Co.*, 81 A. 523.

§ 843 (Conn.) Where an answer which was demurred to was amended, and the facts were found on plaintiff's denial of its averments, the correctness of the ruling sustaining the demurrer to the original answer was immaterial.—*Sutherland v. Brown*, 81 A. 1033.

§ 843 (Vt.) Where plaintiff entered a remittitur covering everything but a specified claim, the court need not consider the pleadings or the evidence as to other claims.—*Griswold v. Wentworth*, 81 A. 622.

§ 852 (Conn.) The theory on which a cause is tried without objection will be followed on appeal.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

§ 856 (N.J.) A judgment of nonsuit, although erroneous upon the ground upon which it was directed, will not be reversed if justified upon some other ground.—*Breintnall v. Sadler*, 81 A. 819.

Where a nonsuit is erroneously ordered with respect to the issue, it cannot be sustained upon a point not put in issue.—*Id.*

§ 861 (Me.) Scope of review on report of a cause by agreement on ordering of nonsuit stated.—*Tatro v. Maine Cent. R. Co.*, 81 A. 216.

(C) Parties Entitled to Allege Error.

§ 882 (N.J.) Appellants could not object to an instruction where a request to charge submitted by them contained the same defect.—*Prout v. Prout*, 81 A. 757.

§ 882 (N.J.) A defendant cannot have a decree molded into a form suggested by him and then have it reversed because of the form so imparted to it.—*Williams v. Lowe*, 81 A. 760.

§ 882 (Pa.) Erroneous ruling at instance of counsel for defendant held not to require reversal of judgment for plaintiff.—*Citizens' Gas Co. of Port Allegheny v. Whitney*, 81 A. 804.

Parties who induce the court to commit an error cannot avail themselves of it on review.—*Id.*

(E) Presumptions.

§ 907 (Md.) On appeal, a ruling of the trial court on a motion is presumed to have been proper, in the absence of a showing to the contrary.—*Wilkin Mfg. Co. v. Melvin*, 81 A. 879.

§ 907 (Vt.) The Supreme Court must assume that a finding was upon sufficient competent evidence, unless it is erroneous on its face, where no exceptions were filed thereto.—*Whitcomb v. Whitcomb*, 81 A. 97.

§ 916 (Pa.) Where Supreme Court cannot say that facts shown on record are plain, action of trial court in discharging rule for judgment for want of sufficient affidavit of defense held not error.—*Davis v. Freshman*, 81 A. 412.

§ 919 (Md.) In state of record, held, that there was a presumption that the court ruled correctly in striking out pleadings.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 355.

§ 926 (Vt.) Where the court stated that plaintiff had a right to cross-examine a witness called by him, held, that it would be pre-

sumed on appeal that it was also found that the witness was hostile.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

In view of an answer to a question, held, that it must be presumed that the trial court was justified in excluding it, and requiring a more responsive answer.—*Id.*

In support of the trial court's ruling permitting certain questions on a cross-examination, it must be presumed that there was evidence, tending to show conditions implied in the questions.—*Id.*

§ 935 (Vt.) The court on appeal held authorized to presume in affirmance of a decree that an inference justified by the evidence was drawn by the trial court.—*Skeels v. Blanchard*, 81 A. 913.

(F) Discretion of Lower Court.

§ 969 (Pa.) Discretion of trial court as to granting severance in ejectment will not be renewed in absence of abuse.—*Citizens' Gas Co. of Port Allegheny v. Whitney*, 81 A. 804.

§ 970 (Pa.) The discretion of the trial court in refusing to admit photographs of the locus in quo will not be reviewed.—*Kaufman v. National Lumber Ins. Co.*, 81 A. 53.

§ 978 (Conn.) The trial court having denied a motion for new trial, made on the ground of a statement in argument of counsel being calculated to influence the jury to render an excessive verdict, held it could not be said the denial was wrong.—*McKiernan v. Lehmaier*, 81 A. 969.

§ 982 (N.J.) Where order refusing to open decree was not abuse of discretion, it will not be reviewed by Court of Errors and Appeals.—*Williams v. Lowe*, 81 A. 760.

(G) Questions of Fact, Verdicts, and Findings.

§ 987 (N.J.Sup.) The Supreme Court will not review a decision of the district court on the questions of fact.—*Backes v. Movsovic*, 81 A. 497.

§ 994 (Conn.) Under Rules of Supreme Court of Errors (Practice Book 1908, p. 268) § 10, held, that a certain fact was not undisputed, and hence a finding in opposition to direct testimony thereon would not be reversed.—*Nichols v. Town of Manchester*, 81 A. 337.

§ 999 (Conn.) A verdict on a question properly submitted to the jury cannot be disturbed on appeal.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

§ 1004 (Conn.) While damages awarded for slander are largely in the discretion of the jury, they are subject to review by the courts for excessiveness.—*Hassett v. Carroll*, 81 A. 1018.

§ 1005 (Conn.) Where the trial court has denied a motion to set aside a verdict as against the evidence, and where it appears from the evidence that the jury might have reasonably and fairly reached such a verdict, it will not be set aside on appeal.—*Sims v. O'Flaherty*, 81 A. 1026.

§ 1008 (Me.) Findings of fact of a sitting justice held ordinarily not subject to reversal, unless clearly erroneous.—*Fall v. Fall*, 81 A. 865.

§ 1008 (Md.) On appeal from the judgment in an action tried to the court without a jury, the Court of Appeals will only review questions of law and will not examine the facts to determine whether the findings are correct.—*Turner v. Egan*, 81 A. 877.

§ 1009 (Pa.) Decree, reforming written instrument, based on chancellor's findings of fact, held not to be reversed by Supreme Court.—*Delaware, L. & W. Ry. Co. v. Welsner*, 81 A. 994.

§ 1010 (Conn.) A finding of fact contrary to the affirmative testimony of uncontradicted wit-

nesses, or made without the support of direct testimony, *held* not necessarily a finding of fact without evidence.—*Nichols v. Town of Manchester*, 81 A. 837.

§ 1010 (Conn.) Finding in an action by a motorman to recover damages for personal injuries in a collision *held* to have such support in the evidence that it could not be reversed on appeal.—*Delinks v. New York, N. H. & H. R. Co.*, 81 A. 1086.

§ 1010 (Pa.) Findings of fact that arbitrators were not guilty of misconduct will not be reversed, when based on sufficient evidence.—*Siegel v. Megraw*, 81 A. 84.

§ 1022 (Pa.) Findings of fact by an auditor on sufficient evidence confirmed by the trial court will not be reversed, except for manifest error.—*Commonwealth v. Union Surety & Guaranty Co.*, 81 A. 910.

(H) Harmless Error.

§ 1032 (N.H.) The refusal to give a correct instruction *held* to authorize the presumption that the error is not harmless.—*McBride v. Huckins*, 81 A. 528.

§ 1033 (Md.) Where depositions have been remanded for the purpose of permitting a party to cross-examine the witness, he cannot assign error on the order of remand.—*Goodman v. Saperstein*, 81 A. 695.

§ 1036 (Me.) The fact that there was no discontinuance in proceedings to enforce a materialman's lien as to a defendant, who had no interest in the property, would not defeat plaintiff's claim, being harmless.—*Witham v. Wing*, 81 A. 100.

§ 1047 (Md.) Rulings in striking evidence became immaterial, where under all of the evidence a verdict was properly directed for appellee.—*Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas*, 81 A. 1.

§ 1048 (N.H.) An error in asking concerning ownership of defendant company in a personal injury action *held* harmless.—*Vigneault v. Winchester Tannery Co.*, 81 A. 407.

§ 1048 (Vt.) Defendant *held* not prejudiced by answers on cross-examination of defendant's witness, even if the cross-examination was too broad.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

§ 1048 (Vt.) Any error in admitting a question over objection *held* cured by the answer.—*Rowley v. Shephardson*, 81 A. 917.

§ 1050 (Md.) The admission of immaterial evidence *held* not reversible error, in the absence of any showing of resulting injury.—*Doggett v. Tatham*, 81 A. 376.

§ 1051 (Conn.) Any error in permitting a question to be asked a witness *held* harmless.—*Hartford Trust Co. v. Town of West Hartford*, 81 A. 244.

§ 1051 (Md.) The admission of certain evidence *held* harmless, if erroneous.—*Betz v. P. Welty & Co.*, 81 A. 382.

§ 1058 (Md.) Error in excluding evidence *held* harmless.—*McCarthy v. Clarke*, 81 A. 12.

§ 1058 (Md.) The subsequent admission, without objection, of evidence once refused renders harmless any error in such refusal.—*Goodman v. Saperstein*, 81 A. 695.

§ 1058 (N.J.) An objection that a question on cross-examination was overruled will not be considered where substantially the same question was afterwards answered by the same witness.—*Dayton v. Boettner*, 81 A. 726.

§ 1058 (Vt.) Defendant may not complain of exclusion of his question whether plaintiff wrote a letter, where plaintiff afterwards admitted he did, and it was received in evidence.—*Davis v. Randall*, 81 A. 250.

§ 1061 (N.J.) Refusal of nonsuit for failure of proofs is not ground for reversal if proofs

were afterwards supplied by either party.—*Dennery v. Great Atlantic & Pacific Tea Co.*, 81 A. 861.

§ 1064 (N.H.) An erroneous theory of liability adopted at the trial of a physician charged with malpractice and with assault and battery, *held* to necessitate the setting aside of the damages awarded.—*McBride v. Huckins*, 81 A. 528.

In an action against a physician for malpractice and for assault and battery, the error in an instruction *held* to necessitate the setting aside of the amount of damages awarded, as well as the setting aside of the verdict against the physician.—*Id.*

§ 1066 (Md.) Prayer stating measure of damages *held* not prejudicial in action for alienation of affections, where defendant went to the jury on her theory of the case.—*Hillers v. Taylor*, 81 A. 286.

§ 1066 (Vt.) In ejectment defendant *held* not prejudiced by an instruction that defendant did not claim that he had made out title by adverse possession.—*Lang v. Clark*, 81 A. 625.

§ 1068 (Pa.) Remarks of judge as to measure of damages *held* not ground for reversal, in view of verdict.—*Walsh v. Altoona & L. V. Electric Ry. Co.*, 81 A. 551.

§ 1073 (Vt.) An erroneous recital of facts in a decree concerning the consolidation of the case with other litigation *held* harmless.—*Bell's Estate v. St. Johnsbury & L. C. R. Co.*, 81 A. 630.

(I) Error Waived in Appellate Court.

§ 1078 (Me.) Exceptions not argued in acceptant's brief are deemed waived.—*Hill v. Day*, 81 A. 581.

§ 1078 (Vt.) Objections to the admission of evidence made below will not be considered, where not relied on in appellant's brief.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

§ 1078 (Vt.) An exception not argued in defendant's brief will be treated as waived.—*Lang v. Clark*, 81 A. 625.

§ 1078 (Vt.) Points of error in appellant's brief, unsupported by any stated grounds, will not be reviewed.—*Gordon v. Deavitt*, 81 A. 1128.

(J) Decisions of Intermediate Courts.

§ 1082 (N.J.) Where a person assessed under the collateral inheritance tax act of 1894 presents ex parte affidavits to show that the property passed him by contract, the Court of Errors and Appeals cannot on writ of error review the judgment of the Supreme Court on that issue, where there is no finding of fact.—*Eastwood v. Russell*, 81 A. 108.

(K) Subsequent Appeals.

§ 1097 (Md.) A decision of the Court of Appeals on a prior appeal is the law of the case.—*Colonial Trust Co. v. Gerke*, 81 A. 594.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1106 (Pa.) Service on corporation in equity proceedings being presumably consistent with mode prescribed by Act June 8, 1893 (P. L. 346) § 5, for service of writ of alternative mandamus, record *held* to be remitted with directions to transfer cause to law side of the court in compliance with Act June 7, 1907 (P. L. 441) § 8.—*City of Williamsport v. Citizens' Water & Gas Co.*, 81 A. 316; *Same v. Williamsport Water Co.*, 81 A. 324.

§ 1106 (Pa.) Where a contention that suit should have been brought at law is not raised, and the question is whether the appeal shall be dismissed, the case *held* not within Act June 7,

1907 (P. L. 441) § 3.—New Cumberland Borough v. Riverton Consol. Water Co., 81 A. 548.

(B) Affirmance.

§ 1135 (N.J.Sup.) Where, on appeal, a judgment of the district court cannot be reversed on any ground specified, it will be affirmed.—Champlin v. Barthold, 81 A. 490.

(D) Reversal.

§ 1172 (Vt.) Where the decision below was correct except that it allowed actual damages, when only nominal damages were recoverable, judgment will be reversed only as to damages.—Kennett v. Tudor, 81 A. 633.

§ 1175 (Vt.) The Supreme Court *held* authorized to render judgment for plaintiffs upon reversing judgment for defendants.—Huntley v. Houghton, 81 A. 452.

§ 1175 (Vt.) Upon deciding, upon appeal in an action for deceit in selling property, concealing mortgages thereon, that plaintiffs were only entitled to nominal damages, *held*, that judgment would not be rendered for plaintiffs for nominal damages, but the case would be remanded to permit plaintiffs to amend.—Kennett v. Tudor, 81 A. 633.

(F) Mandate and Proceedings in Lower Court.

§ 1187 (N.J.Sup.) Where the remittitur was not actually filed below until April 24th, the lower court did not have power to retry the case on April 11th, though the remittitur was ordered by the appellate court on March 6th.—Chambers v. Philadelphia Pickling Co., 81 A. 573.

§ 1191 (N.J.Sup.) Facts *held* to authorize the inference that, while the remittitur was ordered by the appellate court on March 6th, it was not filed in the clerk's office by the attorneys until April 24th, after the case was actually retried below.—Chambers v. Philadelphia Pickling Co., 81 A. 573.

§ 1195 (N.H.) A decision of the Supreme Court on questions of law transferred to it by the superior court without a ruling before a trial of the facts is the law of the case.—Glover v. Baker, 81 A. 1081.

§ 1201 (Vt.) Plaintiff, in an action for deceit in selling property, concealing mortgages thereon, *held* entitled to amend the declaration on remand so as to permit him to recover actual as well as nominal damages.—Kennett v. Tudor, 81 A. 633.

Upon remand of a case, plaintiff should ask leave in the trial court to amend the declaration so as to recover actual damages which he is entitled to recover under the decision on appeal.—*Id.*

§ 1201 (Vt.) After remand with directions to enter decree, the trial court *held* not authorized to permit amendment of the pleadings.—Gordon v. Deavitt, 81 A. 1128.

APPEARANCE.

See Constitutional Law, §§ 249, 309.

§ 18 (Pa.) Defendant *held* not to have waived objection to jurisdiction over subject-matter by appearance to defend the action.—Lewisburg Bridge Co. v. Union County, 81 A. 324.

§ 24 (Del.Super.) The constitutional guaranty that no valid proceeding can be had against one until he has been served by process may be waived by a party voluntarily appearing and submitting himself to the court's jurisdiction, but where he appears only in response to process the service must be legal.—Odessa Loan Ass'n v. Dyer, 81 A. 469.

APPLIANCES.

See Master and Servant.

APPLICATION.

See Divorce, § 214; Insurance, § 379; Payment, § 41.

APPOINTMENT.

See Judges, §§ 3-8.

APPRAISAL.

See Landlord and Tenant, § 272.

APPROVAL.

See Statutes, § 26.

ARBITRATION AND AWARD.

See Appeal and Error, § 1010; Judgment, § 749; Reference; Towns, §§ 30, 79.

ARGUMENT.

See Affidavits, § 18.

ARGUMENTATIVENESS.

See Pleading, §§ 17, 365.

ARGUMENT OF COUNSEL.

See Trial, §§ 121, 125.

ARRAIGNMENT.

See Criminal Law, § 261.

ARREST.

See Action, § 41; Execution, §§ 425-448; False Imprisonment; Malicious Prosecution.

ASSAULT AND BATTERY.

See Appeal and Error, § 1064.

ASSENT.

See Insurance, § 233.

ASSESSMENT.

See Damages, §§ 199-216; Insurance, §§ 755, 756; Municipal Corporations, §§ 407, 433, 958-978; Taxation.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 237, 273, 663, 704, 719-750.

ASSIGNMENTS.

See Fraudulent Conveyances; Mortgages, § 257; Partnership, §§ 67, 344; Patents, §§ 197, 219; Wills, § 840.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 19 (N.J.Sup.) A contract for personal services is not assignable, so that the assignee may command the labor of one who has never agreed to serve him.—Board of Education of Borough of Flemington v. State Board of Education, 81 A. 163.

(B) Mode and Sufficiency of Assignment.

§ 50 (Vt.) A creditor, drawing an order on his debtor in favor of a third person, who notifies the debtor thereof, *held* to equitably assign the debt.—Johnson v. Belanger, 81 A. 621.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy; Execution, § 247.

ASSOCIATIONS.

See Building and Loan Associations; Insurance, §§ 755, 756; Partnership, § 64.

ASSUMPSIT, ACTION OF.

See Action, § 41; Contracts, § 28; Money Received; Pleading, § 382; Trial, §§ 242, 243, 253; Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 203-221, 288.

ATTACHMENT.

See Bankruptcy, § 421; Dower, § 46; Execution; Exemptions; Garnishment; Judgment, §§ 419, 466; Paupers, § 40; Process, § 167; Reformation of Instruments, §§ 32, 37, 41, 45, 51; Sequestration.

II. PROPERTY SUBJECT TO ATTACHMENT.

§ 62 (Md.) Where bonds may not be reached by attachment, because registered in the names of third persons, equity *held* without power to change the registration at the instance of attaching creditors.—*De Bearn v. De Galard de Brassac de Bearn*, 81 A. 222.

§ 62 (Md.) Railroad mortgage bonds of foreign corporations *held* property, within Code Pub. Gen. Laws 1904, art. 9, § 10, and subject to attachment.—*De Bearn v. De Galard de Brassac de Bearn*, 81 A. 223, 227; *Chaumet v. Same*, Id. 227.

III. PROCEEDINGS TO PROCURE.

(B) Affidavits.

§ 89 (Md.) That the affidavit on which an attachment is based had been filed in an attachment suit between the same parties a year previously, and withdrawn from that case for use in the present proceeding, does not affect the validity of the present attachment.—*Tonns v. Collins*, 81 A. 219.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 184 (Me.) An attachment of personalty is dissolved by the officer taking a receipt therefor promising to pay a stated sum on demand or redeliver the property on judgment for plaintiff.—*Gary v. Graham*, 81 A. 666.

§ 185 (Me.) An attachment of personalty dissolved by the officer taking a receipt *held* not restored by an order by the referee in subsequent bankruptcy proceedings made under Bankr. Act, § 67.—*Gary v. Graham*, 81 A. 666.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 206 (Md.) Under Code Pub. Gen. Laws 1904, art. 9, § 38, failure to issue writ of summons to the sheriff of the county wherein defendant resides, in attachment on original process for fraud, *held* not fatal to court's jurisdiction.—*Tonns v. Collins*, 81 A. 219.

§ 217 (Md.) Judgment in attachment of railroad mortgage bonds *held* required to be a condemnation of the bonds.—*De Bearn v. De Galard de Brassac de Bearn*, 81 A. 223, 227; *Chaumet v. Same*, Id. 227.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 227 (Md.) The action of the court in releasing railroad mortgage bonds from an attachment *held* erroneous on the grounds specified.—*De Bearn v. De Galard de Brassac de Bearn*, 81 A. 223, 227; *Chaumet v. Same*, Id. 227.

§ 232 (Md.) Under Laws 1908, c. 240, repealing Code Pub. Gen. Laws 1904, art. 23, §§ 391-401, *held*, that failure of the officer laying an attachment on railroad mortgage bonds of foreign corporations to comply with the requirements of the repealed sections, as directed by Code Pub. Gen. Laws 1904, art. 9, § 18, did not warrant release of the attachment.—*De Bearn v. De Galard de Brassac de Bearn*, 81 A. 223, 227; *Chaumet v. Same*, Id. 227.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 338 (Conn.) An attachment bond *held* to require the obligors to pay the amount of any judgment rendered against the two defendants or either of them in the attachment suit to the value of their interest or the interest of either of them.—*Snelling & Potter v. Merritt*, 81 A. 1039.

The actual interest of the defendant against whom judgment was rendered would be the measure of the obligors' liability on a statutory attachment bond.—Id.

ATTORNEY AND CLIENT.

See Appeal and Error, §§ 207, 267, 712, 713, 978; Costs, § 56; Divorce, § 214; Evidence, § 264; Guardian and Ward, § 183; Judgment, §§ 238, 683; New Trial, § 31; Process, § 58; Reference; Reformation of Instruments, § 44; Wills, §§ 405, 415, 731.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

§ 38 (N.H.) Under the facts, *held*, an attorney should be suspended from his office as morally or mentally wanting in the elements of common honesty and fair dealing (Pub. St. 1901, c. 213, § 5).—*In re Moore*, 81 A. 703.

III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 124 (Vt.) Where an attorney voluntarily deducted \$89.50 from his bill, and was thereafter *held* to have overcharged \$165, the deduction in a suit for an accounting should be subtracted from the overcharge.—*McKane v. Gordon & Hoar*, 81 A. 637.

Liability of attorneys for money received to the use of plaintiff, their client, *held* several, and not joint.—Id.

§ 128 (Vt.) Where in a suit for money received plaintiff pleaded a credit of twenty per cent. for commissions, his failure to prove the basis for such credit did not preclude him from recovering so much of the fund received by defendants as they wrongfully withheld.—*McKane v. Gordon & Hoar*, 81 A. 637.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 136 (Vt.) Whether more than one attorney on the same side is entitled to charge term and attorney fees is a question of fact for the determination of the trier.—*McKane v. Gordon & Hoar*, 81 A. 637.

ATTORNEY GENERAL.

See Costs, § 56.

AUDITORS.

See Executors and Administrators, § 507.

AUTHORITY.

See Bills and Notes, §§ 340, 367; Corporations, §§ 393, 432; Principal and Agent, § 24.

AUTOMOBILES.

See Master and Servant, § 302; Railroads, § 350.

AWARD.

See Eminent Domain, § 234.

BAILMENT.

See Innkeepers.

BALLOTS.

See Elections, §§ 180-194.

BANKRUPTCY.

See Attachment, § 185; Fraudulent Conveyances, § 118.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 139 (Pa.) Where a testator gives real estate to his daughter and her husband as tenants by entireties, a trustee of the husband has no interest in the principal or income.—In re Meyer's Estate, 81 A. 145.

§ 139 (Pa.) The orphan's court in awarding estate by entireties to a husband and wife cannot require them to enter security for the husband's trustee in bankruptcy, if the husband should survive the wife.—In re Meyer's Estate, 81 A. 147.

§ 143 (Conn.) Whether property of a bankrupt could have been levied on and sold under judicial process prior to the filing of petition within Bankruptcy Act July 1, 1898, § 70a, depends on the local law.—Rosenbluth v. De Forest & Hotchkiss Co., 81 A. 955.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 159 (N.J.Ch.) One to whom a bankrupt owed no money, and whose action in purchasing collateral and discharging the secured debts of the bankrupt was to secure for himself whatever equity there was in such collateral, was not a "creditor" of the bankrupt.—Horton v. Bamford, 81 A. 761.

§ 165 (Conn.) "Preference" and "transfer" defined.—Rosenbluth v. De Forest & Hotchkiss Co., 81 A. 955.

§ 179 (Pa.) On a bill to set aside a conveyance by a bankrupt husband to wife, as in fraud of creditors, evidence held to require finding that the husband held the land in trust, and properly executed the trust by conveying it to his wife.—Phillips v. Kleinman, 81 A. 648.

§ 182 (N.J.Ch.) Transactions between a bankrupt and one who has purchased his property from his creditors upon a sale of collateral made with his consent, to be held actually fraudulent, must have been in pursuance of a covinous agreement between the bankrupt and such purchaser to defraud creditors.—Horton v. Bamford, 81 A. 761.

§ 186 (Conn.) Where materialman failed to perfect liens on the faith of security afforded by a void deed to certain real property, he was not entitled, as a condition to vacating the deed by the grantor's trustee in bankruptcy, to the enforcement of so much of the debt as could have been secured by the lien.—Rosenbluth v. De Forest & Hotchkiss Co., 81 A. 955.

§ 214 (N.J.Ch.) An adjudication in bankruptcy held not to impair the jurisdiction of a state court in a pending suit for the enforcement of a specific lien against assets of the

bankrupt.—Bradley v. United Wireless Telegraph Co., 81 A. 1107.

§ 216 (N.J.Ch.) The lien created by the filing of a judgment creditor's bill to set aside a fraudulent conveyance, and by the service of process thereunder, held unaffected by the bankruptcy of the debtor pending the suit and more than four months after the judgment.—Bradley v. United Wireless Telegraph Co., 81 A. 1107.

A trustee in bankruptcy takes the property of the bankrupt subject to an equitable lien asserted by a receiver of an insolvent corporation suing the bankrupt to set aside a conveyance by the corporation to the bankrupt as fraudulent to creditors.—Id.

(E) Actions by or Against Trustee.

§ 279 (N.J.Ch.) A trustee in bankruptcy is a proper person to bring a suit against the purchaser at an execution sale and at a sale of collateral previously owned by the bankrupt to have such transfers declared void.—Horton v. Bamford, 81 A. 761.

§ 301 (Pa.) A trustee in bankruptcy of a husband has no standing to maintain a bill to restrain the husband and wife from alienating property which they hold as tenants by entireties.—Weiss v. Beihl, 81 A. 148.

§ 303 (N.J.Ch.) Evidence in an action by a trustee in bankruptcy to avoid a sale of the bankrupt's property held to show that defendant knew the bankrupt's financial condition, and by express, or tacit understanding undertook to deprive unsecured creditors of whatever equity there was in collateral held by secured creditors.—Horton v. Bamford, 81 A. 761.

In a suit by a bankrupt's trustee to avoid purchases of property formerly owned by the bankrupt set aside as in fraud of creditors, held, that defendant, in view of the apparent inadequacy of consideration, had the burden of proving what the actual value of the stock purchased by him was.—Id.

In a suit by a bankrupt's trustee against a purchaser of stock formerly owned by the bankrupt to avoid the sale, evidence held not to show that the consideration was adequate to justify the transaction.—Id.

§ 305 (N.J.Ch.) On a finding in an action by a bankrupt's trustee to have a sale of property declared void, as in fraud of creditors, that the transfer was void, and the purchaser liable only to the extent of the difference between the value and the consideration actually paid, held, that the complainant on taking judgment would be required to give bond to secure the purchaser.—Horton v. Bamford, 81 A. 761.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 421 (Me.) Bankruptcy of an attachment defendant held to defeat liability on a receipt given the attaching officer.—Gary v. Graham, 81 A. 666.

BANKS AND BANKING.

See Corporations, § 333; Customs and Usages.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 116 (Md.) Knowledge of the vice president held not notice to a bank that a check deposited therein was impressed with a trust.—Denton Nat. Bank v. Kenney, 81 A. 227.

(C) Deposits.

§ 127 (Md.) The title to a check held to pass to a bank under certain indorsement.—Denton Nat. Bank v. Kenney, 81 A. 227.

§ 129 (Md.) A draft, accepted by a bank from the depositor for discount, *held* the property of the bank as against the depositor's creditors.—*Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank*, 81 A. 294.

§ 130 (Md.) A check *held* not to give notice to a bank in which it was deposited that it was impressed with a trust.—*Denton Nat. Bank v. Kenney*, 81 A. 227.

§ 134 (Md.) A bank *held* entitled to apply the proceeds of a check impressed with a trust upon the antecedent indebtedness of the depositor.—*Denton Nat. Bank v. Kenney*, 81 A. 227.

(B) Loans and Discounts.

§ 183 (Pa.) In action on note by bank against payee indorser, judgment for defendant *held* proper.—*First Nat. Bank v. Gerli*, 81 A. 540.

Bank *held* not entitled to assume that cashier, presenting a note made by himself and indorsed by the payee, was the owner thereof.—*Id.*

BAR.

See Judgment, § 600.

BELLS.

See Railroads, § 350.

BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Insurance, §§ 755, 756.

BEST AND SECONDARY EVIDENCE.

See Evidence, §§ 157-174, 591.

BIAS.

See Criminal Law, § 1011.

BIDS.

See Municipal Corporations, §§ 330-332.

BILLIARDS.

See Indictment and Information, § 111; Licenses, § 42.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF LADING.

See Carriers, §§ 153, 163.

BILLS AND NOTES.

See Banks and Banking, §§ 127, 129, 130, 134, 183; Corporations, §§ 432, 464, 516; Customs and Usages; Evidence, §§ 423, 444; Gaming, § 49; Indemnity, §§ 8, 12; Limitation of Actions, §§ 73, 196; Mortgages, § 257; Pleading, § 127; Receivers, §§ 163, 193.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 149 (Md.) Under Code 1904, art. 18, §§ 20, 22, a check *held* a negotiable instrument.—*Denton Nat. Bank v. Kenney*, 81 A. 227.

§ 166 (N.J.) Certificate of indebtedness containing agreement to keep free from incumbrance property on which value of collateral depends *held* not negotiable.—*Strickland v. National Salt Co.*, 81 A. 828, 832.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 223 (Conn.) "On or before" defined.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

§ 237 (Conn.) An accommodation indorser defined by Gen. St. 1902, § 4199, *held* liable independent of notice as an ordinary indorser to third persons, but not liable to the accommodated party.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

§ 238 (Conn.) Defendant S. Company's indorsement on notes *held* not for the plaintiff's accommodation.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

(D) Bona Fide Purchasers.

§ 330 (Md.) Where a negotiable instrument, payable to order, is indorsed by the payee in blank, such indorsement imports property in the holder, and the transferee may treat him as a bona fide owner, without making inquiries whether he holds it as agent or otherwise.—*Denton Nat. Bank v. Kenney*, 81 A. 227.

§ 340 (Md.) The purchaser of a receiver's notes *held* to have taken them with constructive notice of the receiver's want of authority to issue them.—*Ziellian v. Baltimore Plate Ice Co.*, 81 A. 22.

§ 351 (Me.) A note, purchased before, but indorsed after, maturity, is open to any legal defenses that might have been made against the original payee.—*McCormick v. Sawyer*, 81 A. 482.

§ 367 (Conn.) Where a corporation has general power to execute bills and notes, instruments so executed will be valid in the hands of a bona fide purchaser.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

Whether the president of a corporation had authority to indorse commercial paper for it depended not only on his express authority, but on his apparent authority.—*Id.*

VIII. ACTIONS.

§ 473 (Pa.) Affidavit of defense in action on notes *held* insufficient to prevent judgment.—*Keator v. Hunsicker*, 81 A. 140.

§ 489 (Me.) In an action on a note for the price of machinery, the maker *held* not entitled to show breach of warranty under the general issue, without previous notice of such defense.—*McCormick v. Sawyer*, 81 A. 482.

§ 514 (R.I.) In an action against the indorser on a note, defendant *held* entitled to show an agreement by plaintiff to release his liability as indorser and plaintiff's breach thereof.—*Hirsch v. Kaufman*, 81 A. 66.

BOARDS.

See Counties; Licenses, §§ 6, 7; Municipal Corporations, §§ 680, 681, 971; Paupers, § 39; Schools and School Districts, § 62; Taxation, §§ 305, 493.

BOATS.

See Taxation, § 166.

BODY EXECUTION.

See Execution, §§ 425-448.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 330-367; Execution, § 286; Vendor and Purchaser, §§ 229, 232.

BONDS.

See Attachment, §§ 62, 217, 227, 232, 338; Bankruptcy, § 305; Constitutional Law, § 278; Corporations, §§ 331, 482, 563; Costs, § 192; Evidence, §§ 113, 373; Execution, § 48; Indemnity, §§ 8, 12; Injunction, § 260; Judgment, § 747; Mortgages, §§ 209-218; Partnership, § 262; Principal and Surety; Reformation of Instruments, §§ 32, 37, 41, 45, 51; Statutes, § 239; Taxation, § 98; Trusts, § 161.

BONUS.

See Corporations, § 19; Trusts, § 280.

BOOKS.

See Evidence, §§ 157, 166, 376.

BOUNDARIES.

See Municipal Corporations, § 652.

I. DESCRIPTION.

§ 3 (N.H.) A definite boundary such as the line of a lake takes precedence over mere courses and distances.—*Douglass v. Belknap Springs Land Co.*, 81 A. 1086.

BREACH OF MARRIAGE PROMISE.

§ 28 (Vt.) A woman, suing for breach of marriage contract, may recover damages for her seduction by means of the promise.—*Stokes v. Mason*, 81 A. 162.

BRIDGES.

See Eminent Domain, §§ 71, 75, 267; Mandamus, § 90.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 15 (Pa.) Act Feb. 19, 1868 (P. L. 177), authorizing construction of new bridge by bridge company, *held* not to allow bridge company, by section 9, a continuing franchise at the site of the old bridge, as well as at the site of the new bridge.—*Lewisburg Bridge Co. v. Union County*, 81 A. 324.

BRIEFS.

See Appeal and Error, §§ 760, 1078.

BROKERS.

See Evidence, § 166; Frauds, Statute of, § 16.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 37 (Me.) One suing to recover money retained by defendant in excess of his commission for procuring a purchaser for land *held* to have the burden of showing that the broker misrepresented the employment contract which plaintiff signed.—*Light v. E. A. Strout Co.*, 81 A. 807.

In an action to recover money retained by defendant in excess of his agreed commission, evidence *held* to sustain a finding that defendant misrepresented the contents of a contract which purported to entitle defendant to the money sued for.—*Id.*

IV. COMPENSATION AND LIEN.

§ 48 (N.J.Sup.) Contract between vendor and vendee, providing for commission to plaintiffs, *held* binding on the parties thereto.—*Tapscott v. McVey*, 81 A. 348.

§ 60 (Md.) To entitle a broker to commissions, the purchaser procured must actually purchase upon the terms agreed, unless his failure to do so is caused by the vendor's fault.—*Moore v. Councilman*, 81 A. 122.

§ 63 (N.J.Sup.) One who has agreed in writing to pay another a commission for securing a buyer for his land cannot escape payment because he conveyed the land before the commission was earned.—*Payne v. Twitchell*, 81 A. 350.

V. ACTIONS FOR COMPENSATION.

§ 80 (N. J.) In action by broker for agreed compensation, nonsuit *held* properly refused.—*Semkin v. Hollander*, 81 A. 980.

§ 86 (Md.) Evidence in a broker's action for commissions *held* not to show employment to sell.—*Moore v. Councilman*, 81 A. 122.

BUILDING AND LOAN ASSOCIATIONS.

§ 8 (Del.Super.) The contracts of subscription of stockholders in a building and loan association have the same force as those of stockholders in other corporations.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

§ 18 (Del.Super.) Payments on stock by a borrower from a building association are not ipso facto payments on the mortgage debt pro tanto, even if the stock is assigned as collateral.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

§ 26 (Del.Super.) The effect of a stockholder in a building association borrowing money from it, upon his relation as stockholder, stated.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

A shareholder in a loan association retains his character as shareholder after he becomes a borrower, though his stock is assigned as collateral for the loan.—*Id.*

§ 38 (Del.Super.) A mortgage, given to a loan association by a stockholder, secures payment of dues upon the stock as well as the debt created by the loan.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

§ 39 (Del. Super.) That defendant, in an action by a building association to foreclose a mortgage, was not shown to be a member of the association, is not ground for a nonsuit.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

§ 42 (Del.Super.) Insolvency of a building and loan association relieves a stockholder from payment of dues and determines loan contracts.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

The items with which a borrower should be charged and credited upon winding up the affairs of an insolvent building and loan association stated.—*Id.*

§ 44 (Del.Super.) An insolvent building and loan association *held* not entitled to claim payment of premium from a borrower.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

BUILDING CONTRACTS.

See Contracts, §§ 190, 282, 284; Insurance, § 582; Mechanics' Liens; Principal and Surety, § 100.

BUILDINGS.

See Municipal Corporations, § 863.

BURIAL

See Dead Bodies.

BY-LAWS.

See Corporations, §§ 57, 194, 195, 283; Insurance, § 755.

CANALS.

See Easements, § 26.

CANCELLATION OF INSTRUMENTS.

See Corporations, § 232; Deeds, §§ 70, 71; Equity, § 150; Estoppel, § 62; Insurance, §§ 229, 230, 233; Paupers, § 37; Quieting Title; Reformation of Instruments; Vendor and Purchaser, § 335.

II. PROCEEDINGS AND RELIEF.

§ 34 (N.J.) A complainant *held* not guilty of laches in seeking to set aside a conveyance as procured by fraud.—*Ashby v. Yetter*, 81 A. 730.

CARRIERS.

See Negligence, §§ 32, 65; Statutes, § 161; Street Railroads.

I. CONTROL AND REGULATION OF COMMON CARRIERS.**(A) In General.**

§ 12 (N.J.Sup.) Ordinance granting right to operate street railway *held* not to estop municipality from requiring transfer ticket to any passenger who has paid his fare.—*Public Service Ry. Co. v. Board of Public Utility Com'rs*, 81 A. 1117.

§ 12 (Pa.) An ordinance of councils granting permission of a street railway company to make certain extensions *held* not to take from the company the power to discontinue the sale of strip trolley tickets at the rate of six for a quarter on all of its lines.—*City of Reading v. United Traction Co.*, 81 A. 304.

II. CARRIAGE OF GOODS.**(F) Loss of or Injury to Goods.**

§ 114 (Me.) An express company's liability as a carrier continues until delivery to the consignee.—*State v. Parshley*, 81 A. 484.

(H) Limitation of Liability.

§ 153 (N.J.) Acceptance by shipper, without objection, of bill of lading purporting to limit liability, based on assumed valuation of goods, *held* not conclusive against him.—*Hill v. Adams Express Co.*, 81 A. 859.

The court *held* justified in finding, as a matter of fact, that a limitation in a bill of lading, limiting liability to \$50, was not a part of the contract between the parties.—*Id.*

§ 163 (N.J.) The legal presumption is that a common carrier, undertaking to transport merchandise, does so subject to his common-law liability.—*Hill v. Adams Express Co.*, 81 A. 859.

The burden of showing limitation of liability by a carrier rests on the carrier.—*Id.*

(J) Charges and Liens.

§ 196 (Pa.) In an action by railroad company for demurrage charges for detention of cars, affidavit of defense *held* sufficient.—*Pennsylvania R. Co. v. Keally*, 81 A. 646.

IV. CARRIAGE OF PASSENGERS.**(D) Personal Injuries.**

§ 280 (Conn.) Carriers of passengers *held* required to exercise the highest practical degree of skill to carry their passengers in safety.—*Thorson v. Groton & S. St. Ry. Co.*, 81 A. 1024.

§ 303 (Pa.) A railroad company must stop its trains at stations a reasonable length of time to permit passengers to alight.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 81 A. 93.

A carrier must allow a passenger who is seen alighting time to alight before starting the train.—*Id.*

§ 311 (Conn.) A notice sufficient for the purpose contemplated by Gen. St. 1902, § 1130, as a condition precedent to an action against a railway company, *held* sufficient.—*Thorson v. Groton & S. St. Ry. Co.*, 81 A. 1024.

A notice of injury to a trolley car passenger *held* to sufficiently contain a description of the injury, and of the time, place, and cause of its occurrence within Gen. St. 1902, § 1130.—*Id.*

§ 318 (Conn.) Evidence *held* to show prima facie that the injury to a trolley car passenger

was caused by the actionable negligence of the carrier.—*Thorson v. Groton & S. St. Ry. Co.*, 81 A. 1024.

(E) Contributory Negligence of Person Injured.

§ 328 (Pa.) Passenger injured while attempting to get on moving street car *held* guilty of contributory negligence.—*Bradney v. Philadelphia Rapid Transit Co.*, 81 A. 187.

CAUSE OF ACTION.

See Action.

CEMETERIES.

See Easements, §§ 18, 63.

CERTAINTY.

See Charities, § 21; Contracts, § 9.

CERTIFICATE.

See Appeal and Error, § 308; Bills and Notes, § 166; Corporations, §§ 95, 100, 152, 232; Evidence, § 348; Execution, § 425; Insurance, § 755; Mechanics' Liens, § 197; Mortgages, § 209; Railroads, § 14.

CERTIORARI.

See Appeal and Error, § 87; Corporations, § 393; Courts, § 207; Criminal Law, §§ 1011, 1060; Elections, § 306; Eminent Domain, § 264; Municipal Corporations, § 978; Newspapers.

I. NATURE AND GROUNDS.

§ 4 (N.J.Sup.) The court will not review by certiorari the action of a local board of education under the school law until redress has first been sought as provided by the act.—*Board of Education of Borough of Flemington v. State Board of Education*, 81 A. 163.

§ 4 (N.J.Sup.) Existence of remedy by bill in nature of information filed by Attorney General at the relation of a private party *held* a ground for denying certiorari to review proceedings of riparian commissioners.—*Van Schaick v. Board of Riparian Com'rs*, 81 A. 1060.

II. PROCEEDINGS AND DETERMINATION.

§ 70 (N.J.) The question whether the Legislature may amend the title of P. L. 1907, p. 279, by an amendatory act (P. L. 1908, p. 163), *held* not reviewable on certiorari to review a resolution of the play ground commissioners of a city acting under the laws and P. L. 1909, p. 76, when not raised below or on appeal.—*Strock v. City of East Orange*, 81 A. 826.

CHALLENGE.

See Jury, § 137.

CHANCERY.

See Equity.

CHARACTER.

See Criminal Law, § 376; Homicide.

CHARGE.

See Carriers, §§ 12, 196.

To jury, see Criminal Law, § 780; Trial, §§ 194-296, 312, 314, 386.

CHARITIES.

See Wills, §§ 116, 153, 467.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 21 (N.H.) A devise to feeble Congregational churches of a state *held* not invalid for uncertainty.—*French v. Lawrence*, 81 A. 705.

CHARTER.

See Municipal Corporations, § 46.

CHattel MORTGAGES.

See Corporations, § 478; Evidence, §§ 264, 441; Fraud, § 49.

III. CONSTRUCTION AND OPERATION.**(D) Lien and Priority.**

§ 138 (Conn.) Property *held* subject to garnishment as concealed property within Gen. St. 1902, § 880.—*Sutherland v. Brown*, 81 A. 1033.

CHEAT.

See Fraud.

CHECKS.

See Bills and Notes, § 149.

CHILDREN.

See Dead Bodies; Guardian and Ward; Infants.

CHURCHES.

See Religious Societies.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CITIZENS.

See Constitutional Law, §§ 229-249.

CIVIL RIGHTS.

See Constitutional Law, §§ 229-249.

CIVIL SERVICE.

See Municipal Corporations, § 213.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Executors and Administrators, §§ 205-271.

CLERGYMEN.

See Libel and Slander, §§ 51-123.

CLERKS OF COURTS.

See Appeal and Error, § 371; Costs, § 175.

CLOUD ON TITLE.

See Quieting Title.

CLUBS.

See Intoxicating Liquors, § 55.

COAL.

See Mines and Minerals, § 92.

CODICIL.

See Wills, § 153.

COLLATERAL ATTACK.

See Judgment, §§ 470-522.

COLLATERAL INHERITANCE TAXES.

See Taxation, §§ 859, 862.

COLLECTION.

See Executors and Administrators, §§ 87-121; Taxation, § 594.

COLLEGES AND UNIVERSITIES.

See Wills, §§ 516, 517.

COMITY.

See Corporations, § 631.

COMMERCE.

See Carriers.

I. POWER TO REGULATE IN GENERAL.

§ 10 (Md.) The power of Congress, under Const. U. S. art. 1, § 8, to regulate interstate commerce, is exclusive.—*D. E. Foote & Co. v. Clagett*, 81 A. 511.

II. SUBJECTS OF REGULATION.

§ 33 (Md.) An article brought from another state is an article of interstate commerce until sold, and hence Laws 1910, c. 735, which imposes a tax upon oysters shipped in from foreign states before they can be sold, interferes with interstate commerce.—*D. E. Foote & Co. v. Clagett*, 81 A. 511.

The transportation of oysters out of one state into another is commerce within the meaning of Const. U. S. art. 1, § 8.—*Id.*

§ 41 (Me.) An interstate shipment of intoxicating liquors by express *held* not to have been constructively delivered to the consignee, and not subject to search and seizure.—*State v. Parshley*, 81 A. 484.

III. MEANS AND METHODS OF REGULATION.

§ 70 (N.J.Sup.) Annual franchise tax which P. L. 1906, pp. 645, 646, §§ 4, 5, require the state board of assessors to levy upon proportion of the annual gross receipts of street railroad corporation, *held* not a regulation of interstate commerce.—*Phillipsburg Horse Car R. Co. v. State Board of Assessors*, 81 A. 1121.

§ 72 (Md.) Laws 1910, c. 735, providing for an inspection tax upon oysters, *held* unconstitutional as an interference with interstate commerce contrary to Const. U. S. art. 1, § 8.—*D. E. Foote & Co. v. Clagett*, 81 A. 511.

§ 77 (Md.) Laws 1910, c. 735, providing for the inspecting and taxing of oysters *held* not to be sustained as an inspection measure, within Const. U. S. art. 1, § 10.—*D. E. Foote & Co. v. Clagett*, 81 A. 511.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Municipal Corporations, § 213.

COMMISSIONERS.

See Eminent Domain, § 234; Food; Highways, §§ 166, 193; Municipal Corporations, §§ 680, 681, 958, 978; Schools and School Districts, § 62; States; Taxation, §§ 384, 453; Waters and Water Courses, § 179.

COMMISSIONS.

See Attorney and Client, § 128; Brokers, §§ 87, 48-63, 86.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Damages, § 87; Descent and Distribution, § 129; Perpetuities.

COMMUNITY PROPERTY.

See Husband and Wife, § 273.

COMPENSATION.

See Attorney and Client, § 136; Brokers, §§ 48-86; Contracts, § 230; Eminent Domain, §§ 2, 71-153, 167-264, 293; Municipal Corporations, § 162; Principal and Agent, § 81; Reference.

COMPETENCY.

See Witnesses, §§ 37-183.

COMPLAINT.

See Indictment and Information; Pleading.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Contracts, § 72; Death, § 25; Executors and Administrators, § 87; Fines; Insane Persons, § 65; Payment.

§ 2 (Conn.) Where a controversy is actual it is a proper subject-matter for a binding settlement.—*In re Thomas*, 81 A. 972.

§ 18 (Vt.) The settlement, though obtained by duress and fraud, held to bar a recovery at law without an offer to return the consideration.—*Johnson v. Belanger*, 81 A. 621.

COMPUTATION.

See Time.

CONCEALMENT.

See Courts, § 202; Fraud, § 59; Garnishment, § 52.

CONCLUSIVENESS.

See Insane Persons, § 27; Judgment, §§ 644-749.

CONDEMNATION.

See Attachment, § 217; Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 459, 474.

CONDITIONS.

See Carriers, § 311; Evidence, § 444.

CONDONATION.

See Divorce, § 49.

CONFESSION.

See Criminal Law, §§ 517, 1137; Judgment, §§ 68, 70, 407.

CONFIDENTIAL RELATIONS.

See Fraudulent Conveyances, § 101.

CONFLICT OF LAWS.

See Contracts, §§ 2, 144, 325.

CONSENT.

See Corporations, § 83; Courts, § 24; Death, § 25; Insurance, § 233.

CONSERVATORS.

See Insane Persons, § 65.

CONSIDERATION.

See Contracts, § 72; Fraudulent Conveyances, §§ 64, 74, 181, 183.

CONSISTENCY.

See Statutes, §§ 159-167.

CONSOLIDATION.

See Corporations, § 585.

CONSTABLES.

See Sheriffs and Constables, § 10.

CONSTITUTIONAL LAW.

See Appearance, § 24; Commerce, §§ 72, 77; Corporations, § 217; Courts, §§ 78, 79; Criminal Law, § 1011; Eminent Domain, §§ 2, 71, 75; Indictment and Information, § 111; Judges, §§ 3, 7; Master and Servant, § 69; Partnership, § 64; Statutes; Taxation, §§ 859, 862.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 32 (Del.) Const. 1897, art. 9, § 5, held not effective, independent of statute, to deprive foreign corporation, not complying with its provisions, of the right to enforce contract against purchaser, who retains benefits thereof.—*Model Heating Co. v. Magarity*, 81 A. 394.

§ 38 (Pa.) If a statute is plainly in conflict with the organic law, mere lapse of time cannot cure the defect.—*Page v. Carr*, 81 A. 430.

§ 48 (Del.Super.) All reasonable doubts and presumptions are to be solved in favor of the validity of a statute.—*State v. Ferschke*, 81 A. 401.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(B) Judicial Powers and Functions.**

§ 70 (Md.) Courts cannot modify the plain language of a statute to meet the exigencies of a particular case.—*Cummings v. Wildman*, 81 A. 610.

IV. POLICE POWER IN GENERAL.

§ 81 (Pa.) "Police power" defined.—*Commonwealth v. Plymouth Coal Co.*, 81 A. 148.

VII. OBLIGATION OF CONTRACTS.**(B) Contracts of States and Municipalities.**

§ 120 (N.J.Sup.) The creation of a new municipal corporation out of a portion of the territory of one already existing does not impair the obligation of existing contracts.—*Board of Education of Borough of Flemington v. State Board of Education*, 81 A. 163.

§ 137 (Pa.) Act April 29, 1874 (P. L. 107) § 44, held not to constitute continuing contract as to rate of bonus payable by corporations, which is beyond the power of the Legislature to disturb.—*Commonwealth v. Independence Trust Co.*, 81 A. 923.

(C) Contracts of Individuals and Private Corporations.

§ 154 (Pa.) Act May 23, 1907 (P. L. 205), making enforceable contracts theretofore made

by unregistered foreign corporations which under Act April 22, 1874 (P. L. 108), were unenforceable, is not unconstitutional as an impairment of the obligation of contracts.—Pittsburg Const. Co. v. West Side Belt R. Co., 81 A. 884.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 194 (Md.) Statutes validating defectively executed and acknowledged deeds and mortgages, but saving the rights of third parties acquired in good faith, are valid.—Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby, 81 A. 284.

§ 194 (Pa.) Act May 23, 1907 (P. L. 205), making enforceable contracts of unregistered foreign corporations which were unenforceable under Act April 22, 1874 (P. L. 108), held not unconstitutional, though retrospective.—Pittsburg Const. Co. v. West Side Belt R. Co., 81 A. 884.

X. EQUAL PROTECTION OF LAWS.

§ 229 (Conn.) Gen. St. 1902, § 2321, held not invalid as discriminating in the liability for taxation against municipalities owning property of a certain character.—City of Norwalk v. Town of New Canaan, 81 A. 1027.

§ 247 (Md.) Acts 1910, c. 221, amending Acts 1904, c. 37, held to violate Const. U. S. Amend. 14, by unreasonably discriminating against particular classes of employers.—State v. Potomac Valley Coal Co. of Garrett County (Md.) 686; Same v. Hamill Coal & Coke Co., 81 A. 695.

§ 249 (N.J.) Under Corporation Act, § 21, a decree against a nonresident stockholder for his unpaid stock subscription, rendered in a suit by the receiver on notice mailed to the nonresident, not served with process within the state, and not appearing, held not to deny the stockholder the equal protection of the law.—Gilson v. Appleby, 81 A. 925, 927.

XI. DUE PROCESS OF LAW.

§ 278 (Md.) Code Gen. Laws 1888, art. 10, § 205, as amended by Acts 1892, c. 241, requiring trustees to sell to file a bond before any title passes to them, is not in conflict with Const. Amend. U. S. 14, or Declaration of Rights, art. 23, prohibiting the deprivation of property without due process of law.—Cumplings v. Wildman, 81 A. 610.

§ 283 (Pa.) Pennsylvania system of taxation held consistent with natural justice, and not to deprive a taxpayer of property without due process of law.—Appeal of Central Pennsylvania Lumber Co., 81 A. 204.

§ 290 (Vt.) A law providing for public improvements with special assessments upon abutting landowners is not unconstitutional in failing to give such landholders an opportunity to be heard as to the necessity of the improvements.—Corliss v. Village of Richford, 81 A. 234.

§ 291 (Conn.) Rights of abutters can be affected by proceedings to re-establish the bounds of a street only by "due course of law," and after opportunity to be heard.—Hartford Trust Co. v. Town of West Hartford, 81 A. 244.

§ 296 (Pa.) Anthracite Mining Act, art. 3, § 10, providing that owners of adjoining coal properties must leave a pillar of coal in each seam along the adjoining property, held, not a deprivation of property without due process of law.—Commonwealth v. Plymouth Coal Co., 81 A. 148.

§ 299 (Pa.) Act May 23, 1907 (P. L. 205), making enforceable contracts theretofore made by unregistered foreign corporations which were unenforceable by Act April 22, 1874 (P. L. 108), does not constitute the taking of prop-

erty without due process of law.—Pittsburg Const. Co. v. West Side Belt R. Co., 81 A. 884.

§ 300 (N.J.Ch.) The proceeding authorized by Divorce Act 1907, § 26, held in rem or quasi in rem, unaffected by Const. U. S. Amend. 14.—Wood v. Price, 81 A. 1093.

§ 309 (N.J.) Under Corporation Act, § 21, a decree against a nonresident stockholder for his unpaid stock subscription, rendered in a suit by the receiver on notice mailed to the nonresident, not served with process within the state, and not appearing, held not to deny the stockholder due process of law.—Gilson v. Appleby, 81 A. 925, 927.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 321 (Md.) A court rule abating an action on the trial and stet dockets for more than two years held reasonable, and not prohibited by the Declaration of Rights, arts. 19, 20, or other provisions.—Laurel Canning Co. of Prince George's County v. Baltimore & O R. Co., 81 A. 126.

CONSTRUCTION.

See Bridges, § 15; Contracts, §§ 143-176; Deeds, §§ 90-108; Mortgages, §§ 114-119; Specific Performance, § 74; Statutes, §§ 200-263; Taxation, § 204; Vendor and Purchaser, §§ 68, 78; Wills, §§ 449-695.

CONSTRUCTIVE TRUSTS.

See Trusts, §§ 91-110.

CONTEST.

See Elections, § 305.

CONTINGENT REMAINDERS.

See Wills, §§ 629-634.

CONTRACTS.

See Action, § 27; Agriculture, § 11; Assignments; Bills and Notes; Breach of Marriage Promise; Cancellation of Instruments; Chattel Mortgages; Compromise and Settlement; Constitutional Law, §§ 120-154, 299; Corporations, §§ 198, 487, 559, 560, 631, 672; Damages, § 124; Dedication, § 43; Deeds; Evidence, §§ 355, 419-456; Exchange of Property; Executors and Administrators, § 271; Fraud, § 23; Frauds, Statute of; Gaming, § 14; Husband and Wife, §§ 25, 167, 171, 278, 279; Indemnity; Injunction, §§ 16, 23, 61, 128, 159½; Insurance; Landlord and Tenant; Mechanics' Liens; Mines and Minerals; Money Received; Mortgages; Municipal Corporations, §§ 36, 248, 330; Partnership; Patents, § 197; Payment; Physicians and Surgeons; Pleading, §§ 204, 214, 382; Principal and Agent; Principal and Surety; Railroads, § 90; Reformation of Instruments; Sales; Schools and School Districts, §§ 41, 80; Specific Performance; Stipulations; Taxation, § 65; Towns, § 39; Trial, §§ 141, 252; Usury; Vendor and Purchaser; Wills, §§ 67, 68; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 2 (Conn.) The law of the place of contract determines its validity.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

§ 9 (Md.) A railroad company's promise to make a special rate for suburban passengers in consideration of the development by plaintiff's assignors of certain real estate belonging to defendant held too general to sustain an action for breach thereof.—Arundel Realty Co. v. Maryland Electric Rys. Co., 81 A. 787.

(B) Parties, Proposals, and Acceptance.

§ 28 (Del.Super.) In assumpsit, it is incumbent on plaintiff to show by a preponderance of the evidence that there was a contract, express or implied in law, between plaintiff and defendant.—Knowles v. Massey, 81 A. 470.

(D) Consideration.

§ 72 (Conn.) Forbearance or any promise to forbear from doing what one cannot legally do is no consideration for a compromise.—In re Thomas, 81 A. 972.

(F) Legality of Object and of Consideration.

§ 117 (Me.) An agreement by a seller of a business not to re-engage in a similar business in the same city *held* enforceable.—Flaherty v. Libby, 81 A. 166.

§ 127 (Pa.) Provision in building or construction contract for submission of disputes to architect or engineer *held* lawful.—Ruch v. York City, 81 A. 891.

II. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 143 (Vt.) Where the terms of a contract leave its meaning in doubt, the court will adopt the construction which makes the contract equitable.—McLean v. Windham Light & Lumber Co., 81 A. 613.

§ 144 (Conn.) The law of the place of contract determines its construction.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

§ 147 (Del.Super.) Intention of parties must govern construction of contracts, unless in violation of legal principle or public policy.—Flint Wagon Works v. Maloney, 81 A. 502.

§ 147 (Vt.) The court in seeking the intention of the parties to a contract must give regard to the subject-matter of the contract and its language.—McLean v. Windham Light & Lumber Co., 81 A. 613.

Ordinarily, the language of a particular provision of a contract will be construed in the light of its purpose as gathered from a consideration of the contract as a whole.—Id.

§ 153 (Vt.) A contract must be so construed, if possible, as to give some effect to every part thereof.—McLean v. Windham Light & Lumber Co., 81 A. 613.

§ 170 (Vt.) A party to a contract who goes beyond the requirements thereof in circumstances of doubt ought not from that fact alone have his act given the effect of a concession as to his understanding of the contract as an aid to the court in construing the contract.—McLean v. Windham Light & Lumber Co., 81 A. 613.

§ 176 (N.J.) Where a contract has not been reduced to formal language, the intent of the parties is generally a question of fact for the jury.—Gannon v. Brady Brass Co., 81 A. 727.

§ 176 (Pa.) Construction of a contract based on letters and acts of parties is for the jury.—Dougherty v. Briggs, 81 A. 201.

(B) Parties.

§ 187 (Del.Super.) Where a physician rendered services to certain third persons at defendant's request and on his credit, defendant was liable therefor, notwithstanding any subsequent promise of others to pay.—Knowles v. Massey, 81 A. 470.

(C) Subject-Matter.

§ 199 (Pa.) Building contract construed, and rights of builder as to materials to be used in roof determined.—W. H. Shepherd & Sons v. First Nat. Bank, 81 A. 715.

(F) Compensation.

§ 230 (Vt.) That a contract for services is silent on the subject of compensation is not conclusive against a right to a reasonable compensation.—Miller v. Powell, 81 A. 921.

V. PERFORMANCE OR BREACH.

§ 282 (Conn.) A building contractor *held* not entitled to recover on a contract if the owner was honestly dissatisfied with the work.—Hawken v. Daley, 81 A. 1053.

§ 284 (Md.) Where a building contract made the architect's decision conclusive on all matters referred to him, the owner could not recover damages for defective plastering if the plaster work was approved by the architect after completion.—Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas, 81 A. 1.

§ 285 (Pa.) Provision in contract for submission to architect or engineer of disputes as to the fulfillment of the contract *held* not to give the right to pass on a claim for damages for nonfulfillment.—Ruch v. York City, 81 A. 891.

§ 295 (Conn.) The owner *held* not entitled to retain the benefits of a construction contract, and at the same time defeat recovery by the contractor, on the ground that he had not performed according to the contract.—Chariott v. McMullen, 81 A. 65.

Substantial performance of a construction contract *held* sufficient to entitle the contractor to recover, notwithstanding slight defects.—Id.

§ 303 (Md.) A party guilty of a breach of contract may be excused therefor where his act constituting the breach is occasioned by some act of the other party to the contract.—Miller v. Mantik, 81 A. 797.

§ 305 (Md.) Defendant, having accepted a heating plant after installation, was liable therefor, though it was not constructed in strict conformity to the contract.—Turner v. Egan, 81 A. 877.

§ 316 (Md.) A breach of contract by one party thereto may be waived by the other party affected thereby.—Miller v. Mantik, 81 A. 797.

VI. ACTIONS FOR BREACH.

§ 325 (Conn.) The *lex fori* determines the form of remedy on a contract.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 65, 93, 122, 136.

CONVERSATION.

See Witnesses, §§ 37, 129.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Corporations, §§ 439, 542; Deeds; Estoppel, §§ 27, 62; Execution, § 315; Fraudulent Conveyances; Partition; Paupers, §§ 37, 40; Principal and Agent, § 81; Religious Societies.

COPY.

See Evidence, §§ 174, 346.

CORPORATIONS.

See Appeal and Error, §§ 147, 714, 1106; Attachment, § 62; Bankruptcy, § 216; Banks and Banking; Bills and Notes, § 367; Building and Loan Associations; Constitutional

Law, §§ 32, 137, 154, 194, 249, 299, 309; Equity, § 43; Evidence, § 113; Fraudulent Conveyances, § 122; Indemnity, § 8; Insurance; Intoxicating Liquors, § 64; Justices of the Peace, § 81; Life Estates; Municipal Corporations; Quo Warranto, §§ 55, 61; Railroads; Receivers, §§ 192, 193; Religious Societies; Stipulations; Street Railroads; Taxation, §§ 98, 160, 166, 204, 376-394; Waters and Water Courses, §§ 183-209.

I. INCORPORATION AND ORGANIZATION.

§ 19 (Pa.) Under Act April 29, 1874 (P. L. 79) § 11, Act May 3, 1899 (P. L. 189), Act Feb. 9, 1901 (P. L. 3), and Act June 8, 1891 (P. L. 223), a corporation organized in 1889, increasing stock in 1900, *held* required to pay bonus of one-third of 1 per cent. on the increase.—Commonwealth v. Independence Trust Co., 81 A. 928.

Corporation which decreases its capital stock, and subsequently increases it, *held* required to pay bonus only on the net increase on which no bonus has been paid.—Id.

§ 28 (Vt.) A de facto corporation can only exist where there is a law under which a de jure corporation can be created.—State v. Rutland Ry., Light & Power Co., 81 A. 252.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 57 (Pa.) By-laws of corporation *held* a part of its fundamental law, binding not only the corporators and the corporation, but those dealing with it.—Commonwealth v. Vandegrift, 81 A. 153.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 83 (Pa.) Subscription for corporate stock *held* subject to waiver, cancellation, or dissolution by consent of parties.—Harvey v. Weitzenkorn, 81 A. 447.

§ 84 (Pa.) Subscription for corporate stock *held* subject to release.—Harvey v. Weitzenkorn, 81 A. 447.

(C) Issue of Certificates.

§ 95 (Md.) Stock certificates issued to "M., Agent," were presumptively held by him as agent for another.—Tyson v. George's Creek Coal & Iron Co., 81 A. 41.

§ 109 (Md.) In an action by an administrator to have lost stock certificates, originally issued to decedent as "agent," reissued to the administrator, evidence *held* not to overcome the presumption that decedent held the stock for another.—Tyson v. George's Creek Coal & Iron Co., 81 A. 41.

In proceedings by an administrator to have lost stock certificates, originally issued to decedent as "agent," reissued to the administrator, the corporation was not required to show the name of the principal, whose agent M. was.—Id.

(E) Interest, Dividends, and New Stock.

§ 152 (N.J.) Issuance of certificates of indebtedness by corporation *held* invalid as an attempt to secure payment of dividends, whether earned or not.—Strickland v. National Salt Co., 81 A. 828, 832.

§ 157 (N.J.Ch.) In a stated case, a dividend *held* to be a cash dividend, and not a stock dividend.—Ballantine v. Young, 81 A. 119.

V. MEMBERS AND STOCKHOLDERS.

(B) Meetings.

§ 194 (Vt.) Notices of an adjourned meeting of stockholders of a corporation *held* unneces-

sary where not required by by-laws or statute.—Clark v. Wild, 81 A. 536.

The by-laws of a corporation merely requiring notices of a meeting to be "mailed" a certain time before the meeting, *held* failure to date them is immaterial.—Id.

§ 195 (Pa.) By-law of corporation *held* not to authorize a portion of the stockholders to withdraw from an annual meeting in order to break the quorum.—Commonwealth v. Vandegrift, 81 A. 153.

Stockholders attending an annual meeting, and then without cause voluntarily withdrawing, are in no better position than those who voluntarily absent themselves in the first instance.—Id.

A stockholder not voting cannot get relief from the court if he voluntarily refrains from voting if he had an opportunity and his claim of right to vote was not excluded.—Id.

Not even a majority of stockholders of a corporation *held* entitled to withdraw from meeting to break up quorum, and then obtain relief from court on the ground that quorum was not present.—Id.

§ 195 (Vt.) P. S. 4301, declaring what constituted a quorum at a meeting of stockholders of a corporation, *held* to apply notwithstanding a by-law to the contrary.—Clark v. Wild, 81 A. 536.

What constitutes a quorum at a meeting of stockholders of a corporation being provided by law, *held*, it is not affected by a course of corporate action pursuant to a by-law to the contrary.—Id.

§ 196 (Pa.) Corporate stockholders may at an annual meeting select a chairman by a viva voce vote, where there is no statute or by-law to the contrary; a stock vote not being necessary.—Commonwealth v. Vandegrift, 81 A. 153.

Request for stock vote for election of chairman at annual stockholder's meeting coming after the organization has been effected *held* too late.—Id.

§ 198 (N.J.Ch.) Preliminary injunction against voting proxies at annual stockholders' meeting denied, where, notwithstanding such injunction, defendants would retain through other proxies control of a majority of the stock.—Bache v. Central Leather Co., 81 A. 571.

Contract separating voting power of corporate stock from ownership *held* illegal.—Id.

§ 198 (Vt.) A majority of the stock properly represented at a meeting of stockholders of a corporation being a quorum, *held* that, where all the votes were one way, it was immaterial that some shares were voted on illegal proxies.—Clark v. Wild, 81 A. 536.

§ 201 (N.J.Ch.) Master will not be appointed to supervise annual stockholders' meeting for election of directors on the ground that inspectors of election were mere employes of the company.—Bache v. Central Leather Co., 81 A. 571.

(D) Liability for Corporate Debts and Acts.

§ 217 (N.J.) Chancery act, permitting the bringing into court of nonresident stockholders by notice mailed to them, *held* constitutional.—Gilson v. Appleby, 81 A. 925, 927.

§ 219 (N.H.) A corporation *held* not formed for profit, within Pub. St. 1901, c. 150, § 1.—Coulombe v. Eastman, 81 A. 704.

§ 232 (N.J.) Proceeding by receiver of a corporation to enforce a stockholder's unpaid subscription, on a certificate stating it to be fully paid and unassessable, *held* maintainable without first procuring an annulment of such certificate.—Gilson v. Appleby, 81 A. 724.

§ 274 (N.J.) A decree, enforcing the liability of stockholders of an insolvent corporation on their stock subscriptions, *held* conclusive on

specified questions, but open to certain defenses when attempted to be enforced, against a nonresident stockholder.—*Gilson v. Appleby*, 81 A. 925, 927.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

§ 283 (Del.Ch.) Directors of a corporation having permitted the time for the holding of the annual meeting for the election of directors to pass without such election, petitioner, a majority stockholder, *held* entitled to a summary order of the chancellor requiring the holding of such election under Laws 1901-03, c. 394.—*In re Jackson*, 81 A. 992.

§ 283 (Pa.) Election of officers of corporation at meeting of stockholders by minority of shares after withdrawal of other shares *held* valid.—*Commonwealth v. Vandegrift*, 81 A. 153.

Duty as to time and place of holding election of officers of corporation fixed by by-laws *held* as imperative as provision relating to amount of stock necessary to constitute quorum.—*Id.*

§ 283 (Vt.) A mere resolution of illegality of an election of directors of a corporation which was legal *held* ineffectual.—*Clark v. Wild*, 81 A. 536.

(D) Liability for Corporate Debts and Acts.

§ 331 (Pa.) Bill by creditor of bonding company to enforce personal liability against officers of company dismissed, where there is no averment that the acts of defendants caused loss to the corporation.—*Land Title & Trust Co. v. Connolly*, 81 A. 903.

§ 333 (Pa.) Bankrupt law and insolvency act *held* to impose no personal liability on directors of corporation concerned in preferential disposition of its assets.—*Kinter v. Connolly*, 81 A. 905.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 389 (Conn.) The burden of establishing the defense of ultra vires is on the corporation asserting it.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

§ 393 (N.J.Sup.) Certiorari *held* the appropriate writ by which a corporation acting as a state agency may be kept within the bounds of its authority.—*Sisters of Charity of St. Elizabeth v. Morris R. Co.*, 81 A. 817.

(B) Representation of Corporation by Officers and Agents.

§ 426 (Pa.) Majority of stockholders, who are also directors, *held* entitled to ratify act of directors in increasing salaries of two of their number as officers of the corporation.—*Russell v. Henry C. Patterson Co.*, 81 A. 136.

Act of directors of corporation in increasing salaries of two of their number as officers *held* not void, but voidable, so that it may be ratified at a stockholders' meeting.—*Id.*

Directors of corporation acting as stockholders *held* entitled to ratify their own voidable act as directors.—*Id.*

§ 432 (Conn.) On an issue as to the apparent authority of the corporation's president to indorse its paper, matters affecting his authority in fact were irrelevant.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

(C) Property and Conveyances.

§ 439 (Pa.) Sale by corporation of property acquired for proper purpose, but for which it has no use, *held* not engaging in business in violation of charter.—*Delaware, L. & W. Ry. Co. v. Welser*, 81 A. 994.

(D) Contracts and Indebtedness.

§ 464 (Conn.) Corporation engaged in the coal business *held* to have implied power to execute or indorse commercial paper other than for accommodation.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

§ 478 (Del.Ch.) 20 Del. Laws, c. 579, amending the chattel mortgage law, *held* intended to validate the lien of mortgages, upon both real and personal property.—*National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 81 A. 70.

§ 482 (Pa.) Suit by a bondholder for receiver and sale of the property covered by the mortgage securing the bonds *held* a foreclosure suit, and demurrable, when no copy of the mortgage is attached.—*Wagner v. Philadelphia, B. & T. St. Ry. Co.*, 81 A. 944.

§ 487 (N.J.) "Ultra vires contract" defined.—*Strickland v. National Salt Co.*, 81 A. 828, 832.

(E) Torts.

§ 493 (Vt.) A corporation *held* liable for punitive damages for willful act of its managing officers in continuing to maintain a nuisance to the damage of an adjoining property owner.—*Bishop v. Readsboro Chair Mfg. Co.*, 81 A. 454.

(F) Civil Actions.

§ 516 (Me.) In an action on a corporate note, plaintiff *held* properly permitted to amend the declaration by setting forth a provision indorsed on the back of the note, etc.—*Alden v. Camden Anchor-Rockland Mach. Co.*, 81 A. 866.

VIII. INSOLVENCY AND RECEIVERS.

§ 542 (Md.) The president of a debtor corporation cannot to the prejudice of its creditors purchase all the corporate property, and pay the consideration to the stockholders.—*Mundy v. Jacques*, 81 A. 289.

In an action to set aside a conveyance by a corporation to its president as an individual, evidence *held* to show that the transaction was to hinder corporate creditors.—*Id.*

§ 559 (Del.Ch.) A general manager of a corporation, discharged by a receiver, *held* not entitled to damages for termination of the contract.—*Du Pont v. Standard Arms Co.*, 81 A. 1089.

The appointment of a receiver for a corporation does not dissolve it, or terminate its legal existence.—*Id.*

§ 560 (Del. Ch.) A receiver for a corporation *held* not bound by its executory contracts.—*Du Pont v. Standard Arms Co.*, 81 A. 1089.

§ 560 (N.J.) Where corporation violated Corporation Law, § 30, receivers *held* entitled to avail themselves of the illegality, though the corporation received a benefit.—*Strickland v. National Salt Co.*, 81 A. 828, 832.

§ 561 (N.J.Ch.) A receiver of an insolvent corporation *held* authorized to file a bill to set aside fraudulent conveyances by the corporation, and subject the property to the payment of creditors.—*Bradley v. United Wireless Telegraph Co.*, 81 A. 1107.

§ 563 (Pa.) Personal liability of officers and directors of a bonding company to creditors *held* not enforceable in equity by a receiver of the company.—*Kinter v. Connolly*, 81 A. 905.

X. CONSOLIDATION.

§ 585 (Vt.) A charter fee would not accrue to the state by the consolidation of several existing corporations, so as to form a new corporation by virtue of P. S. 4287, as amended by Acts 1908, No. 103.—*State v. Rutland Ry., Light & Power Co.*, 81 A. 252.

If an attempted consolidation of corporations

was without legislative authority, no charter fee would accrue to the state.—*Id.*

Under Acts 1898, No. 19, and P. S. 800, construed in view of section 26, a certain railway light and power company *held* to have become a corporation by a special act (Acts 1908, No. 303, §§ 1, 2), so that a charter fee was due to the state.—*Id.*

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 610 (Del.Ch.) Evidence *held* to show that directors of a failing corporation became liquidating trustees, with duties of such trustees.—*Eberhardt v. Christiana Window Glass Co.*, 81 A. 774.

Where one of three liquidating trustees of a failing corporation acquired title to corporate property, the stockholders *held* entitled to avoid the transfer and participate in the profits on a resale.—*Id.*

Equity, in a suit by stockholders of a failing corporation, will compel an accounting of profits by a liquidating trustee and a new corporation formed by him.—*Id.*

XII. FOREIGN CORPORATIONS.

§ 631 (Del.) By comity a corporation created by one sovereignty is permitted to make contracts in another and sue thereon.—*Model Heating Co. v. Magarity*, 81 A. 394.

§ 636 (Del.) Each sovereignty *held* to have authority to exclude corporations created by another sovereignty or to prescribe terms with which they must comply.—*Model Heating Co. v. Magarity*, 81 A. 394.

§ 657 (Del.) Under Const. 1897, art. 9, § 5, and Act March 23, 1903 (22 Del. Laws, c. 395), foreign corporation which has not complied with statutory provisions *held* entitled to enforce contract against purchaser, who retains benefits thereon.—*Model Heating Co. v. Magarity*, 81 A. 394.

§ 672 (Del.) The question whether a contract made within the state by an agent of a foreign corporation can be enforced *held* properly raised by a plea in abatement.—*Model Heating Co. v. Magarity*, 81 A. 394.

CORRECTION.

See Equity, § 392.

CORROBORATION.

See Criminal Law, §§ 753, 780; Evidence, § 580.

COSTS.

See Appeal and Error, § 688; Divorce, § 180; Injunction, § 159½; Judgment, § 480; Parties, § 95; Pleading, § 85; Wills, §§ 405, 415.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 32 (Del.) Costs *held* improperly awarded against a trustee, on bill for an accounting.—*Emmons v. Curlett*, 81 A. 508.

§ 56 (N.J.) On dismissal of a bill to enjoin trustees from selling property in disregard of the terms of the deed under which they held it, construction of the deed not being involved, but only the question whether the trustees were about to exceed the power given them, *held*, complainants should not be allowed costs and attorney's fees, nor the Attorney General, made a defendant, as representative of the people, be allowed costs.—*Larkin v. Wikoff*, 81 A. 365.

V. AMOUNT, RATE, AND ITEMS.

§ 175 (N.J.Supp.) P. L. 1910, p. 247, amending District Court Act (P. L. 1898, p. 634, § 215), increasing fees to jurors, *held* not to authorize clerk to demand additional amount for

venire for jury of 12 men under District Court Act (P. L. 1906, p. 550) § 214.—*Shine v. District Court of City of Orange*, 81 A. 849.

§ 192 (Pa.) Bondholder improperly bringing suit to foreclose corporate mortgage, and securing appointment of receiver, *held* charged with costs and the expenses of the receiver whose appointment has been improperly secured.—*Wagner v. Philadelphia, B. & T. S. Ry. Co.*, 81 A. 944.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 240 (Md.) Certain nominal defendants *held* not liable for costs on appeal on reversal.—*Renahan v. McAvoy*, 81 A. 586.

COTENANCY.

See Tenancy in Common.

COUNCIL

See Municipal Corporations, §§ 680, 681, 971.

COUNTIES.

See Eminent Domain, § 75; Evidence, § 271; Mandamus, § 90; Taxation, § 453.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(C) County Expenses and Charges and Statutory Liabilities.

§ 134 (N.J.Supp.) The Geran Act does not relieve boards of freeholders of the duty of paying expenses of a general election held in aid for the whole county, imposed upon them by General Election Law, § 180.—*Jurgens v. Booth*, 81 A. 561.

COURTS.

See Constitutional Law, § 70; Criminal Law § 1011; Dead Bodies; Deposits in Court; Eminent Domain, §§ 167, 267; Fraudulent Conveyances, § 237; Garnishment, § 95; Guardian and Ward, § 58; Judges; Judgment, § 818; Jury, § 19; Justices of the Peace; Marriage, § 60; Municipal Corporations, § 971; Parties, § 97; Partition, § 43; Taxation, §§ 453, 495; Trial, §§ 368, 386.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 24 (Del.Super.) Jurisdiction over the subject-matter cannot be conferred by the assent of the parties, but must be given by law.—*Odessa Loan Ass'n v. Dyer*, 81 A. 460.

§ 25 (Del.Super.) The jurisdiction of a court over the person or property of a party *held* acquired by process served in the statutory manner.—*Odessa Loan Ass'n v. Dyer*, 81 A. 460.

§ 37 (Pa.) Objections to jurisdiction over subject-matter, as distinguished from jurisdiction over parties, *held* not subject to waiver.—*Lebanon Bridge Co. v. Union County*, 81 A. 324.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(C) Rules of Court and Conduct of Business.

§ 78 (Md.) A court cannot adopt court rules contrary to a constitutional provision or a statute, unless, in the latter case, in pursuance of the Constitution, and cannot by that means deprive a litigant of a right secured by law.—*Laurel Canning Co. of Prince George's County v. Baltimore & O. R. Co.*, 81 A. 126.

§ 79 (Md.) A court rule abating an action or the trial and stet dockets for more than two years *held* reasonable, and not prohibited.

Declaration of Rights, arts. 19, 20, or other provisions.—*Laurel Canning Co. of Prince George's County v. Baltimore & O. R. Co.*, 81 A. 126.

D) Rules of Decision, Adjudications, Opinions, and Records.

§ 116 (Vt.) Where a record, showing a plea not guilty, was incorrect, the court's refusal to correct the same by an amendment was an abuse of discretion.—*State v. Drown*, 81 A. 41.

7. COURTS OF PROBATE JURISDICTION.

§ 198 (N.J.) The orphans' court cannot assume jurisdiction unless conferred by statute.—*In re Alexander*, 81 A. 732.

§ 200¼ (Pa.) Orphans' Court *held* not to have power to appoint administrator c. t. a. as receiver to bring ejectment for land devised to life tenant and conveyed to third person in fee.—*Power v. Grogan*, 81 A. 416.

§ 202 (Me.) Under Rev. St. c. 65, § 34, an executor or administrator of a deceased heir at law has the same rights of appeal that the heir at law would have if living.—*Sprowl v. Randell*, 81 A. 80.

Neither Rev. St. c. 65, §§ 28-33, nor Rev. St. c. 80, § 7, gives a right of appeal to an executor or an administrator of one aggrieved in his lifetime by an order of a judge of probate.—*Id.*

§ 202 (N.H.) Under Code Pub. Gen. Laws 1904, art. 93, § 244, and article 5, § 60, *held* that the Court of Appeals had no jurisdiction of an appeal from an order of the orphans' court, refusing to receive an answer containing a demand for issues, in a proceeding charging an administrator with concealment of assets.—*McAvoy v. Renehan*, 81 A. 673.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 207 (Md.) The Court of Appeals has appellate jurisdiction only, and may not issue a writ of certiorari in original proceedings.—*Hendrick v. State*, 81 A. 18, 22.

§ 208 (N.H.) In reaching conclusions in opinions given on application by the Governor and the council, the Justices of the Supreme Court cannot receive evidence or determine questions of fact.—*In re Opinion of the Justices*, 81 A. 170.

Ordinarily the Justices of the Supreme Court will not give an opinion to the Governor and the council on a question involving private rights.—*Id.*

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 488 (N.J.) Power to strike out pleading in Supreme Court *held* to lodge solely in that court and not in circuit court judge to whom cause has been referred for trial under P. L. 1906, p. 209.—*Dayton v. Boettner*, 81 A. 726.

COVENANTS.

See Deeds; Evidence, § 456; Mortgages, § 119; States.

CREDIBILITY.

See Witnesses, § 387.

CREDITORS.

See Bankruptcy; Corporations, §§ 542, 561, 563; Creditors' Suit; Deeds, §§ 71, 88; Ex-

ecutors and Administrators, §§ 224, 416, 450; Exemptions; Fraudulent Conveyances; Garnishment; Paupers, § 40; Principal and Surety, § 115; Receivers, § 163.

CREDITORS' SUIT.

§ 36 (N.J.Ch.) The filing of a judgment creditor's bill to set aside a fraudulent conveyance, and to subject the property conveyed to the payment of a judgment and the service of process thereunder, create a lien in equity on the equitable estate of the debtor.—*Bradley v. United Wireless Telegraph Co.*, 81 A. 1107.

CRIMINAL LAW.

See Animals, § 45; Courts, § 116; Fines; Health; Highways, § 186; Homicide; Indictment and Information; Intoxicating Liquors, §§ 165, 168, 226, 236; Jury; Lotteries; Municipal Corporations, § 640; Witnesses.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 261 (Vt.) Under P. S. 2264, conviction of accused who had not been arraigned nor pleaded to the information, *held* void.—*State v. Drown*, 81 A. 641.

X. EVIDENCE.

(A) Judicial Notice. Presumptions, and Burden of Proof.

§ 308 (Del.Gen.Sess.) Person *held* presumed to be innocent until proven guilty to the satisfaction of the jury beyond a reasonable doubt.—*State v. Hastings*, 81 A. 403.

§ 327 (Del.Gen.Sess.) The burden is on the state to prove accused guilty beyond a reasonable doubt.—*State v. Hastings*, 81 A. 403.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 351 (Pa.) Admission in evidence in trial for murder of letter written at request of defendant to secure possession of damaging letters written to third party *held* not reversible error.—*Commonwealth v. Marion*, 81 A. 423.

§ 354 (Pa.) Admission of evidence in murder trial that witnesses observed conduct and appearance of accused after the killing, and saw nothing to indicate that he was of unsound mind, *held* not error.—*Commonwealth v. Marion*, 81 A. 423.

(C) Other Offenses, and Character of Accused.

§ 370 (Md.) On a prosecution for receiving stolen goods, evidence of defendant's receipt thereof on more than one occasion from the same thief *held* admissible.—*Lucry v. State*, 81 A. 681, 685.

Though the state on prosecution for receiving stolen goods failed to prove receipt on the day named in the indictment, *held*, in the absence of application therefor, that it was not required to select some definite time on which to rely for a conviction.—*Id.*

§ 376 (Vt.) The rule that prosecutor cannot impeach the character of accused until the latter has adduced evidence to support it does not apply to evidence otherwise having a legitimate bearing on the issue of guilt or innocence.—*State v. Averill*, 81 A. 461.

(E) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 429 (Conn.) Under Pub. Acts 1907, c. 167, § 3, as amended by Pub. Acts 1909, c. 55, § 2, a kennel certificate *held* admissible in a prosecution for killing dogs, though inartificially drawn.—*State v. Tripp*, 81 A. 247.

(I) Opinion Evidence.

§ 448 (Vt.) A question whether at a particular time and place accused said or did anything that indicated a desire to hide a petticoat *held* properly excluded as calling for a conclusion.—State v. Averill, 81 A. 461.

§ 452 (Pa.) Exclusion of opinion evidence as to sanity of accused *held* not an abuse of discretion.—Commonwealth v. Marion, 81 A. 423.

(K) Confessions.

§ 517 (Pa.) In trial for murder, confession of defendant as to participation in robbery *held* admissible.—Commonwealth v. Comporto, 81 A. 906.

(M) Weight and Sufficiency.

§ 570 (Pa.) To establish the defense of insanity, the evidence must so preponderate in favor of insanity as to overbalance the presumption and proof of sanity.—Commonwealth v. Lee, 81 A. 812.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

§ 656 (Pa.) A judge has a right to express to the jury his opinion as to the weight of evidence.—Commonwealth v. Cunningham, 81 A. 711.

Remarks of judge as to the sufficiency of evidence to show self-defense *held* not ground for reversal.—Id.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 695 (Vt.) Where a question objected to contained several elements and one of them was improper, it was not error to exclude the entire question.—State v. Averill, 81 A. 461.

(F) Province of Court and Jury in General.

§ 753 (Md.) The court will not discharge defendants because the uncorroborated evidence of accomplices alone connects them with the crime.—Luery v. State, 81 A. 681, 685.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 780 (Md.) The courts may well advise juries against conviction on testimony of accomplice without corroboration.—Luery v. State, 81 A. 681, 685.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 936 (Vt.) Where accused was convicted of murder, that the court charged on involuntary manslaughter *held* not to constitute surprise warranting a new trial.—State v. Averill, 81 A. 461.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1011 (Md.) Mode of obtaining review by the Court of Appeals of the constitutionality of Laws 1910, c. 207, relating to motor vehicles, and in section 140p providing for appeals only to the circuit court, stated.—Hendrick v. State, 81 A. 18, 22.

In a prosecution for violation of Laws 1910, c. 207, regulating motor vehicles, accused under section 140p appealed to the circuit court. *Held*, that the circuit court had jurisdiction to determine the constitutionality of the law, and hence certiorari should not issue on that ground.—Id.

Certiorari should not issue to test the jurisdiction of magistrates and lower courts to try infractions of Laws 1910, c. 207, § 140p, regulating motor vehicles.—Id.

§ 1011 (Md.) Where a criminal prosecution was pending before a justice, certiorari should not be issued because of the alleged prejudice or bias of the justice.—Crichton v. State, 81 A. 36.

In view of Code, art. 52, § 12b, as added Laws 1906, c. 444, an irregularity in warrants issued by a justice of the peace under Code art. 56, § 140p, as added by Laws 1910, c. 207, for a violation of the regulation of the motor vehicles, *held* not to deprive the justice of jurisdiction; and hence certiorari should not be issued to correct the error.—Id.

§ 1011 (N.J.Sup.) Certiorari to enable the court to entertain a motion to quash, based on grounds extraneous to the indictment will not be allowed.—State v. Bowman, 81 A. 561.

(C) Proceedings for Transfer of Cause and Effect Thereof.

§ 1069 (Md.) Certiorari may be issued before final judgment.—Crichton v. State, 81 A. 36.

(G) Review.

§ 1137 (Pa.) Defendant *held* not entitled to complain of refusal to strike out confession because not offered as a whole, where a portion was stricken out at his request.—Commonwealth v. Comporto, 81 A. 906.

CROPS.

See Agriculture.

CROSS-COMPLAINT.

See Pleading, § 221.

CROSS-EXAMINATION.

See Witnesses, §§ 268-387.

CROSSINGS.

See Railroads, §§ 303-350.

CRUELTY.

See Animals, § 42.

CURATIVE ACTS.

See Constitutional Law, § 194.

CURTESY.

See Dower.

CUSTODIA LEGIS.

See *Lis Pendens*, § 3.

CUSTOMS AND USAGES.

§ 17 (Md.) Evidence of a usage of banks to take drafts for collection only *held* inadmissible, where the draft in question was taken for discount.—Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank, 81 A. 294.

§ 19 (Md.) Evidence of a custom is inadmissible until proof of existence, and that the custom has become generally known.—Auto & Accessories Mfg. Co. v. Merchants' Nat. Bank, 81 A. 294.

DAMAGES.

See Appeal and Error, §§ 1004, 1066, 1068, 1201; Breach of Marriage Promise, § 2; Corporations, § 493; Death, § 99; Eminent Domain, §§ 71-153, 167-264; Evidence, §§ 113, 473; Fraud, §§ 49, 59; Injunction, § 260, 261; Libel and Slander, §§ 116, 121; Money Received, § 19; Mortgages, § 217; Pleading, § 214; Sales, §§ 384, 418; Specific Performance, § 114; Trial, § 216; Wills, § 68; Work and Labor, § 29.

I. NATURE AND GROUNDS IN GENERAL.

§ 1 (Vt.) Ordinarily damages are awarded on the theory of compensation.—*Chase v. Hoosac Tunnel & W. R. Co.*, 81 A. 236.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(C) Interest, Costs, and Expenses of Litigation.

§ 67 (Vt.) Damages allowed as an equivalent of legal interest are actual and not punitive.—*Griswold v. Wentworth*, 81 A. 622.

§ 69 (Pa.) Damages, in an action for injuries to land for detention of payment of plaintiff's claim, *held* improperly allowed.—*Pierce v. Lehigh Valley Coal Co.*, 81 A. 142.

V. EXEMPLARY DAMAGES.

§ 87 (Conn.) Common-law doctrine authorizing an award of punitive damages in the jury's discretion does not obtain in Connecticut.—*Hassett v. Carroll*, 81 A. 1013.

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

§ 98 (Pa.) Right to recover for permanent injury to earning capacity stated.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 81 A. 93.

§ 100 (Pa.) Any allowance for future loss due to impairment of earning capacity must be capitalized, and brought down to its present worth.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 81 A. 93.

(B) Injuries to Property.

§ 105 (Vt.) Where property wrongfully destroyed may be put to more than one use, and its value for one purpose exceeds that for another, the owner may recover the larger amount.—*Chase v. Hoosac Tunnel & W. R. Co.*, 81 A. 236.

§ 112 (Vt.) The measure of damages for injury to growing timber by fire *held* the difference between the value of the land immediately before and immediately after the fire.—*Chase v. Hoosac Tunnel & W. R. Co.*, 81 A. 236.

(C) Breach of Contract.

§ 124 (N.H.) The owner of an incomplete building destroyed by fire four days after the date fixed for completion by the contractor *held* not entitled to recover any actual damages from the latter for breach of contract to complete on the date fixed.—*S. Anderson & Son v. Shattuck*, 81 A. 781.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) Pleading.

§ 158 (Md.) Under the declaration, plaintiff *held* entitled to show injury to her hearing as an element of damages.—*McCarthy v. Clarke*, 81 A. 12.

(B) Evidence.

§ 172 (Md.) In an action for injuries to plaintiff, who operated a pool room, plaintiff *held* properly permitted to testify as to the profits of the pool room.—*Firor v. Taylor*, 81 A. 389.

§ 174 (Vt.) In an action for damages to growing timber by fire, evidence *held* admissible that hardwood trees were worth more, if permitted to grow, than if cut into firewood.—*Chase v. Hoosac Tunnel & W. R. Co.*, 81 A. 236.

§ 182 (Pa.) Evidence, in an action for personal injuries, that a slight surgical operation would cure an otherwise permanent injury is admissible.—*Leitzell v. Delaware, L. & W. R. Co.*, 81 A. 543.

(C) Proceedings for Assessment.

§ 199 (Vt.) The action of the court on motion for a certified execution in ordering a conditional remittitur of damages to a sum with interest *held* not objectionable as involving an assessment of damages.—*Griswold v. Wentworth*, 81 A. 622.

§ 214 (Pa.) Instruction, in action for personal injuries as to effect of refusal of plaintiff to submit to a simple operation which would reduce the extent of his injury should have been given.—*Leitzell v. Delaware, L. & W. R. Co.*, 81 A. 543.

§ 216 (Pa.) In action for personal injuries, instructions on the question of damages *held* erroneous.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 81 A. 93.

DEAD BODIES.

§ 3 (N.J.Ch.) The court *held* to possess jurisdiction to supervise the burial of a child of parents who had separated.—*De Festetics v. De Festetics*, 81 A. 741.

DEATH.

See Highways, § 213; Master and Servant, §§ 265, 278; Municipal Corporations, §§ 818, 819; Principal and Agent, § 46; Railroads, §§ 297, 347, 350; Wills, § 538.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 25 (Pa.) Widow in action for wrongful death, under Act April 15, 1851 (P. L. 869), and Act April 26, 1855 (P. L. 309), *held* to have a right to compromise the claim without the consent of the guardian of the children.—*Shambach v. Middlecreek Electric Co.*, 81 A. 802.

(D) Pleading and Evidence.

§ 64 (N.J.) In an action for wrongful death under 1 Gen. St. 1895, § 1188, it is competent to show the relations existing between deceased and her next of kin as a basis for pecuniary injury.—*Smith v. Barnard*, 81 A. 736.

§ 67 (Pa.) In action for causing death of plaintiff's husband, evidence of amount of farming and trucking done by him *held* competent.—*Buckman v. Philadelphia & R. Ry. Co.*, 81 A. 332.

(E) Damages, Forfeiture, or Fine.

§ 99 (Conn.) Under the statute allowing recovery for death by negligence of just damages, not exceeding \$5,000, *held* a verdict within such limit should not be set aside as excessive, except for manifest mistake of law or justified suspicion of corruption, prejudice, or partiality.—*McKiernan v. Lehmaier*, 81 A. 969.

DEBTOR AND CREDITOR.

See Bankruptcy; Creditors' Suit; Fraudulent Conveyances; Garnishment.

DECEDENTS.

See Descent and Distribution; Executors and Administrators; Witnesses, §§ 129, 183.

DECEIT.

See Fraud.

DECLARATION.

See Pleading.

DECLARATIONS.

See Evidence, §§ 269, 271.

DECREE.

See Equity, §§ 392, 427-430; Trusts, § 375; Wills, § 423.

DEDICATION.

I. NATURE AND REQUISITES.

§ 15 (Md.) The question of a dedication to the public use depends upon the intention of the parties.—*Stover v. Steffey*, 81 A. 33.

§ 15 (Md.) An intent to dedicate land as a public highway is essential to a dedication.—*Bloede v. City of Baltimore*, 81 A. 67.

§ 19 (Md.) Where platted lots sold with reference to the plat were separated from a lot designated thereon as a "park" by other lots and a street, *held*, that there was no presumptive dedication of the "park" lot as a public park.—*Stover v. Steffey*, 81 A. 33.

§ 19 (Md.) The owner of land, by conveying lots, abutting on land shown on plats made by him as a street, retaining the fee thereof in himself, *held*, to dedicate the land shown as a street to the public use.—*Bloede v. City of Baltimore*, 81 A. 67.

§ 19 (N.H.) Extent of estoppel against a vendor to deny the existence of way shown by a recorded plan as to a particular purchaser determined.—*Douglass v. Belknap Springs Land Co.*, 81 A. 1086.

A vendor *held* not estopped to deny the existence of certain ways shown on a recorded plan.—*Id.*

The right of a purchaser of lots forming part of a tract subdivided according to a recorded plan to have an avenue shown by the plan as following a lake line left unobstructed *held* not affected by a certain mistake, if any.—*Id.*

The right of a purchaser of lots forming part of a tract subdivided according to a recorded plan to have an avenue shown by the plan as following a lake line left unobstructed *held* not affected because part of the avenue can be used only for a footpath.—*Id.*

§ 20 (Vt.) Facts *held* to show a dedication of a strip of land by defendant's grantor to a city for street purposes.—*City of Montpelier v. McMahon*, 81 A. 977.

§ 35 (Vt.) Facts *held* to show an acceptance of a strip of land dedicated by defendant's grantor to a city for street purposes.—*City of Montpelier v. McMahon*, 81 A. 977.

§ 38 (Vt.) Facts *held* to show an irrevocable dedication of a strip of land by defendant's grantor to a city for street purposes.—*City of Montpelier v. McMahon*, 81 A. 977.

§ 43 (Vt.) Evidence of a verbal agreement between defendant's grantor and complainant city concerning land in controversy *held* admissible on the issue of dedication for street purposes.—*City of Montpelier v. McMahon*, 81 A. 977.

§ 44 (Md.) Evidence *held* not to show the dedication as a public park of a lot shown on a plat, with reference to which lots were sold, as a "park".—*Stover v. Steffey*, 81 A. 33.

The intention of the parties to the dedication must be shown by clear evidence.—*Id.*

§ 44 (Md.) The intent to dedicate land as a public highway must be clearly proved.—*Bloede v. City of Baltimore*, 81 A. 67.

A claim of dedication as a street may be rebutted by circumstances inconsistent with an intent to dedicate.—*Id.*

Evidence *held* insufficient to show an intent to dedicate land for a public street.—*Id.*

II. OPERATION AND EFFECT.

§ 61 (N.H.) By deeding lots with reference to a plan recorded by its predecessor, defendant represented that the ways shown by the

plan existed, and the purchaser can enjoin incumbrance of such ways to his prejudice.—*Douglass v. Belknap Springs Land Co.*, 81 A. 1086.

DEDUCTIONS.

See Eminent Domain, § 145.

DEEDS.

See Adverse Possession, § 71; Constitutional Law, § 194; Costs, § 56; Easements, § 26; Ejectment, §§ 90, 92; Estoppel, §§ 27, 62; Evidence, § 143; Execution, § 315; Fraudulent Conveyances, §§ 113, 154; Husband and Wife, §§ 273, 278; Mortgages; Principal and Agent, § 103; Reformation of Instruments, § 45; Taxation, §§ 679, 744; Trespass, § 19; Trial, §§ 53, 59; Trusts, §§ 102, 145.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 24 (Md.) An agreement *held* effective as a covenant to stand seised to uses.—*Murray v. Kerney*, 81 A. 6.

(C) Execution.

§ 52 (Md.) Laws 1908, c. 105, and Laws 1910, c. 588, amending Laws 1908, c. 259, *held* to have cured the errors in a certain deed.—*Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby*, 81 A. 284.

(D) Delivery.

§ 54 (Md.) Delivery and acceptance of a deed is essential to its validity to transfer title.—*Renehan v. McAvoy*, 81 A. 586.

§ 56 (Md.) The test of delivery of a deed is the unconditional relinquishment by the grantor of the custody or control of the instrument.—*Renehan v. McAvoy*, 81 A. 586.

§ 58 (Md.) Delivery of a deed to a third person, in order to be operative, must be for the use and benefit of the grantee.—*Renehan v. McAvoy*, 81 A. 586.

§ 61 (Md.) Delivery of a deed to different persons, each of whom held it as the grantor's agent, was not a sufficient delivery.—*Renehan v. McAvoy*, 81 A. 586.

(E) Validity.

§ 70 (N.J.) A conveyance *held* to be procured by fraud and set aside.—*Ashby v. Yetter*, 81 A. 730.

§ 71 (N.J.) Parents, conveying to a creditor of their son under pressure of a threat to have him criminally prosecuted, *held* entitled to have the conveyance set aside.—*Ball v. Ball*, 81 A. 724.

II. RECORDING AND REGISTRATION.

§ 88 (Md.) Under Code, art. 21, §§ 19, 21, a deed not recorded within six months from its date is valid as between the parties to it, being subject only to the rights of creditors and purchasers without notice.—*Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby*, 81 A. 284.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 90 (Vt.) As between two equally natural and reasonable constructions of a deed, that should be adopted which is most favorable to the grantee.—*Huntley v. Houghton*, 81 A. 452.

§ 93 (Vt.) In construing the descriptive part of a deed, the intention of the parties should control, when it can be ascertained therefrom.—*Huntley v. Houghton*, 81 A. 452.

§ 96 (Pa.) Where possession accompanies an ancient deed, recitals therein are *prima facie* evidence of the facts recited, even against third persons.—*Dougherty v. Welshans*, 81 A. 997.

Recital in administratrix's deed that title became vested in decedent, though not conclusive, *held* evidence affording foundation for presumption of grant to decedent.—*Id.*

§ 108 (Del.Super.) A deed takes effect from its delivery, and not from its record.—*Doe ex dem. Littleton v. Roe*, 81 A. 47.

(B) Property Conveyed.

§ 111 (Vt.) When the particular and general descriptions of a deed conflict, effect should be given to the particular description in ascertaining the intention of the parties.—*Huntley v. Houghton*, 81 A. 452.

§ 114 (Vt.) A deed to plaintiffs *held* to include a certain tract, construed in view of the rule that the particular description of a deed should prevail over the general description.—*Huntley v. Houghton*, 81 A. 452.

(D) Exceptions and Reservations.

§ 138 (Me.) A reservation may be said to vest in the grantor some new right or interest not before existing in him, while an exception in a grant retains in him title to what is excepted.—*McIntire v. Lauckner*, 81 A. 784.

§ 138 (Pa.) Technical meaning of terms "reservation" and "exception" *held* to give way to evident intent.—*Rieser & Sons v. Wayne Storage Water Power Co.*, 81 A. 300.
"Reservation" and "exception" distinguished.—*Id.*

§ 143 (Me.) Unless a reservation to a grantor contains words of inheritance, it gives an estate for his life only.—*McIntire v. Lauckner*, 81 A. 784.

IV. PLEADING AND EVIDENCE.

§ 208 (Del.Super.) Mere possession of a deed by the grantee is not conclusive of delivery.—*Doe ex dem. Littleton v. Roe*, 81 A. 47.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, §§ 106-159, 652.

DELAY.

See Payment, § 66.

DELEGATION OF POWER.

See Eminent Domain, § 9.

DELIVERY.

See Deeds, §§ 54-61, 108, 208; Insurance, § 137; Sales, § 161.

DEMAND.

See Reformation of Instruments, § 37.

DEMURRAGE.

See Carriers, § 196.

DEMURRER.

See Equity, §§ 215, 330; Pleading, §§ 48, 204-221.

DEPOSITIONS.

See Appeal and Error, §§ 526, 1033.

§ 65 (Md.) Under Code Pub. Gen. Laws 1904, art. 35, § 17, a party served with notice of taking depositions may appear in person and

cross-examine witnesses.—*Goodman v. Saperstein*, 81 A. 695.

§ 66 (Md.) The rule that an objection to a question as leading must be made at the time cannot be dispensed with in taking a foreign deposition on the ground that a party was not represented when the depositions were taken because of the expense of being represented.—*Doggett v. Tatham*, 81 A. 376.

§ 111 (Md.) The cross-examination of witnesses testifying by deposition, after a remand of depositions for that purpose, waives all objection to the admissibility of the depositions as a whole.—*Goodman v. Saperstein*, 81 A. 695.

DEPOSITS.

See Banks and Banking, §§ 127-134.

DEPOSITS IN COURT.

§ 2 (Md.) An order requiring money to be brought into court should be passed only upon evidence conclusively showing the present liability of the person directed to deposit it.—*Zielian v. Baltimore Plate Ice Co.*, 81 A. 22.

DESCENT AND DISTRIBUTION.

See Deeds, § 143; Estoppel, §§ 27, 62; Evidence, § 271; Executors and Administrators; Taxation, §§ 859, 862; Wills.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

§ 76 (Me.) A husband *held* to have neither legal nor equitable title to property which belonged to his deceased wife, but only a statutory right to have one-half of the net avails of it after administration, distributed to him.—*Whiting v. Farnsworth*, 81 A. 214.

§ 87 (Me.) An attempted gift by a husband of his deceased wife's personality *held* void.—*Whiting v. Farnsworth*, 81 A. 214.

(C) Debts of Intestate and Incumbrances on Property.

§ 129 (N.J.Ch.) At common law, the heirs at law of a deceased mortgagor had a right of action to compel the administrator to exonerate their land from a mortgage made by the deceased.—*Smith v. Wilson*, 81 A. 851.

2 Gen. St. 1895, p. 2112, § 47, and its supplements, *held* to abolish the right of the heir or devisee to be exonerated out of the personal estate from a mortgage debt, created and owed by the ancestor or testator.—*Id.*

The right of the heir or devisee at common law to exoneration was not allowed, where he received land, incumbered by a mortgage which secured a debt which the ancestor or testator did not owe.—*Id.*

Right of heirs to present a claim against an administrator for exoneration as provided by P. L. 1898, p. 740, § 72, *held* not enforceable where there was no proof of a judicial settlement of the estate by the administrator.—*Id.*

DESCRIPTION.

See Boundaries, § 3; Carriers, § 311; Deeds, §§ 111, 114; Ejectment, § 94; Names; Wills, §§ 566, 584.

DILIGENCE.

See Specific Performance, § 99.

DIRECTING VERDICT.

See Trial, § 139.

DISABILITIES.

See Insane Persons, § 2.

DISBURSEMENTS.

See Wills, § 415.

DISCHARGE.

See Master and Servant, § 29; Principal and Surety, §§ 99-115.

DISCOVERY.**I. IN EQUITY.**

§ 3 (Pa.) A city seeking to acquire works of water company under Act April 29, 1874 (P. L. 95) § 34, cl. 7, *held* not entitled by proceedings in equity to compel itemized statement and exhibit of books, papers, and vouchers; mandamus being the appropriate remedy.—City of Williamsport v. Citizens' Water & Gas Co., 8 A. 316; Same v. Williamsport Water Co., Id. 324.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 79 (N.J.) Under Practice Act (P. L. 1903, p. 575) § 140, answer of defendant to interrogatory *held* not conclusive on plaintiff.—Goodman v. Lehigh Valley R. Co. of New Jersey, 81 A. 848, 851; Mays v. Same, Id. 851.

DISCRETION OF COURT.

See Appeal and Error, §§ 969-982; Courts, § 116; Criminal Law, § 452; Equity, § 430; Municipal Corporations, § 978; Quo Warranto, § 6; Trial, § 314.

DISCRIMINATION.

See Constitutional Law, §§ 229, 247; Master and Servant, § 69.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 87, 211, 627, 633, 635, 781, 856, 861; Brokers, § 80; Building and Loan Associations, § 39; Corporations, § 331; Costs, § 56; Dower; Judgment, § 480; Eminent Domain, § 271; Exceptions, Bill of, § 55; Marriage, § 51; Master and Servant, §§ 29, 238, 276; Mechanics' Liens, § 288; Municipal Corporations, § 706; Names; Quietting Title, § 12; Railroads, §§ 18, 297, 484; Trial, §§ 139, 169.

I. VOLUNTARY.

§ 26 (Md.) In a suit against joint tort-feasors, plaintiff may take a nonsuit as to such defendants as the evidence does not connect with the tort.—Firr v. Taylor, 81 A. 389.

II. INVOLUNTARY.

§ 53 (Del.Super.) Certain facts *held* not ground for a motion for nonsuit.—Trustees of Mutual Loan Ass'n v. Tyre, 81 A. 48.

DISSOLUTION.

See Attachment, § 184; Partnership, §§ 242, 282-344.

DISTRESS.

See Landlord and Tenant, § 272; Time.

DISTRIBUTION.

See Descent and Distribution; Partnership, §§ 304, 311.

DIVERSION.

See Waters and Water Courses, §§ 85, 179.

DIVIDENDS.

See Corporations, §§ 152, 157.

DIVORCE.

See Constitutional Law, § 300.

III. DEFENSES.

§ 49 (N.J.) Adultery ceases to be a ground for divorce after condonation.—Clark v. Clark, 81 A. 1126.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(D) Evidence.**

§ 129 (N.J.) Evidence *held* to show adultery by defendant wife, entitling plaintiff to divorce.—Moyer v. Moyer, 81 A. 1111.

§ 129 (N.J.) Evidence of adultery *held* sufficient to warrant a decree for divorce.—Clark v. Clark, 81 A. 1126.

(H) Fees and Costs.

§ 189 (N.J.) A co-respondent in a divorce suit who causes himself to be made a party *held* liable for plaintiff's costs and expenses under a statute providing that a party charged with being particeps criminis may be made a party upon application on terms prescribed by the court.—Clark v. Clark, 81 A. 1126.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 214 (N.J.Ch.) Application of wife in suit for divorce for alimony and counsel fee pendente lite will not be granted only on her sworn statement of the alleged offense.—Earl v. Earl, 81 A. 575.

§ 266 (N.J.Ch.) Chancery Act, §§ 44, 46, *held* to refer to money decrees rendered in personam, and not to affect Divorce Act 1902, § 20, re-enacted in P. L. 1907, p. 482, § 28.—Wood v. Price, 81 A. 1093.

The lien of a wife acquired in a suit for alimony by the execution of a writ of sequestration on real estate, as authorized by P. L. 1907, pp. 481, 482, §§ 25, 26, *held* transferred to the surplus money on the sale of the real estate to satisfy an underlying incumbrance.—Id.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 327 (N.J.Ch.) That one went to Dakota with the purpose of securing a divorce *held* not to prevent him from getting a valid divorce there, provided he went animus manendi.—Carling v. Carling, 81 A. 565.

In suit for divorce, evidence *held* insufficient to sustain a plea of previous decree, procured in another state.—Id.

§ 331 (N.J.Ch.) A wife instituting a suit for alimony against her nonresident husband and obtaining a sequestration of his real estate under Divorce Act 1907, §§ 25, 26, *held* not to have waived or abandoned the rights acquired.—Wood v. Price, 81 A. 1093.

DOCKETS.

See Appeal and Error, § 76; Constitutional Law, § 321; Equity, § 395; Trial, § 11.

DOCUMENTS.

See Criminal Law, § 429; Evidence, §§ 332-376.

DOGS.

See Animals, §§ 4, 45.

DOMICILE.

See Marriage, § 60; Paupers, §§ 19, 22, 52; Venue.

§ 5 (N.J.Ch.) Domicile of a legitimate unemancipated minor *held* to be that of his father, if the father be alive.—Hess v. Kimble, 81 A. 363.

A minor cannot change his domicile of his own will.—Id.

§ 8 (N.J.Ch.) The burden of proof to establish a change of domicile on the part of a minor is on him.—Hess v. Kimble, 81 A. 363.

DONATIONS.

See Gifts.

DOWER.

See Evidence, § 332.

I. NATURE AND REQUISITES.

§ 27 (Del.Orph.) A vendor of an undivided interest in land to his cotenant may not, as against the dower right of the widow of the cotenant, enforce a lien for the unpaid price.—In re Tomlinson, 81 A. 468.

II. INCHOATE INTEREST.**(B) Bar, Release, or Forfeiture.**

§ 46 (N.J.Ch.) Where the wife of a mortgagor is after foreclosure entitled to subject the surplus to her inchoate right of dower, she is entitled to have one-third of it reserved, even though the mortgagor's judgment creditor has attached part.—Wood v. Price, 81 A. 684.

§ 53 (N.J.Ch.) Where husband conveys land to his wife through an intermediate, and the wife joins in such deed, and conveyance is set aside as fraudulent, a sale under judgment against the husband *held* free from the inchoate right of dower.—Campbell v. Weber, 81 A. 732.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 83 (Del.Orph.) A purchaser at an execution sale *held* a lienor of the debtor, within the rule governing the assigning of dower to a widow.—In re Tomlinson, 81 A. 468.

A debt incurred by a man prior to his marriage and paid during his lifetime cannot be considered in assigning dower to his widow, and her right cannot be diminished thereby.—Id.

§ 99 (Del.Orph.) Freeholders, appointed to assign dower, cannot, as witnesses, contradict, on exceptions, their award, regular on its face and showing a full compliance with the order of the court.—In re Tomlinson, 81 A. 585.

DRAINS.

See Municipal Corporations, §§ 358-362, 809.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 278-309.

DUES.

See Building and Loan Associations, §§ 38, 42; Insurance, §§ 755, 756.

DUPLICITY.

See Pleading, § 205.

DURESS.

See Compromise and Settlement, § 18.

EARNING CAPACITY.

See Damages, §§ 98, 100.

EASEMENTS.

See Dedication; Ejectment, § 6; Estoppel, § 93; Highways; Injunction, § 37; Railroads, §§ 64, 90.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 1 (Pa.) Right to use land, not inconsistent with general right of property in owner, *held* an easement or franchise, and not a grant of the soil.—Riesler & Sons v. Wayne Storage Water Power Co., 81 A. 800.

§ 12 (Md.) A grantee's easement in an alley "to be laid out" by the grantor *held* not lost by the grantor not improving it (citing 5 Words and Phrases, 4087).—Oberheim v. Reeside, 81 A. 590.

§ 18 (Me.) A right of way by necessity *held* to exist from a town road to an inclosed burial lot excepted from a devise.—McIntire v. Lauckner, 81 A. 784.

§ 26 (Pa.) Clause in deed by canal company *held* to constitute a reservation of an easement only, which was extinguished by abandonment of canal by grantor.—Riesler & Sons v. Wayne Storage Water Power Co., 81 A. 300.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 63 (Me.) An action for obstructing a right of way leading to a burial lot *held* on the case, and not in trespass *quare clausum*.—McIntire v. Lauckner, 81 A. 784.

EDUCATION.

See Guardian and Ward, § 80.

EJECTMENT.

See Action, § 60; Adverse Possession, § 116; Appeal and Error, §§ 989, 1066; Courts, § 200½; Estoppel, § 120; Evidence, § 78; Executors and Administrators, §§ 121, 450; Judgment, § 70; Parties, § 59; Trial, §§ 59, 251; Witnesses, §§ 144, 149.

I. RIGHT OF ACTION AND DEFENSES.

§ 6 (Md.) An easement in an alley would not be recoverable in ejectment.—Oberheim v. Reeside, 81 A. 590.

§ 9 (Del.Super.) Plaintiff in ejectment must recover, if at all, on the strength of his own title.—Doe ex dem. Littleton v. Roe, 81 A. 47.

§ 16 (Pa.) Proof of actual possession of wild lands *held* not required in action of ejectment.—Dougherty v. Welshans, 81 A. 997.

III. PLEADING AND EVIDENCE.

§ 90 (Pa.) Deed in chain of title of defendant *held* admissible in evidence, notwithstanding recital of previous conveyance by grantors.—Africa v. Trexler, 81 A. 707.

§ 90 (Pa.) In ejectment, administratrix's deed, made 60 years before the suit, *held* admissible in evidence.—Dougherty v. Welshans, 81 A. 997.

§ 94 (Vt.) In ejectment for lot 71 in the second division of lands in the town of Brighton, defendant *held* not entitled to the direction of a verdict on the theory that such description was insufficient.—Lang v. Clark, 81 A. 625.

§ 95 (Pa.) Evidence *held* sufficient to sustain a verdict for plaintiff.—Citizens' Gas Co. of Port Alleghe v. Whitney, 81 A. 804.

§ 95 (Pa.) Where defendants in ejectment rely on sheriff's deed 60 years old, that one of the writs of execution cannot be found *held* not

to defeat their title.—*Riffert v. Lehigh Valley Coal Co.*, 81 A. 810.

§ 95 (Pa.) In action of ejectment, verdict and judgment for plaintiff *held* sustained by the evidence.—*Dougherty v. Welshans*, 81 A. 907.

§ 96 (Pa.) Acceptance of service by defendant's counsel in ejectment *held*, under Act July 9, 1901 (P. L. 619) § 1, cl. 14, *prima facie* evidence of defendant's possession of the premises.—*Africa v. Trexler*, 81 A. 707.

IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 109 (Vt.) Where there was evidence that plaintiff was entitled to recover part of the land by reason of adverse possession, defendant was not entitled to the direction of a verdict because of the defective character of plaintiff's record title.—*Lang v. Clark*, 81 A. 625.

§ 110 (Vt.) An instruction in ejectment that plaintiff must show a right superior to that of the defendant *held* not objectionable as leading to an inference that defendant must show some title.—*Lang v. Clark*, 81 A. 625.

ELECTION.

See Partition, § 79.

ELECTION OF REMEDIES.

See Marriage, § 51.

§ 7 (Me.) The doctrine of election of remedies does not apply where plaintiff brought a bill to convert an equitable title, after sale on execution, into a legal one and filed an application for scire facias for an alias execution.—*Marsh Bros. & Co. v. Bellefleur*, 81 A. 79.

§ 11 (Me.) Doctrine of election of remedies stated.—*Marsh Bros. & Co. v. Bellefleur*, 81 A. 79.

ELECTIONS.

See Corporations, §§ 195, 196, 198, 201, 283; Counties; Indictment and Information, § 137; Judges, § 3; Municipal Corporations, § 46; Quo Warranto, §§ 55, 61; Stipulations, § 18.

VII. BALLOTS.

§ 180 (N.H.) Certain ballots *held* not to be counted on account of conflicting marks.—*Dinsmore v. City of Manchester*, 81 A. 533.

§ 180 (Pa.) Act April 29, 1903 (P. L. 338), amending Act June 10, 1893 (P. L. 419), *held* not to substantially change the law by the use of the word "may" for the word "shall" in the section relating to the marking of ballots.—*Appeal of Dailey*, 81 A. 655.

§ 180 (R.I.) Under Gen. Laws 1900, c. 11, § 43, a cross in one circle of a ballot is nullified by a cross in another circle.—*Thorpe v. Fales*, 81 A. 721.

Ballots containing marks other than a cross in a party circle *held* void, as rendering the voter's intention uncertain.—*Id.*

§ 186 (Pa.) Improper marking of ballot *held* to render it illegal under Act June 10, 1893 (P. L. 419), as amended by Act April 29, 1903 (P. L. 338).—*Appeal of Dailey*, 81 A. 655.

§ 194 (R.I.) Ballots containing marks other than a cross in a party circle *held* void, as affording a means of subsequent identification.—*Thorpe v. Fales*, 81 A. 721.

Under Gen. Laws 1900, c. 11, § 44, a ballot marked with crosses to the right and left of all candidates in a party column *held* void.—*Id.*

X. CONTESTS.

§ 305 (N.H.) Rule as to right to relief on certiorari stated.—*Dinsmore v. City of Manchester*, 81 A. 533.

On certiorari to review decision of a municipal board in an election contest, the court

held not limited in its investigation to the records of the board.—*Id.*

Decision on certiorari to review an election contest *held* properly limited to an order amending the record to show the number of votes received by the parties.—*Id.*

Error committed by a municipal board in an election contest *held* correctable on certiorari under Pub. St. 1901, c. 204, § 2.—*Id.*

ELECTRICITY.

See Municipal Corporations, §§ 680, 681.

ELEVATORS.

See Negligence, §§ 32, 65.

EMINENT DOMAIN.

See Adverse Possession, § 8; Evidence, § 474; Husband and Wife, § 49½; Statutes, § 51; Taxation, §§ 160, 378; Towns, §§ 30, 79.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 1 (Pa.) "Eminent domain" defined.—*Commonwealth v. Plymouth Coal Co.*, 81 A. 148.

§ 2 (Pa.) Anthracite Mining Act, art. 3, § 10, providing that owners of adjoining coal properties must leave a pillar of coal in each seam along adjoining property, *held* not to violate Const. art. 1, § 10, providing that private property shall not be applied to public use without just compensation.—*Commonwealth v. Plymouth Coal Co.*, 81 A. 148.

§ 9 (N.J.Sup.) Borough, authorized by P. L. 1902, p. 574, to purchase lands for parks, *held* further authorized, by P. L. 1903, p. 393, to condemn lands therefor.—*Hutches v. Borough of Hohokus*, 81 A. 658.

§ 19 (Md.) The closing of an existing avenue in the Annex portion of Baltimore City by the Annex Commission *held* for a public use.—*City of Baltimore v. Brengle*, 81 A. 677.

§ 58 (Pa.) Railroad charter granted prior to General Railroad Law Feb. 19, 1849, *held* to restrict company's right to take land to such quantity as is necessary for the purposes designated in the charter.—*Delaware, L. & W. R. Co. v. Tobyhanna Co.*, 81 Ala. 132.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

§ 71 (Pa.) Act May 13, 1901 (P. L. 191), *held* not unconstitutional as failing to provide mode of assessing damages for taking property of bridge company.—*Lewisburg Bridge Co. v. Union County*, 81 A. 324.

§ 75 (Pa.) Act May 13, 1901 (P. L. 191), relating to taking of abutments, etc., of bridge by counties, *held* not unconstitutional because of failure to provide for payment of damages before taking.—*Lewisburg Bridge Co. v. Union County*, 81 A. 324.

(B) Taking or Injuring Property as Ground for Compensation.

§ 85 (Md.) A street cannot be closed even for a public use without making just compensation to abutting property owners entitled thereto.—*City of Baltimore v. Brengle*, 81 A. 677.

(C) Measure and Amount.

§ 145 (Pa.) Deduction *held* not to be made from value of land taken for railroad purposes under power of eminent domain because of reversionary right in owner.—*Brown v. Title Guaranty & Surety Co.*, 81 A. 410.

(D) Persons Entitled and Payment.

§ 153 (Pa.) Damages awarded in condemnation proceedings *held* to pass to owner at the

time of appropriation, and not to subsequent purchaser.—*Quade v. Columbia & P. D. Ry. Co.*, 81 A. 813.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 167 (N.H.) Laws 1911, c. 164, § 3, subds. "a" and "c," construed, and *held* to deprive the Supreme Court of further jurisdiction under a petition for leave to extend railroad tracks, and to take lands for that purpose.—*In re Sullivan County R. R.*, 81 A. 473.

§ 234 (N.J.Sup.) Award by commissioners in condemnation proceedings, without specifically setting out portion awarded for value of lands and portion representing damages, *held* proper.—*Hutches v. Borough of Hohokus*, 81 A. 658.

§ 238 (Conn.) Under Gen. St. 1902, §§ 2067, 2070, in proceedings to assess damages and benefits for the change of the grade of a highway, *held* not authorized to order a jury to make a reassessment on the application of the town by its selectmen.—*Selectmen of Town of Montville v. Alpha Mills Co.*, 81 A. 1051.

§ 264 (N.J.Sup.) A motion to strike out reasons filed by prosecutors of certiorari to review appointment of commissioners to condemn land of prosecutors denied.—*Sisters of Charity of St. Elizabeth v. Morris R. Co.*, 81 A. 817.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 267 (Pa.) A bridge company, constructing new bridge under authority of Special Acts March 23, 1865 (P. L. 602), and Feb. 19, 1868 (P. L. 177), *held* to have been given special remedy by Act May 6, 1897 (P. L. 46), as amended by Act May 13, 1901 (P. L. 191), excluding jurisdiction of court of action of trespass.—*Lewisburg Bridge Co. v. Union County*, 81 A. 324.

§ 271 (Pa.) Where plaintiff on appeal from award in condemnation proceedings fails to prove difference in value of property before and after construction of railroad, a nonsuit is proper.—*Mitchell v. Columbia & P. D. Ry. Co.*, 81 A. 898.

§ 293 (Pa.) Purchaser of land subsequent to filing of bond in condemnation proceedings who institutes proceedings to assess compensation alleging that the land was his property at the time of the injury *held* not entitled to introduce evidence of assignment of damages without amendment of pleading.—*Quade v. Columbia & P. D. Ry. Co.*, 81 A. 813.

EMPLOYÉS.

See Master and Servant.

ENTIRETY, ESTATE BY.

See Bankruptcy, §§ 139, 301.

ENTRY.

See Appeal and Error, § 76.

ENTRY, WRIT OF.

See Ejectment; Taxation, § 809.

EQUITABLE ASSIGNMENTS.

See Assignments, § 50.

EQUITABLE LIENS.

See Bankruptcy, § 216.

EQUITY.

See Affidavits, § 18; Appeal and Error, §§ 66, 219, 308, 362, 371, 719, 724, 1009, 1106; Assignments, § 50; Bankruptcy, § 216; Cancellation of Instruments; Contracts, § 143;

Corporations, §§ 563, 610; Creditors' Suit; Discovery; Estoppel, §§ 62-120; Frauds, Statute of, § 142; Fraudulent Conveyances, § 237; Injunction; Judgment, §§ 407-456; Mandamus, § 3; Municipal Corporations, § 697; Nuisance, § 80; Partition; Patents, § 219; Quieting Title; Reformation of Instruments; Religious Societies; Specific Performance; Taxation, §§ 453, 495; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 15 (N.J.) Where a landlord derives no profit from his wrongful conveyance of premises, extinguishing the tenant's term, equity will not assume jurisdiction.—*Williams v. Young*, 81 A. 1118.

§ 39 (Pa.) A court of equity having properly taken jurisdiction of one subject of a contest will dispose of the whole matter in controversy, and thus avoid a multiplicity of suits.—*Holden v. Bernstein Mfg. Co.*, 81 A. 428.

Equity, having taken jurisdiction of accounting for royalties, *held* entitled to proceed with settlement of other points in controversy.—*Id.*

(B) Remedy at Law and Multiplicity of Suits.

§ 43 (Pa.) Under Act June 16, 1836 (P. L. 789), § 13, par. 5, ordinary and adequate remedies at law *held* not superseded by equity as against corporations.—*City of Williamsport v. Citizens' Water & Gas Co.*, 81 A. 316; Same v. *Williamsport Water Co.*, *Id.* 324.

§ 46 (N.J.) Where claimants of proceeds of insurance consent to payment to one of them without prejudicing the rights of the other, the latter *held* not entitled to maintain bill in equity therefor.—*Henry v. Thompson*, 81 A. 840.

§ 48 (Pa.) Equity *held* without jurisdiction to compel a water supply company to sell its plant under special contract; the appropriate remedy being by mandamus.—*New Cumberland Borough v. Riverton Consol. Water Co.*, 81 A. 548.

II. LACHES AND STALE DEMANDS.

§ 67 (Conn.) There can be no laches without breach of duty.—*Hartford Trust Co. v. Town of West Hartford*, 81 A. 244.

IV. PLEADING.

(A) Original Bill.

§ 150 (Del.Ch.) Bill in equity to set aside conveyance, brought against a person individually and as administratrix and executrix of different estates, *held* not multifarious.—*Mahoney v. Healy*, 81 A. 583.

(E) Demurrer, Exceptions, and Motions.

§ 215 (Pa.) A defendant can answer to a part of a bill and demur to a part, under equity rule 31, but he may not answer and demur also to the whole bill, or to the same part of it.—*Stegmaier v. Keystone Coal Co.*, 81 A. 187.

(F) Defects and Objections, and Waiver Thereof.

§ 330 (Me.) Where, after demurrer was filed to the original bill for improper joinder of defendants, an amendment was filed by common consent, when defendants answered by a denial, exceptions to overruling the demurrer to the original bill will not be considered.—*Witham v. Wing*, 81 A. 100.

VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.

§ 389 (Pa.) In suit in equity, litigants and reviewing court *held* entitled to direct, definite answers to requests for findings.—*New Cum-*

berland Borough v. Riverton Consol. Water Co., 81 A. 799.

§ 392 (Md.) Under Code Pub. Gen. Laws 1904, art. 16, § 177, the proper method of correcting errors in a decree, before its enrollment, is by a petition for rehearing.—George Long Contracting Co. v. Albert, 81 A. 265.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 395 (Vt.) Under P. S. 1261, 1262, 1266, a special master has no jurisdiction to hear and report proceedings in a cause taken by the court or by the chancellor not appearing from the files or docket entries.—City of Montpelier v. McMahon, 81 A. 977.

X. DECREE AND ENFORCEMENT THEREOF.

§ 427 (Pa.) Contention that bill in equity should be sustained on grounds of ratification and estoppel *held* not maintainable, in absence of averments of such grounds in the bill.—Rittenhouse v. Newhard, 81 A. 445.

§ 430 (N.J.) Whether or not a final decree shall be opened is discretionary with the Court of Chancery.—Williams v. Lowe, 81 A. 760.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Guardian and Ward, §§ 30, 58; Husband and Wife, §§ 9, 14, 279; Life Estates; Perpetuities; Tenancy in Common; Wills.

ESTOPPEL.

See Carriers, § 12; Dedication, § 19; Equity, § 427; Judgment, §§ 606, 644-749; Municipal Corporations, § 652; Stipulations, § 18; Taxation, § 462.

II. BY DEED.

(A) *Oration and Operation in General.*

§ 27 (N.H.) The heirs of a deceased grantor in a deed reciting a consideration may not impeach the consideration to defeat the conveyance.—Amazeen v. Town of Newcastle, 81 A. 1079.

III. EQUITABLE ESTOPPEL.

(A) *Nature and Essentials in General.*

§ 62 (N.H.) Heirs of a grantor conveying her property to a town in consideration of the town supporting her for life *held* not entitled to a decree setting aside the deed on the ground that it was without consideration and was never delivered as a matter of law.—Amazeen v. Town of Newcastle, 81 A. 1079.

A town may be estopped by conduct.—*Id.*

(B) *Grounds of Estoppel.*

§ 68 (Pa.) Plaintiff *held* not estopped by bringing suit as subcontractor from asserting direct contractual relations with defendant so as to maintain claim of lien under Resolutions of January 21, 1843 (P. L. 367), and April 4, 1862 (P. L. 235).—Pittsburg Const. Co. v. West Side Belt R. Co., 81 A. 884.

§ 93 (Md.) Facts *held* not to show an equitable estoppel to assert an easement in the alley, of which defendant had constructive and actual knowledge.—Oberhelm v. Reeside, 81 A. 590.

(C) *Pleading, Evidence, Trial, and Review.*

§ 120 (Pa.) In ejectment, instruction as to liability of one of two innocent parties, whose

negligence makes fraud possible, *held* improper under the evidence.—Higinbotham v. Pauch, 81 A. 718.

EVICION.

See Fraudulent Conveyances, § 192.

EVIDENCE.

See Adjoining Landowners, § 7; Appeal and Error, §§ 232, 526, 690, 694, 695, 728, 731, 837, 848, 907, 926, 1010, 1047, 1050-1051, 1078; Bankruptcy, §§ 179, 303; Bills and Notes, § 514; Brokers, §§ 37, 86, 179; Carriers, §§ 163, 318; Contracts, § 28; Corporations, §§ 109, 389, 542, 610; Courts, § 208; Criminal Law, §§ 308-570, 656, 685, 753, 780, 1137; Customs and Usages; Damages, §§ 158-182; Death, §§ 64, 67; Dedication, §§ 43, 44; Deeds, §§ 96, 208; Depositions; Discovery; Divorce, §§ 129, 327; Domicile, § 8; Ejectment, §§ 90-96; Eminent Domain, § 293; Exchange of Property; Executors and Administrators, §§ 70, 215, 450; Execution, § 433; Fraud, §§ 49, 57; Fraudulent Conveyances, §§ 74, 183; Gaming, § 49; Gifts; Highways, §§ 184, 210-213; Homicide; Husband and Wife, § 333; Injunction, § 128; Insane Persons, § 2; Insurance, §§ 187, 665; Intoxicating Liquors, § 226, 236; Judgment, §§ 126, 199, 818; Landlord and Tenant, § 169; Libel and Slander, §§ 104, 112; Limitation of Actions, § 196; Lotteries, § 29; Master and Servant, §§ 265-281, 350; Mechanics' Liens, § 288; Mortgages, §§ 37, 38, 114, 297; Municipal Corporations, §§ 640, 654, 818, 819; Negligence, § 121-134; Newspapers; New Trial, §§ 70, 168; Notice; Nuisance, § 49; Partnership, § 53; Paupers, §§ 22, 52; Payment, § 66; Pleading, § 382; Principal and Agent, § 24; Quo Warranto, § 55; Railroads, §§ 347, 348, 395, 481, 482, 484, 485; Reference; Reformation of Instruments, §§ 41, 45; Replevin; Sales, §§ 52, 181, 358, 381; Statutes, § 286; Street Railroads, § 114; Taxation, § 446; Tenancy in Common; Trade-Marks and Trade-Names, § 93; Trespass, § 19; Trial, §§ 53-82, 153, 194, 252; Trover and Conversion, § 9; Trusts, §§ 88, 110; Vendor and Purchaser, § 350; Waters and Water Courses, § 209; Witnesses; Work and Labor, § 25.

I. JUDICIAL NOTICE.

§ 5 (Vt.) The court will take judicial notice as a matter of general knowledge that roof guards are in effective use to prevent snow from sliding from a roof.—Bishop v. Readsboro Chair Mfg. Co., 81 A. 454.

§ 19 (N.H.) The court *held* not to judicially know whether the average skill of the medical profession as a body is higher than that of physicians practicing in particular localities.—McBride v. Huckins, 81 A. 528.

II. PRESUMPTIONS.

§ 71 (Md.) Proof of the mailing of original letters raises the presumption of their receipt by the addressee.—Goodman v. Saperstein, 81 A. 695.

§ 78 (Pa.) In ejectment, testimony as to attempt by defendant to suborn one of plaintiff's witnesses was admissible.—Power v. Grogan, 81 A. 416.

§ 83 (Md.) It is presumed that public officers, in the discharge of their duties, properly performed them.—Union Trust Co. of Maryland v. State, 81 A. 873.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) *Facts in Issue and Relevant to Issues.*

§ 113 (Me.) The price at which a corporation's valid bonds were sold is competent evi-

dence of the value bonds, invalid as constituting an overissue, would have had, if valid.—Mullen v. Eastern Trust & Banking Co., 81 A. 948.

§ 113 (N.J.) In action for damages to real estate by fire from locomotive, evidence of cost of buildings *held* relevant as to damages sustained.—Goodman v. Lehigh Valley R. Co. of New Jersey, 81 A. 848, 851; Mays v. Same, *Id.* 851.

(C) Similar Facts and Transactions.

§ 135 (Vt.) In an action for fraud inducing a sale of goods, evidence of other fraudulent representations *held* inadmissible.—Griswold v. Wentworth, 81 A. 622.

§ 136 (Vt.) In an action for damages caused by nuisance, evidence of a recurrence of the injury since the suit was brought *held* admissible.—Bishop v. Readaboro Chair Mfg. Co., 81 A. 454.

(D) Materiality.

§ 143 (Vt.) A witness having testified that after the execution of a deed to the land in controversy he believed the grantee was the owner of it, a question as to whether he had not stated under oath that another owned the land *held* immaterial.—Lang v. Clark, 81 A. 625.

V. BEST AND SECONDARY EVIDENCE.

§ 157 (Pa.) In preliminary mandamus proceedings by city against water company, testimony as to cost of plant *held* not to be excluded because trial court assumed that the company's books and papers would better show the cost.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 816; Same v. Williamsport Water Co., *Id.* 324.

Primary evidence *held* not to be excluded because other corroborative or stronger and more conclusive evidence might have been introduced.—*Id.*

§ 163 (N.J.Sup.) Testimony from memory to the contents of reports of a geological survey, where such reports were not produced, *held* properly stricken.—Stout v. Edison Portland Cement Co., 81 A. 737.

§ 166 (Conn.) In an action to recover amounts paid out as margins for defendant, *held* error to admit oral testimony that certain items shown to have been paid out were regularly charged on the broker's books; the books being accessible.—Raymond v. Parker, 81 A. 1030.

§ 174 (Md.) Carbon copies of letters, *held* admissible on proof of mailing of originals and establishment as copies.—Goodman v. Saperstein, 81 A. 695.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 220 (Vt.) Testimony that husband never claimed property as his *held* admissible with other testimony that the wife always treated it as hers.—Donovan v. Sellinas, 81 A. 235.

(E) Proof and Effect.

§ 264 (Vt.) An admission of plaintiffs' counsel, in an action for deceit, in selling mortgaged chattels, *held* equivalent to the admission sought by a question to plaintiff on cross-examination making it not error to exclude the question.—Kennett v. Tudor, 81 A. 633.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 269 (Conn.) One's intention to do an act is a fact admissible in evidence to explain the act; and may be proved by his words or inferred by his conduct.—Sallies v. Johnson, 81 A. 974.

§ 271 (Conn.) In a proceeding to settle accounts of executors, declarations of the testator as to an indebtedness of one of the executors to him *held* admissible under Gen. St. 1902, § 705, in support of objection that such indebtedness had not been charged in the account.—Mulcahy v. Mulcahy, 81 A. 242.

§ 271 (Pa.) Declarations of county treasurer to third persons, not in presence of witness, *held* not admissible in evidence to contradict his statements.—Africa v. Trexler, 81 A. 707.

§ 271 (Vt.) Testimony of statements by wife to tenant offered on issue of ownership as between widow and heirs of decedent *held* not objectionable as self-serving.—Donovan v. Sellinas, 81 A. 235.

IX. HEARSAY.

§ 317 (N.J.Sup.) Testimony of witness as to whether he could sell plaintiff's horse *held* not objectionable as hearsay.—See v. Public Service Ry. Co., 81 A. 745.

§ 318 (Conn.) Evidence of what another reported to plaintiff as to purchasing and selling stock *held* hearsay, when offered to prove whether purchases and sales were actually made.—Raymond v. Parker, 81 A. 1030.

§ 318 (N.J.Sup.) In a suit for services rendered, a letter, offered by defendant, to show that in the opinion of the writer plaintiff was not entitled to recover, was properly excluded.—Backes v. Movsoovich, 81 A. 497.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 332 (N.J.Ch.) On a petition to have the surplus derived from foreclosure sale held to secure the inchoate right of dower of the mortgagor's wife, certain evidence *held* competent.—Wood v. Price, 81 A. 664.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 348 (Md.) Under Code art. 35, § 40, and in view of section 64, *held*, that certified copies of the record of a foreign judgment were inadmissible in evidence.—Mundy v. Jacques, 81 A. 289.

(C) Private Writings and Publications.

§ 355 (Conn.) In an action by a building contractor for the value of labor and materials, a certain memorandum of items of labor *held* admissible in connection with his testimony to its accuracy.—Hawken v. Daley, 81 A. 1053.

(D) Production, Authentication, and Effect.

§ 373 (N.J.) Where there is no subscribing witness to a bond, testimony that witness saw defendant sign it *held* to justify its admission.—Dayton v. Boettner, 81 A. 728.

§ 376 (Pa.) Time book of an employer made from time slips not produced *held* inadmissible in evidence.—Bockelcamp v. Lackawanna & W. V. R. Co., 81 A. 93.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 419 (N.H.) In a suit to compel specific performance of a contract to will, parol evidence tending to show the consideration of complainant's contract *held* admissible.—Day v. Washburn, 81 A. 474.

§ 423 (N.J.) Negotiable Instruments Act, § 68, relating to parol testimony as to relative liability of indorsers, *held* to apply to a note in renewal of a note made and indorsed before passage of the act.—Schneider v. Mueller, 81 A. 863.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Vt.) Certain evidence *held* properly excluded in an action for deceit in selling mortgaged chattels as tending to impeach the bill of sale.—Kennett v. Tudor, 81 A. 633.

§ 444 (Pa.) Maker of notes cannot overcome his promise to pay by parol evidence that he was not to pay on the happening of certain contingencies.—Faux v. Fittler, 81 A. 91.

(D) Construction or Application of Language of Written Instrument.

§ 456 (N.H.) Extrinsic evidence is admissible to explain the meaning of the word "home" in a covenant by a grantee to provide a home for a person named.—Day v. Towns, 81 A. 405.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

§ 471 (Conn.) On the issue whether a person had acquired a legal settlement in a town, a question asked him *held* objectionable as calling for his conclusion.—Town of Madison v. Town of Guilford, 81 A. 1046.

§ 471 (N.J.) A question as to whether two persons were living together as man and wife *held* not objectionable as asking for a conclusion.—Prout v. Prout, 81 A. 757.

§ 471 (Vt.) A question to a town clerk whether a warning for an annual town meeting was posted in a public place *held* proper.—Bixby v. Roscoe, 81 A. 255.

§ 471 (Vt.) A statement of a witness *held* improper as a conclusion.—Griswold v. Wentworth, 81 A. 622.

§ 472 (Vt.) A defendant, in an action for fraudulent representations inducing a sale on credit, *held* properly required to testify as to his understanding at the time as to what property was exempt from execution.—Griswold v. Wentworth, 81 A. 622.

§ 473 (Vt.) In an action for injuries to plaintiff's house, her husband *held* entitled to give his opinion as to the amount of damages.—Bishop v. Readsboro Chair Mfg. Co., 81 A. 454.

§ 474 (Pa.) In condemnation proceedings, certain witnesses *held* not competent to express an opinion on the value of land condemned.—Mitchell v. Columbia & P. D. Ry. Co., 81 A. 808.

§ 500 (Vt.) Question to an expert witness on the issue of value *held* to take a wrong basis for his opinion.—Rowley v. Shepardson, 81 A. 917.

§ 501 (Pa.) Question to witness *held* not erroneous, as asking opinion as to facts not in evidence.—Dougherty v. Briggs, 81 A. 201.

§ 502 (Vt.) In an action for fraud inducing the purchase of a sugar orchard, questions on the cross-examination of a witness testifying to the value of the orchard *held* competent.—Rowley v. Shepardson, 81 A. 917.

XIV. WEIGHT AND SUFFICIENCY.

§ 588 (Del.Super.) Where the evidence is conflicting, it is the jury's duty to reconcile it, if possible; otherwise, to reject that believed to be untrue.—Knowles v. Massey, 81 A. 470.

§ 589 (Conn.) The jury may credit the uncorroborated testimony of plaintiff, though it seems contrary to the probabilities of the case.—Barrett v. Connecticut Co., 81 A. 963.

§ 591 (Vt.) Secondary evidence admitted without objection is to be considered at its natural probative value against the one introducing it.—Clark v. Wild, 81 A. 336.

EXAMINATION.

See Witnesses, §§ 255-282½.

EXCEPTIONS.

See Appeal and Error, §§ 204, 260-274, 724; Deeds, § 138; Indictment and Information, § 111; Trial, §§ 76, 82, 278, 283.

EXCEPTIONS, BILL OF.**I. NATURE, FORM, AND CONTENTS IN GENERAL.**

§ 9 (Md.) Facts not appearing of record can only be presented on appeal by bill of exceptions or some equivalent.—Wilkin Mfg. Co. v. Melvin, 81 A. 879.

II. SETTLEMENT, SIGNING, AND FILING.

§ 55 (R.I.) A petition to establish the truth of exceptions, under Gen. Laws 1909, c. 28, § 21, *held* to be dismissed.—Allen & Reed v. Russell, 81 A. 438.

§ 55 (R.I.) Where certain of defendant's exceptions in its bill were not stated separately as required by statute, plaintiff's motion to dismiss the petition to establish the truth of the exceptions will be granted.—Rimmer v. Aachen & Munich Fire Ins. Co., 81 A. 977.

§ 56 (Md.) A bill of exceptions which is not signed by the court cannot be considered on appeal.—Goodman v. Saperstein, 81 A. 695.

EXCHANGE OF PROPERTY.

See Fraud, § 57.

§ 13 (Vt.) Evidence *held* admissible as showing the probability that the terms of a contract were not as contended by a party.—Davis v. Randall, 81 A. 250.

EXCISE.

See Intoxicating Liquors.

EXCUSE.

See Contracts, § 303.

EXECUTION.

See Bankruptcy, § 279; Dower, § 83; Mechanics' Liens, § 201; Sales, § 474.

II. PROPERTY SUBJECT TO EXECUTION.

§ 48 (Md.) Judgment in attachment of railroad mortgage bonds *held* required to be a condemnation of the bonds on which a writ of fieri facias may be issued, and the bonds sold, and not in personam against the custodian.—De Bearn v. De Galard de Brassac de Bearn, 81 A. 223.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 99 (Me.) Seire facias to obtain an alias execution does not lie under Rev. St. c. 78, § 19, where upon the original execution real property has been sold and not levied upon by appraisal and set-off.—Marsh Bros. & Co. v. Bellefleur, 81 A. 79.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 247 (Pa.) Attack on sheriff's sale 60 years after its date because purchaser was an assignee for creditor of defendant *held* not to be sustained under the evidence.—Riffert v. Lehigh Valley Coal Co., 81 A. 810.

(B) Title and Rights of Purchaser.

§ 268 (Pa.) A purchaser of realty at sheriff's sale, who obtains possession, is not liable in trespass, where the lease was subject to the

mortgage under which the property was sold.—Moudy v. Bell, 81 A. 551.

§ 286 (Me.) A bona fide purchaser of chattels at sheriff's sale belonging to one other than the judgment debtor *held* entitled to recover from the judgment creditor for money had and received.—Dresser v. Kronberg, 81 A. 487.

(D) Conveyance to Purchaser.

§ 315 (Pa.) That no minute of acknowledgment of sheriff's deed appeared in common pleas minutes *held* not to affect title thereunder.—Rifert v. Lehigh Valley Coal Co., 81 A. 810.

XL. EXECUTION AGAINST THE PERSON.

§ 425 (Vt.) A close jail certificate may be granted against defendant on a judgment against him for deceit while property is held under attachment.—Rowley v. Shepardson, 81 A. 917.

§ 433 (Vt.) The court, on motion for a certified execution, *held* justified in excluding evidence offered to limit the amount for which such an execution could be granted.—Manley v. Johnson, 81 A. 919.

§ 448 (Vt.) A plaintiff obtaining a judgment in an action for deceit, pursuant to the stipulation of the parties, *held* entitled to a certified execution.—Manley v. Johnson, 81 A. 919.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, §§ 150, 781; Corporations, § 109; Courts, §§ 200½, 202; Deeds, § 96; Descent and Distribution; Ejectment, § 95; Election of Remedies, § 7; Evidence, §§ 271, 472; Parties, § 59; Partnership, § 304; Principal and Agent, § 46; Quietting Title, § 30; Trusts, § 102; Wills; Witnesses, §§ 143, 183.

I. ADMINISTRATION IN GENERAL.

§ 3 (Me.) In estates where collateral heirs are entitled to distribution, the estate must be duly administered under the statute providing for inheritance taxation (Rev. St. c. 8, § 69, Laws 1906, c. 124, §§ 86, 87).—Whiting v. Farnsworth, 81 A. 214.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 70 (Conn.) The burden of proving a debt against executors, alleged to have been omitted from the inventory, is on the objector.—Mulcahy v. Mulcahy, 81 A. 242.

Where executors had charged themselves with the amount of the inventory in their final account and had made oath thereto, the burden was on one objecting that the account did not contain a debt against one of the executors to establish the indebtedness.—Id.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 87 (N.J.Sup.) Power of personal representative, under death act, to compromise cause of action either before or after suit in good faith, stated.—Manns v. A. E. Sanford Co., 81 A. 491.

§ 109 (N.J.) Item claimed by administrator of estate in his accounting *held* one for which he should be allowed a credit.—Huston v. Roe, 81 A. 848.

§ 121 (Pa.) Since an executor empowered to sell real estate takes an estate in the land under Act Feb. 24, 1834 (P. L. 70), he may maintain ejectment; and an administrator c. t. a. has the same right.—Power v. Grogan, 81 A. 416.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 205 (Pa.) Evidence *held* insufficient to sustain claim for services in nursing decedent during his last illness.—Wise v. Martin, 81 A. 184.

(B) Presentation and Allowance.

§ 224 (N.J.Ch.) Under the express provision of P. L. 1898, p. 738, § 67 et seq., claims of heirs against an administrator for exoneration from a mortgage made by the deceased, not presented before the rule to bar creditors is made absolute, are barred.—Smith v. Wilson, 81 A. 851.

An heir holding a right to exoneration against the estate from a mortgage debt, held by a third party, is a creditor within Orphans' Court Act (P. L. 1898, pp. 738, 740) §§ 67, 70.—Id.

§ 227 (N.J.Ch.) Under 2 Gen. St. 1895, p. 2112, § 47, *held*, that presentment of claim to the administrator for exoneration of heirs from a mortgage amounted merely to a claim for the payment of any deficiency after the land, as primary security, had been exhausted.—Smith v. Wilson, 81 A. 851.

(D) Priorities and Payment.

§ 271 (N.J.) Under terms of will, debts contracted by executors in carrying on business but not former debts of the testator *held* chargeable as liens against the land.—Paul v. Wilson, 81 A. 835.

Will *held* to show intention of testator that net rents from continuation of factory business should be applied to discharge mortgage debts, and that his general debts should be satisfied out of his personality.—Id.

VII. DISTRIBUTION OF ESTATE.

§ 315 (N.J.Ch.) A court of chancery will not give directions concerning the distribution of a testamentary fund until the time for distribution arrives.—Nagle v. Conard, 81 A. 841.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(A) When Authorized.

§ 326 (N.H.) A will construed, and *held* to require the sale of testator's real estate for distribution.—French v. Lawrence, 81 A. 705.

IX. INSOLVENT ESTATES.

§ 416 (N.J.) An executor of an insolvent estate *held* required to pay to the creditors such a percentage of their claims, principal and interest, as the funds will permit.—Lowentraut v. Jackson, 81 A. 743.

X. ACTIONS.

§ 429 (Pa.) Action by heir of decedent against the administrator for moneys had and received *held* not maintainable.—Wentz v. Blair, 81 A. 144.

§ 450 (N.J.Ch.) Evidence, in an action by heirs against an administrator to compel exoneration of their land from a mortgage made by deceased, *held* insufficient to show a presentment to the administrator as required by Orphans' Court Act (P. L. 1898, p. 738) § 67 et seq., and before the claim was barred by a final rule against creditors.—Smith v. Wilson, 81 A. 851.

§ 450 (Pa.) In ejectment by administrator c. t. a., where defendant relies on alienation of premises to herself in consideration of maintenance and support of life tenant, evidence of value of property and of defendant's services *held* admissible.—Power v. Grogan, 81 A. 416.

§ 454 (Pa.) Executor d. b. n. c. t. a. substituted as defendant *held* to have waived irregularities in sale under writ of venditioni exponas.—*Riffert v. Lehigh Valley Coal Co.*, 81 A. 810.

XI. ACCOUNTING AND SETTLEMENT.

(E) *Stating, Settling, Opening, and Review.*

§ 507 (Pa.) Where an auditor is appointed to pass on specific exceptions to an administrator's account, he cannot surcharge the administrator as to an item not covered by any of the exceptions.—*In re Ford's Estate*, 81 A. 200.

§ 513 (Md.) An administrator may recover as an individual from the real estate of the estate the amount overpaid by him in his accounting as administrator, if the payments were properly chargeable against the estate.—*State v. Graham*, 81 A. 31.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 519 (N.J.Ch.) Neither 2 Gen. St. 1895, p. 1429, § 21, nor Orphans' Court Act, § 29, authorize an ancillary administrator with the will annexed, appointed by the orphans' court of the county in which the realty is situate, to exercise a power of sale of realty given to the executors named in a nonresident's will, who are acting as such in the jurisdiction of his domicile.—*Smith v. Abbott*, 81 A. 115.

EXEMPLARY DAMAGES.

See Damages, § 87.

EXEMPTIONS.

See Evidence, § 472; Homestead; Taxation, §§ 160, 193-231.

I. NATURE AND EXTENT.

(C) *Property and Rights Exempt.*

§ 48 (Md.) Under Code Pub. Gen. Laws 1904, art. 9, § 33, an attaching creditor was not entitled to a judgment against the garnishee for any amount, where the only sum due from the garnishee to the debtor was \$13.—*Wilmer v. Epstein*, 81 A. 379.

EXONERATION.

See Executors and Administrators, §§ 224, 227, 450; Quieting Title, § 30.

EXPERT TESTIMONY.

See Evidence, §§ 471-502.

EXPLOSIVES.

See Master and Servant, § 265.

§ 7 (Pa.) A wholesale dealer in fireworks *held* not liable for injuries to a boy taking a piece of fireworks from the refuse and thereafter injured by the explosion on his lighting it.—*Carpenter v. John M. Miller & Son*, 81 A. 439.

§ 11 (N.J.) In an action for injuries to plaintiff at a pleasure resort owned by defendant, evidence *held* to show no negligence of defendant in arrangements for witnessing a fireworks exhibition.—*Reisman v. Public Service Corporation of New Jersey*, 81 A. 838, 840.

EX POST FACTO LAWS.

See Statutes, § 263.

EXPRESS COMPANIES.

See Carriers, § 114.

EXPRESS TRUSTS.

See Trusts, § 31.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) *Acts Constituting False Imprisonment and Liability Therefor.*

§ 15 (N.J.) Plaintiff, arrested under General Railroad Act 1903, § 59, for riding beyond the distance for which he had paid his fare without paying an additional fare, could not render defendant company liable for false imprisonment by tendering fare after arrest.—*Crotois v. Pennsylvania R. Co.*, 81 A. 107.

FARES.

See Carriers, § 12; False Imprisonment.

FEES.

See Attorney and Client, § 136; Corporations, § 585; Costs, §§ 56, 175; Reference; Wills, §§ 405, 415, 731.

FEE SIMPLE.

See Wills, §§ 597-601.

FELLOW SERVANTS.

See Master and Servant, §§ 129, 168-200, 259.

FIERI FACIAS.

See Execution, § 48.

FILING.

See Appeal and Error, §§ 627, 1191; Homestead; *Lis Pendens*, § 13; Pleading, § 409.

FINAL JUDGMENT.

See Appeal and Error, §§ 66-78, 1175.

FINDINGS.

See Appeal and Error, §§ 1008-1022; Husband and Wife, § 121; Insane Persons, § 27; Nuisance, § 49; Railroads, § 482.

FINES.

§ 19 (Me.) Plaintiff *held* not entitled to recover money paid under an illegal compromise of punishment assessed against him.—*Houlehan v. Inhabitants of Kennebec County*, 81 A. 449.
A fine, illegally imposed, but voluntary paid under mistake of law, is not recoverable.—*Id.*

FIRE ESCAPES.

See Negligence, §§ 65, 121, 124, 126, 134.

FIRES.

See Damages, §§ 112, 124, 174; Evidence, § 113; Insurance, §§ 553, 665; Landlord and Tenant, § 184; Railroads, §§ 453-485.

FIREWORKS.

See Explosives; Master and Servant, § 316.

FISH.

See Commerce, §§ 33, 72, 77; States; Statutes, § 64.

FIXTURES.

§ 17 (N.H.) Whether the ownership of a stove installed by the tenant remained in her

after she accepted a second lease depends upon the intention of the parties when the second lease was made.—*Ferguson v. O'Brien*, 81 A. 479.

§ 32 (N.H.) A tenant's right to remove fixtures continues, so long as he remains in possession of the premises by the landlord's consent, even after the lease has expired.—*Ferguson v. O'Brien*, 81 A. 479.

FOOD.

§ 3 (Pa.) Act May 29, 1901 (P. L. 327), *held* not to authorize the dairy and food commissioner to require matters to be inserted in an application for a license to manufacture or sell oleomargarine, butterine, and similar products, except to advertise the nature of the product.—*Dotson v. Foust*, 81 A. 911.

The dairy and food commissioner *held* to have no power to refuse a license to sell oleomargarine, on the ground that the applicant is selling oleomargarine containing ingredients causing it to resemble yellow butter.—*Id.*

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, § 290.

I. CIVIL LIABILITY.

§ 24 (Me.) Under Rev. St. c. 96, §§ 1, 2, 4, a declaration in forcible entry and detainer *held* insufficient.—*Karahalies v. Dukais*, 81 A. 1011.

FORECLOSURE.

See Mortgages, §§ 479, 507.

FOREIGN CORPORATIONS.

See Corporations, §§ 631-672.

FOREIGN JUDGMENTS.

See Judgment, § 818.

FOREMAN.

See Master and Servant, §§ 129, 182, 189, 231.

FORFEITURES.

See Insurance, § 335.

FORMER ADJUDICATION.

See Judgment, §§ 606, 644-749.

FORMS OF ACTION.

See Action, §§ 27, 35; Ejectment.

FRANCHISES.

See Bridges, § 15; Commerce, § 70; Easements, § 1; Taxation, §§ 376-394.

FRAUD.

See Appeal and Error, §§ 1175, 1201; Brokers, § 37; Compromise and Settlement, § 18; Deeds, § 70; Estoppel, § 120; Evidence, §§ 135, 264, 441, 472, 502; Execution, §§ 425, 448; Frauds, Statute of; Fraudulent Conveyances; Insurance, §§ 553, 665; Judgment, §§ 386, 392, 522; Mortgages, §§ 209, 217; Partnership, § 311; Payment, § 84; Pleading, §§ 248, 382; Reformation of Instruments, § 37; Sales, § 52; Trial, § 53; Trusts, §§ 91-110; Wills, § 153.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 1 (Conn.) "Fraud" defined.—*Sallies v. Johnson*, 81 A. 974.

§ 4 (Conn.) The breach of a promise made in good faith to perform an act will not sup-

port an action of fraud.—*Sallies v. Johnson*, 81 A. 974.

§ 9 (Conn.) "Fraudulent representation" defined.—*Sallies v. Johnson*, 81 A. 974.

§ 9 (Me.) Essential elements of actionable deceit stated.—*Patten v. Field*, 81 A. 77.

§ 12 (Conn.) To be actionable, a misrepresentation must relate to a past or existing fact, and a promise to do an act in the future cannot as a rule be an actionable fraudulent representation.—*Sallies v. Johnson*, 81 A. 974.

A false promise to do an act in the future which the promisor has no present intention of doing will support an action for deceit.—*Id.*

§ 23 (Vt.) A party to a contract may rely on the representations of the adverse party as to his ownership of a specific piece of property.—*Manley v. Johnson*, 81 A. 919.

§ 30 (Pa.) No person can claim an interest under a fraud committed by another, however innocent he may be.—*In re Stirk's Estate*, 81 A. 187.

II. ACTIONS.

(B) Parties and Pleading.

§ 41 (Conn.) Fraud need not be specifically pleaded if the facts alleged authorize an inference of fraud.—*Sallies v. Johnson*, 81 A. 974.

§ 42 (Conn.) A present intent to deceive upon which a right of action for deceit will arise may be based upon a breached promise to do a future act, which may be inferred from the facts alleged without being expressly alleged.—*Sallies v. Johnson*, 81 A. 974.

An allegation of the complaint in an action for fraud *held* to sufficiently allege a present intention by defendants not to perform a certain promise made by them.—*Id.*

§ 44 (Conn.) Allegations of a complaint in an action for fraud in selling plaintiff a barber business *held* to sufficiently allege a present intention by defendant not to engage in the barber business, so as to constitute actionable fraud if false.—*Sallies v. Johnson*, 81 A. 974.

§ 49 (Vt.) In an action for deceit in selling mortgaged chattels, proof of the contract of sale, though merely as matter of inducement, was essential.—*Kennett v. Tudor*, 81 A. 633.

§ 49 (Vt.) A general allegation of damages for fraud inducing the purchase of a farm *held* to justify the admission of certain evidence to show general damages.—*Rowley v. Shepardson*, 81 A. 917.

(C) Evidence.

§ 57 (Vt.) In action for deceit in exchange of horses, evidence as to kind and value of horse plaintiff gave to defendant *held* material.—*Rand v. Bordo*, 81 A. 251.

§ 57 (Vt.) In an action for fraud in the sale of real estate, certain evidence *held* admissible as against a specified objection.—*Rowley v. Shepardson*, 81 A. 917.

In an action for fraud inducing the purchase of a sugar orchard, testimony of a witness as to the market value of the product of the orchard *held* properly received in evidence.—*Id.*

(D) Damages.

§ 59 (N.J.Sup.) In an action for deceit in sale of stock and privileges, measure of damages stated.—*Duffy v. McKenna*, 81 A. 1101.

§ 59 (Vt.) In an action for deceit in selling property concealing the mortgages thereon, plaintiff was only entitled to nominal damages where it appeared that he had not paid off the mortgages.—*Kennett v. Tudor*, 81 A. 633.

(E) Trial, Judgment, and Review.

§ 64 (Me.) Where there were facts in an action for deceit from which the jury might have reached the conclusion that plaintiff did not believe and rely upon the alleged misrep-

sentations, it was error to direct a verdict for plaintiff.—*Patten v. Field*, 81 A. 77.

Whether the elements of actionable deceit existed in an action therefor were questions of fact.—*Id.*

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCAR-RIAGE OF ANOTHER.

§ 16 (N.J.) A promise to pay brokers a certain sum on consummation of contract held not invalid.—*Semkin v. Hollander*, 81 A. 980.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Md.) An agreement of parties to purchase land, to be paid for by the profits of their joint operation of it, held within the statute of frauds.—*Wiley v. Wiley*, 81 A. 180.

VII. SALES OF GOODS.

(A) Contracts Within Statute.

§ 82 (Vt.) A patent may be transferred by an oral agreement; such agreement not being within the statute of frauds.—*Whitcomb v. Whitcomb*, 81 A. 97.

IX. OPERATION AND EFFECT OF STATUTE.

§ 142 (Md.) Though an agreement of parties to purchase land, to be paid for by the profits of their joint operation of it, was within the statute of frauds, so that, defendant having taken title in himself, and refused to convey, there could not be relief by specific performance or declaration of a trust, held, plaintiff could have relief in equity by compensation for his share of the profits from joint operation.—*Wiley v. Wiley*, 81 A. 180.

FRAUDULENT CONVEYANCES.

See Bankruptcy, §§ 179, 182, 216, 303, 305; Corporations, §§ 542, 561; Creditors' Suit; Dower, § 53.

I. TRANSFERS AND TRANSACTIONS INVALID.

(B) Nature and Form of Transfer.

§ 31 (N.J.Ch.) In the pursuit of fraud against creditors it is immaterial whether such fraud was perpetrated by means of judicial or other public sales, or whether it was by private agreement and transfer.—*Horton v. Bamford*, 81 A. 761.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§ 64 (Md.) For a conveyance of property to be valid as against creditors the transfer must be bona fide, as well as for value.—*Mundy v. Jacques*, 81 A. 289.

§ 64 (N.J.Ch.) Voluntary conveyance with actual fraudulent intent held void as against subsequent creditor of grantor, though his debt was not then contemplated by the grantor.—*McNulty v. McCarthy*, 81 A. 568.

(E) Consideration.

§ 74 (N.J.Ch.) One taking property from a debtor under certain circumstances held bound to pay approximately the value of the property, or to take the risk of being held responsible for such inadequacy of consideration as showed that the transfer was not a fair and proper one under the circumstances.—*Horton v. Bamford*, 81 A. 761.

As to a voluntary conveyance made by one who is indebted, there is an irrebuttable presumption of fraud.—*Id.*

(F) Confidential Relations of Parties.

§ 101 (N.J.Ch.) While a settlement upon one dependent upon the settler may not be considered as a badge of fraud, the dealings between near relatives, one of whom is largely indebted and the other of whom obtains his property, are viewed with suspicion.—*Horton v. Bamford*, 81 A. 761.

(G) Reservations and Trusts for Grantor.

§ 113 (Conn.) Where a warranty deed absolute on its face was in fact a mortgage under an unrecorded defeasance, it was invalid as to the grantor's creditors and trustee in bankruptcy.—*Rosenbluth v. De Forest & Hotchkiss Co.*, 81 A. 953.

(H) Preferences to Creditors.

§ 122 (N.J.) Mortgage by corporation in financial straits to secure creditors assenting to its terms held invalid under Statute of Frauds (2 Comp. St. 1910, p. 2618), § 12, as evincing an intent to hinder, delay, and defraud creditors.—*Van Clief v. Melville*, 81 A. 824.

(I) Retention of Possession or Apparent Title by Grantor.

§ 136 (Md.) Under Code, art. 21, § 41, held that a president of a corporation could not by sale and delivery of corporate property to himself obviate the necessity of a bill of sale.—*Mundy v. Jacques*, 81 A. 289.

§ 154 (Conn.) A quitclaim deed not recorded as required by Gen. St. 1902, § 4036, held invalid as to the grantor's creditors.—*Rosenbluth v. De Forest & Hotchkiss Co.*, 81 A. 953.

(J) Knowledge and Intent of Grantee.

§ 158 (N.J.Ch.) Creditors or others dealing with a failing debtor are chargeable with such facts as they would have learned had they properly investigated.—*Horton v. Bamford*, 81 A. 761.

Transfers by a debtor while suits are pending against him are always suspicious circumstances such as would lead a reasonable man to investigate concerning the financial condition of his transferor.—*Id.*

§ 162 (N.J.Ch.) 2 Gen. St. 1895, p. 1604, § 12, relating to fraudulent conveyances, held to apply only where there was an actual participation in the fraud by the grantee or transferee.—*Horton v. Bamford*, 81 A. 761.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

§ 181 (N.J.Ch.) Where the consideration paid by a purchaser on a transfer of property by a debtor went to satisfy legitimate debts of the debtor, the purchaser will be protected to that extent.—*Horton v. Bamford*, 81 A. 761.

§ 183 (N.J.Ch.) In the absence of satisfactory proof of actual fraud, a transfer by a debtor will be sustained to the extent of the consideration actually given and declared void as to the residue.—*Horton v. Bamford*, 81 A. 761.

(B) Purchasers from Grantor.

§ 192 (Pa.) A purchaser of land at a sheriff's sale held entitled to recover damages from a prior vendee in fraud of creditors on eviction from possession.—*Moseby v. Fleck*, 81 A. 934.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

§ 208 (N.J.Ch.) Conveyance in a trust for the benefit of grantor and his children held void as to future creditor of grantor.—*McNulty v. McCarthy*, 81 A. 568.

§ 208 (R.I.) Pub. Laws 1909, c. 387, held not to invalidate a bulk sale of a stock of merchan-

dise, except as to creditors at the time of the transfer.—*Boyajian v. Black*, 81 A. 437.

(C) Right of Action to Set Aside Transfer, and Defenses.

§ 237 (N.J.Ch.) Jurisdiction concerning fraudulent conveyances has been exercised by courts of equity in this state upon the theory that inherent equitable powers were being exercised irrespective of any statute.—*Horton v. Bamford*, 81 A. 761.

(J) Judgment or Decree and Execution

§ 312 (N.J.Ch.) Where grantor conveys property in trust for himself and children retaining life interest, such interest should be exhausted in favor of subsequent creditor before recourse is had to interests of remaindermen.—*McNulty v. McCarthy*, 81 A. 568.

Where a conveyance is made in trust for the benefit of the grantor and his children, such deed is valid as between the grantor and the trustee and his children, and fraudulent only so far as is necessary to pay a subsequent debt of the grantor.—*Id.*

Where a grantor conveys property in trust, income to be paid to himself for life and remainder to his children, when his equitable interest is exhausted to pay a subsequent debt, provision will be made for apportioning balance of debt equitably among the different remaindermen.—*Id.*

GAMING.

See Lotteries.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 14 (Conn.) When speculative contracts for the purchase of stocks are illegal stated.—*Raymond v. Parker*, 81 A. 1030.

(B) Rights and Remedies of Parties.

§ 49 (Pa.) Recovery on notes cannot be defeated on the ground that they were given in gambling transactions, where the maker's own testimony shows that the stock dealings in question were not of such character.—*Faux v. Fittler*, 81 A. 91.

GARNISHMENT.

See Chattel Mortgages, § 138; Exemptions; Judgment, §§ 419, 456.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 52 (Conn.) Gen. St. 1902, § 880, relating to garnishment, construed, and *held* that words therein do not mean that personalty can only be reached by garnishment when it is hidden from sight by the agent or trustee of the debtor.—*Sutherland v. Brown*, 81 A. 1033.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

§ 95 (Md.) Under Code Pub. Gen. Laws 1904, art. 75, § 166, and article 9, §§ 11, 29, a court *held* not to have jurisdiction to render judgment against a garnishee, where the only service of the attachment was upon an agent of the firm intended to be garnished.—*Wilmer v. Epstein*, 81 A. 379.

GIFTS.

See Descent and Distribution, § 87.

I. INTER VIVOS.

§ 47 (N.J.Ch.) The burden of proof *held* to be on dominant member of family receiving gift from dependent member to show that donor had benefit of competent, independent advice.—*Albert v. Haeberly*, 81 A. 660.

§ 49 (N.J.Ch.) Burden of proof resting on dominant member of family receiving gift from dependent member *held* not successfully carried.—*Albert v. Haeberly*, 81 A. 660.

GOOD FAITH.

See Bills and Notes, §§ 330-367; Executors and Administrators, § 87; Fraud, § 4; Specific Performance, § 95.

GOVERNOR.

See Statutes, §§ 26, 30.

GROUND RENTS.

See Vendor and Purchaser, § 68.

GUARANTY.

See Indemnity; Principal and Surety.

GUARDIAN AND WARD.

See Death, § 25; Insane Persons, § 65; Judgment, § 749.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 30 (N.J.) The guardian of infant children *held* authorized to use the income of their estate for their education.—*In re Alexander*, 81 A. 732.

§ 58 (N.J.) The orphans' court, in the absence of statute, has no power to direct in advance a guardian to expend the income of his ward's estate.—*In re Alexander*, 81 A. 732.

P. L. 1901, p. 325, *held* not to authorize the orphans' court to direct the expenditure by a guardian of the income of his ward's estate.—*Id.*

VI. ACCOUNTING AND SETTLEMENT.

§ 163 (Pa.) Ward represented by counsel and personally present on final adjudication of guardian's account *held* not entitled on subsequent adjudication of trustee's account to object to taking of credit for items with which the guardian had debited himself.—*In re Pleasanton's Estate*, 81 A. 420.

An orphans' court decree confirming an account of a guardian is conclusive of all the matters contained therein.—*Id.*

HARMLESS ERROR.

See Appeal and Error, §§ 1032-1073.

HEALTH.

See Food; Licenses, §§ 6, 7.

II. REGULATIONS AND OFFENSES.

§ 37 (Vt.) A master *held* liable, under P. S. 5902, for the acts of his servant in distributing free samples of medicine, though in violation of express instructions.—*State v. Cray*, 81 A. 450.

HEARSAY EVIDENCE.

See Evidence, §§ 317, 318.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Bridges; Dedication, §§ 15, 44; Easements, § 18; Eminent Domain, § 238; Licenses, § 50; Municipal Corporations, §§ 269, 652-706, 733-821; Railroads, §§ 303-350; Towns, §§ 30, 79; Trespass, § 19.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(D) Title to Fee and Rights of Abutting Owners.

§ 85 (N.H.) The rule that rights of adjoining landowners are reciprocal, and are determinable by the doctrine of reasonable user, *held* applicable to towns in their qualified ownership and control of highways as to individuals.—*Elliott v. Town of Mason*, 81 A. 701.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 166 (N.J.) A rule adopted by the board of boulevard commissioners, controlling Hudson county boulevard under P. L. 1898, p. 173, *held* not authorized by P. L. 1888, p. 397 (3 Gen. St. 1895, p. 2882) and supplement thereto of 1891 (P. L. 1891, p. 79).—*Clausen v. De Medina*, 81 A. 924.

§ 176 (N.J.) Law of the road relating to the passing by one vehicle of another one moving in the same direction construed.—*Smith v. Barnard*, 81 A. 734.

§ 184 (N.J.) Unexplained presence on a public highway of a runaway horse harnessed to a wagon *held* to raise a presumption of negligence of the owner.—*Denberry v. Great Atlantic & Pacific Tea Co.*, 81 A. 861.

Evidence that wagon which ran over plaintiff was conspicuously marked with defendant's name was sufficient to warrant the inference that defendant was the owner.—*Id.*

In an action for injuries from being run over by a runaway horse, negligence of the driver *held* a question for the jury.—*Id.*

§ 186 (Md.) In a prosecution under Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, *held*, that a warrant issued under section 140b is not defective in failing to allege that it was issued by the nearest justice.—*Orichton v. State*, 81 A. 36.

Warrants issued in a prosecution under Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, *held*, in view of sections 139, 140b, to be too indefinite.—*Id.*

(C) Injuries from Defects or Obstructions.

§ 187 (Conn.) The wrongs to be redressed by Gen. St. 1902, § 2020, relating to the maintenance of streets, etc., *held* public, and not private.—*Coburn v. Connecticut Co.*, 81 A. 241.

§ 193 (Me.) Notice of a defect to one delegated by a road commissioner to perform the latter's duty under Rev. St. c. 23, § 76, as amended by Laws 1903, c. 108, *held* notice to the commissioner.—*McGown v. Inhabitants of Town of Washington*, 81 A. 1092.

Notice to a road commissioner of a defect in a culvert continues until the defect is repaired.—*Id.*

§ 194 (Pa.) Duty of township supervisors to construct guard rails on highways stated.—*Cobb v. Bradford Tp.*, 81 A. 199.

§ 210 (Pa.) Evidence as to alleged dangerous condition of highway two years after an accident thereon *held* inadmissible.—*Cobb v. Bradford Tp.*, 81 A. 199.

§ 211 (Pa.) In an action for injuries by alleged failure to maintain a guard rail, evidence as to the exact condition of the highway *held* necessary.—*Cobb v. Bradford Tp.*, 81 A. 199.

§ 213 (Me.) In an action against a town for injuries caused by a defective culvert, whether the authorities had actual notice of the defect *held* a jury question.—*McGown v. Inhabitants of Town of Washington*, 81 A. 1092.

§ 213 (Pa.) Evidence that person used highway knowing that there was a safer route *held*

not to show contributory negligence as matter of law, but to present a question for the jury.—*McManamon v. Hanover Tp.*, 81 A. 440.

Evidence in an action against township for death of plaintiff's husband from falling over unguarded vertical cut on main street *held* to present a question for jury as to negligence of the township.—*Id.*

§ 213 (Pa.) Question of township's negligence in an action for injuries to a traveler on highway *held* for the jury.—*Hoch v. Butler Tp.*, 81 A. 546.

HOMESTEAD.

See Mortgages, § 624.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 138 (N.H.) The right of waiver or release given by Pub. St. 1901, c. 195, § 13, *held* personal to the surviving husband, and to be effective it must be filed within the time specified and recorded as required by section 14.—*Horner v. Reynolds*, 81 A. 1078.

The amendment by Laws 1901, c. 113, § 4, to Pub. St. 1901, c. 195, § 13, *held* not effective except on the surviving husband waiving his homestead right in the real estate of his deceased wife.—*Id.*

§ 144 (N.H.) Where the husband of an intestate did not release his right of homestead in her real estate, the husband, under Pub. St. 1901, c. 195, § 13, took his homestead right, which under chapter 138, § 2, expired at his death.—*Horner v. Reynolds*, 81 A. 1078.

HOMICIDE.

See Criminal Law, §§ 351, 354, 517, 936; Indictment and Information, § 189; Insurance, § 455.

VII. EVIDENCE.

(B) Admissibility in General.

§ 158 (Vt.) Evidence of previous threats by accused to kill deceased are admissible.—*State v. Averill*, 81 A. 461.

Evidence of prior threats by accused to kill deceased *held* not objectionable as an attack on accused's character.—*Id.*

(E) Weight and Sufficiency.

§ 253 (Pa.) Evidence *held* to sustain a conviction of murder in the first degree.—*Commonwealth v. Comporto*, 81 A. 906.

HOSPITALS.

See Mandamus, § 154.

HUSBAND AND WIFE.

See Abatement and Revival, § 54; Bankruptcy, §§ 139, 301; Death, §§ 25, 67; Descent and Distribution, §§ 76, 87; Divorce; Dower; Evidence, §§ 220, 271, 471; Highways, § 213; Homestead; Marriage; Parties, § 75; Paupers, §§ 37, 40; Trial, § 216; Trusts, § 81.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 9 (Vt.) A husband on marriage becomes seised of the freehold of his wife's land in which she had an estate of inheritance, with the right to the rents and profits during their joint lives.—*Bishop v. Readsboro Chair Mfg. Co.*, 81 A. 454.

§ 14 (Pa.) Act June 8, 1893 (P. L. 344), does not abolish an estate by entirety existing in a husband and wife.—*In re Meyer's Estate*, 81 A. 145.

§ 14 (Pa.) "Estate by entireties" defined.—*In re Rhodes' Estates*, 81 A. 643.

Grantees *held* to take estate in entireties.

so that surviving husband takes premises in fee simple.—Id.

§ 25 (Vt.) A wife acquiring property pursuant to a contract made by her husband *held* to take subject to a notice of the rights of a third person.—*McLean v. Windham Light & Lumber Co.*, 81 A. 613.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 493½ (Pa.) Where decedent had received proceeds of condemnation of land owned jointly by himself and wife, his widow *held* entitled to one-half of the same from his estate.—In re *Ford's Estate*, 81 A. 200.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 121 (Vt.) Finding that husband bought property with money of wife *held* to preclude idea that husband had any marital interest in it.—*Donovan v. Selinas*, 81 A. 235.

(C) Liabilities and Charges.

§ 167 (N.J.Sup.) Married woman, authorizing third person holding her funds to pay debt of the husband for goods to be furnished, cannot after such payment rescind the agreement.—*Davidson v. Biddleman*, 81 A. 366.

§ 171 (N.J.Sup.) Where a married woman, on agreement of credit to a husband, mortgages her lands for a larger sum, and the difference is paid to her, she cannot recover the sum retained for his debt, on the ground that it is due and unpaid.—*Davidson v. Biddleman*, 81 A. 366.

VI. ACTIONS.

§ 205 (Pa.) A wife cannot sue her husband on a note during coverture.—*Gillan v. West*, 81 A. 128.

§ 207 (Vt.) An action for injuries to a wife's real estate is improperly brought in the name of the wife alone, but may be in the name of the husband alone or in their joint names.—*Bishop v. Readsboro Chair Mfg. Co.*, 81 A. 454.

VII. COMMUNITY PROPERTY.

§ 273 (N.H.) A deed of a surviving husband owning an undivided half interest in land *held* good as against his heirs to the extent of his interest, by virtue of Pub. St. 1901, c. 137, § 18, and valid against his tenants in common on partition so far as the land conveyed is not equitably required to give them their just share.—*Horner v. Reynolds*, 81 A. 1078.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 278 (Pa.) Deeds and postnuptial agreements for immediate separation of husband and wife *held* valid, both at law and in equity.—In re *Singer's Estate*, 81 A. 898.

§ 279 (Pa.) Under agreement between husband and wife, reciting that the parties have become reconciled and desire to live together, but that former agreement of separation shall in no other respect be modified, husband *held* not entitled, after his wife's death, to claim share in her estate under intestate laws.—In re *Singer's Estate*, 81 A. 898.

X. ENTICING AND ALIENATING.

§ 333 (Md.) In suit for alienation of affections, testimony as to conversations between husband and wife *held* admissible to show relations existing between husband and wife.—*Hillers v. Taylor*, 81 A. 286.

IDENTIFICATION.

See Elections, § 194.

IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, §§ 120-154.

IMPEACHMENT.

See Witnesses, § 387.

IMPLIED CONTRACTS.

See Money Received; Work and Labor.

IMPRISONMENT.

See Execution, §§ 425-448; False Imprisonment.

IMPROVEMENTS.

See Constitutional Law, § 290; Municipal Corporations, §§ 269-530, 654; Railroads, § 30.

IMPUTED NEGLIGENCE.

See Negligence, § 93.

INCOMPETENT PERSONS.

See Insane Persons.

INCONSISTENCY.

See Pleading, § 21.

INDEMNITY.

See Municipal Corporations, § 873; Principal and Surety.

§ 8 (Pa.) Indemnity bond, given by purchaser of corporate stock to sellers, *held* to create obligation of purchaser to pay note of corporation, if not paid by the corporation, and to indemnify the sellers of the stock as sureties on the note.—*Evans v. Loomis*, 81 A. 652.

§ 12 (Pa.) Acceptance by holder of note of second note as collateral *held* not to affect liability of person giving indemnity bond to sureties on first note.—*Evans v. Loomis*, 81 A. 652.

§ 13 (Pa.) Borough *held* entitled to recover over from property owner amount of judgment for injuries from defective sidewalk, notwithstanding lease of premises.—*Ashley Borough v. Lehigh & Wilkes-Barre Coal Co.*, 81 A. 412.

That borough did not repair sidewalk at expense of abutting owner after notice and failure to repair *held* not to defeat right of borough to recover over amount of judgment for injuries from defective sidewalk.—Id.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 316; Municipal Corporations, § 751; Negligence, § 32.

INDICTMENT AND INFORMATION.

See Criminal Law, §§ 261, 1011.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 111 (Md.) An indictment charging a violation of a statute need not negative by express averment an exception created in the statute.—*Weber v. State*, 81 A. 606.

A clause in Code Pub. Loc. Laws, art. 4, § 658 (Laws 1898, c. 123), *held* distinct from the provision of the section requiring a license for keeping billiard tables, and an indictment need not negative the exception.—Id.

§ 111 (Vt.) An indictment for a statutory offense need not negative an exception thereto, unless the exception is a material part of the description of the offense.—*State v. Carruth*, 81 A. 922; Same v. *Streeter*, Id. 923.

A complaint framed under P. S. 5320 *held* sufficient, though it did not negative the killing

of the deer in the defense of property, provided as a defense by Acts 1910, No. 208.—Id.

A complaint for the killing of a deer, under P. S. 5320, *held* not insufficient for failing to allege that the deer was not killed in defense of the right of property, granted by article 1 of the Bill of Rights.—Id.

The mere fact that an exception to a penal statute is created by the Constitution, rather than by a statute, does not determine that the exception must be negative, in a complaint charging a violation thereof.—Id.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (N.J.Sup.) Indictment, under P. L. 1898, pp. 271, 324, §§ 67, 197, P. L. 1908, p. 30, § 1, for removal from possession of county clerk of registers which had been used and checked at an election, sustained.—State v. Johnson, 81 A. 657.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189 (Vt.) Accused, under P. S. §§ 2337, 5697, may be convicted of involuntary manslaughter.—State v. Averill, 81 A. 461.

INDORSEMENT.

See Bills and Notes, §§ 237, 238.

INFANTS.

See Domicile, §§ 5, 8; Guardian and Ward.

III. PROPERTY AND CONVEYANCES.

§ 40 (N.J.Ch.) The court of chancery has inherent power to change the character of infants' property for their benefit; and one who holds property for infants may not dispose of the same without the sanction of the court.—Day v. Devitt, 81 A. 368.

INFORMATION.

See Indictment and Information.

INFRINGEMENT.

See Trade-Marks and Trade-Names, §§ 67-95.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Executors and Administrators, § 3; Taxation, §§ 859, 862.

INJUNCTION.

See Appeal and Error, § 150; Bankruptcy, § 301; Corporations, § 198; Costs, § 56; Dedication, § 61; Judgment, §§ 419, 456; Mines and Minerals, § 78; Municipal Corporations, §§ 654, 697, 994; Nuisance, §§ 23, 80; Partnership, § 242; Trade-Marks and Trade-Names, §§ 81-95; Waters and Water Courses, §§ 85, 158½, 179, 188, 203.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

§ 16 (N.J.) Elements to be considered in deciding whether complainant, who seeks to enjoin breach of a contract, has an adequate remedy at law, stated.—People's Brewing Co. of Trenton v. Levin, 81 Atl. 1114.

§ 23 (N.J.) In a suit to enjoin violation of a contract, damages to defendants resulting from another contract *held* no defense.—People's Brewing Co. of Trenton v. Levin, 81 Atl. 1114.

II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 37 (Md.) Statement of when injunction as a determinative remedy will lie, without prior resort to an action at law to determine legal title.—Oberheim v. Reeside, 81 A. 590.

§ 37 (N.J.) Before equity will enjoin an interference with a disputed right of way, the right thereto must be established at law.—Imperial Realty Co. v. West Jersey & S. R. Co., 81 A. 837.

(C) Contracts.

§ 61 (Me.) The seller of a trucking business *held* properly enjoined from directly or indirectly violating an agreement not to re-engage in a similar business for five years.—Flaherty v. Libby, 81 A. 166.

III. ACTIONS FOR INJUNCTIONS.

§ 128 (N.J.) In a suit to restrain defendants from breaching a contract to sell complainant's beer exclusively for five years, evidence *held* sufficient to show that the defense that complainant's beer had deteriorated was untrue.—People's Brewing Co. of Trenton v. Levin, 81 A. 1114.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 132 (N.J.Ch.) Distinction between preliminary injunction and an ad interim restraining order stated.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116.

§ 133 (N.J.Ch.) Mandatory injunctions are rarely granted before final hearing, and are strictly confined to cases where the remedy at law is plainly inadequate.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116.

§ 137 (N.J.Ch.) An interlocutory injunction will not issue where complainant's case is doubtful on the law or the facts.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116.

§ 159½ (N.J.) Where, in a suit to enjoin breach of a contract, many more affidavits are taken by complainant than were necessary, costs to cover those affidavits will not be given complainant.—People's Brewing Co. of Trenton v. Levin, 81 Atl. 1114.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 163 (N.J.Ch.) Preliminary writ of injunction will be dissolved on motion where the subpoena ad respondendum is not returned within the time prescribed by the rule for the return of service.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116.

§ 169 (N.J.Ch.) In order to appear specially to move to dissolve temporary injunction for lack of service, defendant must obtain leave of court.—Allman v. United Brotherhood of Carpenters and Joiners of America, 81 A. 116.

§ 176 (Pa.) Direction in decree that preliminary injunction shall stand in force to give similar relief when a similar emergency shall arise *held* not proper.—North Mountain Water Supply Co. v. Troxell, 81 A. 157.

IX. WRONGFUL INJUNCTION.

§ 260 (N.H.) Defendants, on motion to assess damages for wrongful injunction, *held* entitled to recover the amount of the injunction bond.—Rogers v. Clough, 81 A. 1075.

§ 261 (N.H.) Defendants, on motion for damages for wrongful injunction, *held* not entitled

to defend on the ground that there were other parties who might have legally obtained the injunction.—*Rogers v. Clough*, 81 A. 1075.

INNKEEPERS.

See Intoxicating Liquors, § 71.

§ 4 (N.J.Sup.) Where on complaint under Bishops Law, § 3, amending Werts Act, § 10, the affidavit is challenged by an offer to prove that affiants did not possess the knowledge necessary to verify the complaint, rendered nugatory a subsequent order to revoke the license.—*Allzair v. Blew*, 81 A. 563.

INNOCENT PURCHASERS.

See Bills and Notes, §§ 330-367; Vendor and Purchaser, §§ 229, 232.

IN PAIS.

See Estoppel, §§ 62-120.

IN PERSONAM.

See Judgment, § 16.

INQUISITION.

See Insane Persons, §§ 2, 19, 27.

INSANE PERSONS.

See Criminal Law, §§ 354, 452, 570.

I. DISABILITIES IN GENERAL.

§ 2 (Md.) Evidence *held* insufficient to sustain a finding of insanity on inquisition.—*In re Bristor's Estate*, 81 A. 25.

II. INQUISITIONS.

§ 19 (Md.) An inquisition as to insanity may be conducted by a sheriff's deputy.—*In re Bristor's Estate*, 81 A. 25.

§ 27 (Md.) Under Code Pub. Gen. Laws 1904, art. 16, § 107, art. 5, § 26, *held*, that an appeal would lie from an order confirming a finding on an inquisition of lunacy.—*In re Bristor's Estate*, 81 A. 25.

A finding of the jury as to insanity *held* not conclusive, though the alleged insane person appeared and testified.—*Id.*

V. PROPERTY AND CONVEYANCES.

§ 65 (Conn.) Pub. Acts 1903, c. 203, *held* to authorize a conservator to compromise a disputed claim for or against his ward's estate.—*In re Thomas*, 81 A. 972.

The court *held* authorized to direct the settlement of a claim against an incompetent by requiring the conservator to pay a specified sum in cash.—*Id.*

INSOLVENCY.

See Bankruptcy; Building and Loan Associations, §§ 42, 44; Corporations, §§ 274, 333, 542-563, 610; Executors and Administrators, § 416; Sales, § 407.

INSPECTION.

See Commerce, §§ 72, 77; Master and Servant, § 124; Railroads, § 270; Statutes, § 64.

INSTRUCTIONS.

See Criminal Law, § 780; Master and Servant, §§ 150-157; Trial, §§ 194-206, 312, 314, 386.

INSURANCE.

See Equity, § 46; Pleading, § 248.

IV. INSURABLE INTEREST.

§ 115 (Vt.) A mortgagee having an insurable interest, a declaration alleging the promise of an insurance company to indemnify both the mortgagor and mortgagee shows sufficient consideration to enable them to sue jointly.—*Williams Mfg. Co. v. Insurance Co. of North America*, 81 A. 916.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 137 (Me.) Credit is presumed to have been extended to insured for a premium, if the policy was delivered without requiring payment.—*Washburn v. United States Casualty Co.*, 81 A. 575.

§ 145 (Me.) An accident policy *held* renewed.—*Washburn v. United States Casualty Co.*, 81 A. 575.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 229 (Me.) Where policy provides for cancellation by insured on written notice, after 10 days, verbal notice of immediate cancellation *held* of no effect.—*Bard v. Fireman's Ins. Co.*, 81 A. 870.

Insured *held* not to have waived provision requiring insurer to give notice and tender return of unearned premium before canceling the policy.—*Id.*

§ 230 (Me.) Tender of return of unearned premium under a fire policy after a loss *held* not subject to reliance under a provision entitling the insurer to cancel the policy.—*Bard v. Fireman's Ins. Co.*, 81 A. 870.

§ 233 (Me.) In the absence of consent of insured or waiver upon her part, an agent has no power to cancel a policy of insurance except in the manner provided therein.—*Bard v. Fireman's Ins. Co.*, 81 A. 870.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 335 (Md.) An alleged violation of an iron-safe clause of a policy would not bar a recovery, if assured in good faith placed his books in a safe which he believed was fire proof, or in some place he had a right to believe was not exposed to a fire which would destroy the building.—*Joffe & Mankowitz v. Niagara Ins. Co.*, 81 A. 281.

Where a fire policy insuring a stock and fixtures was unenforceable as to the stock for a violation of an iron-safe clause, it was also unenforceable as to the fixtures.—*Id.*

Where a building containing insured's stock and fixtures was locked for a half hour at noon, it was not then "open for business," within an iron-safe clause in the policy.—*Id.*

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 379 (Me.) Under Rev. St. c. 49, § 93, accident insurance company *held* bound by its general agent's act in filling out an application for another.—*Washburn v. United States Casualty Co.*, 81 A. 575.

XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

§ 452 (Pa.) Clause in accident insurance policy, giving double indemnity for injuries while a passenger in a public conveyance, construed.—*Primrose v. Casualty Co. of America*, 81 A. 212.

§ 455 (Pa.) In an action on an accident policy, where insured was killed in a struggle begun by himself, evidence *held* to sustain a verdict for plaintiff.—*Erb v. Commercial Mut. Accident Co.*, 81 A. 207.

XIV. NOTICE AND PROOF OF LOSS.

§ 539 (Me.) Under Pub. Laws 1905, c. 158, surrounding circumstances *held* properly considered in determining whether a delay in making proof of loss was reasonable.—*Bard v. Fireman's Ins. Co.*, 81 A. 870.

§ 553 (Me.) Recovery on a fire policy *held* defeated by fraudulent overvaluation of articles burned, or fraudulent undervaluation of goods saved.—*Pottle v. Liverpool & London & Globe Ins. Co.*, 81 A. 481.

XVI. RIGHT TO PROCEEDS.

§ 581 (N.J.Ch.) Where a mortgagee takes out insurance on the property at the expense and for the benefit of both mortgagor and mortgagee, the mortgagor in case of loss is entitled to have the avails of the policy applied toward the discharge of his indebtedness.—*Leyden v. Lawrence*, 81 A. 121.

§ 582 (N.H.) Under a provision of a building contract requiring the owner to keep the building insured, contractors *held* entitled to recover out of the insurance moneys received on the destruction of the building before completion only the amount then due them under the contract.—*S. Anderson & Son v. Shattuck*, 81 A. 781.

Under a provision of a building contract for insurance during the work, contractors *held* entitled to recover from the insurance moneys the fair value of lumber brought upon the premises to be used in the building at the time of the fire, though it had not been used.—*Id.*

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§ 606 (N.J.Ch.) In the absence of proof that insurance on mortgaged property taken out by the mortgagee at the expense of the mortgagor was for the benefit of both, the insurer on paying the loss was entitled to be subrogated to the rights of the mortgagee against the property.—*Leyden v. Lawrence*, 81 A. 121.

Where a mortgagee insures the property solely for the better protection of his interest, the insurer, if obliged to pay a loss, may be subrogated pro tanto to the rights of the mortgagee under the mortgage.—*Id.*

XVIII. ACTIONS ON POLICIES.

§ 622 (N.H.) A provision in an accident policy limiting the time within which suit must be brought is binding.—*Maynard v. United States Health & Accident Co.*, 81 A. 1077.

§ 623 (N.H.) In an action on an accident policy, *held*, that there was no waiver of a limitation for time of bringing action.—*Maynard v. United States Health & Accident Co.*, 81 A. 1077.

§ 665 (Me.) In an action on a fire policy, evidence *held* to show fraudulent overvaluation of property lost and fraudulent undervaluation of that saved.—*Pottle v. Liverpool & London & Globe Ins. Co.*, 81 A. 481.

XX. MUTUAL BENEFIT INSURANCE.

(D) Forfeiture or Suspension.

§ 755 (N.H.) In an action on a benefit certificate, facts *held* insufficient to show a waiver of insured's suspension for nonpayment of dues and assessments.—*Labranche v. St. Jean Baptiste Society*, 81 A. 698.

A by-law providing for the suspension of a person insured for nonpayment of assessments or premiums may be waived.—*Id.*

§ 756 (N.H.) Where insured at the time of his death was in arrears both for assessments and dues, he was no longer a member in good standing, though he had not been expelled from the society.—*Labranche v. St. Jean Baptiste Society*, 81 A. 698.

INTENT.

See Contracts, §§ 147, 176; Dedication, §§ 15, 44; Deeds, §§ 93, 111, 138; Elections, § 180; Evidence, § 269; Executors and Administrators, § 271; Fixtures; Fraud, §§ 42, 44; Paupers, § 22; Reformation of Instruments, § 44.

INTEREST.

See Attachment, § 338; Damages, §§ 67, 69; Insurance, § 115; Limitation of Actions, § 157; Mortgages, § 273; Taxation, §§ 80, 98; Usury; Wills, § 116; Witnesses, §§ 143, 144.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 132-176.

INTERLOCUTORY JUDGMENT.

See Appeal and Error, § 78.

INTERPLEADER.

See Appeal and Error, § 143.

INTERPRETATION.

See Contracts, §§ 143-176; Deeds, §§ 90-108; Mortgages, §§ 114-119; Statutes, §§ 200-203; Taxation, § 204; Vendor and Purchaser, §§ 68, 78; Wills, §§ 449-695.

INTERSTATE COMMERCE.

See Commerce.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Commerce, § 41; Injunction, § 128.

IV. LICENSES AND TAXES.

§ 55 (Md.) Under Laws 1908, c. 380, referring to Code Pub. Gen. Laws 1904, art. 56, sections 90, 91, and 102 of which provide for oyster house license, a social club *held* to make sales of liquor to its members so as to be required to procure a license.—*Conococheague Club of Washington County v. State*, 81 A. 602.

§ 64 (Md.) Laws 1908, c. 380, relating to the sale of intoxicating liquors without a license, *held* to apply to corporations as well as to natural persons.—*Conococheague Club of Washington County v. State*, 81 A. 602.

§ 64 (N.J.Sup.) Malt Liquors Act, § 14, governing section 2, *held* to extend to cities adopting laws regulating sales of malt liquors after the act was passed, as well as those in which such laws were previously in force.—*Dunbar v. Board of Excise of Elizabeth*, 81 A. 347.

§ 71 (N.J.Sup.) Under Inns and Taverns Act, § 36, refusal to one person of a license to keep an inn or tavern *held* not to preclude issuance to another of a malt liquor license for the same place.—*Dunbar v. Board of Excise of Elizabeth*, 81 A. 347.

VI. OFFENSES.

§ 165 (Del.Gen.Sess.) To convict one of a sale of spirituous liquor, it is necessary to find that accused sold the liquor with intention that it be used as a beverage, irrespective of the

subsequent uses to which the purchaser put it.—*State v. Hastings*, 81 A. 403.

Person selling spirituous liquor as medicine, *held* required to make the sale in good faith, and to use reasonable care to ascertain for what purpose it is to be used.—*Id.*

A person *held* entitled to sell Jamaica ginger for medicinal purposes, but not as a beverage.—*Id.*

§ 168 (Del.Gen.Sess.) Accused *held* criminally liable for sale of spirituous liquor with his authority by a clerk acting as his agent.—*State v. Hastings*, 81 A. 403.

VIII. CRIMINAL PROSECUTIONS.

§ 226 (Del.Gen.Sess.) In determining purpose for which accused sold Jamaica ginger, jury *held* required to consider all the evidence concerning the facts surrounding the sale.—*State v. Hastings*, 81 A. 403.

§ 236 (Del.Gen.Sess.) Defendant, to avail himself of defense that Jamaica ginger sold by him was not a spirituous liquor, but a medicine, *held* required to prove it to the satisfaction of the jury.—*State v. Hastings*, 81 A. 403.

INVENTION.

See Patents.

INVENTORY.

See Executors and Administrators, § 70; Taxation, §§ 353, 594, 839.

INVITATION.

See Railroads, § 350.

INVITED ERROR.

See Appeal and Error, § 882.

IRON-SAFE CLAUSE.

See Insurance, § 335.

JOINDER.

See Action, § 41.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 3 (Pa.) Under Const. art. 5, § 15, and constitutional amendment of article 8, § 3, adopted November 2, 1909 (P. L. 951), and its schedule, an election cannot be held in November, 1911, for a judge of the court of common pleas or orphans' court, whose term expires January 1, 1913.—*Commonwealth v. McAfee*, 81 A. 85.

§ 7 (Pa.) Acts 1911, p. 9, § 2, providing that judges, whose commissions expire on the first Monday of January in odd-numbered years, shall hold their offices until the first Monday of January in the following even-numbered year, is unconstitutional as extending the term of the judges beyond the limit fixed by the Constitution.—*Commonwealth v. McAfee*, 81 A. 85.

§ 8 (Pa.) Where a judicial term ends on the first Monday of January, 1913, a vacancy exists which must be filled by the Governor, under Const. art. 4, § 8.—*Commonwealth v. McAfee*, 81 A. 85.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 29 (N.J.) In absence of all the judges of a certain circuit, any justice of the Supreme Court could discharge their duties under Act

March 23, 1900 (P. L. pp. 351, 355) §§ 14, 28.—*New Jersey & H. R. Ry. & Ferry Co. v. American Electric Works*, 81 A. 989.

§ 31 (N.J.Sup.) District Court Act, §§ 3, 21, *held* to authorize outgoing judge to determine causes on the actual trial of which he has entered, but not to enter on the trial of a new cause, though instituted during his term.—*Van Riper v. Dubron*, 81 A. 433.

JUDGMENT.

See Appeal and Error, §§ 66, 706, 1073; Attachment, § 217; Bankruptcy, § 305; Banks and Banking, § 183; Bills and Notes, § 473; Corporations, § 274; Creditors' Suit; Equity, § 427-430; Evidence, § 348; Execution; Exemptions; Guardian and Ward, § 163; Quo Warranto, § 61; Taxation, § 493; Trusts, § 375.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 16 (Md.) A judgment in personam is wholly void, if no jurisdiction of defendant's person is acquired.—*Wilmer v. Epstein*, 81 A. 379.

§ 17 (Md.) Jurisdiction of defendant's person must be acquired by personal service or by his voluntary appearance, before judgment in personam can be rendered against him.—*Wilmer v. Epstein*, 81 A. 379.

II. BY CONFESSION.

§ 68 (Md.) The court entering a judgment by confession *held* to possess jurisdiction to determine a motion to strike the judgment on specified grounds.—*Leaverton v. Albert*, 81 A. 601.

§ 70 (Pa.) Attack on former judgment on bond *held* properly excluded in ejectment, where no collusion or fraud was alleged.—*Gould v. Randal*, 81 A. 809.

Judgment on warrant of attorney *held* to have the qualities of a judgment on a verdict until set aside or reversed in an appropriate proceeding.—*Id.*

III. ON CONSENT, OFFER, OR AD-MISSION.

§ 72 (Vt.) Failure of a party to sign a stipulation orally agreed on in court *held* not to affect the validity of the judgment entered on the stipulation.—*Manley v. Johnson*, 81 A. 919.

A stipulation between the parties, providing for a judgment, *held* supported by a valid consideration, so that a party could not withdraw therefrom.—*Id.*

§ 90 (Vt.) An oral stipulation of the parties, made in court and acted on by the court, *held* not within the rule providing for the disregard of an oral agreement, where the parties differ as to its terms.—*Manley v. Johnson*, 81 A. 919.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 106 (Md.) Under Acts 1902, c. 409, a plaintiff may take a default judgment where defendant has failed to plead within the required time, even though defendant has since requested leave to plead.—*Betz v. P. Welty & Co.*, 81 A. 382.

§ 106 (Pa.) Order discharging rule for judgment for want of sufficient affidavit of defense *held* not reversible, except where pure question of law is raised, and clear error has been committed.—*Harvey v. Weitzenkorn*, 81 A. 447.

§ 126 (Md.) Though a judgment by default in a contractual action establishes the liability of defendant, it is incumbent upon plaintiff to prove the amount of such liability.—*Betz v. P. Welty & Co.*, 81 A. 382.

(B) Opening or Setting Aside Default.

§ 138 (R.I.) Defendant *held* entitled to a trial and vacation of a judgment by default.—*Japanese Importers Co. v. Walsh*, 81 A. 337.

§ 141 (R.I.) Where the writ on which a default judgment was rendered was returnable, on a date prior to the date the writ was issued, the judgment was void on its face, and defendant has no occasion for a trial, under Gen. Laws 1909, c. 297, § 1.—*Prescott v. Angell*, 81 A. 194.

§ 159 (Pa.) Order discharging rule for judgment for want of sufficient affidavit of defense, in action by trustee of bankrupt corporation for amount of subscription to stock, *held* not reversible error.—*Harvey v. Weitzenkorn*, 81 A. 447.

VI. ON TRIAL OF ISSUES.**(A) Rendition, Form, and Requisites in General.**

§ 199 (Pa.) Under Act April 22, 1905 (P. L. 286), power of court to enter judgment, notwithstanding the verdict, defined.—*Duffy v. York Haven Water & Power Co.*, 81 A. 908.

Where evidence for plaintiff tended to show that a dam erected by defendant injured plaintiff's property, entry of a judgment for defendant non obstante veredicto *held* error.—*Id.*

(B) Parties.

§ 238 (Vt.) Where plaintiff sued two attorneys for money received, and failed to establish a cause of action against one of them, he was nevertheless entitled to judgment against the other under P. S. 1530.—*McKane v. Gordon & Hoar*, 81 A. 637.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 250 (Md.) In an action against four defendants as joint tort-feasors, two of them having been dismissed at the trial, the declaration *held* insufficient to sustain a judgment against the remaining two.—*Firor v. Taylor*, 81 A. 389.

§ 252 (Vt.) Prayer for general relief *held* to sustain a decree following the net earnings of a railroad in the hands of receivers applicable to preferred claims into the hands of a purchasing corporation, and to compel payment by the latter.—*Bell's Estate v. St. Johnsbury & L. C. R. Co.*, 81 A. 630.

IX. OPENING OR VACATING.

§ 386 (Md.) An application to vacate a judgment for fraud must be made within a reasonable time after discovery of the facts showing fraud.—*Clark v. Southern Can Co.*, 81 A. 271.

§ 392 (Pa.) Rule to show cause why judgment entered in an action for personal injuries should not be set aside for perjury and fraud discharged.—*Itenson v. Altoona & L. V. Electric Ry. Co.*, 81 A. 198.

X. EQUITABLE RELIEF.**(A) Nature of Remedy and Grounds.**

§ 407 (Md.) Refusal to strike out a judgment by confession on specified grounds *held* to bar a bill in equity to vacate the judgment based on the same grounds.—*Leaverton v. Albert*, 81 A. 601.

§ 419 (Md.) A garnishee, not having funds subject to attachment and who was not personally served, so that the judgment against him was void, *held* entitled to enjoin its enforcement.—*Wilmer v. Epstein*, 81 A. 379.

(B) Jurisdiction and Proceedings.

§ 456 (Md.) A letter from the attaching creditor, claiming under a void judgment, *held* to show the contemplated enforcement of the judgment, authorizing the garnishee to enjoin

its enforcement without waiting until his property was levied upon.—*Wilmer v. Epstein*, 81 A. 379.

§ 456 (Pa.) A judgment *held* not to be opened at instance of an administrator of defendant after nine years, where such action would invalidate title to real estate.—*Gould v. Randal*, 81 A. 809.

XI. COLLATERAL ATTACK.**(A) Judgments Impeachable Collaterally.**

§ 470 (Md.) A judgment of a court having jurisdiction of the parties and subject-matter cannot be impeached in a collateral proceeding.—*Clark v. Southern Can Co.*, 81 A. 271.

§ 479 (Md.) An order ratifying the final audit of a trustee and requiring him to pay a sum to one as an individual *held* not subject to collateral attack, in an action on the trustee's bond, by showing that it was ordered paid to such person as an individual.—*State v. Graham*, 81 A. 31.

§ 480 (Md.) The rule that a judgment by a court having jurisdiction cannot be collaterally attacked applies to all kinds of judgments, including judgments of dismissal and for costs.—*Clark v. Southern Can Co.*, 81 A. 271.

(C) Proceedings.

§ 522 (Md.) Where a personal injury action was marked "agreed and settled" after plaintiff had executed a release, *held*, that she could not, in a subsequent action for the same injuries, have the release set aside for fraud and a judgment entered pursuant thereto annulled.—*Clark v. Southern Can Co.*, 81 A. 271.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.**(B) Causes of Action and Defenses Merged, Barred, or Concluded.**

§ 606 (Pa.) Where landowner recovers for entire destruction of beneficial use of flooded land, subsequent grantee *held* not entitled to recover for later loss of crops or injury to use and occupation of the land.—*Vanderslice v. Irondale Electric Light, Heat & Power Co.*, 81 A. 445.

XIV. CONCLUSIVENESS OF ADJUDICATION.**(A) Judgments Conclusive in General.**

§ 644 (Md.) The judgment against a teacher in mandamus to compel a board of school commissioners to restore her to her position *held* conclusive against her, and so to bar actions by her against them for damages for having made false statements in their answer, and committed perjury, in the mandamus suit.—*Roschen v. Packard*, 81 A. 174.

§ 652 (Md.) A judgment by default establishes the liability of the defendant, and defendant may not in a proceeding to assess the damages offer testimony contradicting such liability.—*Betz v. P. Welty & Co.*, 81 A. 382.

(B) Persons Concluded.

§ 683 (Md.) An attorney retained by a wife in a pending divorce case and to recover property due her in part assigned by her to the attorney *held* not authorized to sue the husband and third persons for their procuring, in pursuance of a conspiracy, false testimony defeating the action.—*Schaub v. O'Ferrall*, 81 A. 721.

(C) Matters Concluded.

§ 725 (Pa.) Judgment on award in favor of plaintiff against railroad company *held* conclusive, in an action on a scire facias sur judgment, that plaintiff was a contractor within Resolutions of January 21, 1843 (P. L. 367), and April 4, 1862 (P. L. 235), giving a prior

lien to contractors building railroad.—Pittsburg Const. Co. v. West Side Belt R. Co., 81 A. 884.

§ 744 (Del.Ch.) A decree of foreclosure held to preclude receivers of the mortgagor railway company from contending that freight cars were not included in the mortgage.—National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co., 81 A. 70.

(D) Judgments in Particular Classes of Actions and Proceedings.

§ 747 (Pa.) Where invalidity of judgment on bond is set up as defense in ejectment, bill in equity to set aside the judgment on the bond held not maintainable under Act April 20, 1905 (P. L. 239).—Gould v. Randal, 81 A. 809.

§ 749 (Conn.) An application by a conservator to the court for authority to settle a claim against the ward's estate held to present the question whether the compromise is a reasonable one and for the best interests of the estate.—In re Thomas, 81 A. 972.

XVII. FOREIGN JUDGMENTS.

§ 818 (Md.) The presumption is in favor of jurisdiction, where judgment was rendered by a foreign court.—Mundy v. Jacques, 81 A. 289.

In connection with the presumptions in favor of judgments of foreign states, evidence held to show that defendant was served with process.—Id.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 870 (Md.) Record on scire facias against three judgment debtors held required to show why fiat was asked against two only.—Wilkin Mfg. Co. v. Melvin, 81 A. 879.

JUDICIAL NOTICE.

See Evidence, §§ 5, 19.

JUDICIAL POWER.

See Constitutional Law, § 70.

JUDICIAL SALES.

See Bankruptcy, §§ 143, 279; Dower, §§ 53, 83; Execution, §§ 247-315; Executors and Administrators, §§ 326, 454; Fraudulent Conveyances, §§ 31, 192.

JURISDICTION.

See Appearance, §§ 18, 24; Attachment, § 206; Bankruptcy, § 214; Courts; Criminal Law, § 1011; Dead Bodies; Eminent Domain, §§ 167, 267; Equity, §§ 15, 39, 48, 395; Fraudulent Conveyances, § 237; Garnishment, § 95; Guardian and Ward, § 58; Judgment, §§ 16, 17, 68, 818; Justices of the Peace; Marriage, § 60; Municipal Corporations; Nuisance, § 80; Parties, § 97; Partition, § 43; Pleading, § 111; Specific Performance, § 127; Trusts, § 177.

JURY.

See Costs, § 175; Trial, §§ 139-160, 194-296, 312, 314, 386.

II. RIGHT TO TRIAL BY JURY.

§ 19 (Pa.) Trial by jury may be had in mandamus proceedings in a court of common pleas, and such a trial is conducted as in other actions at law.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316; Same v. Williamsport Water Co., Id. 324.

§ 22 (Md.) Laws 1906, c. 475, amending Code, art. 52, § 12, held not to apply to Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, of which section 140p

authorizes justices of the peace to try offenders without the intervention of a jury.—Crichton v. State, 81 A. 36.

§ 31 (Md.) Laws 1910, c. 207, amending Code, art. 56, §§ 131-140, and adding sections 140a-140i, 140k-140t, regulating motor vehicles, is not invalid because authorizing justices of the peace to try the offenders without the intervention of a jury.—Crichton v. State, 81 A. 36.

V. COMPETENCY OF JURORS, CHALLENGES AND OBJECTIONS.

§ 137 (Pa.) Under Act July 9, 1901 (P. L. 629), permission to commonwealth to peremptorily challenge juror after he was turned over unchallenged to defense and accepted by the latter held not error under the circumstances.—Commonwealth v. Marion, 81 A. 423.

JUSTICES OF THE PEACE.

See Criminal Law, § 1011; Highways, § 186; Jury, §§ 22, 31.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 37 (Del.Super.) Under Rev. Code 1852, as amended to 1893, p. 740, c. 99, § 1, held, that a justice of the peace had no jurisdiction of an action on a warranty arising out of a contract for the sale of a horse.—Wills v. Wright, 81 A. 507.

§ 58 (Del.Super.) The jurisdiction of a justice's court must affirmatively appear in the record.—Wills v. Wright, 81 A. 507.

IV. PROCEDURE IN CIVIL CASES.

§ 81 (N.J.Sup.) Where domestic corporation has a director residing within the county, service of summons from small cause court on agent in the county held insufficient.—Harrison v. Union Transp. Co., 81 A. 490.

A summons issued out of the small cause court can be legally served only as directed by the act creating that court.—Id.

Under Small Cause Act, § 17, as amended by P. L. 1906, p. 47, where domestic corporation has a director within the county on whom summons from the small cause court may be served, service on an agent in an office in the county is insufficient.—Id.

KNOWLEDGE.

See Banks and Banking, § 116; Estoppel, § 93; Evidence, § 5; Fraudulent Conveyances, §§ 158, 162; Highways, § 213; Landlord and Tenant, § 160; Master and Servant, §§ 125, 217; Notice; Payment, § 84; Vendor and Purchaser, §§ 215, 220, 232.

LACHES.

See Cancellation of Instruments, § 34; Equity, § 67; Partnership, § 321; Pleading, § 221; Reformation of Instruments, § 32; Specific Performance, § 99.

LANDLORD AND TENANT.

See Equity, § 15; Evidence, § 271; Execution, § 268; Fixtures; Indemnity, § 13; Specific Performance, § 13; Taxation, § 65; Time; Trusts, §§ 105, 280; Vendor and Purchaser, §§ 232, 350.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

§ 48 (N.J.) Where a landlord extinguishes his tenant's term by a wrongful conveyance of the premises, the tenant can maintain an action against the landlord for breach of the engage-

ments in the lease.—*Williams v. Young*, 81 A. 1118.

Where a landlord extinguishes a tenant's term by a wrongful conveyance, the tenant has an action for damages to the value of the term, based upon the wrongful destruction of his term.—*Id.*

Tenant's right of action against a landlord for the wrongful extinguishment of his term *held* to accrue at the time the wrongful conveyance was made.—*Id.*

Upon a landlord's wrongful conveyance of lands subject to a tenant's term, *held*, that the tenant was entitled to recover upon an implied contract.—*Id.*

IV. TERMS FOR YEARS.

(D) Termination.

§ 95 (N.J.) Landlord's wrongful conveyance of premises subject to a term *held* to destroy the term.—*Williams v. Young*, 81 A. 1118.

Payments by a lessee after the landlord's wrongful extinguishment of his term by conveyance *held* ineffectual for any purpose.—*Id.*

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(D) Repairs, Insurance, and Improvements.

§ 150 (Me.) A lessor of a dwelling house *held* not to impliedly warrant its reasonable fitness for use, nor to be bound to repair unless he has expressly agreed to do so.—*Hill v. Day*, 81 A. 581.

(E) Injuries from Dangerous or Defective Condition.

§ 162 (Me.) A landlord is under no greater duty to a subtenant respecting safety of the premises than to the tenant.—*Hill v. Day*, 81 A. 581.

§ 164 (Me.) A landlord *held* not liable for injury to a subtenant caused by plaster falling.—*Hill v. Day*, 81 A. 581.

A subtenant *held* not entitled to recover against the landlord for injury from plaster falling on the theory of gratuitous undertaking by the landlord to repair.—*Id.*

§ 169 (Me.) Evidence in an action by a subcontractor against a landlord for injury caused by plaster falling *held* insufficient to show that the landlord knew of the defective condition.—*Hill v. Day*, 81 A. 581.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 184 (N.J.Sup.) Under 2 Gen. St. 1895, p. 1923, pl. 35, surety for payment of rent *held* not liable after destruction of buildings by fire, where landlord did not repair.—*Colonial Land Co. v. Asmus*, 81 A. 367.

§ 192 (N.J.) Under P. L. 1874, p. 27 (2 Gen. St. 1895, p. 1923, § 35), lessee defending action for rent on ground of injury to or total destruction of building *held* required to be without fault.—*Colonial Land Co. v. Asmus*, 81 A. 827.

To authorize tenant to defend action for rent on ground of injury to or destruction of building under P. L. 1874, p. 27 (2 Gen. St. 1895, p. 1923, § 35), it must appear that a subtenant was without fault.—*Id.*

(D) Distress.

§ 272 (Pa.) Where landlord appraises goods distrained before five full days have elapsed after seizure, and sells them, he is a trespasser.—*Ehrhart v. Esbenshade*, 81 A. 814.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 290 (Me.) Forcible entry and detainer is a proper remedy against a tenant at will whose

tenancy has been terminated by alienation by the landlord for a term of years.—*Karahalies v. Dukais*, 81 A. 1011.

LANGUAGE.

See Evidence, § 456.

LAPSE.

See Wills, §§ 774, 775.

LAW OF THE CASE.

See Appeal and Error, §§ 1097, 1195.

LAW OF THE ROAD.

See Highways, § 176.

LEADING QUESTIONS.

See Depositions, § 66; Witnesses, § 282.

LEASE.

See Landlord and Tenant; Mines and Minerals.

LEGISLATURE.

See Statutes, § 30.

LETTERS.

See Evidence, §§ 71, 174, 318.

LETTERS PATENT.

See Patents.

LEX LOCI.

See Contracts, §§ 2, 144, 325.

LIBEL AND SLANDER.

See Appeal and Error, § 1004.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 36 (Conn.) Communications absolutely privileged are practically limited to legislative or judicial proceedings and acts of a state.—*Hassett v. Carroll*, 81 A. 1013.

§ 51 (Conn.) Slanderous statements made by a priest as a part of a sermon *held* only qualifiedly or conditionally privileged, and sufficient to support a recovery on proof of malice.—*Hassett v. Carroll*, 81 A. 1013.

IV. ACTIONS.

(C) Evidence.

§ 104 (Conn.) Evidence of the time, place, manner, and circumstances of preparation and publication as well as the language of a slander, is admissible to show malice.—*Hassett v. Carroll*, 81 A. 1013.

§ 104 (N.J.Sup.) In an action of libel, plaintiff *held* entitled to put in evidence on the question of malice a plea of defendant which has been withdrawn.—*Ruskin v. Armn*, 81 A. 342.

§ 112 (Conn.) Proof that a slander was spoken in an improper and unjustifiable manner, or with improper and unjustifiable motives, establishes malice in fact within Gen. St. 1902, § 767.—*Hassett v. Carroll*, 81 A. 1013.

Uttering of slanderous charges by a priest against a member of his congregation in a Sunday sermon *held* malicious and actionable.—*Id.*

(D) Damages.

§ 116 (Conn.) Where only general damages are demanded in an action for slander, plaintiff was only entitled to recover compensation for those damages which the law presumes to be the actual and proximate result of the publication.—*Hassett v. Carroll*, 81 A. 1013.

§ 121 (Conn.) In an action for slander, a verdict allowing plaintiff \$4,000 *held* excessive, and to be reduced to \$2,500.—*Hassett v. Carroll*, 81 A. 1013.

(B) Trial, Judgment, and Review.

§ 123 (Conn.) Where a slander was spoken by a priest as a part of a sermon, the nature of the occasion, as privileged or not, was a question for the court, but the character of the use which defendant made of the occasion was for the jury.—*Hassett v. Carroll*, 81 A. 1013.

LICENSES.

See Animals, § 4; Food; Indictment and Information, § 111; Innkeepers, § 4; Intoxicating Liquors, §§ 55-71; Mandamus, § 154.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 6 (N.J.Sup.) No power is given a board of health by 2 Gen. St. 1895, p. 1644, pl. 49, to require the wagons used for gathering slaughterhouse refuse to be licensed by them.—*M. L. Shoemaker & Co. v. Board of Health of Gloucester City*, 81 A. 349.

§ 7 (N.J.Sup.) License fee of \$50 for each wagon removing slaughterhouse refuse *held* for revenue, and not within the statutory powers of boards of health.—*M. L. Shoemaker & Co. v. Board of Health of Gloucester City*, 81 A. 349.

§ 42 (Md.) Under Code Pub. Gen. Laws 1904, art. 17, and article 56, §§ 8-10, and Code Pub. Loc. Laws, art. 4, §§ 658-660 (Laws 1898, c. 123), a license for the keeping of billiard tables in Baltimore city must be procured from the state.—*Weber v. State*, 81 A. 606.

II. IN RESPECT OF REAL PROPERTY.

§ 50 (N.H.) A licensee of an owner of land adjacent to a highway who has a private way from his land across a ditch maintained by the town to the highway *held* not entitled to maintain an action against the town for maintaining a nuisance based on the ditch rendering travel unsafe.—*Elliott v. Town of Mason*, 81 A. 701.

LIENS.

See Agriculture, § 11; Bankruptcy, §§ 214, 216; Corporations, § 478; Creditors' Suit; Divorce, § 266; Dower, §§ 27, 83; Estoppel, § 68; Executors and Administrators, § 271; Limitation of Actions, § 122; *Lis Pendens*, § 24; Mechanics' Liens; Mortgages, § 156; Municipal Corporations, § 530; Railroads, §§ 144, 167, 171.

LIFE ESTATES.

See Deeds, § 143; Dower; Executors and Administrators, § 450; Fraudulent Conveyances, § 312; Mortgages, § 273; Perpetuities; Wills, §§ 524, 549.

§ 15 (N.J.Ch.) In a stated case, where stock had been bequeathed to one for life and remainder to another, a dividend *held* to be an extraordinary one, which must be apportioned between the life tenant and remainderman.—*Ballantine v. Young*, 81 A. 119.

The right to subscribe for new shares which command a premium is, where corporate stock has been bequeathed to one for life and remainder to another, considered a part of the principal.—*Id.*

In a stated case, *held* that the stock dividends must be apportioned between the life tenant and remainderman.—*Id.*

In apportioning a stock dividend between the life tenant and the remainderman, the apportionment should be made on the basis of the company's accounts.—*Id.*

Where corporate stock, bequeathed to one for life with remainder to another, secured a holder the right to purchase on favorable terms shares of another corporation, that right is capital belonging to the remainderman.—*Id.*

§ 15 (N.J.Ch.) Statements of rights of life tenant under a will of corporate stock, on a stock dividend, representing more than the earnings after testator's death, being declared.—*Day v. Faulks*, 81 A. 354.

LIGHTS.

See Municipal Corporations, § 818.

LIMITATION OF ACTIONS.

See Adverse Possession; Parties, § 59; Partnership, § 321; Pleading, § 409.

I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

§ 19 (N.J.Ch.) The statute of limitations applies to a suit in equity to foreclose a mortgage.—*Wallace v. Coward*, 81 A. 739.

§ 36 (Md.) Under facts stated, *held*, that it could not be said that limitations had run against the enforcement of a trust under which corporate stock was held.—*Tyson v. George's Creek Coal & Iron Co.*, 81 A. 41.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 44 (N.J.Ch.) A bill to foreclose a mortgage *held* to show on its face that the suit was barred by limitations.—*Wallace v. Coward*, 81 A. 739.

§ 56 (Pa.) Limitations of right of borough to recover over amount paid for injuries from defective sidewalk *held* not to run from date of accident, but from date of judgment, or payment thereof.—*Ashley Borough v. Lehigh & Wilkes-Barre Coal Co.*, 81 A. 442.

(C) Personal Disabilities and Privileges.

§ 73 (Pa.) Period of wife's coverture is to be excluded in ascertaining time in which presumption of payment of a note of the husband arose.—*Gillan v. West*, 81 A. 128.

(H) Commencement of Action or Other Proceeding.

§ 121 (Pa.) Where action has been brought against a corporation, the record cannot be amended by naming as defendant a partnership of the same name.—*Girardi v. Laquin Lumber Co.*, 81 A. 63.

§ 122 (Pa.) Municipal lien *held* lost, where scire facias, issued within statutory period, was not served according to law, and the lien was not revived by general appearance to alias scire facias, issued after the expiration of the period.—*City of Scranton v. Genet*, 81 A. 335.

§ 127 (Md.) Amendment to pleadings in an action of trover, so as to change the form of action to assumpsit on the common counts, *held* equivalent to a new action as of the date of the amendment, so that the defense of limitations was available to defendant.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 385.

§ 127 (N.J.Sup.) An amendment of the declaration after limitations have run is not improper, so long as a new cause of action is not introduced thereby.—*Duffy v. McKenna*, 81 A. 1101.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 148 (Me.) To take an indebtedness out of the statute by an acknowledgment in writing, it must appear that the debtor intended to renew his promise.—Lord v. Jones, 81 A. 169.

A letter sent by the maker of an overdue note to the holder *held* a sufficient acknowledgment of the debt and a promise to pay to take the note out of the statute.—Id.

§ 157 (N.J.Ch.) Payment of interest on a mortgage by the mortgagor or his grantee within 20 years will toll limitations.—Wallace v. Coward, 81 A. 739.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 180 (N.J.Ch.) Where it appears on the face of a bill that complainant's right of action is barred by limitations, a demurrer will lie.—Wallace v. Coward, 81 A. 739.

§ 196 (Me.) In an action on a note, where defendant pleaded limitations, plaintiff could introduce a letter from defendant promising to pay in the future, and showing that the letter referred to the note in suit.—Lord v. Jones, 81 A. 169.

LIMITATION OF LIABILITY.

See Carriers, § 153.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

§ 2 (N.J.) P. L. 1902, p. 477, relating to notice of lis pendens, *held* intended to eradicate injustice of rule that during pendency of equitable suit, neither party could alienate property so as to affect rights of opponent.—Wood v. Price, 81 A. 983.

§ 3 (N.J.Ch.) The actual execution of a writ of sequestration authorized by Divorce Act 1907, §§ 25, 26, in an action for alimony against a nonresident by the entry of the sequestrator, places the property in the custody of the law and is constructive notice to all the world.—Wood v. Price, 81 A. 1093.

§ 13 (N.J.) Omission to file and record statutory notice of lis pendens under P. L. 1902, p. 477, *held* to leave the parties free to deal with the subject-matter of the litigation untrammelled.—Wood v. Price, 81 A. 983.

§ 22 (N.J.) P. L. 1902, p. 477, relating to notice of lis pendens, *held* not to deal with rights of persons having notice of equities.—Wood v. Price, 81 A. 983.

§ 22 (N.J.Ch.) P. L. 1902, p. 477, § 1, *held* not to override the effect of actual sequestration of real estate authorized by Divorce Act 1907, §§ 25, 26, in an action for alimony against a nonresident.—Wood v. Price, 81 A. 1093.

§ 24 (Vt.) Purchaser of railroad property on foreclosure pending suit to impose a lien for services and materials *held* to have purchased subject to the decree subsequently rendered.—Bell's Estate v. St. Johnsbury & L. C. R. Co., 81 A. 630.

LISTS.

See Taxation, §§ 411-446.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOANS.

See Mortgages, § 114; Municipal Corporations, §§ 863, 904; Taxation, § 462.

LOCAL LAWS.

See Statutes, § 85.

LOGS AND LOGGING.

See Damages, §§ 112, 174.

§ 3 (Vt.) Errors in classification of timber sold under a contract stipulating for measurements by surveyors selected by the parties for the basis of settlement *held* subject to correction by the courts.—McLean v. Windham Light & Lumber Co., 81 A. 613.

A contract between a purchaser of standing timber and a third person for the sale of the timber to the third person construed, and *held* a sale for a consideration depending on the amount of the timber.—Id.

LOST INSTRUMENTS.

See Corporations, § 109.

LOTTERIES.

I. REGULATION AND PROHIBITION.

§ 3 (Del.Gen.Sess.) A baseball pool *held* to provide for the payment of money depending on a contingency in the nature of a lottery, in violation of Rev. Code 1852, amended to 1893, p. 396 (12 Del. Laws, c. 33).—State v. Sedgwick, 81 A. 472.

That tickets issued pursuant to a baseball pool contained no promise or guaranty that on the happening of an event the holder should be entitled to money did not save the scheme from a violation of Rev. Code 1852, amended to 1893, p. 396 (12 Del. Laws, c. 33).—Id.

IV. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 29 (Del.Gen.Sess.) The character of a lottery scheme involving more than appeared on the tickets could be shown by any proper testimony.—State v. Sedgwick, 81 A. 472.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

See Master and Servant.

MALICE.

See Libel and Slander, §§ 51, 104, 112.

MALICIOUS PROSECUTION.

See False Imprisonment.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

§ 6 (N.J.) One is liable for procuring the arrest of another on a false complaint, charging disorderly conduct and that accused is of unsound mind.—Dordoni v. Smith, 81 A. 743.

MALPRACTICE.

See Physicians and Surgeons.

MANDAMUS.

See Appeal and Error, § 1106; Discovery, § 3; Equity, § 48; Evidence, § 157; Judgment, § 644; Jury, § 19; Waters and Water Courses, § 183.

I. NATURE AND GROUNDS IN GENERAL.

§ 1 (Me.) When mandamus is an appropriate remedy stated.—Webster v. Ballou, 81 A. 1009.

§ 3 (Me.) Mandamus *held* to lie to compel a sheriff to execute a writ of possession.—Webster v. Ballou, 81 A. 1009.

§ 3 (Pa.) Pendency of proceedings in equity *held* not to oust jurisdiction by mandamus, unless equity can give complete relief.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316; Same v. Williamsport Water Co., Id. 324.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 90 (Pa.) Provision of Act May 13, 1901 (P. L. 191), relating to construction of bridge by adjoining counties, construed.—Lewisburg Bridge Co. v. Union County, 81 A. 324.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 154 (Conn.) Under Gen. St. 1902, § 4670, a petition for mandamus to compel the issuance of a license to keep a maternity hospital *held* to require allegations that the plaintiff was a proper person to keep such a hospital, and that the board of health did not exercise a reasonable discretion in refusing a license.—Adleman v. Board of Health of City of Hartford, 81 A. 1055.

§ 172 (Pa.) Issues in preliminary mandamus by city seeking to acquire works and property of water company stated.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316; Same v. Williamsport Water Co., Id. 324.

§ 173 (Pa.) In Act May 13, 1901 (P. L. 191), term "hearing" defined.—Lewisburg Bridge Co. v. Union County, 81 A. 324.

§ 174 (Pa.) Though Act June 14, 1836 (P. L. 621), and Act June 8, 1893 (P. L. 345), authorize jury trials in mandamus, court *held* to have authority to submit special issues to secure special findings on controlling issues.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316; Same v. Williamsport Water Co., Id. 324.

§ 187 (Pa.) Findings of fact of the lower court in mandamus against a civil service commission to compel reinstatement of chief examiner are conclusive on appeal.—Commonwealth v. City of Philadelphia, 81 A. 59.

MANSLAUGHTER.

See Homicide.

MANUFACTURES.

See Taxation, § 204; Trade-Marks and Trade-Names, §§ 67, 93.

MAPS.

See Municipal Corporations, § 652.

MARGINS.

See Evidence, § 166.

MARKS.

See Elections, §§ 180, 186, 194.

MARRIAGE.

See Breach of Marriage Promise; Divorce; Husband and Wife.

§ 51 (N.J.) Where evidence of cohabitation, etc., was offered on an issue of marriage only

in corroboration of a ceremonial marriage, defendant was not entitled to a nonsuit unless plaintiff elected between proof of a ceremonial and common-law marriage.—Prout v. Prout, 81 A. 757.

§ 60 (N.J.Ch.) On petition for annulment of marriage, *held* that, under the divorce and annulment act of 1907, the petitioner was not a bona fide resident of this state, and hence that the court had no jurisdiction.—Hess v. Kimble, 81 A. 363.

Where petitioner in a suit for annulment of a marriage attempts to regard himself a resident of this state, for the purpose only of procuring the benefits of our statute, no relief can be granted.—Id.

MASTER AND SERVANT.

See Constitutional Law, § 247; Contracts, § 230; Corporations, § 201; Health; Negligence, § 32; Railroads, § 207; Trial, § 243; Waters and Water Courses, § 206; Witnesses, § 268.

I. THE RELATION.

(C) Termination and Discharge.

§ 29 (N.J.) In action for unlawful discharge from employment a nonsuit *held* properly granted.—Phelps v. Fuchs & Lang Mfg. Co., 81 A. 728.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 69 (Md.) Acts 1910, c. 221, amending Acts 1904, c. 37, *held* to violate Const. U. S. Amend. 14, by unreasonably discriminating against particular classes of employers.—State v. Potomac Valley Coal Co. of Garrett County, 81 A. 686; Same v. Hamill Coal & Coke Co., Id. 695.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 85 (Md.) A master's liability for injury to a servant must rest either on negligence of commission or omission.—Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267.

§ 96 (Conn.) An employer's liability for injury depends primarily upon whether the injury was caused by his negligence.—Belevicze v. Platt Bros. & Co., 81 A. 339.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Conn.) Master's duty to a workman at a machine as to providing a safe place to work, stated.—Belevicze v. Platt Bros. & Co., 81 A. 339.

§§ 101, 102 (Md.) To warrant recovery for a servant's injury from machinery, it must be shown that it was defective, and that the master did not exercise proper care in the premises.—Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267.

§§ 101, 102 (N.J.Sup.) A master must provide tools which are reasonably safe and fit for the purpose to which they are to be applied.—Pushcart v. New York Shipbuilding Co., 81 A. 113.

§ 117 (Md.) Running a hoisting engine exposed to the weather *held* not negligence per se on the part of a master.—Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267.

§ 124 (Conn.) Where a street car company had the duty of providing and maintaining a hand brake suitable and reasonably safe for the work to which it would be put, such duty required an inspection and reasonable care by the company.—Delinks v. New York, N. H. & H. R. Co., 81 A. 1036.

§ 125 (Conn.) An employer is not liable for injuries resulting from defects of which he did not know or was not bound to know by the use of due care.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

§ 127 (Conn.) A street railroad company *held* bound to provide and maintain a hand brake reasonably suitable and safe for the work to which it was to be put.—*Delinks v. New York, N. H. & H. R. Co.*, 81 A. 1036.

§ 129 (Pa.) Injury to employé *held* not due to act of fellow servant under direction of foreman, for which employer would be liable.—*Sterner v. S. Morgan Smith Co.*, 81 A. 889.

(C) Methods of Work, Rules, and Orders.

§ 137 (Md.) An engineer of a hoisting machine *held* negligent in lowering a load onto a scow without signal.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

(D) Warning and Instructing Servant.

§ 150 (Conn.) Master's duty to a workman at a machine as to instruction and warning, stated.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

§ 155 (Conn.) An employer must warn his employé against latent dangers known to the employer, but not known to the employé.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

§ 157 (Conn.) An instruction of an employé against danger should be proportioned to his abilities to understand and should fully point out the danger.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

(E) Fellow Servants.

§ 168 (Vt.) A master is not an insurer of the competency of his employés, but is *held* only to reasonable care in their selection.—*Doyle v. Melendy*, 81 A. 1129.

§ 182 (Pa.) Under Act June 10, 1907 (P. L. 523), negligence of fellow servant, in acting in obedience to instructions of foreman, *held* no defense to action for injuries.—*Sterner v. S. Morgan Smith Co.*, 81 A. 889.

§ 185 (Md.) Defective working of a foot brake of a hoisting engine on another occasion *held* not sufficient to show negligence of the master, where the servant in charge of the engine did not attempt to use it at the time of an accident.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

§ 185 (N.J.) Failure of employé in control of machinery to give, as was his duty, warning when it started, whereby another employé was injured, *held* imputable to the master.—*Ondis' Adm'x v. Great Atlantic & Pacific Tea Co.*, 81 A. 856.

§ 189 (Pa.) Character of duties of mine foreman *held* not necessarily changed because he may hire or discharge men, or suggest where they shall work or how entries shall be driven or the mine developed.—*Hood v. Connell Anthracite Mining Co.*, 81 A. 56.

Where mine foreman acts also as superintendent, and is negligent, owner of mine *held* liable for the consequences of such negligence.—*Id.*

Act June 2, 1891 (P. L. 176), regulating mining operations in anthracite fields, and Act May 15, 1893 (P. L. 52), relating to bituminous mines, in so far as they relate to duties of mine foreman, *held* practically the same.—*Id.*

§ 197 (N.J.) Employés *held* not regarded in law as fellow servants.—*Ondis' Adm'x v. Great Atlantic & Pacific Tea Co.*, 81 A. 856.

§ 200 (Md.) The engineer of a hoisting engine *held* a fellow servant of the captain of a scow being loaded by such engine.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

(F) Risks Assumed by Servant.

§ 203 (Conn.) Applicability of assumption of risk to ordinary and extraordinary risks, defined.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

An employer is not liable for injury resulting from the ordinary risks of the service; these being assumed by the servant.—*Id.*

§ 217 (Conn.) An employer *held* not liable for injury to an employé resulting from a danger of which the servant knew or ought to have known.—*Belevicze v. Platt Bros. & Co.*, 81 A. 339.

§ 217 (N.J.Sup.) Where defect in a tool is obvious, a servant cannot assume the risk for a fellow servant who does not know of the defect.—*Pushcart v. New York Shipbuilding Co.*, 81 A. 113.

§ 219 (Md.) The captain of a scow *held* to have assumed risk of injury from loads being placed thereon by a derrick, and hoisting engine.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

§ 219 (N.J.Sup.) Where defect in tool is obvious, the servant assumes the risk.—*Pushcart v. New York Shipbuilding Co.*, 81 A. 113.

§ 221 (N.J.) Rule as to assumption of risk by a servant after promise of master to repair, stated.—*Mellon v. Victor Talking Mach. Co.*, 81 A. 755.

(G) Contributory Negligence of Servant.

§ 229 (Md.) A servant must take ordinary precautions to inform himself of the dangers of his service.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

§ 231 (Vt.) The assurance of a planing mill employé's foreman that he would take care of boards piled near the employé's machine *held* not to excuse the employé from exercising due care to prevent stumbling over them.—*Hartigan v. Deerfield Lumber Co.*, 81 A. 259.

§ 234 (Pa.) Employé, injured by fall of iron plate, *held* guilty of contributory negligence.—*Sterner v. S. Morgan Smith Co.*, 81 A. 889.

§ 235 (Vt.) An employer is not liable for injuries through defects in the employé's place of work which he could have observed by exercising due care.—*Hartigan v. Deerfield Lumber Co.*, 81 A. 259.

§ 236 (Md.) A servant injured by being struck by a swinging bucket carrying a heavy load to be placed in a scow *held* guilty of contributory negligence.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

§ 236 (Vt.) It is an employé's duty to exercise the care of a prudent man to prevent falling upon material accumulated around his place of work.—*Hartigan v. Deerfield Lumber Co.*, 81 A. 259.

§ 238 (Pa.) In an action for injuries to a servant, nonsuit *held* properly directed on evidence that plaintiff, having a safe place in which to work, voluntarily took an unsafe position.—*Zuraw v. Hammermill Paper Co.*, 81 A. 654.

§ 246 (Conn.) In a motorman's action for personal injuries, *held*, that his act in emergency, while it might have been a mistake, was not contributory negligence.—*Delinks v. New York, N. H. & H. R. Co.*, 81 A. 1036.

§ 247 (Conn.) A motorman's disobedience of a rule as to the use of reverse power, not shown to have had any proximate connection with his injuries, *held* not such contributory negligence as would defeat his right to a recovery.—*Delinks v. New York, N. H. & H. R. Co.*, 81 A. 1036.

(H) Actions.

§ 258 (N.J.Sup.) Complaint in action against master must specify the character of the defect in the tool causing injury to plaintiff.—*Pushcart v. New York Shipbuilding Co.*, 81 A. 113.

§ 258 (Pa.) In action for injuries to servant, allegations that rope and appliances were insufficient, and that they were not properly inspected, *held* not inconsistent.—Wells v. Erie R. Co., 81 A. 330.

§ 259 (Vt.) Avertisments in counts in an action for personal injuries *held* to sufficiently allege that defendant failed to perform the duty of exercising reasonable care in the selection of fellow servants.—Doyle v. Melendy, 81 A. 1129.

§ 265 (Me.) The burden is on plaintiff to show that her intestate did not by his own fault contribute to the accident which caused his death.—Fournier v. York Mfg. Co., 81 A. 82.

Where the death of an employé was caused by his own act in producing a contact with a fuse box in a power house, it must affirmatively appear that in doing the act he was not negligent, but in the exercise of due care.—*Id.*

Where there was no evidence as to how plaintiff's intestate came in contact with a fuse box in a power house, if he did so, plaintiff failed to sustain the burden of showing that her intestate did not negligently contribute to the injury which caused his death.—*Id.*

§ 265 (Me.) In an action for death of a railway employé, the burden was on plaintiff to show that decedent's own negligence did not contribute to the accident.—Tatro v. Maine Cent. R. Co., 81 A. 216.

In an action for death of a railway employé, the burden was on plaintiff to show negligence in delaying medical treatment, etc., after the accident.—*Id.*

§ 265 (Pa.) In an action for personal injuries, the burden is on plaintiff to show that defendant's negligence caused the injury, but not to disprove contributory negligence.—Bollinger v. Crystal Sand Co., 81 A. 712.

§ 276 (Conn.) An employer is *prima facie* liable for injury to an employé for failure to perform a duty to him.—Belevicze v. Platt Bros. & Co., 81 A. 339.

§ 276 (Conn.) Evidence in a motorman's action for personal injuries *held* to sustain a finding that the defendant's negligence was the proximate cause of his injuries.—Delinks v. New York, N. H. & H. R. Co., 81 A. 1036.

§ 276 (Pa.) In an action to recover damages for personal injuries received by an employé from defects in certain machinery, evidence *held* to sustain nonsuit.—Conway v. Philadelphia Hardware & Malleable Iron Works, 81 A. 421.

§ 278 (Conn.) In an action for injury to an employé at a machine containing a revolving cylinder, evidence *held* to sustain a finding of negligence in failing to warn him against the dangers of the employment.—Belevicze v. Platt Bros. & Co., 81 A. 339.

§ 278 (Me.) In an action for death of a railway employé, evidence *held* insufficient to show negligence of the company in delaying medical treatment, etc., after the accident.—Tatro v. Maine Cent. R. Co., 81 A. 216.

§ 278 (Me.) In an action for injury to an employé, evidence *held* insufficient to show negligence of defendant.—Rowe v. Hill Lumber Mfg. Co., 81 A. 669.

§ 278 (Md.) Fact that a gear guard was missing *held* not negligence in an action for injury to a servant, where there was nothing to show that its presence could have prevented the accident.—Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267.

§ 278 (N.H.) In an action for injury to an employé evidence *held* to sustain a finding of negligence of the employer in failing to instruct against the danger.—Vigneault v. Winchester Tannery Co., 81 A. 407.

§ 278 (Pa.) In an action for injuries to a servant, evidence *held* to establish a *prima facie*

case of negligence of defendant.—Bollinger v. Crystal Sand Co., 81 A. 712.

§ 281 (Conn.) Evidence in an action by a motorman for personal injuries *held* not to show that he was negligent in attempting to use a hand brake to stop his car.—Delinks v. New York, N. H. & H. R. Co., 81 A. 1036.

§ 281 (Vt.) In a mill employé's action for personal injuries by stumbling over boards and catching his hand in a planer saw, evidence *held* to show that plaintiff was guilty of contributory negligence.—Hartigan v. Deerfield Lumber Co., 81 A. 259.

§ 285 (Md.) Evidence which tended to show that an accident was caused either by slipping of a friction drum or negligence of a fellow servant *held* not to support a cause of action against the master.—Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267.

§ 285 (Pa.) Where plaintiff rested after simply showing an unexplained accident, case *held* to be for the jury, where evidence introduced by defendant showed unsafe condition of place in which employé was required to work.—Husvar v. Delaware, L. & W. R. Co., 81 A. 200.

§ 286 (Conn.) Ordinarily in an employé's personal injury action, what warning or instruction should have been given him is for the jury.—Belevicze v. Platt Bros. & Co., 81 A. 339.

In an employé's personal injury action, whether defendant was negligent in failing to warn him of dangers attending work at a machine containing a revolving cylinder *held*, under the evidence, a jury question.—*Id.*

§ 286 (N.J.) In an action for injuries to a servant while working at a press in a factory, evidence *held* to present a question for the jury as to the negligence of the master.—Mellon v. Victor Talking Mach. Co., 81 A. 755.

§ 286 (Pa.) In an action for injuries to an employé, evidence *held* to present a question for the jury as to defendant's negligence in furnishing a defective rope or sling.—Wells v. Erie R. Co., 81 A. 330.

In action for injuries to employé, testimony as to condition of rope *held* properly submitted to the jury, though the witnesses did not identify completely the rope they saw with the one which broke.—*Id.*

§ 286 (Pa.) Question of negligence of master in the use of a dangerous appliance *held* to be for the jury.—Ferry v. Philadelphia Rapid Transit Co., 81 A. 426.

§ 287 (Pa.) In an action for injuries to a miner, resulting from negligence of the mine foreman, whether the latter acted in the dual capacity of mine foreman and superintendent *held* a question for the jury.—Hood v. Connell Anthracite Mining Co., 81 A. 56.

§ 288 (N.H.) In an action for injury to an employé, evidence *held* insufficient to show as a matter of law that he assumed the risk.—Vigneault v. Winchester Tannery Co., 81 A. 407.

§ 288 (N.J.) Whether three days is a reasonable time for the servant to incur the risk in the expectation that the master will perform his promise to repair is a question for the jury.—Mellon v. Victor Talking Mach. Co., 81 A. 755.

§ 289 (N.J.) Whether danger from defective machine is so great that a prudent person would not continue in employment after promise to repair, *held* a question for the jury.—Mellon v. Victor Talking Mach. Co., 81 A. 755.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302 (Conn.) Defendant's chauffeur *held* to have been in the scope of his employment when he ran into plaintiff.—McKiernan v. Lehmaier, 81 A. 969.

§ 304 (Md.) Where a third person is injured by the concurring negligence of the servants of two masters, the law does not make fine distinctions in determining which was the proximate cause of the injury.—*Firor v. Taylor*, 81 A. 389.

(B) Work of Independent Contractor.

§ 316 (N.J.) Persons employed by defendant to set off fireworks at a pleasure resort held an independent contractor for whose negligence defendant was not liable.—*Reisman v. Public Service Corporation of New Jersey*, 81 A. 838, 840.

(C) Actions.

§ 330 (Md.) In an action for injuries against two defendants, evidence that the accident was solely due to the negligence of the driver of a wagon, and that he was solely the agent of one of the defendants, held admissible.—*Firor v. Taylor*, 81 A. 389.

MASTERS IN CHANCERY.

See Equity, § 395.

MATERIALITY.

See Evidence, § 143.

MEASURE OF DAMAGES.

See Damages, §§ 98-124.

MECHANICS' LIENS.

See Appeal and Error, § 1036; Bankruptcy, § 186; Municipal Corporations, § 373; Pleading, § 111; Statutes, §§ 85, 117, 200.

II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

§ 35 (Md.) Under Laws 1910, c. 52, § 1, which, as to Baltimore city, gives a lien only for work done, a subcontractor, whose contract is on its face an indivisible contract for labor and materials, is entitled to no lien whatever.—*Joseph B. Dunn & Sons v. Brager*, 81 A. 516.

§ 47 (Me.) Under Rev. St. c. 93, § 29, one held entitled to a materialman's lien for iron columns set in building, but afterwards taken out on revision of the plans.—*Fletcher-Crowell Co. v. Chevalier*, 81 A. 578.

§ 48 (Me.) Under Rev. St. c. 93, § 29, one held not entitled to mechanic's lien for material furnished, but not used in the particular building.—*Fletcher-Crowell Co. v. Chevalier*, 81 A. 578.

(E) Subcontractors' and Contractors' Workmen and Materialmen.

§ 103 (Pa.) Change of ownership during the construction held not to affect the stipulation against liens contained in the original contract between the owner and contractor, filed in prothonotary's office in accordance with Act June 4, 1901 (P. L. 440) § 18.—*Felin v. Locust Realty Co.*, 81 A. 158.

IV. OPERATION AND EFFECT.

(A) Amount and Extent of Lien.

§ 166 (Me.) A materialman's lien is created by law when the materials are furnished; claimant being required, to perfect his lien for enforcement by bill in equity, only to record his statement of lien in the town clerk's office, as required by statute.—*Witham v. Wing*, 81 A. 100.

(C) Priority.

§ 197 (Me.) The town clerk's certificate of the filing of a materialman's lien, filed in the registry of deeds office pursuant to Rev. St. c.

93, § 39, is notice to the world of a claim of a lien upon the property described, making or thereafter purchasing it to do so at his risk.—*Witham v. Wing*, 81 A. 100.

§ 201 (Md.) Under Code Pub. Gen. Laws 1904, art. 63, § 15, one purchasing property at execution sale, with notice of a prior lien, takes subject to the lien.—*George Long Contracting Co. v. Albert*, 81 A. 265.

VII. ENFORCEMENT.

§ 263 (N.J.Sup.) A mortgagee whose mortgage was of record before the contract sued on was filed or suit commenced to enforce a mechanic's lien could not be properly made a party defendant.—*Conlan v. Leonard*, 81 A. 492.

To entitle a mortgagee to be made a party to a suit to enforce a mechanic's lien, the mortgage must have been of record at the time of commencement of the suit.—*Id.*

§ 276 (Me.) Amendment to the bill in a suit to enforce a materialman's lien held to allege that certain work and material were furnished to W., while the original bill alleged that they were furnished to him and two others.—*Witham v. Wing*, 81 A. 100.

§ 277 (Me.) Any variance between the name of the persons contracted with, as alleged in the bill in suit to enforce a materialman's lien, and as shown in the statement of lien, filed pursuant to Rev. St. c. 93, § 31, and put in evidence, held not to defeat the lien.—*Witham v. Wing*, 81 A. 100.

§ 288 (N.J.Sup.) In an action to enforce a mechanic's lien, evidence held not to authorize a nonsuit or direction of verdict for defendants.—*Conlan v. Leonard*, 81 A. 492.

MEDICINES.

See Intoxicating Liquors, §§ 165, 236.

MEETINGS.

See Corporations, §§ 194-201, 283; Towns, § 19.

MEMBERS.

See Insurance, § 756.

MEMORANDA.

See Evidence, § 355; Witnesses, §§ 255, 253, 271.

MENTAL CAPACITY.

See Paupers, §§ 19, 22.

MINERS.

See Infants.

MINES AND MINERALS.

See Constitutional Law, § 296; Eminent Domain, § 2; Master and Servant, §§ 189, 287.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§ 73 (Pa.) Description of premises in oil lease construed.—*Owens v. American Natural Gas Co.*, 81 A. 547.

§ 78 (Pa.) Under provision in oil lease, evidence held not to show error in refusing injunction against drilling of well.—*Owens v. American Natural Gas Co.*, 81 A. 547.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(A) Statutory Regulation.

§ 92 (Pa.) Anthracite Mining Act, art. 3, § 10, provides that owners of adjoining coal properties must leave a pillar of coal in each seam.

worked by them along the line of adjoining property. *Held* a valid exercise of the police power.—*Commonwealth v. Plymouth Coal Co.*, 81 A. 148.

(C) Rights and Liabilities Incident to Working.

§ 125 (Pa.) In an action by a landowner for depositing culm on his land by a stream, the case is for the jury, where there is evidence that culm from other mines was also deposited on the land.—*Pierce v. Lehigh Valley Coal Co.*, 81 A. 141.

MISCONDUCT.

See New Trial.

MISREPRESENTATION.

See Fraud; Mortgages, §§ 209, 217; Sales, § 52.

MISTAKE.

See Dedication, § 19; Fines; Payment, § 84; Reformation of Instruments, §§ 19, 32, 87, 45.

MONEY PAID.

See Executors and Administrators, § 513; Fines.

MONEY RECEIVED.

See Attorney and Client, §§ 124, 128; Execution, § 286; Executors and Administrators, § 429; Judgment, § 238; Payment, § 84; Pleading, § 248.

§ 15 (Me.) Assumpsit for money had and received *held* comprehensive in its scope, and favored.—*Dresser v. Kromberg*, 81 A. 487.

§ 19 (Md.) Measure of damages in assumpsit on the common counts on an open account for the value of a cargo of fruit which defendant had received and sold stated.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 385.

MONUMENTS.

See Adverse Possession, § 116.

MORTGAGES.

See Building and Loan Associations, §§ 18, 38, 39; Chattel Mortgages; Constitutional Law, § 194; Corporations, § 482; Costs, § 192; Descent and Distribution, § 129; Dower, § 46; Evidence, § 332; Execution, §§ 48, 268; Executors and Administrators, §§ 224, 227, 271, 460; Fraud, § 59; Fraudulent Conveyances, §§ 113, 122; Husband and Wife, § 171; Insurance, §§ 115, 581, 606; Judgment, § 744; Limitation of Actions, §§ 19, 44; Mechanics' Liens, § 263; Parties, § 97; Principal and Agent, § 81; Quieting Title, § 30; Railroads, §§ 144, 167, 171; Statutes, § 239; Trusts, § 100; Usury; Wills, §§ 821, 840.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 37 (Vt.) A deed absolute on its face may be shown by parol to be a mortgage.—*Skeels v. Blanchard*, 81 A. 913.

§ 38 (N.J.) Evidence *held* insufficient to entitle complainant to have an absolute conveyance declared a conveyance for security.—*Mealey v. Howard*, 81 A. 1108.

§ 38 (Vt.) The sufficiency of the evidence to show that a deed absolute in form is a mortgage, when it is the first and only instrument evidencing the transaction, defined.—*Skeels v. Blanchard*, 81 A. 913.

III. CONSTRUCTION AND OPERATION.

(B) Parties and Debts or Liabilities Secured.

§ 114 (Del.Super.) A mortgagor can only be charged with the amount actually received under the mortgage, though it was given for a greater sum.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

§ 114 (Pa.) Where a loan of \$11,000 was made on condition that the father of the borrower should execute a mortgage for \$8,000 as security, the presumption is that the mortgage was given only as security for the sum named.—*Bergdoll v. Sopp*, 81 A. 62.

§ 119 (N.H.) A grantee's covenant to furnish a home construed.—*Day v. Townis*, 81 A. 405.

On bill to establish plaintiff's rights under defendant's covenant to furnish her a home on land resold by him, defendant *held* not entitled to set off the value of plaintiff's future earning capacity.—*Id.*

(D) Lien and Priority.

§ 156 (N.J.) Mortgagees of a grantee of executors with power of sale *held* entitled to enforce the mortgages against the property described.—*Cook v. Jack*, 81 A. 1110.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 209 (Me.) A trustee under a mortgage is bound to know that all the statements made by him in a certificate authenticating a bond secured by the mortgage are true.—*Mullen v. Eastern Trust & Banking Co.*, 81 A. 948.

Plaintiff *held* entitled to recover against a trustee under a trust mortgage for falsely certifying an overissue of the bonds, two of which were purchased by plaintiff.—*Id.*

Provision in a trust mortgage *held* not to relieve the trustee, a corporation, from liability for its secretary's act in falsely certifying an overissue of bonds under the mortgage.—*Id.*

§ 217 (Me.) Measure of damages recoverable against a trustee under a mortgage for falsely certifying an overissue of bonds, two of which were purchased by plaintiff, *held* the difference between the value of the bonds when purchased and their value if they had been as represented.—*Mullen v. Eastern Trust & Banking Co.*, 81 A. 948.

§ 218 (N.J.Sup.) Subsequent bond *held* not so strictly identical with former bonds as to strip the former bonds of their common-law force under Act March 23, 1881 (P. L. p. 184; 2 Gen. St. 1895, p. 2112).—*Knight v. Cape May Sand Co.*, 81 A. 361.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 257 (Del.Super.) An assignee of a mortgage after maturity of the secured note took it subject to all equities.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 273 (N.J.Ch.) A life tenant *held* bound to pay interest on mortgage on the premises to protect the rights of the remainderman.—*Nagle v. Conard*, 81 A. 841.

§ 295 (N.J.Ch.) Merger of a mortgage in the legal estate *held* not favored in equity.—*Nagle v. Conard*, 81 A. 841.

A mortgage bequeathed by testator, devising the mortgaged premises to trustees in trust, *held* to pass to the legatee, who must take subject to the conditions imposed on the gift.—*Id.*

§ 296 (Vt.) A mortgagee may purchase the equity of redemption, but, in view of the relation of the parties, the transaction will be

carefully scrutinized.—*Skeels v. Blanchard*, 81 A. 913.

A conveyance of mortgaged premises by the mortgagor to the mortgagee *held* prima facie a security subject to the right of redemption.—*Id.*

§ 297 (Vt.) Where a mortgagor under a past-due mortgage gave to the mortgagee a warranty deed of the premises, a finding by a preponderance of evidence alone that the deed was intended as a mortgage is justified.—*Skeels v. Blanchard*, 81 A. 913.

Evidence *held* admissible to show that parties to a deed absolute in form intended it to be a mortgage.—*Id.*

X. FORECLOSURE BY ACTION.

(H) Trial or Hearing and Reference.

§ 479 (Vt.) Where the amount of the redemption payment to be made upon foreclosure was a matter of record, the trial court need not refer the cause to a master.—*Gordon v. Deavitt*, 81 A. 1128.

(J) Sale.

§ 507 (Md.) One trustee appointed to sell mortgaged property at foreclosure could not bind his cotrustee, so as to charge the proceeds of the sale with commissions.—*Moore v. Councilman*, 81 A. 122.

XI. REDEMPTION.

§ 591 (Vt.) Where a mortgage exists, an equitable right of redemption attaches.—*Skeels v. Blanchard*, 81 A. 913.

§ 624 (Vt.) Where a wife redeemed the homestead from mortgage foreclosure, *held*, that she was not chargeable with rents and profits to a second mortgagee.—*Gordon v. Deavitt*, 81 A. 1128.

MOTIONS.

See Affidavits, §§ 18, 237, 241, 706, 748.

§ 26 (N.J.Sup.) The affidavits on which a rule to show is made must be filed as a basis for the rule upon entering it.—*Peer v. Bloxham*, 81 A. 659.

MOTOR VEHICLES.

See Criminal Law, § 1011; Highways, § 186.

MULTIFARIOUSNESS.

See Equity, § 150.

MULTIPLICITY OF SUITS.

See Equity, § 39.

MUNICIPAL CORPORATIONS.

See Carriers, § 12; Certiorari, § 70; Constitutional Law, §§ 120, 229, 291; Counties; Dedication, §§ 19, 20, 35, 38, 43, 44; Discovery, § 3; Eminent Domain, §§ 9, 19, 85; Evidence, § 157; Indemnity, § 13; Intoxicating Liquors, § 64; Limitation of Actions, §§ 58, 122; Mandamus, § 178; Newspapers; Schools and School Districts; Sheriffs and Constables, § 10; Street Railroads; Taxation, §§ 186, 193, 204, 206, 217; Towns; Trespass, § 19; Trial, §§ 252, 253; Waters and Water Courses, §§ 183-209.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 27 (N.J.Sup.) Legislature *held* to have power to divide counties and towns at its pleasure, and to apportion the property and common burdens.—*Board of Education of Borough of*

Flemington v. State Board of Education, 81 A. 163.

§ 36 (N.J.Sup.) Though Legislature has power to impose on new municipality obligation of existing contract of an old one, the old corporation *held* to remain liable in the absence of legislation to that effect.—*Board of Education of Borough of Flemington v. State Board of Education*, 81 A. 163.

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 46 (Md.) Act 1910, c. 305, amending the charter of Hyattsville, *held* adopted by the town, though the ballots printed for the election read for and against "the road bill," instead of for and against "the act to improve the streets," as prescribed by the act.—*Carr v. Town of Hyattsville*, 81 A. 8.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 57 (Md.) Municipal corporations have only such powers as are granted by the Constitution or statutes expressly or by fair construction.—*Rushe v. Town of Hyattsville*, 81 A. 278.

Any doubt as to the existence of municipal power must be resolved against the corporation.—*Id.*

V. OFFICERS, AGENTS, AND EMPLOYÉS.

(A) Municipal Officers in General.

§ 129 (N.J.Sup.) Appointment of city engineer by resolution by common council of city incorporated under P. L. 1899, p. 96, under authority given to appoint subordinate officers under section 18, subd. 34, *held* unauthorized.—*Eckerson v. City of Englewood*, 81 A. 1070.

§ 144 (N.J.Sup.) P. L. 1906, p. 13, relative to official oaths of municipal officers, *held* to include cities.—*Ludlam v. Dallas*, 81 A. 489.

§ 147 (N.J.) Approval by a de facto mayor of a borough, who acts under color of authority of an ordinance, gives it validity.—*Harrison v. Borough of Madison*, 81 A. 755.

§ 162 (Pa.) That a city treasurer's failure to appoint a clerk as authorized by ordinance cast upon the treasurer heavier burdens did not authorize him to recover the salary of the clerk.—*Bovaird v. City of Bradford*, 81 A. 719.

§ 165 (Pa.) In assumpsit by city treasurer for salary of clerk after repeal of ordinance, claim being based on Act May 23, 1889 (P. L. 277), direction of verdict for defendant *held* proper.—*Bovaird v. City of Bradford*, 81 A. 719.

(B) Municipal Departments and Officers Thereof.

§ 213 (Pa.) Under Act March 5, 1906 (P. L. 83), creating a civil service commission, it has power to remove the chief examiner when he disregards its directions or questions its authority.—*Commonwealth v. City of Philadelphia*, 81 A. 59.

VII. CONTRACTS IN GENERAL.

§ 248 (N.J.Sup.) Contract on behalf of municipality by unauthorized agent *held* not subject to ratification when in excess of powers granted to municipality.—*Bourgeois v. Board of Chosen Freeholders of Atlantic City*, 81 A. 358.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 269 (Md.) Under Laws 1904, c. 274, §§ 1, 3, the Annex Commission of Baltimore City *held* to have power to close a street necessary in carrying out its plan for opening and

straightening a street in the annex part of the city.—*City of Baltimore v. Brengle*, 81 A. 677.

(C) Contracts.

§ 330 (N.J.Sup.) Where proposals under a city charter that calls for competitive bidding are purposely so framed as to prevent competition, an award will be set aside.—*Johnson v. Atlantic City*, 81 A. 1106.

§ 332 (N.J.Sup.) Under advertisement for bids under Town Act, § 64, as amended in 1906 (P. L. p. 325), contract held invalid for failure to state number of working days required for completion.—*Hornung v. Town of West New York*, 81 A. 1116.

§ 333 (N.J.Sup.) Requirement that bidders on municipal contract shall submit certified checks with their bids held substantially complied with.—*Hornung v. Town of West New York*, 81 A. 1116.

§ 358 (Pa.) Error in the decision of an engineer as to the fulfillment of a contract for construction of a sewer, does not invalidate the decision except in case of fraud or misconduct to which the city was a party.—*Ruch v. York City*, 81 A. 891.

Provisions of sewer construction contract held not to authorize engineer to pass on claim for damages for failure of city to provide an outlet for sewers.—*Id.*

§ 360 (Pa.) Under provisions of sewer contract, decision whether certain work was to be paid for as extra work held to be for the engineer.—*Ruch v. York City*, 81 A. 891.

Under terms of a contract for construction of sewers, contractors held entitled only to unit prices and not to extra compensation for certain items.—*Id.*

§ 362 (Pa.) An engineer is not authorized to pass on a claim for damages for delay in performance of a contract for the construction of sewers where the contract contains no provision conferring such authority.—*Ruch v. York City*, 81 A. 891.

§ 373 (N.J.) A stipulation in a building contract held not for the protection of the laborers and materialmen, so that an assignment by the contractor passed the amount due under the contract free from any lien.—*United States Fidelity & Guaranty Co. v. City of Newark*, 81 A. 758.

(E) Assessments for Benefits and Special Taxes.

§ 407 (Vt.) An act providing for public improvements held invalid in not fixing the legal standard of the assessment.—*Corliss v. Village of Richford*, 81 A. 234.

§ 438 (Vt.) Special assessments upon abutting or adjoining landowners for public improvements are based upon special benefits.—*Corliss v. Village of Richford*, 81 A. 234.

(F) Enforcement of Assessments and Special Taxes.

§ 530 (Pa.) Act June 4, 1901 (P. L. 364, § 10) held not to contemplate indefinite prolongation of lien of claim for municipal improvements through successive revivals by writ of *scire facias*.—*City of Scranton v. Genet*, 81 A. 335.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

§ 640 (N.J.Sup.) Evidence held insufficient to convict of the offense of standing hacks at a place not designated as a public stand.—*Town of Morristown v. Murphy*, 81 A. 498.

§ 641 (N.J.Sup.) Record of conviction of violation of town ordinance before police justice must set out evidence sufficient to show com-

mission of offense.—*Town of Morristown v. Murphy*, 81 A. 498.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 652 (Conn.) Strict compliance with the statute is a jurisdictional prerequisite to the validity of a proceeding under Gen. St. 1902, § 2083, to re-establish the bounds of a street.—*Hartford Trust Co. v. Town of West Hartford*, 81 A. 244.

Requirement by Gen. St. 1902, § 2083, for exhibition of map in proceedings to re-establish the bounds of a street, held mandatory.—*Id.*

Notice of proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street, may be given by mail.—*Id.*

Failure to give abutters notice of proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street, invalidates the proceedings as to them.—*Id.*

Notice of selectmen's decision in proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street, given by mailing marked copy of newspaper held insufficient.—*Id.*

Recording decision of selectmen of a town in proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street, held not constructive notice.—*Id.*

Abutters held not estopped to claim equitable relief against proceedings under Gen. St. 1902, § 2083, to re-establish the bounds of a street.—*Id.*

§ 654 (Conn.) In a suit to enjoin a street improvement conforming to invalid proceedings under Gen. St. 1902, § 2083, evidence offered by defendant held properly excluded.—*Hartford Trust Co. v. Town of West Hartford*, 81 A. 244.

§ 654 (Vt.) Evidence held insufficient to show right to a strip of land along a street by a city for street purposes by prescription.—*City of Montpelier v. McMahon*, 81 A. 977.

§§ 680, 681 (N.J.) Act March 28, 1891 (P. L. p. 249; 1 Gen. St. 1895, p. 465), held to take from common council and give to board of street and water commissioners authority to pass ordinance relating to conduits and wires in streets for distribution of electricity, which authority is not restored to common council by Act April 21, 1896 (P. L. p. 322).—*United Electric Co. of New Jersey v. Mutual Ben. Electric Light & Power Co.*, 81 A. 754.

§ 697 (Md.) In a suit to enjoin encroachments on an alley in which plaintiffs had an easement, held, there was no adequate remedy at law.—*Oberheim v. Reeside*, 81 A. 590.

§ 697 (Vt.) Equity jurisdiction to prevent purprestures held supplemented, but not supplanted, by the statutes prohibiting encroachments on highways.—*City of Montpelier v. McMahon*, 81 A. 977.

In a suit by a city to restrain an obstruction of a street, denial of complainant's title to the land in question was sufficient to raise the question whether the city had sufficient interest to entitle it to sue.—*Id.*

A city held to have a sufficient interest in a street to entitle it to sue to restrain the construction of a piazza over the same.—*Id.*

§ 706 (Md.) In an action for injuries to a person standing on a curb by being struck by the overhang of beams hauled along the street, an instruction on contributory negligence held as favorable to defendants as they were entitled to.—*Fliror v. Taylor*, 81 A. 389.

That beams by which plaintiff was struck projected from the edge of the wagon on which they were being hauled along a city street did not establish that the wagon was negligently loaded.—*Id.*

§ 706 (N.J.Sup.) In an action for damages, failure of plaintiff, whose automobile was struck by defendant's wagon, to prove possession of a license at the time of the collision, is no ground for nonsuit.—*Shaw v. Thielbahr*, 81 A. 497.

§ 706 (Pa.) In an action against the owner of a wagon to recover for injuries received at a street crossing, question of driver's negligence held for the jury.—*Cronmuller v. Evening Telegraph*, 81 A. 58.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 727 (Conn.) A city accepting a charter imposing a public governmental duty held not liable for negligence in performance thereof, but is liable for negligence in the performance of a private duty granted primarily for the benefit of its own citizens.—*Dyer v. City of Danbury*, 81 A. 958.

§ 733 (Conn.) The duty of a city to remove an overhanging limb of a tree in a city held a public governmental duty for the neglect of which there is no liability, unless imposed by statute.—*Dyer v. City of Danbury*, 81 A. 958.

(B) Acts or Omissions of Officers or Agents.

§ 750 (Md.) A city held not exempted from liability for injuries from an obstruction on a sidewalk, placed there by its own agents.—*McCarthy v. Clarke*, 81 A. 12.

§ 751 (Md.) Contractors putting in a sewer for a city held not independent contractors, so as to relieve the city from liability for injuries by falling over an obstruction placed by the contractors on a sidewalk.—*McCarthy v. Clarke*, 81 A. 12.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 778 (Conn.) A limb of a tree standing in a public street held not a defect in the street within Gen. St. 1902, § 2020.—*Dyer v. City of Danbury*, 81 A. 958.

A complaint in an action against a city and town for injuries to a pedestrian on a sidewalk held not to state a cause of action against the city in view of Gen. St. 1902, § 4443, as amended by Pub. Acts 1903, c. 83, and Pub. Acts 1905, c. 114.—*Id.*

§ 809 (Md.) It was the duty of sewer contractors to deposit material in a reasonable place on the street, and to give reasonable warning to the public of its location.—*McCarthy v. Clarke*, 81 A. 12.

§ 818 (Conn.) In an action against a municipality for wrongful death caused by an obstruction in a highway, held, that in making its finding as to whether deceased might have avoided the obstruction the trial court should consider certain matters.—*Nichols v. Town of Manchester*, 81 A. 337.

§ 818 (Md.) In an action for personal injuries by falling over an obstruction on a sidewalk, an ordinance held admissible to show defendant's duty to light the obstruction.—*McCarthy v. Clarke*, 81 A. 12.

In an action for personal injuries by falling over an obstruction on a sidewalk, an ordinance held admissible to show plaintiff's right to assume that the sidewalk was safe.—*Id.*

In an action against a city for injuries by falling over an obstruction on a sidewalk, defendants held entitled to show that their employé had placed a lamp on it each night while it was there.—*Id.*

In an action for injuries by falling over an obstruction on a sidewalk, evidence as to whether the block was well lighted as compared with other blocks held properly excluded.—*Id.*

§ 819 (Conn.) In an action against a municipal corporation for wrongful death caused by an obstruction in a highway, evidence held to warrant a finding that deceased might have avoided the obstruction.—*Nichols v. Town of Manchester*, 81 A. 337.

§ 821 (Md.) Plaintiff in an action against a city and sewer contractors for injuries by falling over obstruction on a sidewalk held not guilty of contributory negligence as a matter of law.—*McCarthy v. Clarke*, 81 A. 12.

In an action against a city and sewer contractors for injuries by falling over an obstruction on a sidewalk, evidence held not to show as a matter of law that defendants were not negligent in placing the frame on the sidewalk.—*Id.*

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 863 (Md.) Under Hyattsville Charter, §§ 2, 17, 25, 28, the town held not empowered to issue evidence of indebtedness for loans to purchase land and erect a municipal building thereon.—*Rushe v. Town of Hyattsville*, 81 A. 278.

§ 873 (N.J.Sup.) A municipality held not authorized to pledge public funds in exoneration of the liability of a railroad company to a manufacturing corporation because of its failure to continue a siding which the manufacturing company claimed the railroad had no right to abolish.—*American Malleables Co. v. Town of Bloomfield*, 81 A. 500.

(D) Taxes and Other Revenue, and Application Thereof.

§ 958 (N.J.Sup.) P. L. 1901, p. 304, amending P. L. 1898, p. 442, authorizing the appointment of commissioners to adjust unpaid taxes, applies only to arrearages accruing prior to the approval of the act.—*Voorhees v. Borough of North Wildwood*, 81 A. 264.

§ 966 (Conn.) Every municipality is entitled to assess all of the real estate lying within its limits.—*Comstock v. Town of Waterford*, 81 A. 1059.

§ 971 (Pa.) Under Act March 14, 1865 (P. L. 320) and its supplements, the court of common pleas of the county of Philadelphia has the power to appoint a board of revision of taxes, and the councils of the city of Philadelphia have no power to appropriate money for a duplicate assessment.—*Selig v. City of Philadelphia*, 81 A. 308.

§ 978 (N.J.Sup.) General interest of relator as a taxpayer held insufficient to entitle him to maintain certiorari to review an order annulling an order appointing commissioners to adjust unpaid taxes, under P. L. 1901, p. 364, amending P. L. 1898, p. 442.—*Voorhees v. Borough of North Wildwood*, 81 A. 264.

Whether certiorari should be granted to review an order annulling the appointment of commissioners to adjust unpaid taxes, under P. L. 1901, p. 364, amending P. L. 1898, p. 442, held a matter of discretion.—*Id.*

Whether tax adjustment commissioners should be appointed, under P. L. 1901, p. 364, amending P. L. 1898, p. 442, held a matter to be largely determined by the municipal authorities, in the exercise of discretion.—*Id.*

(E) Rights and Remedies of Taxpayers.

§ 994 (Md.) A municipal taxpayer can enjoin negotiation of an ultra vires loan by the corporation.—*Rushe v. Town of Hyattsville*, 81 A. 278.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 755, 756.

NAMES.

See Parties, § 66; Trade-Marks and Trade-Names.

§ 2 (N.J.Sup.) Requisites of legal name at common law stated.—*Schaffer v. Levenson Wrecking Co.*, 81 A. 434.

§ 6 (N.J.Sup.) In action on book account, motion to nonsuit, on the ground that plaintiff had not sued in his true name, *held* properly denied.—*Schaffer v. Levenson Wrecking Co.*, 81 A. 434.

NAVIGABLE WATERS.

See Certiorari, § 4.

NEGLIGENCE.

See Adjoining Landowners, § 7; Carriers, §§ 318, 328; Death; Estoppel, § 120; Explosives; Highways, §§ 184, 187, 213; Master and Servant; Municipal Corporations, §§ 706, 727, 750-821; New Trial, § 70; Pleading, § 237; Railroads, §§ 270-485; Street Railroads; Trial, §§ 139, 253; Waters and Water Courses, § 209.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(C) Condition and Use of Land, Buildings, and Other Structures.

§ 32 (Pa.) Plaintiff, injured by the fall of an elevator, *held* a mere licensee, and not entitled to recover.—*Urban v. Focht*, 81 A. 55.

§ 32 (Pa.) Duty of owner of premises to independent contractor and his servants at work thereon stated.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§ 65 (Pa.) That plaintiff used elevator or stairway in disregard of orders *held* not to affect his right to rely on fire escape which he was ordered to use.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

(C) Imputed Negligence.

§ 93 (Pa.) Negligence of driver, not under control of plaintiff, *held* not to be imputed to her.—*Walsh v. Altoona & L. V. Electric Ry. Co.*, 81 A. 551.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 119 (Md.) That an accident occurred on a different date from that named in the declaration is insufficient to prevent a recovery.—*Firor v. Taylor*, 81 A. 389.

(B) Evidence.

§ 121 (Pa.) In action for injuries from defective fire escape, owner of building *held* not presumed to have complied with Act May 2, 1905 (P. L. 359) § 22, relating to fire escapes.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 122 (Pa.) Burden of proof as to contributory negligence *held* to be on defendant, unless plaintiff's evidence discloses such negligence.—*McManamon v. Hanover Tp.*, 81 A. 440.

§ 124 (Pa.) In action for injuries from defective fire escape, evidence that plaintiff was inside the building contrary to orders *held* properly excluded.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 126 (Pa.) In action for injuries from defective fire escape, evidence that the contractor

employing plaintiff had notice of the danger *held* properly excluded.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 134 (Conn.) It is sufficient if the jury may fairly and reasonably infer from the evidence the existence of facts essential to negligence, though there be no direct evidence of negligence.—*Barrett v. Connecticut Co.*, 81 A. 993.

If the evidence might support either an inference of negligence or its absence, the jury must adopt that inference which from the evidence appears probable.—*Id.*

§ 134 (N.J.) Plaintiff must show the existence of circumstances rendering the inference of negligence by defendant at least probable, and excluding an inference that the damage was due to other causes.—*Austin v. Pennsylvania R. Co.*, 81 A. 739.

§ 134 (Pa.) In action for injuries from giving way of fire escape on defendant's building, evidence *held* to sustain verdict for plaintiff.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

(C) Trial, Judgment, and Review.

§ 136 (Md.) To make plaintiff guilty of contributory negligence as a matter of law, his conduct must have been so reckless as to preclude a difference of opinion as to its character.—*McCarthy v. Clarke*, 81 A. 12.

§ 139 (Md.) In an action for injuries against F. and S., an instruction requested by S. that there was no evidence legally sufficient to entitle plaintiff to recover *held* misleading.—*Firor v. Taylor*, 81 A. 389.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWSPAPERS.

See Notice.

§ 1 (N.J.Sup.) Evidence on certiorari to review a resolution of a city council awarding payment for official advertising *held* not to show such payment to be to an unofficial paper.—*Fagen v. City of Hoboken*, 81 A. 365.

NEW TRIAL.

See Appeal and Error, § 975; Criminal Law, § 936.

II. GROUNDS.

(B) Misconduct of Parties, Counsel, or Witnesses.

§ 31 (Conn.) A party knowing of misconduct of the adversary's counsel calculated to arouse the jury's sympathy, not having complained thereof till after the verdict, should not then be heard to do so.—*McKiernan v. Lehmaier*, 81 A. 969.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 70 (Conn.) The question of contributory negligence *held* generally one of fact; so that a verdict in a case involving the question should not be set aside where there was evidence on which the jury might have reasonably reached their conclusion.—*McKiernan v. Lehmaier*, 81 A. 969.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 168 (Me.) That the record shows that the verdict is against the weight of the evidence *held* not to warrant reversal.—*Harvey v. Donnell*, 81 A. 865.

A defendant, in moving for a new trial for insufficiency of evidence to sustain a recovery, has the burden to show that the verdict is clearly wrong.—*Id.*

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NONRESIDENCE.

See Corporations, §§ 217, 274; Marriage, § 60.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Banks and Banking, §§ 116, 130; Bills and Notes, §§ 237, 340; Carriers, § 311; Constitutional Law, §§ 249, 309; Corporations, §§ 194, 217; Deeds, § 88; Depositions, § 65; Fraudulent Conveyances, §§ 158, 162; Highways, §§ 193, 213; Husband and Wife, § 25; Indemnity, § 13; Insurance, § 229; Justices of the Peace; Landlord and Tenant, § 169; Lis Pendens; Master and Servant, §§ 125, 217; Mechanics' Liens, §§ 197, 201; Municipal Corporations, § 652; Negligence, § 128; Nuisance, §§ 42, 49; Quo Warranto, § 55; Railroads, § 171; Taxation, §§ 363, 453, 482; Towns, § 19; Vendor and Purchaser, §§ 215, 229, 232.

§ 10 (Conn.) Requisites of proof of service by mail stated.—Hartford Trust Co. v. Town of West Hartford, 81 A. 244.

§ 11 (Conn.) One cannot be charged with notice of what may be contained in the advertising columns of a newspaper, though the copy received by him be a marked copy.—Hartford Trust Co. v. Town of West Hartford, 81 A. 244.

NUISANCE.

See Adjoining Landowners, § 8; Corporations, § 493; Evidence, § 139; Licenses, § 50.

I. PRIVATE NUISANCES.

(C) Abatement and Injunction.

§ 23 (Pa.) Issuance of injunction to restrain threatened nuisance, consisting of a stockyard in residential section of borough, held proper.—Eckels v. Weibley, 81 A. 645.

Circumstances under which injunction will issue to prevent threatened nuisance, stated.—Id.

(D) Actions for Damages.

§ 42 (Vt.) A grantee is not liable for an existing nuisance until after notice to remove.—Bishop v. Readsboro Chair Mfg. Co., 81 A. 454.

Any notice of a grantee of property on which is an existing nuisance, of the existence thereof, and of the desire of the objecting party to have it removed, is sufficient to render him liable for its continuance.—Id.

§ 49 (Vt.) Evidence held to warrant a finding of notice to defendant of the existence of a nuisance on defendant's premises to which plaintiff objected.—Bishop v. Readsboro Chair Mfg. Co., 81 A. 454.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 63 (Vt.) "Purpresture" defined.—City of Montpelier v. McMahon, 81 A. 977.

(C) Abatement and Injunction.

§ 80 (Vt.) Jurisdiction of equity to protect a public right from encroachment in the nature of a purpresture cannot be defeated by the denial of such right.—City of Montpelier v. McMahon, 81 A. 977.

NUNC PRO TUNC.

See Appeal and Error, § 362.

OATH.

See Municipal Corporations, § 144; Sheriffs and Constables, § 10.

OBJECTIONS.

See Appeal and Error, §§ 194, 204, 211, 215, 219, 231, 232, 237, 260, 712, 1078; Criminal Law, § 695; Depositions, §§ 66, 111; Jury, § 137; New Trial, § 31; Trial, §§ 76, 82, 278, 283, 417.

OBLIGATION OF CONTRACTS.

See Constitutional Law, §§ 120-154.

OBSTRUCTIONS.

See Easements, § 63; Highways, §§ 187-213; Municipal Corporations, §§ 750-821.

OFFICERS.

See Banks and Banking, § 116; Evidence, §§ 83, 271, 471; Judges; Justices of the Peace; Municipal Corporations, §§ 129-248, 750, 751, 958, 978; Receivers; Schools and School Districts, § 62; Sheriffs and Constables; States; Statutes, §§ 26, 30; Taxation, §§ 318, 384, 453; Trial, § 142; Witnesses, § 149.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Holding Over.

§ 55 (Pa.) The word "vacancy," as applied to an office, defined.—Commonwealth v. McAfee, 81 A. 85.

OIL.

See Mines and Minerals.

OLEOMARGARINE.

See Food.

OPENING.

See Equity, § 430; Judgment, §§ 138-159, 386, 392, 456.

OPINION EVIDENCE.

See Criminal Law, §§ 448, 452; Evidence, §§ 471-502.

ORCHARDS.

See Evidence, § 502.

ORDERS.

See Corporations, § 283; Damages, § 199; Deposits in Court, § 2; Injunction, § 176; Partnership, § 344; Receivers, § 163.

ORDINANCES.

See Municipal Corporations, §§ 147, 680, 681.

ORPHANS' COURTS.

See Courts, §§ 198, 200½.

PAPER BOOKS.

See Appeal and Error, §§ 589, 714, 743.

PARENT AND CHILD.

See Dead Bodies; Deeds, § 71; Domicile; Guardian and Ward; Infants; Perpetuities; Principal and Agent, § 24.

PARKS.

See Dedication, §§ 19, 44; Eminent Domain, § 9; Statutes, § 39.

PAROL EVIDENCE.

See Evidence, §§ 419-456.

PARTIES.

See Appeal and Error, §§ 143-150, 324, 1036; Contracts, § 187; Corporations, § 561; Divorce, § 189; Equity, § 330; Executors and Administrators, § 121; Husband and Wife, § 207; Judgment, §§ 238, 683; Mechanics' Liens, § 263; Paupers, § 37; Quieting Title, § 30; Specific Performance, § 106; Trusts, §§ 366, 387.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 59 (Pa.) Administrator *c. t. a.* *held* entitled to be substituted as plaintiff in ejectment in place of himself as receiver, where not prevented by limitations.—*Power v. Grogan*, 81 A. 416.

IV. DESIGNATION AND DESCRIPTION.

§ 66 (N.J.Sup.) Actions *held* required to be prosecuted in proper Christian and surname of parties, and not by initials, except in cases prescribed by Practice Act, par. 27.—*Schaffer v. Levensboro Wrecking Co.*, 81 A. 434.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Vt.) That an action for injuries to the real property of a married woman was improperly brought in her name alone was matter for plea in abatement, and was not available in bar or under the general issue.—*Bishop v. Readsboro Chair Mfg. Co.*, 81 A. 454.

§ 95 (N.J.Sup.) After a plea of misnomer, the plaintiff may amend summons and declaration upon payment of costs.—*Jefferson v. Hotel Cape May*, 81 A. 349.

§ 97 (Del.) On bill to compel the trustee under a trust deed to account, *held*, that he was not entitled to assert want of jurisdiction to adjudicate a claim sought to be deducted from complainant's share.—*Emmons v. Curlett*, 81 A. 508.

PARTITION.

See Husband and Wife, § 273.

II. ACTIONS FOR PARTITION.**(B) Proceedings and Relief.**

§ 43 (Pa.) Under Act Feb. 20, 1854 (P. L. 89), court of county in which part of land sought to be partitioned was located *held* not to have jurisdiction under the evidence.—*King v. Ambrose*, 81 A. 714.

§ 77 (N.J.Ch.) Where one party to partition holds five shares and the other party one share, the question is whether the land can be divided into two portions having the ratio of value of five to one.—*Davis v. Palmer*, 81 A. 573.

§ 78 (N.J.Ch.) Where one party to partition holds five shares and the other party holds one share, distribution by lot is impracticable.—*Davis v. Palmer*, 81 A. 573.

§ 79 (N.J.Ch.) Under Partition Act, § 65, where defendants in partition join in election to have their shares set off to them jointly, answer should be submitted to master with other matters.—*Davis v. Palmer*, 81 A. 573.

PARTNERSHIP.

See Statutes, § 64.

I. THE RELATION.**(C) Evidence.**

§ 53 (N.J.) Evidence *held* insufficient to establish a partnership.—*Hoffecker v. Austin*, 81 A. 864.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

§ 64 (Del.Super.) The act providing for registration of persons composing partnerships and associations does not violate the rights guaranteed under the Constitution respecting private property.—*State v. Ferschke*, 81 A. 401.

The act providing for the registration of persons composing partnerships and associations is not an unreasonable exercise of the police power.—*Id.*

§ 67 (Vt.) A patent right *held* the subject of ownership by partnership.—*Whitcomb v. Whitcomb*, 81 A. 97.

The legal title to property was not vested in the partnership merely by the use of partnership funds in purchasing it.—*Id.*

A partnership *held* to be the equitable assignee of property procured with partnership funds under an agreement between the partners.—*Id.*

V. RETIREMENT AND ADMISSION OF PARTNERS.

§ 242 (N.J.) Injunction to restrain breach of contract entered into by partnership *held* to lie against the individual partners after dissolution of the partnership.—*People's Brewing Co. of Trenton v. Levin*, 81 Atl. 1114.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.**(A) Causes of Dissolution.**

§ 262 (Pa.) Under terms of contract between general partnership and defendant, a member thereof, defendant *held* precluded from setting up as defense to a judgment bond given by him the removal of personalty owned by a limited partnership of which defendant was not a member.—*Trexler v. Reynolds*, 81 A. 194.

(C) Distribution and Settlement Between Partners and Their Representatives.

§ 304 (Pa.) Rights of surviving partner in accounting with administrator of deceased partner stated.—*Huey v. Christ*, 81 A. 159.

§ 311 (Vt.) A partner taking an order drawn by the copartner on his individual debtor in settlement of firm affairs *held* not entitled to rescind the settlement induced by fraud without returning the order.—*Johnson v. Belanger*, 81 A. 621.

(D) Actions for Dissolution and Accounting.

§ 321 (Md.) A partnership being still existing, *held*, the defenses of laches and limitations were not available to a suit to dissolve, and for an accounting.—*Wiley v. Wiley*, 81 A. 180.

§ 344 (Vt.) The court *held* to have properly ordered a partner to make an assignment of property adjudged to belong to the firm in a partnership accounting action, and, on his failure to do so, it may appoint a trustee for that purpose.—*Whitcomb v. Whitcomb*, 81 A. 97.

PASSENGERS.

See Carriers, §§ 280-328.

PATENTS.

See Frauds, Statute of, § 82; Partnership, § 67; Trade-Marks and Trade-Names, § 3.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Assignments and Other Transfers.

§ 197 (Vt.) An oral agreement transferring a patent is not prohibited by Rev. St. U. S. § 4898 (U. S. Comp. St. 1901, p. 3387), requiring assignments of patents to be in writing.—*Whitcomb v. Whitcomb*, 81 A. 97.

(C) Licenses and Contracts.

§ 219 (Me.) A declaration, in an action for patent royalties, *held* sufficient as against general demurrer.—*Anderson v. Eastern Coupling Co.*, 81 A. 167.

§ 219 (Pa.) Patentee *held* entitled to invoke equity jurisdiction for accounting for royalties on sales by an assignee of the patent.—*Holden v. Bernstein Mfg. Co.*, 81 A. 428.

PAUPERS.

III. SETTLEMENT AND REMOVAL.

§ 19 (Conn.) The word "resided," in Gen. St. 1902, § 2469, defined.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

That a person removing from one town to another is of inferior mental capacity *held* not to prevent his acquisition of a legal settlement in the latter town.—*Id.*

§ 22 (Conn.) That a person removing from one town to another is of inferior mental capacity may be considered as evidence in determining whether he resided in the latter town, so as to gain a settlement.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

One's intent attending a change of place of abode from that of his then domicile, or continuance in such changed place of abode, *held* an important factor in determining the question of acquired domicile, within the pauper statutes.—*Id.*

On the issue whether one has acquired a legal settlement evidence of intent concurring with attending acts, and evidence of an intent as to the future, *held* admissible.—*Id.*

On the issue whether an alleged pauper had acquired a legal settlement, a declaration *held* admissible as bearing on the question of the pauper having a place of residence.—*Id.*

IV. SUPPORT, SERVICES, AND EXPENSES.

§ 37 (Conn.) Under Gen. St. 1902, §§ 1833, 2480, 2499, 2500, a town *held* to stand like any other party when seeking to set aside a conveyance by an inhabitant of all his property.—*Town of Winchester v. Moriarty*, 81 A. 965.

A town, liable to furnish support to a wife as a pauper, *held* authorized to proceed under Gen. St. 1902, §§ 2480, 2499, 2500, to compel her husband or relatives to furnish support.—*Id.*

A town *held* not entitled to sue to set aside a conveyance by an inhabitant of all his property, followed by his wife becoming a charge on the town.—*Id.*

§ 39 (Me.) Under the express terms of Pub. Laws 1909, c. 55, a town furnishing antitoxin to an indigent person is entitled to reimbursement by the town of his settlement.—*Inhabitants of Eden v. Inhabitants of Southwest Harbor*, 81 A. 1003.

Under Pub. Laws 1909, c. 25, § 2, a determination of a town board of health on the expenses of persons quarantined in that town, but having their pauper settlement in another town, *held* to make the latter town liable.—*Id.* "Town to which he belongs," within Rev. St. c. 18, § 51, defined.—*Id.*

Rev. St. c. 18, § 51, and Pub. Laws 1909, c. 25, § 2, construed, and the former *held* not impliedly repealed by the latter.—*Id.*

§ 40 (Conn.) A town, which becomes a creditor of an inhabitant who had conveyed all his

property by reason of it furnishing support to his wife as a pauper, *held* entitled to attach the property, and thereby secure its debt.—*Town of Winchester v. Moriarty*, 81 A. 965.

§ 44 (N.H.) Under Pub. St. 1901, c. 83, § 1, chapter 84, § 1, and Laws 1903, c. 42, a transaction *held* sustainable as within the jurisdiction of the selectmen as overseers of the poor.—*Amazeen v. Town of Newcastle*, 81 A. 1079.

§ 52 (Conn.) An instruction *held* to properly submit the issue of whether a person had acquired a legal settlement in a town, within Gen. St. 1902, § 2469.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

In an action by a town for supplies furnished a pauper belonging to another town, an instruction *held* not objectionable as leading the jury to ignore evidence.—*Id.*

PAYMENT.

See Appeal and Error, § 371; Brokers, § 63; Building and Loan Associations, §§ 18, 42; Damages, § 69; Eminent Domain, § 75; Equity, § 46; Executors and Administrators, § 416; Frauds, Statute of, §§ 56, 142; Insurance, §§ 137, 755; Landlord and Tenant, § 95; Limitation of Actions, § 157; Newspapers; Tender.

II. APPLICATION.

§ 41 (Del.Super.) Payments on account of collateral securities are not payments on account of the debt they secure.—*Trustees of Mutual Loan Ass'n v. Tyre*, 81 A. 48.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 66 (N.J.Ch.) A general demurrer to a bill to foreclose after lapse of 20 years will be sustained, in the absence of an allegation excusing the delay.—*Wallace v. Coward*, 81 A. 739.

V. RECOVERY OF PAYMENTS.

§ 84 (Me.) Money paid under mistake of law, with full knowledge of the facts, is not recoverable, unless the payment was induced by fraud or imposition, or undue influence, or was made under duress.—*Houlehan v. Inhabitants of Kennebec County*, 81 A. 449.

PENALTIES.

See Taxation, § 839.

PENDENCY OF ACTION.

See *Lis Pendens*; *Mandamus*, § 3.

PEREMPTORY CHALLENGES.

See Jury, § 137.

PERJURY.

See Judgment, §§ 392, 644, 683; Torts.

PERPETUITIES.

§ 4 (Conn.) The common-law rule against perpetuities does not forbid a devise to one's legal heirs effective upon a life tenant's death, though one or more of the heirs be born after testator's death.—*Tingier v. Woodruff*, 81 A. 967.

§ 4 (Conn.) A bequest over *held* to be void under the statute of perpetuities; it being possible the persons to whom it was made might be children of persons not in being at testatrix's death.—*Hartford Trust Co. v. Wolcott*, 81 A. 1057.

A bequest *held* not to a class within the rule that those of them eligible could take the whole gift to the exclusion of those incompetent under the statute of perpetuities.—*Id.*

PERSONAL INJURIES.

See Abatement and Revival, § 54; Carriers, §§ 280-328; Damages, §§ 98, 100, 158, 172, 182, 214, 216; Explosives: Highways, §§ 184, 187-213; Indemnity, § 13; Judgment, §§ 392, 522; Landlord and Tenant, §§ 162-169; Limitation of Actions, § 56; Master and Servant; Municipal Corporations, §§ 706, 750-821; Negligence: Pleading, §§ 21, 205, 237, 240, 248, 354; Railroads, §§ 303-395; Street Railroads; Trial, §§ 194, 252, 253, 260.

PERSONAL PROPERTY.

See Descent and Distribution, § 76.

PETITION.

See Equity, § 392; Exceptions, Bill of, § 55; Pleading.

PHOTOGRAPHS.

See Appeal and Error, § 970.

PHYSICIANS AND SURGEONS.

See Appeal and Error, § 1004; Contracts, § 187; Evidence, § 19; Trial, § 251.

§ 14 (N.H.) A physician *held* to impliedly agree that his skill is at least equal to that of the average physician practicing in the same or similar localities.—*McBride v. Huckins*, 81 A. 528.

§ 18 (N.H.) A requested instruction in a malpractice case, using the phrase "physicians practicing," *held* not too indefinite because possibly including quacks.—*McBride v. Huckins*, 81 A. 528.

In a malpractice case, the court in its instructions *held* required to give a test for determining the average skill of physicians in communities similar to those in which defendant practices.—*Id.*

PIPES.

See Waters and Water Courses, §§ 188-209.

PLEADING.

See Action, § 27; Appeal and Error, §§ 78, 103, 179, 192, 194, 679, 837, 843, 919, 1201; Attorney and Client, § 128; Bills and Notes, § 480; Carriers, § 196; Corporations, §§ 331, 482, 516; Courts, §§ 202, 488; Damages, § 158; Eminent Domain, § 293; Equity, §§ 150-330, 427; Forcible Entry and Detainer; Fraud, §§ 41-49; Indictment and Information; Insurance, § 115; Judgment, §§ 106, 250, 252; Limitation of Actions, §§ 127, 180; Mandamus, § 154; Master and Servant, §§ 258, 259; Mechanics' Liens, §§ 276, 277; Municipal Corporations, § 778; Negligence, § 119; Parties, § 75; Partition, § 79; Patents, § 219; Payment, § 66; Process, § 167; Quieting Title, § 12; Quo Warranto, § 55; Railroads, §§ 344, 395; Reformation of Instruments, §§ 32, 37, 41; Specific Performance, § 114; Statutes, § 279; Street Railroads, § 51; Trespass, § 40; Trial, § 251.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 9 (Vt.) A plaintiff need not allege defendant's legal duty, but must allege facts from which the court can see that the duty existed.—*Doyle v. Melendy*, 81 A. 1129.

§ 17 (Conn.) An argumentative denial in the answer was improper.—*Snelling & Potter v. Merritt*, 81 A. 1039.

§ 21 (Vt.) A pleading which contains inconsistent allegations is bad.—*Doyle v. Melendy*, 81 A. 1129.

Allegations in counts in action for personal injuries *held* not inconsistent.—*Id.*

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 48 (Md.) A demurrer to a declaration must be overruled, if the allegations constitute a plain statement of the nature of plaintiff's demand, and inform defendant of the particular acts for which he is sought to be held liable.—*Lapp v. Stanton*, 81 A. 675.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 83 (Md.) Defendant *held* not in default for failing to plead until rule was laid against him.—*Wilkin Mfg. Co. v. Melvin*, 81 A. 879.

§ 85 (Md.) A rule security for costs, or a motion therefor, does not extend the time in which to plead.—*Wilkin Mfg. Co. v. Melvin*, 81 A. 879.

(B) Dilatory Pleas and Matter in Abatement.

§ 111 (Del.Super.) The court, in a suit to obtain a mechanic's lien, will not try an issue of fact presented by a plea to the jurisdiction.—*Richards v. Naudain*, 81 A. 872.

(C) Traverses or Denials and Admissions.

§ 127 (Conn.) An admission in an answer that certain notes sued on had been indorsed by defendant *held* to import an authorized indorsement.—*Edward Knapp & Co. v. Tidewater Coal Co.*, 81 A. 1063.

V. DEMURRER OR EXCEPTION.

§ 204 (Me.) If a declaration contains one good count, or one good assignment of a breach of an agreement declared upon, a general demurrer must be overruled.—*Anderson v. Eastern Coupling Co.*, 81 A. 167.

§ 204 (Vt.) A declaration consisting of more than one count will stand, as against demurrer, if any count is good.—*Williams Mfg. Co. v. Insurance Co. of North America*, 81 A. 916.

§ 205 (Me.) Objection to a declaration for duplicity can be taken advantage of by special demurrer only.—*Anderson v. Eastern Coupling Co.*, 81 A. 167.

A general demurrer reaches only matters of substance.—*Id.*

§ 205 (N.J.Sup.) Failure of complaint to sufficiently describe defect in tool causing injury cannot be taken advantage of on general demurrer.—*Pushcart v. New York Shipbuilding Co.*, 81 A. 113.

§ 214 (Me.) A demurrer admits all facts well pleaded.—*Anderson v. Eastern Coupling Co.*, 81 A. 167.

§ 214 (Md.) An averment in a bill for specific performance of irreparable loss or injury if performance be not decreed *held* but a conclusion of law which does not show that a breach of contract could not be compensated for by damages.—*Ward v. Newbold*, 81 A. 793.

§ 221 (Conn.) The overruling of a demurrer to a cross-complaint filed on the ground of laches did not preclude plaintiffs from raising the question of laches on trial when the facts were brought out.—*Snelling & Potter v. Merritt*, 81 A. 1039.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 237 (Md.) In an action for injuries, it was proper, at the close of plaintiff's evidence, to permit him to amend by limiting the allegations of negligence to two particular defendants.—*Firor v. Taylor*, 81 A. 389.

§ 240 (Md.) Where, in an action for injuries, two of the defendants were dismissed and the declaration amended, the proper practice was to leave the original declaration in the case and

file a new one against the remaining parties.—*Firor v. Taylor*, 81 A. 389.

§ 248 (N.J.Sup.) In action for deceit, amendment of declaration *held* not to set forth a new cause of action.—*Duffy v. McKenna*, 81 A. 1101.

§ 248 (Pa.) In action for injuries from use by defendant of defective car, amendment of description of car in statement *held* properly allowed.—*Rick v. New York, C. & St. L. R. Co.*, 81 A. 650.

§ 248 (Vt.) Amendment of a declaration to recover money received in violation of a provision of a life policy by allegation of other breaches for which recovery is also sought *held* an introduction of a new cause of action, not permissible.—*Sowles v. Hartford Life Ins. Co.*, 81 A. 98.

XI. MOTIONS.

§ 354 (N.J.Sup.) Failure of complaint to sufficiently describe defect in tool causing injury *held* ground for striking out declaration.—*Pushcart v. New York Shipbuilding Co.*, 81 A. 113.

§ 365 (Conn.) The court *held* authorized upon its own or plaintiff's motion, to order an argumentative denial in the answer expunged.—*Snelling & Potter v. Merritt*, 81 A. 1039.

XII. ISSUES, PROOF, AND VARIANCE.

§ 382 (Md.) Under a plea of the general issue in assumpsit for breach of contract, defendant *held* entitled to give evidence by way of recoupment of damage suffered by plaintiff's breach.—*Doggett v. Tatham*, 81 A. 376.

§ 382 (Vt.) In an action for deceit, a plea of not guilty operated to deny all of the facts alleged in the inducement as well as the deceit itself.—*Kennett v. Tudor*, 81 A. 633.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 409 (Md.) A replication to a plea of limitations filed after rule day waives objection to the plea.—*Wilkin Mfg. Co. v. Melvin*, 81 A. 879.

§ 418 (Pa.) Where, after judgment on demurrer against a party, he amends under leave of court, he acquiesces in the judgment, and will not be permitted to assign it as error.—*Davis v. Fleshman*, 81 A. 412.

POLICE COURTS.

See Municipal Corporations, § 641.

POLICE POWER.

See Constitutional Law, § 81; Partnership, § 64.

POLICY.

See Insurance.

POLITICAL RIGHTS.

See Elections.

POOLS.

See Lotteries.

POSSESSION.

See Adverse Possession, § 96; Deeds, §§ 96, 208; Ejectment, § 96; Quietting Title, § 12; Replevin; Trespass, § 16; Trusts, § 182; Vendor and Purchaser, § 232.

Writ of, see *Mandamus*, § 3; *Sheriffs and Constables*, § 106.

POST OFFICE.

See Evidence, §§ 71, 174.

POWERS.

See Trusts, § 191.

PRACTICE.

See Trial.

PREFERENCES.

See Bankruptcy, § 165; Corporations, § 333; Fraudulent Conveyances, § 122; Receivers, § 163.

PRELIMINARY INJUNCTION.

See Injunction, §§ 132-176.

PREMIUMS.

See Insurance, §§ 137, 230, 755.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESENTMENT.

See Executors and Administrators, §§ 224, 227, 450.

PRESUMPTIONS.

See Appeal and Error, §§ 907-935; Criminal Law, §§ 308, 570; Evidence, §§ 71-83.

PRIEST.

See Libel and Slander, §§ 51-123.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, §§ 96, 109, 233-333, 393, 432, 493, 563, 672; Deeds, § 61; Garnishment, §§ 52, 95; Insurance, §§ 233, 379; Intoxicating Liquors, § 168; Municipal Corporations, §§ 129-248, 750, 751.

I. THE RELATION.

(A) Creation and Existence.

§ 24 (Md.) In an action for a balance due on goods sold, evidence as to the authority of a son of defendant to sign letters *held* properly admitted.—*Goodman v. Saperstein*, 81 A. 695.

(B) Termination.

§ 46 (Md.) Intestate's agency for holding property *held* revoked by his death, so that the property would not pass to his administrator.—*Tyson v. George's Creek Coal & Iron Co.*, 81 A. 41.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(B) Compensation and Lien of Agent.

§ 81 (Vt.) An agent employed by a trustee in a deed of trust to bid in the property at a public auction *held* not required to convey the property to the trustee and his wife as a condition precedent to his demand for compensation.—*Miller v. Powell*, 81 A. 921.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 103 (Pa.) That a sister left with her brother her deed, to enable him to collect rents, did not raise any implied agency in him to make sale of her real estate.—*Higinbotham v. Pauch*, 81 A. 718.

PRINCIPAL AND SURETY.

See Attachment, § 338; Indemnity.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (Md.) A surety's liability cannot be extended by construction beyond the limits fixed by the contract.—*Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas*, 81 A. 1.

§ 59 (Pa.) Surety company *held* relieved from its obligation as surety only where a departure from the contract is shown to be a material variance.—*Brown v. Title Guaranty & Surety Co.*, 81 A. 410.

III. DISCHARGE OF SURETY.

§ 99 (Pa.) Agreement between landowner and railroad company *held* not a material departure from bond of surety company to secure payment of damages from the taking of the land.—*Brown v. Title Guaranty & Surety Co.*, 81 A. 410.

§ 100 (Md.) Where a building contract specified lime plaster, the contractor's sureties would not be liable for damages resulting from using a different kind of plaster without their consent.—*Trustees of Seventh Baptist Church of Baltimore v. Andrew & Thomas*, 81 A. 1.

§ 115 (N.H.) A surety *held* not discharged by the failure of the creditor to collect more than it did from certain assets received from the principal as collateral to his indebtedness.—*Berlin Nat. Bank v. Guay*, 81 A. 475.

A surety *held* not discharged by the creditor's failure to exercise diligence, by which it might have secured additional security from the principal debtor.—*Id.*

PRINTING.

See Appeal and Error, § 633.

PRIORITIES.

See Mechanics' Liens, §§ 197, 201.

PRIVATE NUISANCE.

See Nuisance, §§ 23-49.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 36, 51.

PROBATE.

See Wills, § 423.

PROBATE COURTS.

See Courts, §§ 198-202.

PROCESS.

See Appearance, § 24; Attachment, § 206; Bankruptcy, §§ 143, 216; Constitutional Law, §§ 249, 309; Courts, § 25; Ejectment, § 96; Execution; Garnishment; Injunction; Judgment, §§ 141, 818; Justices of the Peace, § 81; Mandamus; Notice; Prohibition; Scire Facias; Sequestration.

II. SERVICE.

(A) Personal Service in General.

§ 58 (Del.Super.) Under the statute defining legal service of process, service on, or service accepted by, the attorney of defendant, does not constitute legal service.—*Odessa Loan Ass'n v. Dyer*, 81 A. 469.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 167 (Vt.) Process issued against and served by attaching the property of defendant *held* not void because the declaration contained counts *ex contractu* and *ex delicto*, where the defect was cured by striking out the count *ex contractu*.—*Rowley v. Shepardson*, 81 A. 917.

PROFITS.

See Corporations, § 219; Damages, § 172; Frauds, Statute of, §§ 56, 142.

PROHIBITION.

See Intoxicating Liquors.

I. NATURE AND GROUNDS.

§ 1 (Me.) Nature of remedy by writ of prohibition stated.—*Norton v. Emery*, 81 A. 671.

§ 3 (Me.) Adequacy of remedy, under Rev. St. c. 79, § 6, par. 11, *held* to preclude a writ under section 5 to prohibit assessors from abating taxes pursuant to a vote at a town meeting.—*Norton v. Emery*, 81 A. 671.

PROMISE.

See Fraud, §§ 4, 12, 42; Frauds, Statute of, § 16.

PROMISE OF MARRIAGE.

See Breach of Marriage Promise.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance, § 539.

PROPERTY.

See Attachment, § 62; Dedication; Fixtures.

PROVINCE OF COURT AND JURY.

See Criminal Law, § 753; Trial, §§ 194, 199.

PROXIMATE CAUSE.

See Master and Servant, § 304.

PUBLIC AUCTION.

See Principal and Agent, § 81.

PUBLIC BUILDINGS.

See Municipal Corporations, § 863.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 269-530, 654.

PUBLIC LANDS.

See Taxation, §§ 186, 193, 217.

PUBLIC NUISANCE.

See Nuisance, §§ 63, 80.

PUBLIC POLICY.

See Contracts, § 147.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

PUBLIC USE.

See Dedication; Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 183-209.

PUNISHMENT.

See Fines.

PUNITIVE DAMAGES.

See Damages, § 87.

PURE FOOD LAWS.

See Food.

PURPRESTURE.

See Municipal Corporations, § 697; Nuisance, §§ 63, 80.

QUANTUM MERUIT.

See Sales, § 340; Work and Labor.

QUARANTINE.

See Paupers, § 39.

QUASHING.

See Appeal and Error, § 66.

QUESTIONS OF LAW AND FACT.

See Appeal and Error, §§ 987-1022; Criminal Law, § 753; Trial, §§ 139-143.

QUIETING TITLE.**I. RIGHT OF ACTION AND DEFENSES.**

§ 12 (Pa.) Petition for issue to quiet title, under Act June 10, 1893 (P. L. 415), will be dismissed, where petitioners are not in possession.—*Putt v. Africa*, 81 A. 203.

II. PROCEEDINGS AND RELIEF.

§ 30 (N.J.Ch.) To a bill by heirs against an administrator for exoneration of their land from a mortgage made by the deceased, treated strictly as a bill quia timet, the holders of the mortgage debt *held* not necessary parties.—*Smith v. Wilson*, 81 A. 851.

QUORUM.

See Corporations, §§ 195, 198.

QUO WARRANTO.

See Railroads, § 18.

I. NATURE AND GROUNDS.

§ 6 (Vt.) There is no discretion to issue quo warranto, unless defendant's title be shown defective.—*Clark v. Wild*, 81 A. 536.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 55 (Vt.) Under P. S. 1972, requiring the complaint for quo warranto to set forth the facts warranting the issuance of the writ, *held*, it not having alleged the contrary, it is presumed there was reasonable notice of the meeting at which there was a purported election of defendants as directors of a corporation.—*Clark v. Wild*, 81 A. 536.

Complainant in quo warranto has the burden of making out a case, and, if relying on non-giving of proper notices of a meeting at which defendants were elected directors of a corporation, must show it.—*Id.*

§ 61 (R.I.) Under Gen. Laws 1909, c. 328, § 3, an order for a new election *held* proper, where the court found that the result was a tie.—*Thorpe v. Fales*, 81 A. 721.

RAILROADS.

See Adverse Possession, §§ 8, 96; Appeal and Error, § 231; Attachment, §§ 62, 217, 227, 232; Carriers; Contracts, § 9; Eminent Domain, §§ 53, 145, 167, 271; Evidence, § 113;

False Imprisonment; Judgment, §§ 252, 723, 744; Lis Pendens, § 24; Master and Servant, §§ 265, 278; Principal and Surety, § 40; Street Railroads; Taxation, §§ 231, 376; Trial, §§ 139, 252.

II. RAILROAD COMPANIES.

§ 14 (Pa.) In a suit between two railroad companies as to crossing a grade, one cannot attack the legal organization of the other on the ground of irregularities, where the state does not interfere.—*Pittsburg, S. & N. R. Co. v. Keating & S. R. Co.*, 81 A. 935.

Railroad company *held* presumed to have been organized under General Railroad Act April 4, 1868, as amended by Act May 13, 1876 (P. L. 157), and not under Act March 18, 1875 (P. L. 28), relating to narrow gauge railroads.—*Id.*

General Railroad Act April 4, 1868, as amended by Act May 13, 1876 (P. L. 157), does not require the certificate of incorporation of a railroad to state its gauge, and, if a gauge is stated, it may be treated as surplusage.—*Id.*

§ 18 (Pa.) Writ of quo warranto challenging the right of a railroad company to purchase water from water company dismissed.—*Commonwealth v. Pennsylvania R. Co.*, 81 A. 196.

§ 30 (Vt.) Where receivers of a railroad applied the net income to betterments, instead of paying a preferred claim, such claim became chargeable to a succeeding corporation which purchased the railroad property on foreclosure.—*Bell's Estate v. St. Johnsbury & L. C. R. Co.*, 81 A. 630.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 64 (Pa.) Vendor of land to railroad for right of way *held* not entitled to complain that the contract of sale was invalid, because the company purchased more than it actually required.—*Delaware, L. & W. Ry. Co. v. Welsch*, 81 A. 994.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 90 (Pa.) Under contract between railroad companies, grantor *held* entitled to lay additional track across the road of another company.—*Pittsburg, S. & N. R. Co. v. Keating & S. R. Co.*, 81 A. 935.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

§ 144 (Del.Ch.) In view of General Corporation Law, §§ 60, 123, *held*, that a car purchased by the receiver of a consolidated railway company was subject to the lien of a mortgage placed upon the rolling stock of one of the constituent companies.—*National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 81 A. 70.

The priority of mortgages of the constituent companies of a consolidated railway, with respect to property purchased by the consolidated company, stated.—*Id.*

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.**(A) Nature and Extent of Liabilities.**

§ 167 (Del.Ch.) A car purchased by the receiver of a corporation *held* subject to the lien of a mortgage upon the property of the corporation.—*National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 81 A. 70.

§ 171 (Pa.) Mortgage lien on railroad *held* not to be given priority over lien of contractor on ground of want of notice of the contractor's claim of lien.—*Pittsburg Const. Co. v. West Side Belt R. Co.*, 81 A. 884.

X. OPERATION.**(C) Companies and Persons Liable for Injuries.**

§ 270 (Pa.) Where defendant acknowledges receipt of iron to be carried on a certain car, that another company did the switching onto defendant's track *held* not to relieve defendant of the duty to have the car efficiently inspected and kept in repair.—*Rick v. New York, C. & St. L. R. Co.*, 81 A. 650.

(E) Accidents to Trains.

§ 297 (Pa.) In action against railroad company for death of employé of another railroad lawfully using defendant's tracks, nonsuit *held* properly entered.—*Smith v. Philadelphia & R. Ry. Co.*, 81 A. 297.

(F) Accidents at Crossings.

§ 303 (N.J.Sup.) A "byway" being a public way of which the public are entitled to make use as of right, an electric railway company where its tracks cross it is under the duty not to subject the traveling public to latent dangers at such crossing from an unguarded third rail.—*Tarlucki v. West Jersey & S. R. Co.*, 81 A. 495.

§ 327 (N.J.) Traveler failing to look and listen at a crossing *held* guilty of negligence, barring recovery, though the railroad is also negligent.—*Dickinson v. Erie R. Co.*, 81 A. 104.

§ 328 (N.J.) Where there is a transient noise making danger at crossing inaudible, it is negligence to go forward without waiting for hearing to become effective.—*Dickinson v. Erie R. Co.*, 81 A. 104.

§ 334 (N.J.) A traveler placed in sudden peril at railroad crossing by failure of the railroad company to give signals is not guilty of contributory negligence because of mistake of judgment in the sudden emergency.—*Dickinson v. Erie R. Co.*, 81 A. 104.

§ 337 (N.J.) Failure to give statutory signals of approach of train to crossing *held* the proximate cause of injuries from the frightening of horse by blast from whistle near crossing.—*Walling v. Central R. Co. of New Jersey*, 81 A. 987; *Keough v. Same*, Id. 980.

§ 344 (N.J.Sup.) The term "byway," as used in a declaration for negligently charging a third rail with an unguarded electric current, *held* equivalent to the word "byroad," as used in 3 Gen. St. 1895, p. 2827, § 113, and page 2836, § 154.—*Tarlucki v. West Jersey & S. R. Co.*, 81 A. 495.

§ 347 (Pa.) In action for causing death at railroad crossing, evidence that place where deceased stopped was customary place *held* competent.—*Buckman v. Philadelphia & R. Ry. Co.*, 81 A. 332.

§ 348 (Pa.) In an action for injuries at railroad crossing, evidence *held* to sustain judgment for plaintiff.—*Fetterolf v. Pennsylvania R. Co.*, 81 A. 539.

§ 350 (N.J.) Driver of automobile injured at railroad crossing *held* not guilty of contributory negligence as a matter of law.—*Dickinson v. Erie R. Co.*, 81 A. 104.

Where the evidence leaves contributory negligence of the plaintiff in doubt, the determination of the question is for the jury.—*Id.*

§ 350 (N.J.) Question of contributory negligence of plaintiff injured at grade crossing *held* for the jury.—*McCool v. West Jersey & S. R. Co.*, 81 A. 111.

A traveler approaching railroad crossing *held* not guilty of negligence as a matter of law.—*Id.*

§ 350 (N.J.) Under Act April 14, 1903 (P. L. p. 645) § 28, question whether railroad company negligently omitted to maintain safe

crossing *held* one for the jury.—*Samkiewicz v. Atlantic City R. Co.*, 81 A. 833.

The mere attempt of one on foot to cross over a railroad track when the gates are down *held* not to conclusively show contributory negligence.—*Id.*

§ 350 (N.J.Sup.) Whether plaintiff was guilty of contributory negligence in going upon a track at a grade crossing *held* for the jury.—*Tischman v. Erie R. Co.*, 81 A. 114.

In action for injuries at a crossing evidence *held* to justify submission of the question whether the bell was rung.—*Id.*

§ 350 (Pa.) In action for causing death of person at railroad crossing, question of contributory negligence of deceased *held* to be for the jury.—*Buckman v. Philadelphia & R. Ry. Co.*, 81 A. 332.

§ 350 (Pa.) In action for wrecking of automobile at railroad crossing, evidence *held* to present questions for the jury as to whether driver stopped a sufficient time and whether he advanced with due caution.—*Bush v. Philadelphia & R. Ry. Co.*, 81 A. 409.

Evidence that one stopped before crossing railroad tracks *held* to require submission of question of contributory negligence, unless opposing evidence is so clear that no other inference can properly be drawn.—*Id.*

§ 350 (Pa.) In an action to recover for death of plaintiff's intestate, struck by a train at a public crossing, evidence *held* sufficient to take the question of defendant's negligence to the jury.—*Johnson v. Philadelphia & R. Ry. Co.*, 81 A. 415.

§ 350 (Pa.) Question of defendant's failure to signal at a railroad crossing *held*, under conflicting evidence, to be for the jury.—*Fetterolf v. Pennsylvania R. Co.*, 81 A. 539.

§ 350 (Pa.) In an action for injuries at an obstructed railroad crossing, where the evidence showed invitation of brakeman to cross the track, the question of plaintiff's negligence was for the jury.—*Kitchen v. Pennsylvania R. Co.*, 81 A. 711.

(G) Injuries to Persons on or near Tracks.

§ 359 (N.J.Sup.) General Railroad Law, § 55, precludes recovery for damages to any person injured while on the track without authority.—*Barcolini v. Atlantic City & S. R. Co.*, 81 A. 494.

§ 395 (Pa.) Allegations of statement of claim for injuries from defendant's train running into plaintiff's home *held* supported by the evidence.—*Smith v. Lehigh Valley R. Co.*, 81 A. 554.

(I) Fires.

§ 453 (N.J.) Under P. L. 1903, p. 673, § 57, requiring railroads to use all practicable means to prevent the escape of fire from locomotives, a charge that due care in inspecting the screens on engines means a high degree of care was proper.—*Goodman v. Lehigh Valley R. Co. of New Jersey*, 81 A. 848, 851; *Mays v. Same*, Id. 851.

§ 481 (N.J.) Evidence of another fire set by the same locomotive within a few minutes of the time the fire in question was set *held* admissible.—*Austin v. Pennsylvania R. Co.*, 81 A. 739.

§ 481 (N.J.) In an action for fire caused by operation of railroad, evidence as to effect on screens in engines of another railroad *held* admissible.—*Goodman v. Lehigh Valley R. Co. of New Jersey*, 81 A. 848, 851; *Mays v. Same*, Id. 851.

§ 482 (N.J.) Evidence *held* to justify a finding that fire was communicated to plaintiff's buildings from other buildings set on fire by defendant railroad.—*Goodman v. Lehigh Valley*

R. Co. of New Jersey, 81 A. 848, 851; Mays v. Same, Id. 851.

§ 484 (N.J.) In actions for fires caused by the operation of a railroad, evidence *held* not to require a nonsuit or direction of verdict for defendant.—Goodman v. Lehigh Valley R. Co. of New Jersey, 81 A. 848, 851; Mays v. Same, Id. 851.

§ 485 (N.J.) In action for fire caused by operation of railroad, refusal to instruct to disregard evidence as to diaphragms on engines *held* not error in view of instruction given.—Goodman v. Lehigh Valley R. Co. of New Jersey, 81 A. 848, 851; Mays v. Same, Id. 851.

RATIFICATION.

See Corporations, § 426; Equity, § 427; Municipal Corporations, § 248.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

RECEIPTS.

See Trial, § 58.

RECEIVERS.

See Bankruptcy, § 216; Bills and Notes, § 340; Constitutional Law, §§ 249, 309; Corporations, §§ 232, 482, 559; Costs, § 192; Courts, § 200½; Judgment, §§ 252, 744; Parties, § 59; Railroads, §§ 30, 144, 167.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 163 (Md.) An order requiring a receiver to bring a sum into court to discharge certain unauthorized receiver's notes constituted a preference over other creditors holding similar notes.—Ziellian v. Baltimore Plate Ice Co., 81 A. 22.

VII. ACCOUNTING AND COMPENSATION.

§ 192 (Md.) If money, appropriated by a receiver from the assets of a corporation, was charged to his personal account, it was error to again charge him with such money.—Ziellian v. Baltimore Plate Ice Co., 81 A. 22.

§ 193 (Md.) A receiver was entitled to a credit for money raised by notes executed by him without authority, which went into the corporation's business.—Ziellian v. Baltimore Plate Ice Co., 81 A. 22.

RECEIVING STOLEN GOODS.

See Criminal Law, § 370.

RECEPTION OF EVIDENCE.

See Trial, §§ 53-82.

RECORDS.

See Appeal and Error, §§ 169, 371, 515-714; Courts, § 116; Dedication, §§ 19, 61; Deeds, §§ 88, 108; Elections, § 305; Evidence, § 48; Exceptions, Bill of, § 9; Execution, § 315; Fraudulent Conveyances, § 154; Homestead; Indictment and Information, § 137; Judgment, § 870; Justices of the Peace, § 58; Limitation of Actions, § 121; Lis Pendens, § 13; Mechanics' Liens, § 166; Municipal Corporations, §§ 641, 652; New Trial, § 168.

§ 6 (Md.) The term "duly recorded," used in Acts 1908, c. 105, curing defectively acknowledged instruments, if duly recorded, *held* not to confine the benefit of the acts to instruments recorded within the statutory six months after taking effect.—Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby, 81 A. 284.

REDEMPTION.

See Mortgages, §§ 591, 624.

REFERENCE.

See Appeal and Error, §§ 78, 143, 266, 274, 526, 713, 714, 1022; Attachment, § 185.

II. REFEREES AND PROCEEDINGS.

§ 61 (Vt.) On an issue as to the reasonableness of attorney's charges in preparing a case for the Supreme Court, a referee was properly authorized to examine their briefs, and was not limited to the undisputed testimony of witnesses as to the time spent and per diem charges.—McKane v. Gordon & Hoar, 81 A. 637.

REFORMATION OF INSTRUMENTS.

I. RIGHT OF ACTION AND DEFENSES.

§ 19 (Conn.) To reform a contract for mutual mistake, the mistake must have been common to both parties and have resulted in both doing what neither intended to do.—Snelling & Potter v. Merritt, 81 A. 1039.

II. PROCEEDINGS AND RELIEF.

§ 32 (Conn.) Under the circumstances, *held*, that it could not be said, as a matter of law, that defendants, in an action on an attachment bond, were guilty of laches in filing a cross-complaint on the date stated to have it reformed for mutual mistake.—Snelling & Potter v. Merritt, 81 A. 1039.

§ 37 (Conn.) A cross-complaint in an action on an attachment bond *held* to sufficiently allege a cause of action for reformation for mutual mistake.—Snelling & Potter v. Merritt, 81 A. 1039.

An allegation of fraud was not necessary where the complaint sufficiently alleged a cause of action for reforming an attachment bond on the ground of mutual mistake.—Id.

A cross-complaint filed in an action on an attachment bond seeking reformation of the bond for mutual mistake, need not allege a prior demand upon plaintiff for its reformation.—Id.

§ 41 (Conn.) Under the allegations of a cross-complaint seeking to reform the attachment bond sued on, certain evidence *held* admissible.—Snelling & Potter v. Merritt, 81 A. 1039.

§ 44 (Conn.) In an action on an attachment bond, sought to be reformed by defendant, evidence of the intent of defendant's attorney in drawing the bond *held* not admissible.—Snelling & Potter v. Merritt, 81 A. 1039.

§ 45 (Conn.) Evidence in a cross-proceeding to reform an attachment bond sued upon *held* not to sustain a finding that, before and at the delivery of the attachment bond, the parties had agreed to the execution and delivery of a different bond so as to show mutual mistake.—Snelling & Potter v. Merritt, 81 A. 1039.

The evidence showing mutual mistake so as to authorize the reformation of the contract on that ground must be clear, substantial, and convincing.—Id.

§ 45 (Vt.) More than a mere preponderance of evidence is required to secure the reformation of a deed.—Skeels v. Blanchard, 81 A. 913.

§ 51 (Conn.) The reformation of an attachment bond sued on pursuant to defendants' cross-complaint *held* to relate back to the institution of the action.—Snelling & Potter v. Merritt, 81 A. 1039.

REFRESHING MEMORY.

See Witnesses, § 255.

REFUSE.

See Licenses, §§ 6, 7.

REGISTRATION.

See Partnership, § 64; Records.

REHEARING.

See Equity, § 892; New Trial.

REIMBURSEMENT.

See Taxation, § 800.

RELEASE.

See Attachment, §§ 227, 232; Bills and Notes, § 514; Corporations, § 84; Homestead; Judgment, § 522; Payment.

RELEVANCY.

See Evidence, §§ 113-143.

RELIGIOUS SOCIETIES.

See Charities, § 21; Libel and Slander, §§ 51-123.

§ 18 (Pa.) Resolution by Roman Catholic congregation, vesting in bishop of diocese all the property of the congregation, to, hold as trustee in accordance with the laws of the church, *held* not enforceable in equity, since such enforcement would violate Act April 26, 1855 (P. L. 330) § 7.—*Mazaika v. Krauczunas*, 81 A. 938.

Under Act April 26, 1855 (P. L. 328), when property has been bequeathed, devised, or conveyed to any person or persons whomsoever for the use of any church, congregation, or religious worship, the person so acquiring the legal title is as to the property acquired but a dry trustee, without any power of control or management.—*Id.*

REMAINDERS.

See Fraudulent Conveyances, § 312; Life Estates; Mortgages, § 273; Wills, §§ 601, 629-634.

REMEDY AT LAW.

See Municipal Corporations, § 697; Specific Performance, § 86; Taxation, § 453.

REMITTITUR.

See Appeal and Error, §§ 843, 1187, 1191; Damages, § 199.

REMOVAL.

See Paupers, §§ 19, 22.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL.

See Insurance, § 145.

RENT.

See Executors and Administrators, § 271; Landlord and Tenant, §§ 184, 192; Principal and Agent, § 103; Vendor and Purchaser, § 68.

REPAIRS.

See Landlord and Tenant, §§ 150, 184; Master and Servant, §§ 221, 289.

REPEAL.

See Statutes, §§ 159-167.

REPLEVIN.

See Time.

I. RIGHT OF ACTION AND DEFENSES.

§ 8 (Vt.) Possession of personalty *held* presumptively rightful and sufficient to support replevin against a wrongdoer.—*Cramton v. Chapman*, 81 A. 231.

REPORT.

See Evidence, § 163.

REPUGNANCY.

See Statutes, §§ 159-167.

REQUESTS.

See Trial, §§ 258-267.

RESCISSION.

See Husband and Wife, § 167; Partnership, § 311; Vendor and Purchaser, § 335.

RESERVATIONS.

See Deeds, §§ 138, 148.

RESIDENCE.

See Domicile; Marriage, § 60; Venue.

RES JUDICATA.

See Judgment, §§ 606, 644-749.

RESOLUTIONS.

See Corporations, § 283; Religious Societies.

RESTORATION.

See Attachment, § 185.

RESULTING TRUSTS.

See Trusts, §§ 81-88.

RETROSPECTIVE LAWS.

See Constitutional Law, § 194; Statutes, § 263.

RETURN.

See Appeal and Error, § 635.

REVENUE.

See Taxation.

REVERSAL.

See Appeal and Error, §§ 1172, 1175.

REVERSIONS.

See Eminent Domain, § 145.

REVIEW.

See Appeal and Error; Certiorari; Elections, § 306; Eminent Domain, § 264.

REVOCATION.

See Innkeepers, § 4.

RIGHT OF WAY.

See Easements, §§ 18, 63; Railroads, §§ 64, 90.

RIPARIAN RIGHTS.

See Waters and Water Courses, § 85.

RISKS.

Assumption of, see Master and Servant, §§ 203-221, 288.

ROADS.

See Highways.

ROBBERY.

See Criminal Law, § 517.

ROYALTIES.

See Patents, § 219.

RULES.

See Master and Servant, § 247.

RULES OF COURT.

See Action, § 41; Appeal and Error, §§ 580, 633, 994; Constitutional Law, § 321; Courts, §§ 78, 79.

SAFE PLACE TO WORK.

See Master and Servant.

SALARY.

See Corporations, § 426.

SALES.

See Corporations, §§ 439, 482, 542, 610, 657; Costs, § 56; Dedication, § 19; Evidence, §§ 135, 318, 441, 472; Execution, §§ 48, 99, 247-315; Executors and Administrators, §§ 121, 328, 454, 519; Food; Fraud, §§ 44, 49, 57, 59; Frauds, Statute of, §§ 56, 82, 142; Fraudulent Conveyances, §§ 31, 136, 181, 192, 208; Gaming, § 14; Indemnity, § 8; Injunction, §§ 61, 128; Intoxicating Liquors; Justices of the Peace, § 37; Landlord and Tenant, § 272; Logs and Logging; Mortgages, §§ 296, 507; Patents, § 219; Principal and Agent, §§ 24, 103; Railroads, § 64; Schools and School Districts, § 80; Taxation, §§ 679, 734, Trial, §§ 53, 243, 267; Trusts, §§ 191-204; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 52 (Vt.) In an action for fraud inducing a sale, certain testimony *held* admissible against defendant on the issue of what representations were made.—Griswold v. Wentworth, 81 A. 622.

IV. PERFORMANCE OF CONTRACT.**(C) Delivery and Acceptance of Goods.**

§ 161 (Conn.) Delivery of goods by a seller to a carrier and notice to the buyer *held* to pass title.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

On a partial breach of a buyer's contract, the storage of the goods with an agent of the seller or delivery to a carrier does not add to the seller's responsibility as the buyer's bailee.—*Id.*

§ 161 (Md.) A purchaser is bound to accept or reject goods at the place of delivery *f. o. b.*—Doggett v. Tatham, 81 A. 376.

§ 181 (Vt.) In a suit for the price of a monument purchased by defendant for resale to D., evidence that after the monument was erected D. objected to certain dark stains thereon *held* admissible on the question of acceptance.—H. P. Agostines & Co. v. C. E. Fenn & Co., 81 A. 255.

§ 182 (Md.) Whether a seller waived the buyer's breach of contract of sale *held* for the jury.—Miller v. Mantik, 81 A. 797.

V. OPERATION AND EFFECT.**(A) Transfer of Title as Between Parties.**

§ 208 (Conn.) Where goods sold had neither been segregated nor delivered to a carrier, the title had not passed.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

VI. WARRANTIES.

§ 246 (Del.Super.) A warranty in a contract of sale is an undertaking collateral to the object of the sale.—Wills v. Wright, 81 A. 507.

VII. REMEDIES OF SELLER.**(E) Actions for Price or Value.**

§ 340 (Conn.) Prior to the sales act, on breach of buyer's contract to purchase goods, the seller could sue for damages, but not for the price.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

Elements of a cause of action by seller against buyer for breach of contract to purchase under Sales Act, §§ 63, 3, 64, 4, stated.—*Id.*

On breach of a wholesaler's order to a manufacturer for post cards after the close of the season, the manufacturer was not bound to sell the cards at retail, but could sue for the price under Sales Act, § 63, 3.—*Id.*

§ 340 (Md.) Where there is a special contract, a recovery, if any, must be had thereon instead of on a quantum meruit.—Miller v. Mantik, 81 A. 797.

§ 345 (Conn.) On a partial breach of a buyer's contract to purchase post cards, the seller *held* under no obligation to separate the order or attempt to resell the cards.—Illustrated Postal Card & Novelty Co. v. Holt, 81 A. 1061.

§ 347 (Md.) A prayer, in an action for a balance due on goods, asking a direction for defendant on a finding that the goods were not delivered by a certain date, *held* properly refused, where time was not shown to have been of the essence.—Goodman v. Saperstein, 81 A. 695.

§ 358 (Md.) Evidence as to damages for failure to deliver by a certain day *held* not admissible, in an action for a balance due on such goods.—Goodman v. Saperstein, 81 A. 695.

§ 363 (Pa.) Under terms of written agreement for transfer of engine to defendant, plaintiff *held* entitled to directed verdict on notes for the price.—Russell & Co. v. Boody, 81 A. 548.

(F) Actions for Damages.

§ 381 (Pa.) In an action against a purchaser of screens for breach of contract, burden *held* to be on seller to show the value of the screens remaining.—Imperial Rolling Screen Co. v. Steinfeld Bros., 81 A. 413.

§ 382 (Pa.) In an action against purchaser for breach of contract, finding of value of the property not delivered at the price at which the seller offered it to the buyer *held* not to be set aside by the appellate court.—Imperial Rolling Screen Co. v. Steinfeld Bros., 81 A. 413.

§ 384 (Pa.) In an action against a purchaser of screens for refusal to take a portion, measure of damages stated.—Imperial Rolling Screen Co. v. Steinfeld Bros., 81 A. 413.

VIII. REMEDIES OF BUYER.**(C) Actions for Breach of Contract.**

§ 407 (Pa.) Vendor refusing to complete contract because of delay in payments by vendee *held* not entitled to set up insolvency of vendee as defense to action for such refusal.—Honesdale Ice Co. v. Lake Lodore Improvement Co., 81 A. 306.

§ 418 (Pa.) Measure of damages for breach by vendor of contract of sale stated.—Hones-

dale Ice Co. v. Lake Lodore Improvement Co., 81 A. 306.

§ 420 (Pa.) In action for breach of contract to furnish ice for a definite period, question whether vendor by repeatedly accepting overdue payments had waived its right to terminate the contract for delay *held* properly submitted to the jury.—Honesdale Ice Co. v. Lake Lodore Improvement Co., 81 A. 306.

IX. CONDITIONAL SALES.

§ 459 (Del.Super.) Sale of goods *held* conditional as between parties.—Flint Wagon Works v. Maloney, 81 A. 502.

§ 474 (Del.Super.) Vendor in conditional sale *held* entitled to assert title as against creditor of vendee, who obtained possession under execution.—Flint Wagon Works v. Maloney, 81 A. 502.

SATISFACTION.

See Payment.

SCHOOLS AND SCHOOL DISTRICTS.

See Certiorari, § 4; Judgment, § 644; Wills, §§ 516, 517.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

§ 19 (Conn.) Gen. St. 1902, § 2157, providing for the apportionment of school funds, has no application to a school district governed by a district committee.—Hassett v. Carroll, 81 A. 1013.

School funds payable under Gen. St. 1902, § 2257, *held* payable on comptroller's order to the treasurer of the towns, and not by the state to the school districts.—Id.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 21 (Conn.) Under Gen. St. 1902, § 2177, school districts are not permanent corporations, but are quasi corporations of a public nature, with limited statutory powers.—Hassett v. Carroll, 81 A. 1013.

Under Gen. St. 1902, §§ 2175, 2177, school districts may be formed, altered, or dissolved by the towns within the limits of which they exist, and are subject to regulation by such towns.—Id.

§ 41 (N.J.Sup.) School Law, § 34, *held* not to impose on a new school district erected out of a portion of an existing district the obligation of a contract with the teacher.—Board of Education of Borough of Flemington v. State Board of Education, 81 A. 163.

Contract of employment of school teacher *held* not binding on new school district formed out of part of district making the contract.—Id.

(C) Government, Officers, and District Meetings.

§ 62 (Md.) A board of school commissioners *held* not liable to a teacher for having refused an adjournment of the hearing of charges against her on their finding on which they removed her.—Roschen v. Packard, 81 A. 174.

The board of school commissioners in trying charges against and removing a teacher *held*, under Baltimore City Charter, § 99, to exercise quasi judicial powers, and so not liable to the teacher, unless their acts are done willfully, fraudulently, and corruptly.—Id.

(D) District Property, Contracts, and Liabilities.

§ 80 (Conn.) Member of school district committee *held* not to have violated Gen. St. 1902,

§ 1368, by selling coal to the district without submitting to competition.—Hassett v. Carroll, 81 A. 1013.

SCIRE FACIAS.

See Election of Remedies, § 7; Execution, § 99; Judgment, § 870; Limitation of Actions, § 122; Municipal Corporations, § 530.

§ 8 (Me.) A writ of scire facias is amendable in the same manner as declarations in other cases.—Marsh Bros. & Co. v. Bellefleur, 81 A. 79.

SEARCHES AND SEIZURES.

See Commerce, § 41.

SECONDARY EVIDENCE.

See Evidence, §§ 157-174, 591.

SECURITY.

See Appeal and Error, § 688; Bankruptcy, § 189; Executors and Administrators, § 227; Payment, § 41.

SEDUCTION.

See Breach of Marriage Promise, § 28.

SELECTMEN.

See Municipal Corporations, § 652.

SELF-DEFENSE.

See Criminal Law, § 656.

SEPARATE ESTATE.

See Husband and Wife, §§ 121-171.

SEPARATION.

See Husband and Wife, §§ 278, 279.

SEQUESTRATION.

See Divorce, §§ 286, 331; Lis Pendens, §§ 3, 22; Vendor and Purchaser, § 229.

§ 13 (N.J.) Provision in P. L. 1907, p. 482, § 26, for indorsement of writ of sequestration *held* not to render the writ void for lack of such indorsement, but only voidable until application be made to set it aside.—Wood v. Price, 81 A. 983.

SERVANTS.

See Master and Servant.

SERVICE.

See Appeal and Error, § 24; Process, § 58.

SERVICES.

See Assignments, § 19; Executors and Administrators, §§ 206, 450; Work and Labor.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

See Pleading, § 382; Trial, § 141.

SETTING ASIDE.

See Judgment, §§ 138-159, 386, 392, 456; Taxation, §§ 453, 462.

SETTLEMENT.

See Compromise and Settlement; Evidence, § 471; Guardian and Ward, § 163; Partnership, §§ 304, 311; Paupers, §§ 19, 22; Payment.

SEVERANCE.

See Action, § 60; Appeal and Error, § 969.

SEWERS.

See Municipal Corporations, §§ 358-362, 809.

SHERIFFS AND CONSTABLES.

See Insane Persons, § 19; Mandamus, § 3.

I. APPOINTMENT, QUALIFICATION, AND TENURE.**(B) Constables.**

§ 10 (Vt.) A constable *held* in authority under a town, and so not required to take and subscribe the oath of office required by Const. c. 2, § 29, of officers "in authority under this state."—*Bixby v. Roscoe*, 81 A. 255.

III. POWERS, DUTIES, AND LIABILITIES.

§ 106 (Me.) Certain facts *held* not to excuse a sheriff's refusal to execute a writ of possession.—*Webster v. Ballou*, 81 A. 1009.

SIDEWALKS.

See Municipal Corporations, §§ 750-821.

SIGNALS.

See Master and Servant, §§ 137, 185; Railroads, §§ 334, 337, 350.

SIGNATURES.

See Evidence, § 373; Exceptions, Bill of, § 56; Judgment, § 72; Statutes, §§ 30, 286.

SLANDER.

See Libel and Slander.

SLAUGHTER HOUSES.

See Licenses, §§ 6, 7.

SPECIAL LAWS.

See Statutes, § 85.

SPECIFIC PERFORMANCE.

See Evidence, § 419; Frauds, Statute of, § 142; Pleading, § 214; Vendor and Purchaser, § 129.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 13 (N.J.) Specific performance of a contract of lease will not lie where performance is impossible.—*Williams v. Young*, 81 A. 1118.

§ 14 (N.J.Ch.) In a suit for specific performance of a contract to sell land, the defense that the bill required defendant to get in an outstanding interest *held* not available.—*Day v. Devitt*, 81 A. 368.

§ 24 (Vt.) A claim for breach of testator's contract to will all his estate to complainant should be prosecuted against his administrator, and not against his heirs or legatees.—*Day v. Washburn*, 81 A. 474.

II. CONTRACTS ENFORCEABLE.

§ 26 (Md.) A contract for the sale of real property providing for a future creation, and conveyance of certain ground rents, *held* not subject to specific performance.—*Ward v. Newbold*, 81 A. 793.

§ 28 (Md.) Where a contract for the sale of real estate reserved certain ground rents, but did not specify how they were to be created or when or for what time the leases were to run, the contract was not subject to specific performance.—*Ward v. Newbold*, 81 A. 793.

§ 32 (N.J.Ch.) In a suit for specific performance of a contract for the sale of land, *held*, that there was no want of mutuality in the contract.—*Day v. Devitt*, 81 A. 368.

§ 38 (Vt.) An oral agreement to transfer a patent may be specifically enforced.—*Whitcomb v. Whitcomb*, 81 A. 97.

§ 74 (Md.) A contract for the sale of real estate required by the contract to be built on *held* not subject to specific performance, as equity will not enforce specific performance of a contract to build or repair.—*Ward v. Newbold*, 81 A. 793.

§ 74 (N.J.) The general rule that equity will not specifically enforce a construction contract *held* not to prevent it from doing so as incidental to other relief in exceptional cases.—*Williams v. Lowe*, 81 A. 760.

§ 86 (N.H.) A claim for specific performance of decedent's contract to will all his property to claimant *held* not objectionable, on the theory that claimant had an adequate remedy at law.—*Day v. Washburn*, 81 A. 474.

III. GOOD FAITH AND DILIGENCE.

§ 95 (N.J.Ch.) Equity will not compel a purchaser to specifically perform his contract where there is a doubtful question of law or fact affecting the title of the vendor.—*Kohlrepp v. Ram*, 81 A. 1103.

§ 99 (N.J.Ch.) Defendant, in a bill for specific performance of a contract to sell land, *held* not entitled to raise the question of complainant's laches.—*Day v. Devitt*, 81 A. 368.

IV. PROCEEDINGS AND RELIEF.

§ 106 (N.J.Ch.) In a suit for specific performance, the persons having interests in the land or rights in the purchase money *held* properly included as parties.—*Day v. Devitt*, 81 A. 368.

§ 114 (Md.) A bill for specific performance, which prayed for performance of the contract as written, and further prayed for such further and other relief as the case might require, did not authorize a recovery of damages on performance being refused.—*Ward v. Newbold*, 81 A. 793.

§ 127 (N.H.) In a proceeding to enforce a contract to will all testator's property to complainant, the superior court had no jurisdiction to set up a former will in performance of the contract, or to annul the probate of a later one in breach thereof.—*Day v. Washburn*, 81 A. 474.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

STATEMENT.

See Appeal and Error, § 362.

STATES.

See Courts, § 208; Libel and Slander, § 36; Limitation of Actions, § 36; Municipal Corporations, §§ 27, 36; Statutes, §§ 26, 30, 39.

VI. ACTIONS.

§ 191 (Pa.) Suit to restrain commissioner of fisheries *held* not a suit against the state, but merely to prevent breach of covenant by the commissioner in the performance of ministerial duties.—*Issett v. Meehan*, 81 A. 544.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.
See Frauds, Statute of; Limitation of Actions.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 26 (N.H.) Under Const. pt. 2, art. 43, the Governor's approval of a law *held* as essential to its enactment as passage by the Legislature.—In re Opinion of the Justices, 81 A. 170.

§ 30 (N.H.) A bill improperly engrossed *held* not subject to be re-engrossed and presented to the Governor for resignature after adjournment of the Legislature.—In re Opinion of the Justices, 81 A. 170.

§ 37 (Md.) Laws 1910, c. 52, § 1, as signed by the Governor, as required by Const. art. 3, § 30, after an error in its enrollment, and as printed in the statutes, *held* to be the same act passed by the Legislature, and to be valid.—Joseph B. Dunn & Sons v. Brager, 81 A. 516.

§ 39 (N.H.) Part of Laws 1911, c. 130, relating to a forest reservation and state park, *held* not to have become a valid law.—In re Opinion of the Justices, 81 A. 170.

§ 51 (N.J.Sup.) P. L. 1906, p. 553, amending P. L. 1902, p. 574, § 5, relating to condemnation of land by boroughs, *held* not violative of Const. art. 4, § 7, par. 4, relating to enactment of statutes.—Hutches v. Borough of Hohokus, 81 A. 658.

§ 64 (Del.Super.) Under Const. art. 2, § 16, the act providing for the registration of persons composing partnerships (25 Del. Laws, c. 146), etc., *held* unconstitutional in so far as it relates to registration of persons not members of firms or associations.—State v. Ferschke, 81 A. 401.

§ 64 (Md.) Law 1910, c. 735, being unconstitutional in part, *held* wholly void in providing for the inspection and taxing of oysters.—D. E. Foote & Co. v. Clagett, 81 A. 511.

§ 64 (N.J.Sup.) Object, unexpressed in title of act, if wholly separable from expressed object, *held* to be excised from the body of the act.—Hutches v. Borough of Hohokus, 81 A. 658.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 85 (Pa.) Act June 4, 1901 (P. L. 437) § 13, relating to priority of mechanics' liens over advance money mortgages, *held* violative of Const. art. 3, § 7.—Page v. Carr, 81 A. 430.

III. SUBJECTS AND TITLES OF ACTS.

§ 109 (Pa.) Title of act *held* not required to be a general index to the contents, but to be sufficient if it relates to one general subject-matter.—Page v. Carr, 81 A. 430.

§ 117 (Pa.) Act June 4, 1901 (P. L. 437) § 13, giving priority to mechanics' liens over advance money mortgages, *held* violative of Const. art. 3, § 3, relating to titles of statutes.—Page v. Carr, 81 A. 430.

§ 126 (N.J.) A person assessed under Act 1894 (P. L. 1894, p. 318) on property acquired by will *held* not entitled to assert that the title of the act does not express its object.—Eastwood v. Russell, 81 A. 108.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Me.) A statute which repeals by implication an earlier statute must be plainly repugnant to and inconsistent with the earlier

statute.—Inhabitants of Eden v. Inhabitants of Southwest Harbor, 81 A. 1003.

§ 161 (Me.) A statute which repeals by implication an earlier statute must show that it was intended to cover the whole subject-matter.—Inhabitants of Eden v. Inhabitants of Southwest Harbor, 81 A. 1003.

§ 161 (Md.) If two provisions of a statute on the same subject are repugnant, the later statute impliedly repeals the earlier one to the extent of the repugnancy.—State v. Gambrill, 81 A. 10.

Code Pub. Gen. Laws 1904, art. 27, § 194, inserting in the Code as that article and section, as well as article 14, § 10, Act 1876, c. 262, § 6, *held* impliedly repealed by Uniform Warehouse Receipts Act, § 52, construing the statute with section 57 thereof, and with the uniform bills of lading act.—Id.

§ 167 (Md.) A subsequent statute revising the whole subject-matter of a former statute and intended as a substitute therefor impliedly repeals the former statute.—State v. Gambrill, 81 A. 10.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 200 (Md.) In view of Code Pub. Gen. Laws 1904, art. 63, § 1, and Laws 1908, c. 495, § 281, relating to mechanics' liens in Baltimore city, *held*, that the punctuation of Laws 1910, c. 52, § 1, would be changed to make the purpose of the Legislature clear.—Joseph B. Dunn & Sons v. Brager, 81 A. 516.

(B) Particular Classes of Statutes.

§ 239 (N.J.Sup.) Act March 23, 1881 (P. L. p. 184; 2 Gen. St. 1895, p. 2112), relating to enforcement of debt secured by bond and mortgage, *held* to be construed strictly.—Knight v. Cape May Sand Co., 81 A. 361.

§ 244 (Me.) Statutes authorizing summary proceedings must be strictly construed.—Karahalies v. Dukais, 81 A. 1011.

§ 245 (Md.) The courts construe laws for the assessment and collection of general taxes with utmost liberality with a view of upholding them, if possible.—Union Trust Co. of Maryland v. State, 81 A. 873.

§ 245 (Vt.) A statute classifying property for the purposes of taxation, enacted to secure the direct production of state revenue, ought to be liberally construed.—Frazier v. W. H. H. Slack & Bro., 81 A. 161.

(D) Retroactive Operation.

§ 263 (Me.) Laws 1855, c. 129 (Rev. St. c. 20, § 6), *held* not retroactive, and hence not applicable to an exception of a burial lot from a devise made in 1849.—McIntire v. Lauckner, 81 A. 784.

VII. PLEADING AND EVIDENCE.

§ 279 (Me.) In relying on a public statute *held* sufficient that a pleading states facts bringing the case within it.—Karahalies v. Dukais, 81 A. 1011.

§ 286 (N.H.) Finding of a properly signed act in the Secretary of State's office *held* not conclusive of its due enactment.—In re Opinion of the Justices, 81 A. 170.

STATUTES CONSTRUED

UNITED STATES.

CONSTITUTION.

Amend. 14.....610, 686, 1093
Art. 1, §§ 8, 10.....511

STATUTES AT LARGE.

1898, July 1, ch. 541, § 67,
30 Stat. 564 (U. S. Comp.
St. 1901, p. 3449).....666
1898, July 1, ch. 541, §
70a, 30 Stat. 565 (U. S.
Comp. St. 1901, p. 3451) 955

REVISED STATUTES.

§ 4898 (U. S. Comp. St.
1901, p. 3387).....97

COMPILED STATUTES
1901.

Page 3387.....97
Page 3449.....666
Page 3451.....955

CONNECTICUT.

GENERAL STATUTES 1902.

§ 705.....242
767.....1013
880.....1033
1130.....241, 1024
1368.....1013
1833.....965
2020.....241, 958
§§ 2067, 2070.....1051
2083.....244
§§ 2157, 2175, 2177, 2257 1013
2290.....1059
2321.....1027
§ 2469.....1046
§§ 2480, 2490, 2500.....965
3837.....241
4036.....955
4199.....1003
4443. Amended by Laws
1903, ch. 83; Laws 1905,
ch. 114.....958
§ 4670.....1055

PRACTICE BOOK 1908.

Page 268, § 10.....337

LAWS.

1903, ch. 83.....958
1903, ch. 203.....972
1905, ch. 114.....958
1905, ch. 154.....1050
1907, ch. 167, § 3. Amend-
ed by Laws 1909, ch.
55, § 2.....247
1907, ch. 167, § 15.....247
1907, ch. 212.....1061
1907, ch. 212, §§ 63, 64.....1061
1908, ch. 55, § 2.....247

DELAWARE.

CONSTITUTION.

Art. 2, § 16.....401
Art. 9, § 5.....394

REVISED CODE 1852 AS
AMENDED TO 1893.

Page 396 (12 Del. Laws,
ch. 33).....472
Page 740, ch. 99, § 1....507

LAWS.

1875-77, ch. 477. Amend-
ed by Laws 1895-97, ch.
579.....70
1895-97, ch. 579.....70
1901-03, ch. 392, §§ 60,
123.....70
1901-03, ch. 394, § 31....892
1901-03, ch. 395.....394
1909, ch. 146.....401

MAINE.

REVISED STATUTES 1908.

Ch. 8, § 69.....214
Ch. 9, §§ 73-75.....1068
Ch. 18, § 51.....1003
Ch. 20, § 6.....784
Ch. 23, § 76. Amended by
Laws 1903, ch. 108.....1092
Ch. 49, § 93.....575
Ch. 65, §§ 28-34.....80
Ch. 78, § 19.....79
Ch. 79, § 5.....671
Ch. 79, § 6, par. 11....671
Ch. 89, § 7.....80
Ch. 93, § 29.....578
Ch. 93, §§ 31, 39.....100
Ch. 93, § 54.....1091
Ch. 96, §§ 1, 2, 4.....1011

LAWS.

1855, ch. 129.....784
1903, ch. 108.....1092
1905, ch. 158.....870
1906, ch. 124, §§ 86, 87..214
1909, ch. 25, § 2.....1003
1909, ch. 55.....1003

MARYLAND.

CONSTITUTION.

Declaration of Rights, arts.
19, 20.....126
Declaration of Rights, art.
23.....610
Art. 3, § 30.....516

CODE OF PUBLIC GENER-
AL LAWS 1888.

Art. 16, § 205. Amended
by Laws 1892, ch. 241..610

CODE OF PUBLIC GEN-
ERAL LAWS 1904.

Art. 5, § 26.....25, 178
Art. 5, § 34.....685
Art. 5, § 60.....673
Art. 9, § 10.....223
Art. 9, § 11.....379
Art. 9, § 18.....223
Art. 9, §§ 29, 33.....379
Art. 9, § 38.....219
Art. 13, §§ 20, 22.....227
Art. 14, § 10.....10
Art. 16, § 107.....25
Art. 16, § 177.....265
Art. 17.....606
Art. 21, §§ 19, 21.....284
Art. 21, § 41.....289
Art. 23, §§ 391-401. Re-
pealed by Laws 1908,
ch. 240.....223
Art. 27, § 194.....10
Art. 35, § 17.....695
Art. 35, §§ 40, 64.....289
Art. 35, § 65.....695

Art. 52, § 12. Amended
by Laws 1908, ch. 475..36
Art. 52 (§ 12b added by
Laws 1906, ch. 444)....36
Art. 53, §§ 8-10.....696
Art. 56, §§ 90, 91, 102...692
Art. 56, §§ 131-140.
Amended by Laws 1910,
ch. 207.....36
Art. 56 (§§ 140a-140i,
140k-140t added by
Laws 1910, ch. 207)....36
Art. 63, § 1.....516
Art. 63, § 15.....265
Art. 75, § 3.....675
Art. 75, § 166.....379
Art. 81, § 17.....520
Art. 81 (§ 17a added by
Laws 1910, ch. 430)....520
Art. 81, § 22. Amended
by Laws 1906, ch. 404..873
Art. 81, § 150.....873
Art. 93, § 244.....673

CODE OF PUBLIC LOCAL
LAWS.

Art. 4, §§ 658-660.....606

CITY CHARTERS.

Baltimore, § 99. Laws
1898, ch. 123.....174
Baltimore, § 170. Laws
1898, ch. 123. Amended
by Laws 1908, ch. 167..3
Hyattsville, §§ 2, 17.
Laws 1908, ch. 79.....278
Hyattsville, § 21. Laws
1908, ch. 79. Amended
by Laws 1910, ch. 305..9
Hyattsville, §§ 25, 28.
Laws 1908, ch. 79.....278

LAWS.

1868, ch. 273.....523
1876, ch. 262, § 6.....10
1892, ch. 241.....610
1898, ch. 123.....696
1898, ch. 123, § 99.....174
1898, ch. 123, § 170.
Amended by Laws 1908,
ch. 167.....3
1902, ch. 409.....382
1904, ch. 37. Amended
by Laws 1910, ch. 221..696
1904, ch. 274, §§ 1, 3....677
1906, ch. 404.....873
1906, ch. 444, § 12b.....36
1906, ch. 475.....36
1908, ch. 79, §§ 2, 17....278
1908, ch. 79, § 21.
Amended by Laws 1910,
ch. 305.....8
1908, ch. 79, §§ 25, 28...278
1908, ch. 105.....284
1908, ch. 167.....3
1908, ch. 240.....223
1908, ch. 259. Amended by
Laws 1910, ch. 588....284
1908, ch. 380.....602
1908, ch. 405, § 281.....516
1910, ch. 52, § 1.....516
1910, ch. 207.....36
1910, ch. 207, § 140p....18
1910, ch. 221.....696
1910, ch. 300, §§ 1, 7, 20.
21.....520
1910, ch. 305.....8
1910, ch. 336.....10
1910, ch. 406, §§ 52, 57..10
1910, ch. 430.....520

1910, ch. 588.....	284
1910, ch. 735.....	511

NEW HAMPSHIRE.**CONSTITUTION.**

Pt. 2, art. 43.....	170
---------------------	-----

PUBLIC STATUTES 1901.

Ch. 61, §§ 5, 6.....	526
Ch. 83, § 1.....	1079
Ch. 84, § 1.....	1079
Ch. 137, § 18.....	1078
Ch. 138, § 2.....	1078
Ch. 150, § 1.....	704
Ch. 195, § 13.....	1078
Ch. 195, § 13, Amended by Laws 1901, ch. 113, § 4.....	1078
Ch. 195, § 14.....	1078
Ch. 204, § 2.....	533
Ch. 204, §§ 11-13.....	1081
Ch. 213, § 5.....	708

LAWS.

1895, ch. 64, § 2.....	526
1901, ch. 78.....	1081
1901, ch. 113, § 4.....	1078
1903, ch. 42.....	1079
1911, ch. 130.....	170
1911, ch. 164, § 3, subsecs. a, c.....	473

NEW JERSEY.**CONSTITUTION.**

Art. 4, § 7, par. 4.....	658
Art. 4, § 7, par. 12.....	108

GENERAL STATUTES 1895.**Volume 1.**

Pages 35, 41, §§ 27, 46...	496
Page 465.....	754
Page 1188.....	491, 736

Volume 2.

Page 1891, § 1.....	725
Page 1429, § 21.....	115
Page 1604, § 12.....	761
Page 1644, § 49.....	349
Pages 1793, 1797, 1799, §§ 35, 61, 73.....	347
Page 1923, § 35.....	367, 827
Page 2112.....	361
Page 2112, § 47.....	851

Volume 3.

Pages 2827, 2836, §§ 113, 154.....	495
Page 2882.....	924
Pages 3235, 3243, §§ 137, 142.....	989

COMPILED STATUTES**1910.****Volume 2.**

Page 1610, § 21.....	925
Page 2618, § 12.....	824

LAWS.

1874, p. 27.....	827
1880, p. 217, § 11.....	496
1881, p. 184.....	361
1888, p. 397.....	924
1889, p. 82, § 10, Amend- ed by Laws 1906, p. 201, § 8.....	563
1891, p. 79.....	924
1891, p. 249.....	754
1893, p. 302.....	989
1893, pp. 315, 318, §§ 18, 23.....	989

1893, p. 361, § 16.....	496
1894, p. 318.....	108
1895, p. 218, § 64, Amend- ed by Laws 1906, p. 325	1116
1896, p. 286, § 30.....	828
1896, p. 322.....	754
1898, p. 173.....	924
1898, p. 271, § 67.....	657
1898, p. 317, § 180.....	561
1898, p. 324, § 197.....	657
1898, p. 442, Amended by Laws 1901, p. 364.....	264
1898, p. 556, §§ 3, 21.....	433
1898, p. 634, Amended by Laws 1910, p. 247, § 215	499
1898, p. 666, § 65.....	573
1898, p. 725, 29.....	115
1898, p. 738, 67.....	851
1898, p. 738, § 67 et seq.	851
1898, p. 740, §§ 70, 72.....	851
1899, p. 96.....	1070
1899, p. 101, § 18, subsec. 34.....	1070
1900, pp. 351, 355, §§ 14, 28.....	989
1901, p. 325.....	732
1901, p. 364.....	264
1902, p. 477.....	983
1902, pp. 477, 508, 524, 325, §§ 1, 20, 44, 46.....	1093
1902, p. 563.....	263
1902, p. 574.....	658
1902, p. 574, § 5, Amend- ed by Laws 1906, p. 553	658
1902, p. 596, § 68.....	863
1903, p. 253, § 17, Amend- ed by Laws 1906, p. 47	490
1903, p. 393.....	658
1903, p. 537, §§ 196, 197	659
1903, p. 541, § 27.....	434
1903, p. 569, § 110.....	726
1903, p. 575, § 140.....	848
1903, p. 590, §§ 202, 203.....	347
1903, p. 645, § 26.....	833
1903, p. 673, § 55.....	494
1903, p. 673, § 57.....	848
1903, p. 674, § 59.....	107
1903 (2d Sp. Sess.) p. 15, § 34.....	163
1905, p. 259.....	263
1906, p. 13.....	489
1906, p. 47.....	489
1906, p. 201, § 3.....	563
1906, p. 209.....	726
1906, p. 325.....	1116
1906, p. 418.....	1072
1906, p. 432.....	108
1906, p. 550, § 214.....	490
1906, p. 553.....	658
1906, pp. 645, 646, §§ 4, 5	1121
1907, p. 132.....	1072
1907, p. 279.....	826
1907, p. 474.....	363
1907, p. 481, § 25.....	1093
1907, p. 482, § 26.....	1093
1908, p. 80, § 1.....	657
1908, p. 163.....	826
1909, p. 76.....	826
1910, p. 247, § 215.....	499
1911, p. 322.....	561

PENNSYLVANIA.**CONSTITUTION.**

Art. 1, § 10.....	148
Art. 3, §§ 3, 7.....	430
Art. 4, § 8.....	85
Art. 5, § 15.....	85
Art. 8, § 3.....	85

LAWS.

1804, p. 517.....	204
1806 (4 Smith's Laws, p. 332, § 13).....	324
1832-33, p. 249.....	212

1833-34, p. 70.....	416
1833-34, p. 78, § 28.....	554
1833-34, p. 509, Amended by Laws 1841, p. 393...	204
1836, p. 621.....	316
1836, p. 789, § 13, par. 5.....	316
1841, p. 393.....	204
1843, p. 367.....	884
1849, p. 79.....	132
1851, p. 609.....	802
1854, p. 89.....	714
1855, p. 309.....	802
1855, p. 328.....	207, 935
1855, p. 330, § 7.....	938
1862, p. 235.....	884
1865, p. 320.....	308
1865, p. 602.....	324
1868, p. 62, Amended by Laws 1876, p. 157.....	935
1868, p. 177.....	324
1868, p. 179, § 9.....	324
1868, p. 443.....	891
1874, p. 73.....	548
1874, p. 79, § 11.....	928
1874, p. 95, § 34, cl. 7.....	316
1874, p. 107, § 44.....	928
1874, p. 108.....	884
1875, p. 28.....	985
1876, p. 157.....	935
1887, p. 159, § 5, cl. e.....	416, 707
1889, p. 37.....	204
1889, p. 277.....	719
1891, p. 176.....	56
1891, p. 183, art. 3, § 10	148
1891, p. 223.....	928
1893, p. 52.....	56
1893, p. 344.....	145
1893, p. 345.....	316
1893, p. 346, § 5.....	316
1893, p. 415.....	203
1893, p. 419, Amended by Laws 1903, p. 338.....	655
1897, p. 46, Amended by Laws 1901, p. 191.....	324
1899, p. 189.....	928
1901, p. 3.....	928
1901, p. 191.....	324
1901, p. 327.....	911
1901, p. 364, § 10.....	335
1901, p. 437, § 13.....	430
1901, p. 440, § 18.....	158
1901, p. 601.....	204
1901, p. 619, § 1, subsec. 14.....	707
1901, p. 629.....	423
1903, p. 338.....	655
1905, p. 230.....	809
1905, p. 296.....	908
1905, p. 359, § 22.....	556
1906, p. 83.....	59
1907, p. 205.....	884
1907, p. 441, § 3.....	316, 548
1907, p. 523.....	889
1909, p. 493, § 12.....	204
1909, p. 951.....	85
1911, p. 9, § 2.....	85

RHODE ISLAND.**GENERAL LAWS 1909.**

Ch. 11, §§ 43, 44.....	721
Ch. 50, § 43.....	193
Ch. 297, § 1.....	194
Ch. 298, § 5.....	193
Ch. 298, § 21.....	433
Ch. 328, § 3.....	721

LAWS.

1909, ch. 387.....	437
--------------------	-----

VERMONT.**CONSTITUTION.**

Ch. 1, art. 1.....	922
Ch. 2, § 29.....	255

VERMONT STATUTES.		§§ 1261, 1262, 1266.....	977	§ 4301	536
§ 365	255	1508	232	5320	922
		1530	637	5697	461
- PUBLIC STATUTES.		1589	625	5902	450
		1794	637		
§ 26	252	1972	536	LAWS.	
§ 547, 555, 561.....	161	2264	641	1898, No. 19.....	252
§ 606	255	2337	461	1908, No. 103.....	252
§ 706, 707, 797.....	161	4287. Amended by Laws		1908, No. 303, §§ 1, 2.....	252
§ 800	252	1908, No. 103.....	232	1910, No. 206.....	922

STENOGRAPHERS.

See Appeal and Error, §§ 515, 627.

STIPULATIONS.

See Execution, § 448; Judgment, §§ 72, 90.

§ 14 (Vt.) A stipulation between the parties, in an action by the state for a charter fee for incorporating by special legislative act, *held* to cover a claim for a fee which should have been paid to the state before introducing the special act of incorporation, but which was not paid until the act was passed.—*State v. Rutland Ry., Light & Power Co.*, 81 A. 252.

§ 18 (N.H.) A party to an election contest *held* estopped by an agreement to claim certain votes.—*Dinsmore v. City of Manchester*, 81 A. 533.

STOCK.

See Corporations, §§ 19, 83-157.

STOCKHOLDERS.

See Corporations, §§ 194-274.

STREET RAILROADS.

See Appeal and Error, § 1010; Carriers; Commerce, § 70; Master and Servant, §§ 124, 127, 246, 247, 276, 281; Railroads, § 303; Taxation, § 394.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 51 (N.J.) Petition by dissenting stockholder on consolidation of traction companies under Traction Act 1893, § 18, etc., which petition complies with section 23 of said act, *held* sufficient.—*New Jersey & H. R. Ry. & Ferry Co. v. American Electric Works*, 81 A. 989.

Order for appointment of appraisers *held* sufficiently specific to show the proceedings were brought under the traction act of 1893.—*Id.*

II. REGULATION AND OPERATION.

§ 81 (Conn.) Street railway companies *held* liable for personal injury, the same as other private corporations and individuals.—*Coburn v. Connecticut Co.*, 81 A. 241.

§ 85 (N.J.) Street railroad and traveling public *held* required respectively to exercise their rights in the highway with due regard to the rights of the other.—*Kraut v. Public Service Ry. Co.*, 81 A. 751.

§ 86 (Conn.) A street car company is only negligent in using grease on its tracks when it places grease upon its rails or the street in such quantities as to make the street not reasonably safe for traffic.—*Barrett v. Connecticut Co.*, 81 A. 963.

§ 93 (N.J.) Motorman of a street car *held* bound to have car under control when approaching crosswalk, so as not to endanger safety of pedestrians.—*Kraut v. Public Service Ry. Co.*, 81 A. 751.

§ 98 (N.J.) Pedestrian *held* entitled to assume that motorman of street car would respect his right to cross the street if he could safely do so.—*Kraut v. Public Service Ry. Co.*, 81 A. 751.

§ 99 (Pa.) Act of plaintiff in leaping from wagon to avoid collision with street car *held* not negligence.—*Walsh v. Altoona & L. V. Electric Ry. Co.*, 81 A. 551.

§ 105 (Conn.) Under Gen. St. 1902, §§ 1130, 2020, 3887, notice to a street railway company of injury caused by its neglect to maintain a street in safe condition *held* given in time.—*Coburn v. Connecticut Co.*, 81 A. 241.

§ 114 (Conn.) In an action against a street car company for injuries by slipping on its track, claimed to have resulted from grease on the rails, evidence *held* not to sustain a finding that defendant placed the grease upon which plaintiff slipped, upon the rail.—*Barrett v. Connecticut Co.*, 81 A. 963.

§ 117 (N.J.) In action for injuries to pedestrian by street car, question of contributory negligence *held* for the jury.—*Kraut v. Public Service Ry. Co.*, 81 A. 751.

In action for injuries to pedestrian by street car, evidence *held* to present question for jury as to negligence of defendant.—*Id.*

§ 117 (N.J.Sup.) In an action for collision between a street car and a truck, submission to jury of question whether driver of truck exercised due care in crossing track *held* not error.—*See v. Public Service Ry. Co.*, 81 A. 745.

§ 117 (Pa.) Question whether plaintiff was negligent in permitting the driver of his vehicle to attempt to cross tracks *held* to be for the jury.—*Walsh v. Altoona & L. V. Electric Ry. Co.*, 81 A. 551.

In an action for injuries to plaintiff in avoiding an impending collision with a street car, evidence *held* to present a question for the jury as to defendant's negligence.—*Id.*

STREETS.

See Highways; Municipal Corporations, §§ 269, 652-706, 733-821.

STRIKING OUT.

See Appeal and Error, §§ 103, 237, 748, 919; Courts, § 488; Criminal Law, § 1137; Judgment, §§ 68, 407; Pleading, § 354.

SUBCONTRACTORS.

See Mechanics' Liens, § 35.

SUBORNATION.

See Evidence, § 78.

SUBROGATION.

See Insurance, § 606.

SUBSCRIPTIONS.

See Building and Loan Associations, § 8; Corporations, §§ 83, 84, 232.

SUDDEN PERIL.

See Railroads, § 334.

SUIT.

See Action.

SUMMARY PROCEEDINGS.

See Landlord and Tenant, § 290; Statutes, § 244.

SUMMONS.

See Process.

SUMMONS AND SEVERANCE

See Appeal and Error, § 324.

SUNDAY.

See Appeal and Error, § 712; Time.

SUPPLEMENTARY PROCEEDINGS.

See Execution, § 416.

SURETYSHIP.

See Principal and Surety.

SURPRISE.

See Criminal Law, § 936.

SURVIVORSHIP.

See Wills, § 549.

SUSPENSION.

See Attorney and Client, § 38; Insurance, § 755.

TAXATION.

See Appeal and Error, §§ 78, 87, 1082; Commerce, §§ 33, 70, 72, 77; Constitutional Law, §§ 137, 229, 283, 290; Executors and Administrators, § 3; Licenses; Municipal Corporations, §§ 407, 438, 958-994; Prohibition; Statutes, § 245.

III. LIABILITY OF PERSONS AND PROPERTY.**(A) Private Persons and Property in General.**

§ 65 (Conn.) Private contracts between a lessor and a lessee as to whether certain cottages erected on the land should be a part of the realty would not bind the town in assessing the property.—Comstock v. Town of Waterford, 81 A. 1059.

Under Gen. St. 1902, § 2299, summer cottages held properly listed as real estate against the owner of the land.—Id.

§ 80 (Conn.) Gen. St. 1902, § 2299, held to require freehold interest properly termed real estate, and not mere chattel interests, to be listed for taxation against the record owner of the land.—Comstock v. Town of Waterford, 81 A. 1059.

§ 98 (Pa.) A consolidated corporation having an office in New York held required to deduct from interest on its bonds the four-mill tax thereon, and to pay the same to the Treasurer of Pennsylvania.—Commonwealth v. Buffalo & Lake Erie Traction Co., 81 A. 932.

(B) Corporations and Corporate Stock and Property.

§ 160 (Pa.) A manufacturing corporation, compelled to stop business by the condemnation of lands by a municipality, held not exempt from taxation.—Commonwealth v. Excelsior Brick & Stone Co., 81 A. 933.

§ 166 (N.J.Sup.) Boats owned by foreign corporation held taxable at its domicile, and not in the state.—West Shore R. Co. v. State Board of Assessors, 81 A. 351.

(C) Public Property and Institutions.

§ 186 (Conn.) Land owned by a city in an adjoining town which is not used for reservoir

purposes is liable to assessment for taxation by such town.—City of Norwalk v. Town of New Canaan, 81 A. 1027.

(D) Exemptions.

§ 193 (Conn.) Gen. St. 1902, § 2321, specifying the place where land owned by a municipal corporation and used for reservoir purposes shall be taxed, held not invalid.—City of Norwalk v. Town of New Canaan, 81 A. 1027.

§ 204 (Vt.) Exemptions from taxation are strictly construed.—Frazier v. W. H. H. Slack & Bro., 81 A. 161.

§ 204 (Vt.) An offer of a town, under V. S. 385, to exempt a manufacturing plant for a number of years, held to be for such number of years from the commencement of business.—Bixby v. Roscoe, 81 A. 255.

Acts of a town and a person held a practical construction of acceptance of an offer of exemption of a manufacturing plant being in time.—Id.

§ 206 (Vt.) A town may not withdraw an accepted offer to exempt a manufacturing plant for a number of years.—Bixby v. Roscoe, 81 A. 255.

§ 217 (Conn.) Under Gen. St. 1902, § 2321, a dam used by a municipality for reservoir purposes held improperly made a separate item on the assessment sheet.—City of Norwalk v. Town of New Canaan, 81 A. 1027.

Land belonging to a municipal corporation and containing the mains and pipes for the carriage of water held properly assessed under Gen. St. 1902, § 2321, as land owned for the creation or furnishing of a supply of water.—Id.

Pipes and water mains laid in public streets and through private lands held not subject to assessment for taxation under Gen. St. 1902, § 2321.—Id.

Under Gen. St. 1902, § 2321, the easements of a municipal corporation for the laying of its mains through the land of private owners held not subject to assessment for taxation.—Id.

§ 230 (N.J.Sup.) Surplus set aside for deferred dividend policies under P. L. 1907, p. 132, held exempt from taxation, together with general liabilities on policies under P. L. 1906, p. 418.—City of Newark v. Lewis, 81 A. 1072.

§ 231 (Vt.) Where property leased to an electric railroad was used exclusively in the operation of its road, partly without the state, the method of determining for taxation the value of the property held the method prescribed by P. S. 797.—Frazier v. W. H. H. Slack & Bro., 81 A. 161.

Under P. S. 706, 707, 797, property leased to an electric railroad company and used exclusively in its business held exempt from general taxation.—Id.

V. LEVY AND ASSESSMENT.**(A) Levy and Apportionment.**

§ 298 (Md.) The Legislature has power to levy a tax as is done by Laws 1906, c. 404, levying a tax of a specified amount on each \$100 for a specified purpose.—Union Trust Co. of Maryland v. State, 81 A. 873.

§ 305 (Pa.) Under Act March 24, 1868 (P. L. 443), relating to taxation of real estate in Philadelphia county, no appeal lies from the action of the board of revision, classifying the territory in which the real estate is located.—Appeal of Drake, 81 A. 891.

(B) Assessors and Proceedings for Assessment.

§ 318 (Me.) Right to tax plaintiff for moneys at interest under Rev. St. c. 9, §§ 73-75, held not defeated because the assessors did not

make inquiries to him until June 10th.—*Powell v. City of Old Town*, 81 A. 1068.

The "reasonable time" to which assessors are entitled, under Rev. St. c. 9, §§ 73-75, defined.—*Id.*

Under Rev. St. c. 9, §§ 73-75, inquiries by assessors concerning money which plaintiff had at interest *held* to refer to April 1st, and not to a later date upon which the inquiries were made.—*Id.*

(C) Mode of Assessment in General.

§ 353 (Vt.) In the absence of any finding on the subject, *held* that it must be presumed that the listers found that a taxpayer's failure to return an inventory was not willful, within P. S. 561.—*Frazier v. W. H. H. Slack & Bro.*, 81 A. 161.

§ 356 (Me.) One should not be taxed for money at interest under Rev. St. c. 9, §§ 73-75, if he owes debts in excess of the amount.—*Powell v. City of Old Town*, 81 A. 1068.

§ 363 (Md.) Personal notice of an assessment is not necessary to give the due notice required by Baltimore Charter, § 170, as amended and re-enacted by Laws 1908, c. 167.—*Wannenwetsch v. City of Baltimore*, 81 A. 3.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 376 (N.J.Sup.) Mode of determining value of franchise of interstate railway for purposes of taxation as a whole and within the state stated.—*West Shore R. Co. v. State Board of Assessors*, 81 A. 351.

§ 378 (Pa.) The stock of a manufacturing corporation, compelled to stop business by the condemnation of lands by a municipality, may be taxed on a fair valuation of its assets.—*Commonwealth v. Excelsior Brick & Stone Co.*, 81 A. 933.

§ 384 (Md.) The power of the state tax commissioner conferred by Code Pub. Gen. Laws 1904, art. 81, § 150, *held* not affected by Laws 1906, c. 404, amending article 81, § 22.—*Union Trust Co. of Maryland v. State*, 81 A. 873.

A tax on corporate stock imposed by Code Pub. Gen. Laws 1904, art. 81, § 150, *held* imposed on the owners of stock, making the corporation the medium through which the tax is collected.—*Id.*

Under Code Pub. Gen. Laws 1904, art. 81, § 150, an assessment on corporate stock *held* not void because it was not certified to the comptroller until two days after the time fixed by statute for certification.—*Id.*

Code Pub. Gen. Laws 1904, art. 81, § 150, *held* to fix January 1st of each year as the time for the valuation of corporate stock for taxation, and a subsequent reduction of stock does not render void an assessment fixing the valuation as of January 1st.—*Id.*

§ 384 (N.J.) "True value" of national bank shares for taxation *held* ordinarily their exchangeable value in the market.—*City of Newark v. Tunis*, 81 A. 722; *Same v. Clark*, Id. 723; *Same v. Conklin*, Id.; *Same v. Plume*, Id. 724.

§ 394 (N.J.Sup.) P. L. 1906, pp. 645, 646, §§ 4, 5, *held* to require state board of assessors to levy annual franchise tax upon proportion of the annual gross receipts of street railroad corporation.—*Phillipsburg Horse Car R. Co. v. State Board of Assessors*, 81 A. 1121.

(E) Assessment Rolls or Books.

§ 411 (Vt.) The abstract of the individual list of all the taxpayers *held*, under the statute, not required to show the specific action of the listers in making up the list of an individual.—*Bixby v. Roscoe*, 81 A. 255.

§ 441 (Vt.) Inclusion of property twice in a tax list *held*, under P. S. 606, not to invalidate

the whole tax assessed thereon.—*Bixby v. Roscoe*, 81 A. 255.

§ 446 (Vt.) In view of testimony of a town clerk that it was not altered after being lodged in his office, *held*, the abstract of the individual list of all taxpayers could not be excluded from evidence because showing alterations.—*Bixby v. Roscoe*, 81 A. 255.

(G) Review, Correction, or Setting Aside of Assessment.

§ 453 (Md.) Under Laws 1908, c. 167, which amended and re-enacted Baltimore Charter, § 170, *held* that the city court was authorized to declare assessments void when made without proper notice; and one whose property was assessed without due notice could not resort to equity, having a remedy at law.—*Wannenwetsch v. City of Baltimore*, 81 A. 3.

§ 453 (Pa.) Neither county commissioners nor courts *held* to have any power, in relation to valuation or levy of assessment of taxes, except that conferred by statute.—*Appeal of Central Pennsylvania Lumber Co.*, 81 A. 204.

§ 462 (Me.) Prerequisites to right to abatement of taxes for money at interest under Rev. St. c. 9, §§ 73-75, stated.—*Powell v. City of Old Town*, 81 A. 1068.

A taxpayer *held* to have estopped himself to complain of taxation for money at interest under Rev. St. c. 9, §§ 73-75.—*Id.*

§ 470 (Pa.) Under Act April 3, 1804 (P. L. 517), and Act April 15, 1834 (P. L. 1833-34, p. 509), as amended by Act May 15, 1841 (P. L. 393), and Act May 8, 1909 (P. L. 493), § 12, neither county commissioners nor court on appeal *held* to have power to reduce assessment valuation of land between triennial assessments by allowance for timber removed.—*Appeal of Central Pennsylvania Lumber Co.*, 81 A. 204.

§ 482 (Conn.) An assessor's failure to give a property owner notice of an addition to his tax list as required by Pub. Acts 1905, c. 154, *held* waived by his appeal to the board of relief.—*Comstock v. Town of Waterford*, 81 A. 1059.

§ 493 (Md.) Laws 1910, c. 300, § 21, construed in view of sections 1, 7, 20, 21, and chapter 430, adding section 17a to Code Pub. Gen. Laws 1904, art. 81, and section 17 of such article, *held* not to authorize an appeal to the circuit court from an assessment by the county commissioners, sitting as a board of control and review, on the ground that the valuation was excessive.—*Chesapeake & Potomac Telephone Co. of Baltimore v. Board of County Com'rs*, 81 A. 520.

Laws 1910, c. 430, adding section 17a to Code Pub. Gen. Laws 1904, art. 81, *held* not to authorize an appeal to the circuit court from a new general assessment by the county commissioners, acting as a board of control and review, in valuing and assessing the property under chapter 300, in view of sections 1, 7, 20, and 21 of chapter 300.—*Id.*

Laws 1910, c. 430, adding section 17a to Code Pub. Gen. Laws 1904, art. 81, construed in view of section 17 of such article, and Acts 1910, c. 300, §§ 1, 7, 20, 21, *held* not to authorize an appeal to the circuit court on the ground of an excessive valuation by the county commissioners, acting as a board of control and review.—*Id.*

§ 493 (N.J.Sup.) Where no principle of law is involved, and no preponderance of testimony exists in favor of the prosecutor, the judgment of the state board of assessors upon a question of value will not be disturbed.—*Long Dock Co. v. State Board of Assessors*, 81 A. 568.

§ 495 (Pa.) Under Acts April 19, 1889 (P. L. 37), and June 26, 1901 (P. L. 601), courts *held* not to have power on appeal from assessment to treat the controversy on the broad

principles of equity without reference to tax laws.—Appeal of Central Pennsylvania Lumber Co., 81 A. 204.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 594 (Vt.) The material question in an action for taxes, whether one willfully omitted to swear to his inventory, on which depends the way that the listers should make up his list, *held*, on conflicting evidence, a question for the jury.—Bixby v. Roscoe, 81 A. 255.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 679 (N.H.) Neither a town nor a collector of taxes *held* entitled to sue on a judgment for taxes after tax deed to the town.—Town of Winchester v. Stockwell, 81 A. 526.

Under Laws 1895, c. 64, § 2, and Pub. St. 1901, c. 61, § 6, validity of a town's purchase at tax sales *held* not affected by certain non-compliance with Pub. St. 1901, c. 61, §§ 5, 6.—*Id.*

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 734 (Pa.) Sale of unseated lands for taxes, after payment of taxes demanded by county treasurer, *held* to pass no title.—Africa v. Trexler, 81 A. 707.

(B) Tax Deeds.

§ 744 (Pa.) Where a tax sale was wholly void, the county treasurer's deed thereunder does not give purchasers constructive possession of the premises.—Africa v. Trexler, 81 A. 707.

(C) Actions to Confirm or Try Title.

§ 800 (N.H.) Reimbursement of a tax sale purchaser of taxes paid *held* a prerequisite to taxpayer's right to judgment setting aside tax title.—Town of Winchester v. Stockwell, 81 A. 526.

§ 809 (N.H.) A town, improperly suing on a judgment for taxes, *held* entitled to amend by filing a writ of entry.—Town of Winchester v. Stockwell, 81 A. 526.

XII. FORFEITURES AND PENALTIES.

§ 839 (Vt.) Under P. S. 547, 555, 561, the right to double the ascertained value *held* to exist only where the failure of a taxpayer to return an inventory is willful, and in the absence of willful failure the quadrennial appraisal is properly used to determine assessable value.—Frazier v. W. H. H. Slack & Bro., 81 A. 161.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 859 (N.J.) A collateral inheritance tax assessed under Acts 1894 (P. L. 1894, p. 318) *held* not a property tax within Const. art. 4, § 7, par. 12.—Eastwood v. Russell, 81 A. 108.

§ 862 (N.J.) Inheritance Tax Act 1906, amending P. L. 1894, p. 318, being unconstitutional, did not affect the act of 1894.—Eastwood v. Russell, 81 A. 108.

TEACHERS.

See Schools and School Districts, §§ 41, 62.

TENANCY IN COMMON.

See Husband and Wife, § 273.

I. CREATION AND EXISTENCE.

§ 3 (Md.) Evidence *held* to show an agreement of the parties to purchase land, to pay for it with the profits of their joint operation of it, after which each should have a half undivided interest in it.—Wiley v. Wiley, 81 A. 180.

TENDER.

See False Imprisonment; Insurance, §§ 229, 230.

§ 24 (Vt.) A tender by a party *held* a tender of performance as a condition precedent to performance by the adverse party, and a demand of performance by the adverse party may accompany the tender.—Skeels v. Blanchard, 81 A. 913.

TERMINATION.

See Carriers, § 114; Easements, § 26.

TERMS.

See Judges, §§ 7, 8, 31; Landlord and Tenant, § 95.

TESTAMENTARY TRUSTS.

See Trusts, §§ 182, 191, 197, 217.

THEATERS AND SHOWS.

See Damages, § 172; Explosives; Licenses, § 42; Master and Servant, § 316.

THEORY.

See Appeal and Error, § 852.

THREATS.

See Deeds, § 71; Homicide.

TIMBER.

See Logs and Logging.

TIME.

See Appeal and Error, §§ 627, 633, 679; Carriers, §§ 303, 311; Constitutional Law, § 38; Corporations, §§ 194, 283, 370; Damages, § 124; Executors and Administrators, § 315; Fixtures; Homestead; Insurance, §§ 622, 623; Negligence, § 119; Payment, § 66; Pleading, §§ 85, 409; Trade-Marks and Trade-Names, § 81; Vendor and Purchaser, § 78.

§ 10 (Pa.) Where last day for replevying goods levied on in distress falls on Sunday, the tenant has all of Monday in which to replevy.—Ehrhart v. Esbenshade, 81 A. 814.

TITLE.

See Banks and Banking, §§ 127, 129; Deeds, §§ 54, 138; Descent and Distribution, § 76; Ejectment, §§ 9, 90, 109; Execution, § 315; Fixtures; Fraud, § 23; Highways, § 85; Husband and Wife, §§ 9, 14; Injunction, § 37; Partnership, § 67; Quieting Title; Quo Warranto, § 6; Religious Societies; Sales, §§ 161, 208, 474; Statutes, §§ 64, 100-126; Taxation, §§ 734-809; Trespass, §§ 16, 19; Vendor and Purchaser, § 120.

TOOLS.

See Master and Servant.

TORTS.

See Action, § 27; Corporations, § 493; Damages, §§ 69, 105, 112; Death; Dismissal and Nonsuit, § 26; False Imprisonment; Fraud; Husband and Wife, § 207; Judgment, § 250; Libel and Slander; Malicious Prosecution;

Municipal Corporations, §§ 727-821; Negligence; Nuisance; Parties, § 75; Trespass; Trover and Conversion.

§ 13 (Md.) A witness giving false testimony pursuant to conspiracy to procure the giving of false testimony, resulting in miscarriage of justice, is not liable civilly to the party injured thereby.—*Schaub v. O'Ferrall*, 81 A. 789.

§ 13 (Pa.) Action held not to lie for giving false answers under oath to interrogatories, nor for giving false testimony.—*Yoder v. Cole*, 81 A. 546.

TOWNS.

See Appeal and Error, § 308; Eminent Domain, § 238; Estoppel, § 62; Evidence, § 471; Highways, §§ 85, 194, 213; Municipal Corporations; Paupers; Prohibition.

II. GOVERNMENT AND OFFICERS.

§ 19 (Vt.) Matters held prima facie evidence that the warning of an annual town meeting was posted as required by law.—*Bixby v. Roscoe*, 81 A. 255.

§ 30 (Me.) The selectmen of a town held authorized to submit to arbitration a claim for damages caused by taking land for a road.—*Mitchell v. Inhabitants of Lianeu*, 81 A. 945.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 39 (N.H.) A town held to ratify a transaction whereby land was conveyed to the selectmen on condition that the town should support the grantor for life.—*Amazeen v. Town of Newcastle*, 81 A. 1079.

VI. ACTIONS.

§ 79 (Me.) Evidence held to show that a town selectman was authorized to sign a submission to arbitration of a claim for damages through taking of land for a road.—*Mitchell v. Inhabitants of Linneus*, 81 A. 945.

TRADE-MARKS AND TRADE-NAMES.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 3 (N.J.Ch.) Corporation held to have acquired no property right in descriptive words by its exclusive use during its control of process patents.—*Mississippi Wire Glass Co. v. Continuous Glass Press Co.*, 81 A. 374.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(B) What Competition Unlawful.

§ 67 (N.J.) A change of name of a brand held the putting forth of a new brand, entitled to protection.—*Taylor Provision Co. v. Edwards*, 81 A. 1120.

§ 67 (N.J.Ch.) A manufacturer of wire glass may use the same mesh as its first manufacturer, where the design of the mesh is not original with the first user and not patented.—*Mississippi Wire Glass Co. v. Continuous Glass Press Co.*, 81 A. 374.

(C) Actions.

§ 81 (N.J.) There is no arbitrary period during and over which a brand must be sold and advertised to entitle the complainant to an injunction against imitators, but the question of time is always one to be considered in connection with all the facts of a given case.—*Taylor Provision Co. v. Edwards*, 81 A. 1120.

§ 93 (N.J.Ch.) Evidence in an action for injunction held insufficient to show an attempt by a manufacturer of wire glass to deceive the public by manufacturing and marketing glass similar to that made by complainant.—*Missis-*

issippi Wire Glass Co. v. Continuous Glass Press Co., 81 A. 374.

§ 95 (N.J.) Evidence held to show plaintiff entitled to preliminary injunction against simulation of trade-mark.—*Taylor Provision Co. v. Edwards*, 81 A. 1120.

TRANSCRIPTS.

See Appeal and Error, §§ 515, 627.

TRANSFERS.

See Bankruptcy, § 165; Carriers, § 12.

TREES.

See Logs and Logging; Municipal Corporations, §§ 733, 778.

TRESPASS.

See Action, §§ 27, 41; Adjoining Landowners, § 7; Easements, § 63; Eminent Domain, § 267; Execution, § 268; Landlord and Tenant, § 272; Railroads, § 359; Trial, § 368.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 16 (Vt.) One having title and the right of immediate possession of land could maintain an action of trespass to the freehold.—*Huntley v. Houghton*, 81 A. 452.

§ 19 (Me.) Certain record title held prima facie evidence of ownership of land, permitting recovery against a mere trespasser, or one who cannot show better title.—*Smith v. Sawyer*, 81 A. 868.

A deed from the commonwealth of Massachusetts, executed in 1788, held not defective as a basis for record title for want of showing of authority of the legislative committee to execute it.—*Id.*

§ 19 (N.J.Sup.) Plaintiff held to have sufficiently shown title to portion of street to maintain action against stranger for wrongfully destroying trees.—*Nevin v. Public Service Corp. of New Jersey*, 81 A. 434.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 40 (Md.) A declaration for trespass held to contain a sufficient description of the property.—*Lapp v. Stanton*, 81 A. 675.

In an action for trespass by plaintiff's chickens, alleged to have damaged defendant's property, the declaration held not defective for failure to state how the damage was done.—*Id.*

TRIAL.

See Adjoining Landowners, § 7; Adverse Possession, § 116; Appeal and Error, §§ 204, 207, 211, 215, 216, 231, 237, 688, 719, 882, 926, 970, 978, 999, 1005, 1032, 1047, 1061, 1064, 1066; Brokers, § 80; Contracts, § 176; Costs; Criminal Law, §§ 656-780; Damages, §§ 87, 214, 216; Ejectment, §§ 94, 109, 110; Estoppel, § 120; Fraud, § 64; Highways, §§ 184, 213; Judgment, §§ 199-252; Jury; Libel and Slander, § 123; Mandamus, §§ 174, 187; Master and Servant, §§ 285-289; Mines and Minerals, § 125; Mortgages, § 479; Municipal Corporations, §§ 706, 821; Negligence, §§ 134, 139; New Trial; Paupers, § 52; Physicians and Surgeons; Quo Warranto, § 6; Railroads, §§ 350, 453, 484, 485; Reference; Sales, §§ 182, 347, 363, 382, 420; Stipulations; Street Railroads, § 117; Taxation, § 594; Venue; Work and Labor, §§ 12, 30.

II. DOCKETS, LISTS, AND CALENDARS.

§ 11 (Md.) If plaintiff permitted a case to remain on the stet docket for a length of time which would abate it, defendant was not bound

to have it removed to the trial docket.—*Laurel Canning Co. of Prince George's County v. Baltimore & O. R. Co.*, 81 A. 126.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 53 (Md.) Where a shipping receipt has been properly placed in evidence, references may be made thereto by other witnesses.—*Goodman v. Saperstein*, 81 A. 695.

§ 53 (Pa.) Recital in administratrix's deed held properly considered as evidence to raise a presumption of grant, though it was offered to show title.—*Dougherty v. Welshans*, 81 A. 997.

§ 53 (Vt.) A plaintiff suing for fraud inducing a sale of goods by him to defendant held not to justify the admission of evidence of prior representations inducing other sales for which settlement had been made.—*Griswold v. Wentworth*, 81 A. 622.

(B) Order of Proof, Rebuttal, and Re-opening Case.

§ 59 (Vt.) Defendant in ejectment held not entitled to inject a deed in evidence as part of the cross-examination of a witness, where it was in fact independent evidence.—*Lang v. Clark*, 81 A. 625.

§ 62 (Md.) Evidence is admissible for plaintiff to contradict relevant evidence introduced by defendant.—*McCarthy v. Clarke*, 81 A. 12.

§ 62 (Vt.) There having been no evidence of a sale to defendant, as set up in a count of the declaration, held, defendant was not entitled to introduce evidence in contradiction.—*Davis v. Randall*, 81 A. 250.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 76 (Vt.) An objection, made after the question was answered, held made to the answer, so that it was made in time.—*Jewell v. Hoosac Tunnel & W. R. Co.*, 81 A. 238.

§ 82 (N.J.) Objection to admission or rejection of evidence held required to point out precise point of objection.—*Semkin v. Hollander*, 81 A. 980.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 121 (N.H.) Argument by plaintiff's counsel in a personal injury action held proper.—*Vigneault v. Winchester Tannery Co.*, 81 A. 407.

§ 125 (Vt.) Statement of counsel in argument held an unwarranted appeal to the jury's sympathy.—*Davis v. Randall*, 81 A. 250.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Conn.) A nonsuit was properly directed where there was no evidence from which it could reasonably be found that defendant was negligent, and that plaintiff's own negligence did not contribute to his injury.—*Rhone v. Sperry & Barnes Co.*, 81 A. 100.

§ 139 (Me.) Where fair-minded persons might reasonably differ on the conclusions to be drawn from undisputed facts, the question is for the jury.—*Patten v. Field*, 81 A. 77.

If the evidence would warrant a jury in returning a verdict for defendant, it is error to direct a verdict for plaintiff.—*Id.*

§ 139 (Md.) If there is any evidence, however slight, upon the material questions involved, the court should not withdraw the case from the jury.—*Doggett v. Tatham*, 81 A. 376.

§ 139 (Md.) Prayers instructing a verdict for one of the defendants held properly refused, where there was evidence justifying a submis-

sion of the case to the jury as to him.—*Firor v. Taylor*, 81 A. 389.

§ 139 (N.J.) Where the evidence will support a verdict for the plaintiff, a motion to nonsuit must be denied.—*Dayton v. Boettner*, 81 A. 726.

§ 139 (N.J.) Nonsuit held proper where plaintiff has failed to sustain burden on the issue.—*Breintnall v. Sadler*, 81 A. 819.

§ 139 (Pa.) Question whether testimony that signal had been given of approach of train was overcome by positive testimony to the contrary held for the jury.—*Buckman v. Philadelphia & R. Ry. Co.*, 81 A. 332.

§ 141 (Md.) The asserted right of recoupment by defendant in a contract action necessarily admitted defendant's breach of the contract, making it error to submit that question to the jury.—*Doggett v. Tatham*, 81 A. 376.

§ 142 (N.J.) Whether the conduct of an officer in respect to an executive order retiring him therefrom constituted a surrender of the office held a question for the jury.—*Breintnall v. Sadler*, 81 A. 819.

§ 143 (Pa.) Where the testimony is contradictory, it is for the jury to reconcile the conflicting statements.—*Cronmuller v. Evening Telegraph*, 81 A. 58.

§ 143 (Pa.) Where the facts are in dispute, the prime object of a trial is to elicit the truth, and all the evidence is for the consideration of the jury, whether it makes for or against the party calling a witness.—*Husvar v. Delaware, L. & W. R. Co.*, 81 A. 298.

(D) Direction of Verdict.

§ 169 (N.J.Sup.) A showing that evidence was clearly insufficient to justify verdict for plaintiff held necessary to warrant direction for defendant.—*City of Elizabeth v. Central R. Co. of New Jersey*, 81 A. 344.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 194 (Del.Super.) Where account books are introduced in evidence, it is improper for the court to charge the jury as to the weight to be given thereto.—*Knowles v. Massey*, 81 A. 470.

§ 194 (Md.) In an action for injuries, a requested charge, assuming as true a question which under the evidence was for the jury's determination, was properly refused.—*Firor v. Taylor*, 81 A. 389.

§ 194 (Pa.) In action for personal injuries, the court should instruct as to the number of witnesses, and their respective interests in the result.—*Bockelcamp v. Lackawanna & W. V. R. Co.*, 81 A. 93.

§ 199 (Md.) An instruction in a contract action held erroneous for submitting questions of law to the jury.—*Doggett v. Tatham*, 81 A. 376.

(B) Necessity and Subject-Matter.

§ 203 (Conn.) Each party is entitled to an instruction upon his theory of the case, if supported by any evidence.—*Murphy v. Connecticut Co.*, 81 A. 961.

§ 204 (Conn.) The instructions should be so framed that the jury may clearly understand the issues submitted, and it may or may not be necessary to call their attention to particular facts claimed to have been established.—*Murphy v. Connecticut Co.*, 81 A. 961.

§ 216 (Md.) Where evidence in action for alienation of affections tended to prove the issue, there was no error in giving a requested instruction on the measure of damages; a refusal amounting to holding that no ground of recovery was shown.—*Hillers v. Taylor*, 81 A. 286.

Where, in an action for alienation of affections, the main issue is properly left to the

jury, it is entitled to be instructed on the measure of damages.—*Id.*

(C) Form, Requisites, and Sufficiency.

§ 229 (Md.) The refusal of two identical instructions asked for by a party *held* proper.—*Goodman v. Saperstein*, 81 A. 695.

§ 242 (Md.) An instruction in assumpsit on the common counts for breach of contract *held* misleading.—*Doggett v. Tatham*, 81 A. 376.

§ 243 (Md.) Instructions charging a master with different degrees of care *held* improper for inconsistency.—*Eyre-Shoemaker Const. Co. v. Mackin*, 81 A. 267.

§ 243 (Md.) Instructions in assumpsit on the common counts *held* confused and misleading, and hence improperly given.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 385.

§ 243 (Md.) In an action for the price of goods sold, a modification of an instruction *held* not inconsistent with the remainder.—*Miller v. Mantik*, 81 A. 797.

(D) Applicability to Pleadings and Evidence.

§ 251 (Md.) A requested charge which did not correctly state the facts relied on, as alleged in plaintiff's amended declaration, was properly refused.—*Firor v. Taylor*, 81 A. 389.

§ 251 (N.H.) In a malpractice case, defendant *held* entitled to avail himself of the erroneous refusal to give an instruction, notwithstanding the issues raised by the pleadings.—*McBride v. Huckins*, 81 A. 528.

§ 251 (Vt.) Defendant in ejectment *held* not entitled to object to an instruction on the theory that it contained nothing with reference to the rights of tenants in common to maintain ejectment against each other.—*Lang v. Clark*, 81 A. 625.

§ 252 (Conn.) Refusal to charge *falsus in uno*, *falsus in omnibus*, *held* not error.—*Hawken v. Daley*, 81 A. 1053.

An instruction that a building contractor could not disregard an express contract and recover on quantum meruit *held* properly refused.—*Id.*

§ 252 (Md.) In an action for injuries to a pedestrian by being struck by beams hauled along a city street, an instruction that plaintiff could not recover if he was warned and failed to move *held* properly refused.—*Firor v. Taylor*, 81 A. 389.

In an action for injuries, a requested charge *held* not supported by the evidence, and therefore erroneously given.—*Id.*

§ 252 (Pa.) An instruction that there was no evidence that a railroad car in which plaintiff was hurt was inspected by an incompetent inspector, or that the railroad company was negligent, *held* properly refused.—*Rick v. New York, C. & St. L. R. Co.*, 81 A. 650.

§ 252 (Vt.) It was error to submit to the jury whether plaintiff or his ancestor had made out title by adverse possession, where there was no proof that plaintiff's father died intestate and that plaintiff was his sole heir.—*Lang v. Clark*, 81 A. 625.

Evidence as to plaintiff's ignorance of the boundaries of land in controversy *held* not to authorize a request that he had no knowledge of its limits, and therefore could only recover what he actually occupied.—*Id.*

A request to charge on an abstract question of law not applied to the evidence was properly refused.—*Id.*

§ 253 (Md.) Prayer in an action against a city and sewer contractors for injuries by falling over a sidewalk obstruction *held* properly refused, as ignoring certain issues of negligence.—*McCarthy v. Clarke*, 81 A. 12.

§ 253 (Md.) An instruction requested by plaintiff, which excludes from consideration the evidence and defenses of the defendant, *held* properly refused.—*Catanzaro Di Giorgio Co. v. F. W. Stock & Sons*, 81 A. 385.

Requested instruction in assumpsit on the common counts *held* properly refused as ignoring evidence.—*Id.*

§ 253 (Md.) An instruction *held* improper for segregating facts, and instructing the jury to find a verdict thereon.—*Goodman v. Saperstein*, 81 A. 695.

A prayer, requested in an action for a balance due on goods sold, which failed to submit the question as to the acceptance of the goods shipped, *held* improper.—*Id.*

§ 253 (Md.) An instruction which ignores a large part of the evidence of a party is erroneous.—*Miller v. Mantik*, 81 A. 797.

(E) Requests or Prayers.

§ 258 (Pa.) Request for definite instructions must apply the law to the particular points in issue.—*Cobb v. Bradford Tp.*, 81 A. 199.

§ 260 (Pa.) In action for injuries from defective fire escape, instruction as to contributory negligence *held* properly refused in view of instructions given.—*Newingham v. J. C. Blair Co.*, 81 A. 556.

§ 260 (Vt.) It is not error to refuse a request to charge the substance of which is covered by instructions given.—*Lang v. Clark*, 81 A. 625.

§ 267 (Md.) On the issue of a seller's waiver of a buyer's default, a modification of a requested prayer so as to submit the issue to the jury *held* proper.—*Miller v. Mantik*, 81 A. 797.

(F) Objections and Exceptions.

§ 278 (Conn.) Exception to instructions is insufficient if it fails to designate the parts complained of.—*State v. Tripp*, 81 A. 247.

§ 283 (Vt.) An exception to an instruction as given does not raise the question whether there was error in failing to give other or further instructions.—*Lang v. Clark*, 81 A. 625.

(G) Construction and Operation.

§ 296 (Conn.) Refusal to instruct as to the duty of the jury if there should be an exact equipoise in the evidence *held* not error in view of the other charges given.—*Hawken v. Daley*, 81 A. 1053.

§ 296 (Pa.) Error in instruction, contrary to the whole trend of the charge *held* not cause for reversal.—*Nowlis v. Hurwitz*, 81 A. 143.

VIII. CUSTODY, CONDUCT, AND DE-LIBERATIONS OF JURY.

§ 312 (Vt.) Giving additional instructions, without their being asked for, on the jury coming in disagreed, cannot be complained of.—*Covey v. Rogers*, 81 A. 1130.

§ 314 (N.J.Sup.) Conduct of jury and of clerk in charge *held* not such as to vitiate the verdict.—*Duffy v. McKenna*, 81 A. 1101.

§ 314 (Vt.) Telling the jury on their coming in disagreed, and being returned with further instructions, that neither party could well afford the expense of a new trial, and, unless it was necessary, they should not be subjected to it, *held* in the discretion of the court.—*Covey v. Rogers*, 81 A. 1130.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 368 (N.H.) A recital in an agreed statement of facts in an action of trespass to the freehold *held* to imply that defendant was out of possession at a stated time.—*Huntley v. Houghton*, 81 A. 452.

§ 386 (Md.) In an action for the value of a heating plant, a prayer limiting the jury, on the question of plaintiff's performance, to the consideration of defendant's evidence alone and assuming facts not proved, was properly refused.—*Turner v. Egan*, 81 A. 877.

In an action for work and labor in installing a heating plant, an instruction that the court should allow defendant an amount necessary to put the plant in the condition called for by the contract *held* properly rejected.—*Id.*

In an action for work and labor, a prayer for instructions *held* properly refused as too general and as assuming facts instead of submitting them to the court sitting as a jury.—*Id.*

In an action for the value of a heating plant installed for defendant, a prayer for instructions *held* properly refused as too general.—*Id.*

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 417 (Md.) Error in refusing prayers to withdraw the case from the jury at the close of plaintiff's testimony *held* waived by going on and offering testimony thereafter.—*Goodman v. Saperstein*, 81 A. 695.

TROVER AND CONVERSION.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 1 (Vt.) One *held* not guilty of conversion.—*C. H. Eddy & Co. v. Field*, 81 A. 249.

§ 9 (Pa.) Evidence *held* insufficient to show conversion of personally by purchaser of real estate at sheriff's sale.—*Moudy v. Bell*, 81 A. 551.

TRUST DEEDS.

See Mortgages; Trusts, § 145.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Bankruptcy, § 179; Banks and Banking, §§ 116, 130, 134; Constitutional Law, § 278; Frauds, Statute of, § 142; Fraudulent Conveyances, §§ 208, 312; Judgment, § 479; Partnership, § 344; Religious Societies; Wills, §§ 608, 675-687.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 31 (Pa.) Decree declaring trust in favor of plaintiff as to stock held in his wife's name, and annulling contract between her and another defendant, sustained.—*Ireland v. Ireland Advertising Agency*, 81 A. 716.

(B) Resulting Trusts.

§ 81 (Vt.) Where a husband bought property with his wife's money and took the title to himself, he *held* that title, so far as he did not convey it to her, for her use and benefit.—*Donovan v. Selinas*, 81 A. 235.

§ 86 (N.J.Ch.) The law *held* to raise constructive trust in favor of person paying consideration for conveyance to a stranger.—*Thomas v. Thomas*, 81 A. 748.

§ 88 (N.J.Ch.) Parol evidence *held* admissible in case of payment by a father for conveyance to sons to rebut presumption of gift, settlement, or advancement.—*Thomas v. Thomas*, 81 A. 748.

(C) Constructive Trusts.

§ 91 (Me.) Constructive trusts, or trusts *ex maleficio*, are based upon fraud or deceit.—*Fall v. Fall*, 81 A. 865.

§ 100 (N.J.Ch.) The purchaser at a foreclosure sale of mortgaged property of an intestate *held* charged with a trust for the benefit of the intestate's surviving husband and children.—*Day v. Devitt*, 81 A. 368.

§ 102 (N.J.) A conveyance by executors and trustees under a will *held* fraudulent, and equity will compel the grantee to execute a quitclaim deed to the substituted trustees.—*Cook v. Jack*, 81 A. 1110.

§ 105 (N.J.) On landlord's receipt of property upon a wrongful conveyance, extinguishing a tenant's term, *held*, that equity would declare the landlord a trustee *ex maleficio* of the property so received.—*Williams v. Young*, 81 A. 1118.

§ 110 (Me.) Constructive trusts, or trusts *ex maleficio*, can be sustained only upon full, clear, and convincing evidence.—*Fall v. Fall*, 81 A. 865.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 145 (Del.) A grantor, by joining in a trust deed, *held* to have waived any right to subject a coganor's interest to a certain claim.—*Emmons v. Curlett*, 81 A. 508.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 161 (Md.) Code Pub. Gen. Laws 1888, art. 16, § 205, as amended by Acts 1892, c. 241, requiring trustees to file a bond, applies to a conveyance to trustees to sell, lease, or incumber.—*Cummings v. Wildman*, 81 A. 610.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 177 (Md.) The supervision of the administration of trusts is a well-recognized ground of equity jurisdiction.—*Preston v. Safe Deposit & Trust Co.*, 81 A. 523.

§ 182 (N.J.Ch.) Testamentary trustees *held* entitled to retain possession of the property until the termination of the trust.—*Nagle v. Conard*, 81 A. 841.

§ 191 (Md.) The existence of expressed powers of sale in a testamentary trust would not negative an implied power of sale of other property.—*Preston v. Safe Deposit & Trust Co.*, 81 A. 523.

A testamentary trust *held* to impliedly authorize the sale of realty by the trustees.—*Id.*
The manner in which an implied power of sale may be granted in a will, stated.—*Id.*

§ 193½ (Md.) A future sale of property devised in trust *held* not authorized under the Act of 1868, c. 273; it appearing that the sale would not be beneficial when the decree of sale was passed.—*Preston v. Safe Deposit & Trust Co.*, 81 A. 523.

§ 197 (Md.) That a testamentary trustee sold the property acting under a decree of court based upon statute *held* not to prevent the trustee from making good title, where he had in fact an implied power of sale under the will.—*Preston v. Safe Deposit & Trust Co.*, 81 A. 523.

§ 198 (Del.Ch.) Where a trustee remains in possession of the land of the trust estate which he has purchased, the sale will be adjudged void at the suit of the cestui que trust.—*Eberhardt v. Christiana Window Glass Co.*, 81 A. 774.

§ 200 (Md.) A court of equity administering a trust estate must, on its own motion, protect the interests of infants in the estate, and may refuse to ratify a sale, though no one objects thereto.—*Goldsborough v. Coblentz*, 81 A. 595.

§ 204 (Md.) The court administering trust property *held* authorized to accept the highest bid offered for the purchase of the property.—*Goldsborough v. Coblentz*, 81 A. 595.

Where the court administering trust property annulled at the request of a purchaser an order confirming the sale, the court's protection of the purchaser terminated.—*Id.*

§ 217 (N.J.Ch.) Trustees of corporate stock, held under a will authorizing them to continue any investments, are entitled to hold new stock of the corporation purchased with the cash dividend declared for that purpose.—*Balantine v. Young*, 81 A. 119.

In a stated case, trustees having under a will the legal title to corporate stock *held* justified in investing an extraordinary cash dividend in a new issue of stock.—*Id.*

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 280 (Pa.) Bonus paid on renewal as rent *held* not apportionable in respect to time.—*In re Archambault's Estate*, 81 A. 314.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 366 (N.J.Ch.) Whenever trust property is the subject-matter of litigation in a court of equity, all the parties in interest are proper, if not necessary parties.—*Day v. Devitt*, 81 A. 368.

§ 375 (Pa.) Clause in decree, in suit to declare trust in shares of stock, authorizing plaintiff to call meeting of stockholders, stricken out.—*Ireland v. Ireland Advertising Agency*, 81 A. 716.

VIII. LIABILITIES ON TRUSTEES' BONDS.

§ 387 (Md.) A suit by the state for the use of one who was an administrator, to recover a sum audited to him by the trustee of the estate, *held* not brought by the equitable plaintiff as administrator, but as an individual.—*State v. Graham*, 81 A. 31.

ULTRA VIRES.

See Corporations, §§ 389, 487; Municipal Corporations, § 994.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, §§ 67-95.

UNITED STATES.

See Trade-Marks and Trade-Names.

UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

USAGES.

See Customs and Usages.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 82 (N.J.Ch.) A mortgagor in a usurious mortgage, who is made a party to a foreclosure suit against his purchaser, *held* entitled to as-

sert the defense of usury as against a liability for a deficiency.—*Scully v. Idler*, 81 A. 746.

Under a bill to foreclose a mortgage, the defense of usury *held* available.—*Id.*

A purchaser of equity of redemption subject to the lien of a mortgage, *held* not entitled to set up a usury as a defense to the mortgage.—*Id.*

VACANCY.

See Judges, § 8; Officers.

VACATION.

See Judgment, §§ 138-159, 386, 392, 456.

VALUATION.

See Taxation, §§ 384, 453.

VALUE.

See Damages, § 112; Eminent Domain, § 271; Evidence, §§ 113, 474, 500.

VEHICLES.

See Licenses, §§ 6, 7; Municipal Corporations, § 706.

VENDOR AND PURCHASER.

See Brokers, § 48; Dedication, § 19; Dower, § 27; Eminent Domain, §§ 153, 293; Evidence, § 502; Exchange of Property; Mortgages, § 296; Sales; Specific Performance.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 68 (Md.) The term "ground rents," reserved in a contract for the sale of real estate, did not mean a rent reserved under a lease for 99 years renewable forever.—*Ward v. Newbold*, 81 A. 793.

§ 78 (Vt.) The rule that time is not of the essence of a contract of sale of real estate *held* not to apply in specific circumstances.—*McLean v. Windham Light & Lumber Co.*, 81 A. 613.

Equity will not treat time as of the essence of a contract of sale of real estate, unless it appears that the parties so regarded it.—*Id.*

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 129 (N.J.Ch.) The validity of a deed executed by an attorney in fact and constituting a chain of title of a vendor *held* so doubtful that equity will not compel the purchaser to specifically perform his contract of purchase.—*Kohlrepp v. Ram*, 81 A. 1103.

Equity *held* not authorized to compel a purchaser to specifically perform his contract when the vendor's title depended on facts in issue between himself and a third person.—*Id.*

V. RIGHTS AND LIABILITIES OF PARTIES.

(B) As to Third Persons in General.

§ 215 (Vt.) A vendor purchasing his purchaser's equity with knowledge of the claims of a third person *held* to stand in no better position than the purchaser.—*McLean v. Windham Light & Lumber Co.*, 81 A. 613.

(C) Bona Fide Purchasers.

§ 229 (N.J.Ch.) A subsequent purchaser *held* chargeable with constructive notice of the execution of a writ of sequestration under Divorce Act 1907, §§ 25, 26, in an action for alimony against a nonresident.—*Wood v. Price*, 81 A. 1093.

§ 232 (N.J.) Possession of real estate *held* constructive notice to all the world of the

rights of the party in possession.—Wood v. Price, 81 A. 983.

Rule that possession of real estate is constructive notice of rights of party *held* to include equities of one who occupies as tenant.—*Id.*

Possession by tenant *held* constructive notice not only of his rights, but also of those of the landlord.—*Id.*

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 335 (Pa.) On rescission of contract of sale, sellers *held* bound to place buyer in statu quo by returning payments made.—Howard v. Stillwagon, 81 A. 807.

(B) Actions for Breach of Contract.

§ 350 (Me.) In an action to recover for breach of contract to convey land, evidence *held* to warrant a finding that plaintiff waived his right to purchase and held possession as a tenant.—Magoon v. Flanders, 81 A. 665.

VENUE.

See Appeal and Error, § 66.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 19 (N.J.Sup.) Venue *held* required to be laid and trial held as prescribed by Practice Act, § 202, unless the venue is changed by the court under section 203.—Chancellor of State of New Jersey v. Morris, 81 A. 347.

VERDICT.

See Trial, § 139.

VESTED REMAINDERS.

See Wills, §§ 629-634.

VINDICTIVE DAMAGES.

See Damages, § 87.

VOTERS.

See Elections.

WAIVER.

See Appeal and Error, §§ 24, 1078; Appearance, § 18; Contracts, §§ 305, 316; Corporations, § 83; Courts, § 37; Depositions, § 111; Divorce, § 331; Equity, § 330; Estoppel; Executors and Administrators, § 454; Homestead; Insurance, §§ 229, 233, 623, 755; Pleading, § 409; Sales, § 182; Taxation, § 482; Trial, § 417; Trusts, § 145; Vendor and Purchaser, § 350.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

See Statutes, § 161.

WARNING.

See Master and Servant, §§ 137, 150-157, 185; Municipal Corporations, § 809.

WARRANT.

See Highways, § 186.

WARRANTY.

See Landlord and Tenant, § 150; Sales, § 246.

WATERS AND WATER COURSES.

See Discovery, § 8; Equity, § 48; Evidence, § 157; Judgment, § 606; Railroads, § 18; Taxation, §§ 193, 217.

II. NATURAL WATER COURSES.

(D) Diversion.

§ 85 (Pa.) Equity will enjoin continued wrongful diversion of water course, though complainant has suffered no material damage.—Griffiths v. Monongahela R. Co., 81 A. 713.

VII. CONVEYANCES AND CONTRACTS.

§ 158½ (Pa.) Bill to enjoin shutting off of flow of water in a pipe *held* properly dismissed, where agreement for maintenance of the supply is not established.—Rittenhouse v. Newhard, 81 A. 445.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 179 (Pa.) Commissioner of fisheries will be enjoined from diverting water from creek in violation of reservation in deed only when waters of the creek were not running over dam.—Isett v. Meehan, 81 A. 544.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 183 (Pa.) Scope of proceedings in mandamus by city seeking to acquire works and property of water company stated.—City of Williamsport v. Citizens' Water & Gas Co., 81 A. 316; Same v. Williamsport Water Co. (Pa.) 324.

§ 183 (Pa.) Companies incorporated after borough ordinance *held* bound thereby, though they had a charter right to install water plant under Act April 29, 1874 (P. L. 73).—New Cumberland Borough v. Riverton Consol. Water Co., 81 A. 548.

Borough ordinance, granting franchise to enter streets to supply water to borough and its inhabitants, *held* to give the borough the right to acquire the plant under Act April 29, 1874 (P. L. 73), at any time after 10 years.—*Id.*

§ 188 (Pa.) Charter rights of water company, not inconsistent with borough ordinance, *held* not affected thereby.—New Cumberland Borough v. Riverton Consol. Water Co., 81 A. 799.

Under ordinance authorizing a water company to furnish water to borough, laying of additional pipes from a certain creek named in the ordinance *held* not to be enjoined.—*Id.*

§ 192 (Pa.) Whether borough ordinance permits construction of water line in street *held* immaterial, since water companies have the charter right to lay their mains without permission of the borough.—New Cumberland Borough v. Riverton Consol. Water Co., 81 A. 799.

That water main is to be used to transport water beyond borough *held* not ground for enjoining its laying at the suit of the borough.—*Id.*

§ 203 (Pa.) Bill to restrain water company from instituting a new scale of rates *held* properly dismissed.—Atticks v. Riverton Consol. Water Co., 81 A. 707.

§ 206 (Me.) Defendant *held* not liable for any mistake made by its employes in repairing plaintiff's automatic sprinkler system, resulting in an enhancement of a fire loss on the system failing to work.—People's Nat. Bank v. Kennebec Water Dist., 81 A. 866.

§ 209 (Me.) Evidence *held* insufficient to charge defendant with negligence in repairing a water pipe connected with plaintiff's automatic sprinkler system.—People's Nat. Bank v. Kennebec Water Dist., 81 A. 866.

WAYS.

See Easements, §§ 18, 63; Highways.

WIDOWS.

See Dower.

WILLS.

See Charities, § 21; Descent and Distribution; Evidence, § 419; Executors and Administrators; Mortgages, § 295; Perpetuities; Religious Societies; Specific Performance, §§ 24, 86, 127.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 67 (N.H.) A contract by decedent to will all his property to complainant, in consideration of services *held* enforceable, in case of default against decedent's administrator.—Day v. Washburn, 81 A. 474.

§ 68 (N.H.) The measure of complainant's damages for decedent's breach of a contract to will all of his property to her *held* the amount, not so willed, not necessary for expense of administration or payment of debts.—Day v. Washburn, 81 A. 474.

IV. REQUISITES AND VALIDITY.

(C) Execution.

§ 116 (Pa.) A witness to a will establishing a charity *held* not disinterested, as required by Act April 26, 1855 (P. L. 328).—In re Stinson's Estate, 81 A. 207.

Disqualifying interest of a witness to a will, within Act April 26, 1855 (P. L. 328), defined.—Id.

§ 125 (Pa.) An alleged codicil to a will cannot be probated, when not signed anywhere by the testatrix, as required by Act April 8, 1833 (P. L. 249).—In re Stinson's Estate, 81 A. 212.

(F) Mistake, Undue Influence, and Fraud.

§ 153 (Pa.) Codicil by which testatrix gave residuary estate to trust company, being apparently intended to carry the bequest to charities named in the will, *held* not sustainable.—In re Stirk's Estate, 81 A. 187.

Action of officer of trust company in procuring execution of bequest to the trust company *held* a constructive fraud, preventing the trust company from reaping any benefit, though it did not participate in the fraud.—Id.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(L) Fees and Costs.

§ 405 (N.H.) Heirs, who unsuccessfully attempted to defeat a testamentary trust and to have the fund turned to themselves, were not entitled to reimbursement out of the trust fund for their fees and costs.—Adams v. Page, 81 A. 1074.

§ 415 (Del.Super.) No allowance can be made for counsel fees to petitioner's counsel in a will contest, payable as costs out of the estate, though an allowance for disbursements may be granted.—In re Warrington's Will, 81 A. 501.

(M) Operation and Effect.

§ 423 (Pa.) When two wills were found, a daughter of testator cited in the proceeding *held* concluded by a decree on an appeal from the probate of the first will.—In re Given's Estate, 81 A. 64.

VI. CONSTRUCTION.

(A) General Rules.

§ 449 (N.J.Ch.) A will construed, and *held* that testator died intestate as to the corpus of his property.—Nagle v. Conard, 81 A. 841.

§ 457 (Me.) A reservation in a devise may be construed as an exception to effectuate testator's intent.—McIntire v. Lauckner, 81 A. 784.

§ 463 (Me.) Rule as to construction of wills stated.—Moulton v. Chapman, 81 A. 1007.

§ 467 (Pa.) Precatory words in a will construed.—In re Stinson's Estate, 81 A. 207.

Words used to designate the executive committee of a charity *held* mandatory.—Id.

§ 487 (N.J.) Statements made by testator as to the meaning and purpose of his will cannot be considered in construing it.—Hammell v. Barrett, 81 A. 1106.

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 511 (Conn.) A bequest to the "legal representatives" of the first taker *held* to be to his heirs.—Hartford Trust Co. v. Wolcott, 81 A. 1057.

§ 516 (Me.) A bequest to the "Baptist Theological Seminary situate in Newton," *held* good as a bequest to the "Newton Theological Institution."—Giddings v. Gillingham, 81 A. 951.

§ 517 (Me.) A bequest to the "Baptist Missionary Union of Foreign Missions" *held* good as a bequest to the "American Baptist Foreign Mission Society."—Giddings v. Gillingham, 81 A. 951.

§ 524 (N.J.) A devise or bequest to "surviving children" at termination of life estate construed.—Stout v. Cook, 81 A. 821, 824.

Under provisions of will, share of daughter of testator *held* to go on her death childless to surviving children of testator and not to children of predeceased children of testator.—Id.

That construction of will as to remainder after death of testator's daughter without child or children might leave testator intestate as to such share *held* not to require an opposite construction.—Id.

§ 524 (Pa.) Will construed, and heirs of testator living at the time of his death *held* entitled to a trust fund on the death of the beneficiary.—In re Fitzpatrick's Estate, 81 A. 816.

(C) Survivorship, Representation, and Substitution.

§ 538 (Conn.) A legacy with provision that, on the beneficiary's death, any portion remaining should go to a parish, passed to the parish on the beneficiary dying before testatrix.—Appeal of Strong, 81 A. 1020.

§ 549 (Conn.) A will *held* to give testator's granddaughter income during her life and to provide for distribution of the principal at her death among those who are then testator's heirs.—Tingier v. Woodruff, 81 A. 967.

(D) Description of Property.

§ 566 (N.J.Ch.) The word "moneys," in a will, *held* used in the sense of property, of whatever kind, without which meaning there would be a partial intestacy.—Mt. Holly Safe Deposit & Trust Co. v. Deacon, 81 A. 356.

§ 584 (Me.) A burial lot excepted from a devise *held* to have descended to testator's heirs without words of inheritance.—McIntire v. Lauckner, 81 A. 784.

An exception of a burial lot from a devise some 60 years old *held* inoperative to give testator's family title beyond a smaller lot actually marked on the ground.—Id.

(E) Nature of Estates and Interests Created.

§ 597 (Pa.) Will construed, and devisees *held* to take a fee-simple estate in the realty.—Moyer v. Rentschler, 81 A. 52.

§ 600 (Pa.) A will *held* to pass absolute fee in real estate to testator's wife.—Caslow v. Strausbaugh, 81 A. 927.

§ 601 (N.J.) Will construed and *held* that a devisee took an estate in fee, and that a limitation over was void as inconsistent with the rights of the devisee.—Bennett v. Association to Provide and Maintain a Home for the Friendless, 81 A. 1008.

§ 608 (Pa.) Will construed, and children of testator *held* to take a legal estate not affected by the naming of a trustee, creating a dry trust.—Steel v. Linn, 81 A. 92.

§ 612 (Conn.) A legacy *held* to have become absolute on the legatee surviving testatrix.—Appeal of Strong, 81 A. 1020.

(F) *Vested or Contingent Estates and Interests.*

§ 629 (Me.) A testamentary remainder will not be construed to be contingent, if it can be deemed vested.—Moulton v. Chapman, 81 A. 1007.

§ 629 (Pa.) Law *held* to encourage a construction favorable to the unfettering of an estate, rather than prolonged restraint upon its free alienability.—In re Miffin's Estate, 81 A. 129.

§ 634 (Conn.) Scope of rule that a remainder cannot be limited upon a fee *held* restricted in its operation.—Appeal of Strong, 81 A. 1020.

§ 634 (Conn.) An attempted bequest over after death of the first taker to such of his heirs "as are related to me by blood" *held* a contingent remainder.—Hartford Trust Co. v. Wolcott, 81 A. 1057.

§ 634 (Me.) Vested and contingent remainders distinguished.—Giddings v. Gillingham, 81 A. 951.

Remainders under a will *held* contingent, and not vested.—Id.

§ 634 (Me.) A remainder under a will *held* vested, and not contingent.—Moulton v. Chapman, 81 A. 1007.

(H) *Estates in Trust and Powers.*

§ 675 (Me.) Will considered, and *held* to create a resulting trust in favor of the heirs at law.—Fitzsimmons v. Harmon, 81 A. 967.

§ 682 (N.H.) A will *held* not to make a devise to the use of E., which, executed by the statute, would give her the legal title of the property, but to create a trust with discretion in the trustee to use the income for the benefit of E., or to sell the property and give E. the proceeds, with a devise over in case of no sale; so that E. had no title, legal or equitable, to the property.—Abbott v. Abbott, 81 A. 690.

§ 684 (Pa.) Sum paid trustees of life estate of testator's widow on renewal of the lease *held* a part of the rental to the property, payable to the widow during her life.—In re Archambault's Estate, 81 A. 314.

§ 687 (Pa.) Provision of will as to disposition of share of children of testatrix who should die without leaving issue construed.—Id. re Miffin's Estate, 81 A. 129.

"Accrue," as used in will, defined.—Id.

Will conveying property on death of legatees to beneficiaries "to receive and pay over the rents and income of such share or shares" *held* to carry the rights to the principal absolutely.—Id.

Construction of limitation over in case of death of child of testatrix without issue *held* not affected by provisions relating to power to appoint by will.—Id.

(I) *Actions to Construe Wills.*

§ 695 (Pa.) Where a testator provides that the income from real estate should be paid his wife for life, and for a fund, on her death, to maintain a pew, the validity of the second provision cannot be determined until the death of the widow.—In re Archambault's Estate, 81 A. 313.

The courts have no jurisdiction to construe a will by way of advice, and without adverse litigants actually before them.—Id.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) *Nature of Title and Rights in General.*

§ 731 (Md.) The interest of devisees *held* not chargeable with counsel fees paid to an

attorney employed by executors in determining whether their individual accounts with the estate were properly stated.—Frick v. Denison, 81 A. 597.

§ 733 (N.H.) A will *held* to postpone payment of legacies and distribution of the remainder of a fund until a specified date.—Wilcomb v. Moore, 81 A. 1076.

(C) *Advancements, Ademption, Satisfaction, and Lapse.*

§ 774 (Me.) A bequest, to be paid over as directed by testator's wife, lapsed through her failure to exercise the power of disposition.—Giddings v. Gillingham, 81 A. 951.

§ 775 (Me.) Legacies, payable on termination of a life estate, lapsed on death of the beneficiaries before such termination; the bequests being contingent.—Giddings v. Gillingham, 81 A. 951.

(F) *Legacies Charged on Property, Estate, or Interest.*

§ 821 (N.J.Ch.) A legatee of a mortgage, who takes the legacy, *held* not entitled to reject the provision in the will for the payment of the mortgage from the income of the mortgaged premises owned by testator in remainder.—Nagle v. Conard, 81 A. 841.

§ 826 (N.J.) A will creating a charge on land in favor of testator's sister may be enforced in equity by requiring the devisee to give security to perform the duties with which he is charged.—Hammell v. Barrett, 81 A. 1106.

(G) *Debts of Testator and Incumbrances on Property.*

§ 840 (N.J.Ch.) An assignee of a legatee of a mortgage on real estate *held* to take it subject to the conditions imposed by the will.—Nagle v. Conard, 81 A. 841.

(H) *Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.*

§ 858 (Conn.) A bequest over being void, *held*, the fund went to the residuary legatees; the will not showing a contrary intention.—Hartford Trust Co. v. Wolcott, 81 A. 1057.

§ 865 (N.J.Ch.) A declaration by testator *held* not to prevent legatees from sharing in his intestate estate.—Nagle v. Conard, 81 A. 841.

WITNESSES.

See Appeal and Error, §§ 926, 1033, 1048; Depositions; Dower, § 90; Evidence; Torts; Wills, § 116.

II. COMPETENCY.

(A) *Capacity and Qualifications in General.*

§ 37 (Vt.) That a witness did not hear all of a conversation between accused and deceased did not render her incompetent to testify to the parts she did hear.—State v. Averill, 81 A. 461.

(C) *Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.*

§ 129 (N.J.Ch.) In suit to establish title to real estate, testimony as to conversations between complainant and a son since deceased *held* not inadmissible as against representative of deceased son defending the suit.—Thomas v. Thomas, 81 A. 748.

§ 143 (N.J.) An assignor of a claim against a decedent's estate *held* not disqualified by interest to testify against the administrator in a suit by the assignee on the claim.—Clendennin v. Clancy, 81 A. 750.

§ 144 (Pa.) Under Act May 23, 1887 (P. L. 159) § 5, cl. "e," codefendant in ejectment,

filing disclaimer and securing costs, *held* relieved from disability as witness, though he still has an interest in the controversy.—*Africa v. Trexler*, 81 A. 707.

§ 144 (Vt.) P. S. 1589, *held* not to disqualify the grantor of plaintiff's father, since deceased, to testify to the conveyance of the land in controversy by a deed claimed to have been lost.—*Lang v. Clark*, 81 A. 625.

§ 149 (Pa.) Act May 23, 1887 (P. L. 159) § 5, cl. e, *held* not to exclude testimony of defendant as to conveyance to her of premises by life tenant since deceased.—*Power v. Grogan*, 81 A. 416.

§ 149 (Pa.) In ejectment, testimony of disclaiming codefendant as to transaction with county treasurer *held* not incompetent because of treasurer's death.—*Africa v. Trexler*, 81 A. 707.

§ 183 (N.J.) In an action on an assigned claim against decedent's estate, oral traverse of a plea denying the good faith of the assignment, merely to raise the question of the assignor's competency as a witness presented an issue for the court.—*Clendennin v. Clancy*, 81 A. 750.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 236 (N.J.Sup.) Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is properly excluded as a whole.—*Backes v. Movso-vich*, 81 A. 497.

§ 236 (Vt.) A proper question *held* not made improper by an unresponsive answer.—*Bixby v. Roscoe*, 81 A. 255.

§ 255 (N.J.) Witness *held* entitled to refresh his memory from written memorandum even if it states facts other than those within his personal knowledge so long as he does not testify as to such facts.—*Goodman v. Lehigh Valley R. Co. of New Jersey*, 81 A. 848, 851; *Mays v. Same*, *Id.* 851.

§ 258 (Md.) A witness cannot testify from books or memoranda which are not books of original entry, nor made under the witness' supervision, but by clerks not shown to be dead or unobtainable.—*Doggett v. Tatham*, 81 A. 376.

(B) Cross-Examination and Re-Examination.

§ 268 (N.J.) In action for wrongful discharge from employment, question to plaintiff on cross-examination *held* proper.—*Phelps v. Fuchs & Lang Mfg. Co.*, 81 A. 728.

§ 271 (N.J.) That memorandum from which witness testified was not offered in evidence *held* not to prevent his being cross-examined on it.—*Goodman v. Lehigh Valley R. Co. of New Jersey*, 81 A. 848, 851; *Mays v. Same*, *Id.* 851.

§ 277 (Vt.) Evidence concerning defendant's knowledge of the relations previously existing between deceased and another woman *held* proper cross-examination.—*State v. Averill*, 81 A. 461.

§ 280 (Conn.) A question asked a witness on cross-examination *held* objectionable as vague, in view of the inferior mental capacity of the witness.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

§ 282 (Conn.) A question asked a witness on cross-examination *held* properly excluded as leading, in a matter wherein the cross-examiner made the witness his own witness.—*Town of Madison v. Town of Guilford*, 81 A. 1046.

§ 282½ (Vt.) Where a witness testified that he had not been a party to any suit concerning the land in controversy, it was not error to refuse to compel him to answer whether he had not been a party to a suit in chancery after it had been admitted that he had been.—*Lang v. Clark*, 81 A. 625.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(D) Inconsistent Statements by Witness.

§ 387 (Vt.) Circumstances *held* not to show an abuse of discretion in permitting certain questions on cross-examination to impeach the witness.—*Chase v. Hoosac Tunnel & W. R. Co.*, 81 A. 236.

WOODS AND FORESTS.

See Statutes, § 39.

WORDS AND PHRASES.

"About to."—*Sallies v. Johnson* (Conn.) 81 A. 974.

"Accommodation indorser."—*Edward Knapp & Co. v. Tidewater Coal Co.* (Conn.) 81 A. 1063.

"Accrue."—*In re Mifflin's Estate* (Pa.) 81 A. 129.

"Actions."—*Mulcahy v. Mulcahy* (Conn.) 81 A. 242.

"Actions for wrongs done to the person."—*Smith v. Lehigh Valley R. Co.* (Pa.) 81 A. 554.

"Ad interim restraining order."—*Allman v. United Brotherhood of Carpenters and Joiners of America* (N. J. Ch.) 81 A. 116.

"Agent."—*Tyson v. George's Creek Coal & Iron Co.* (Md.) 81 A. 41.

"Alley."—*Oberhelm v. Reeside* (Md.) 81 A. 590.

"Assumption of risk."—*Belevicze v. Platt Bros. & Co.* (Conn.) 81 A. 339.

"Attorney."—*Denton Nat. Bank v. Kenney* (Md.) 81 A. 227.

"Board of aldermen or common council."—*United Electric Co. of New Jersey v. Mutual Benefit Electric Light & Power Co.* (N. J.) 81 A. 754.

"Bona fide resident."—*Hess v. Kimble* (N. J. Ch.) 81 A. 363.

"But."—*In re Sullivan County R. R.* (N. H.) 81 A. 473.

"Byroad."—*Tarlucki v. West Jersey & S. R. Co.* (N. J. Sup.) 81 A. 495.

"Byway."—*Tarlucki v. West Jersey & S. R. Co.* (N. J. Sup.) 81 A. 495.

"Cause of action."—*Slayton v. Davis* (Vt.) 81 A. 232.

"Certified check."—*Hornung v. Town of West New York* (N.J.Sup.) 81 A. 1116.

"Christian name."—*Schaffer v. Levenson Wrecking Co.* (N. J. Sup.) 81 A. 434.

"Commerce."—*D. E. Foote & Co. v. Clagett* (Md.) 81 A. 511.

"Concealed."—*Sutherland v. Brown* (Conn.) 81 A. 1033.

"Contingent remainder."—*Giddings v. Gillingham* (Me.) 81 A. 951.

"Contractor."—*Pittsburg Const. Co. v. West Side Belt R. Co.* (Pa.) 81 A. 834.

"Conversion."—*C. H. Eddy & Co. v. Field* (Vt.) 81 A. 249.

"Creditor."—*Horton v. Bamford* (N. J. Ch.) 81 A. 761; *Smith v. Wilson*, *Id.* 851.

"Defect."—*Dyer v. City of Danbury* (Conn.) 81 A. 958.

"Delivery."—*Renahan v. McAvoy* (Md.) 81 A. 586.

"Duly recorded."—*Eden Street Permanent Bldg. Ass'n No. 1 of Baltimore City v. Lusby* (Md.) 81 A. 284.

"Election of remedies."—*Marsh Bros. & Co. v. Bellefeur* (Me.) 81 A. 79.

"Eminent domain."—*Commonwealth v. Plymouth Coal Co.* (Pa.) 81 A. 148.

"Estate by entireties."—*In re Rhodes' Estates* (Pa.) 81 A. 643.

"Exception."—*Riefler & Sons v. Wayne Storage Water Power Co.* (Pa.) 81 A. 300.

"False."—*Sallies v. Johnson* (Conn.) 81 A. 974.

"False representation."—*Sallies v. Johnson* (Conn.) 81 A. 974.

"Feeble churches."—*French v. Lawrence* (N. H.) 81 A. 705.
 "Fraud."—*Sallies v. Johnson* (Conn.) 81 A. 974.
 "Fraudulent representation."—*Sallies v. Johnson* (Conn.) 81 A. 974.
 "Ground rents."—*Ward v. Newbold* (Md.) 81 A. 793.
 "Hearing."—*Lewisburg Bridge Co. v. Union County* (Pa.) 81 A. 324.
 "Home."—*Day v. Towns* (N. H.) 81 A. 405.
 "Institution."—*Hassett v. Carroll* (Conn.) 81 A. 1013.
 "Insurable interest."—*Williams Mfg. Co. v. Insurance Co. of North America* (Vt.) 81 A. 916.
 "Interest."—*In re Stinson's Estate* (Pa.) 81 A. 207; *Williams Mfg. Co. v. Insurance Co. of North America* (Vt.) 81 A. 916.
 "Judgment."—*Clark v. Southern Can Co.* (Md.) 81 A. 271.
 "Kennel."—*State v. Tripp* (Conn.) 81 A. 247.
 "Laid out."—*Oberheim v. Reeside* (Md.) 81 A. 590.
 "Land."—*City of Norwalk v. Town of New Canaan* (Conn.) 81 A. 1027.
 "Legal representatives, as are related by blood."—*Hartford Trust Co. v. Wolcott* (Conn.) 81 A. 1057.
 "Levy."—*Union Trust Co. of Maryland v. State* (Md.) 81 A. 873.
 "Lottery."—*State v. Sedgwick* (Del. Gen. Sess.) 81 A. 472.
 "May."—*Appeal of Dailey* (Pa.) 81 A. 655.
 "Moneys."—*Mt. Holly Safe Deposit & Trust Co. v. Deacon* (N. J. Ch.) 81 A. 356.
 "Name."—*Schaffer v. Levenson Wrecking Co.* (N. J. Sup.) 81 A. 434.
 "Negotiation."—*Edward Knapp & Co. v. Tide-water Coal Co.* (Conn.) 81 A. 1063.
 "On or before."—*Edward Knapp & Co. v. Tide-water Coal Co.* (Conn.) 81 A. 1063.
 "Open for business."—*Joffe & Mankowitz v. Niagara Ins. Co.* (Md.) 81 A. 281.
 "Other municipalities."—*Ludlam v. Dallas* (N. J. Sup.) 81 A. 489.
 "Person."—*Conococheague Club of Washington County v. State* (Md.) 81 A. 602.
 "Person or persons."—*Selectmen of Town of Montville v. Alpha Mills Co.* (Conn.) 81 A. 1051.
 "Persons."—*State v. Rutland Ry., Light & Power Co.* (Vt.) 81 A. 252.
 "Physicians practicing."—*McBride v. Huckins* (N. H.) 81 A. 528.
 "Police power."—*Commonwealth v. Plymouth Coal Co.* (Pa.) 81 A. 148.
 "Porpresture."—*City of Montpelier v. McMahon* (Vt.) 81 A. 977.
 "Preference."—*Rosenbluth v. De Forest & Hotchkiss Co.* (Conn.) 81 A. 955.
 "Preliminary injunction."—*Allman v. United Brotherhood of Carpenters and Joiners of America* (N. J. Ch.) 81 A. 116.
 "Profit."—*Coulombe v. Eastman* (N. H.) 81 A. 704.
 "Prohibition."—*Norton v. Emery* (Me.) 81 A. 671.
 "Property."—*De Bearn v. De Galard de Bras-sac de Bearn* (Md.) 81 A. 223.
 "Property tax."—*Eastwood v. Russell* (N. J.) 81 A. 108.
 "Public."—*Commonwealth v. Pennsylvania R. Co.* (Pa.) 81 A. 196.
 "Public conveyances."—*Primrose v. Casualty Co. of America* (Pa.) 81 A. 212.
 "Purpresture."—*City of Montpelier v. McMahon* (Vt.) 81 A. 977.
 "Reasonable time."—*Powell v. City of Old Town* (Me.) 81 A. 1068.
 "Representative capacity."—*Thomas v. Thomas* (N. J. Ch.) 81 A. 748.
 "Reservation."—*Riefler & Sons v. Wayne Storage Water Power Co.* (Pa.) 81 A. 300.
 "Resided."—*Town of Madison v. Town of Guilford* (Conn.) 81 A. 1046.

"Resident."—*Hess v. Kimble* (N. J. Ch.) 81 A. 363.
 "Shall."—*Lewisburg Bridge Co. v. Union County* (Pa.) 81 A. 324.
 "Special benefits."—*Corliss v. Village of Rich-ford* (Vt.) 81 A. 234.
 "Surname."—*Schaffer v. Levenson Wrecking Co.* (N. J. Sup.) 81 A. 434.
 "Surviving children."—*Stout v. Cook* (N. J.) 81 A. 821.
 "Then."—*In re Fitzpatrick's Estate* (Pa.) 81 A. 815.
 "Town to which he belongs."—*Inhabitants of Eden v. Inhabitants of Southwest Harbor* (Me.) 81 A. 1003.
 "Transfer."—*Rosenbluth v. De Forest & Hotchkiss Co.* (Conn.) 81 A. 955.
 "True value."—*City of Newark v. Tunis* (N. J.) 81 A. 722.
 "Ultra vires contract."—*Strickland v. National Salt Co.* (N. J.) 81 A. 828.
 "Vacancy."—*Commonwealth v. McAfee* (Pa.) 81 A. 85.
 "Vested remainder."—*Giddings v. Gillingham* (Me.) 81 A. 951.
 "Waiver."—*Bard v. Fireman's Ins. Co.* (Me.) 81 A. 870.
 "Warranty."—*Wills v. Wright* (Del. Super.) 81 A. 507.

WORK AND LABOR.

See Assignments, § 19; Mechanics' Liens; Trial, §§ 252, 386.

§ 7 (Vt.) Circumstances from which can be properly found a mutual expectation that she was to be paid *held* to entitle one to recover for services as housekeeper for her brother.—*Covey v. Rogers*, 81 A. 1130.

§ 12. (Md.) In an action for work, labor, and materials furnished under a special contract, a prayer that plaintiff could not recover without proof that the contract had been executed and completed *held* properly refused.—*Turner v. Egan*, 81 A. 877.

§ 14 (N.H.) The fact that a building was destroyed by fire while uncompleted four days after the contract required it to be finished *held* not to prevent the contractor from recovering on a quantum meruit.—*S. Anderson & Son v. Shattuck*, 81 A. 781.

§ 28 (Vt.) Evidence *held* to warrant a finding of mutual understanding that one was to be paid for her services as housekeeper for her brother.—*Covey v. Rogers*, 81 A. 1130.

§ 29 (N.H.) A contractor's measure of damages in an action on a quantum meruit after destruction of the building by fire before completion stated.—*S. Anderson & Son v. Shattuck*, 81 A. 781.

§ 30 (Vt.) Evidence in an action for services of plaintiff as housekeeper for her brother *held* not to authorize direction of verdict against her as showing explicit notice to her from him that if she remained she would receive no wages.—*Covey v. Rogers*, 81 A. 1130.

WRITS.

See Attachment; Certiorari; Execution; Executors and Administrators, § 454; Garnishment; Injunction; Mandamus; Process; Prohibition; Quo Warranto; Replevin; Scire Facias; Sequestration; Sheriffs and Constables, § 106.

Of error, see Appeal and Error.
 Of possession, see Mandamus, § 3.

WRONGFUL INJUNCTION.

See Injunction, §§ 260, 261.

WRONGS.

See Torts.

TABLES OF ATLANTIC CASES

IN

STATE REPORTS

Vol. 7, PENNEWILL'S (DELAWARE) REPORTS

Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.	Pen. Rep.	Atl. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	76	1117	71	75	372	127	76	632	211	78	877	280	78	607	333
2	76	601	74	76	53	135	76	319	217	82	35	265	78	920	340
5	76	961	78	76	785	140	78	50	220	78	611	275	79	919	355
14	76	959	81	76	1088	146	77	412	223	79	920	278	79	104	384
21	77	970	97	76	607	151	74	1086	226	78	634	292	78	845	370
30	76	617	101	76	230	159	74	836	229	78	915	295	76	787	383
40	76	965	108	76	363	174	74	1073	242	63	197	301	76	226	398
48	76	610	115	76	621	192	78	636	245	78	879	311	82	81	397
54	76	623	119	74	1099	197	72	983	255	78	635	315	77	963	403
56	75	789	123	74	1	204	74	82	258	77	965	318	76	636	408
64	74	11													

Vol. 7, PENNEWILL'S (DELAWARE) REPORTS

	Page		Page
Allender v. City of Wilmington (76 A. 610)	48	Lanham & Bro. v. Carpenter (81 A. 1135)	417
American Bridge Co. v. Valente (73 A. 400)	370	Layman v. F. F. Slocomb & Co. (76 A. 1094)	403
Baldwin v. People's R. Co. (76 A. 1088)	81	Lenkewicz v. Wilmington City R. Co. (74 A. 11)	64
Bennum v. Coursey (76 A. 53)	74	Loscolzo v. Eggner (78 A. 607)	260
Brown v. State (74 A. 836)	159	Lynch v. Wilmington City R. Co. (76 A. 959)	14
Bye v. George W. McCaulley & Son Co. (76 A. 621)	115	Lynch's Ex'rs v. Wilmington City R. Co. (78 A. 636)	192
Chandler v. Woodward (76 A. 623)	54	Maris, In re (63 A. 197)	242
City of Wilmington v. Wilmington City R. Co. (76 A. 965)	40	Mayor, etc., of City of Wilmington v. Wilmington City R. Co. (76 A. 965)	40
Clay v. People's R. Co. (76 A. 319)	135	Morton v. Granfield (76 A. 602)	333
Cochran v. City of Wilmington (77 A. 963)	315	National Cash Register Co. v. Riley (74 A. 362)	355
Continental Ins. Co. v. Rosenberg (74 A. 1073)	174	Pennell v. City of Wilmington (78 A. 915)	229
Coyle v. People's R. Co. (80 A. 638)	454	People's R. Co. v. Baldwin (72 A. 979)	383
Cromwell v. Granfield (76 A. 602)	333	Reed's Estate, In re (76 A. 617)	80
Dougherty v. Carberry (75 A. 789)	56	Short v. Philadelphia, B. & W. R. Co. (76 A. 363)	108
Dougherty v. Flemming (79 A. 104)	278	Skonieczny v. Churchman (78 A. 634)	226
Duggan v. New Jersey & W. Ferry Co. (76 A. 636)	318	Solomon v. Philadelphia, B. & W. R. Co. (77 A. 970)	21
Du Hadaway v. Commissioners of Town of Townsend (82 A. 35)	217	State v. Ainscow (75 A. 372)	71
Emory v. Glens Falls Ins. Co. (76 A. 230)	101	State v. Barr (79 A. 730)	340
Evans v. Wilmington City R. Co. (80 A. 634)	458	State v. Blackburn (75 A. 536)	479
Farrow v. Hoffecker (79 A. 920)	223	State v. Dinneen (76 A. 623)	505
Faulkner v. Everson (78 A. 879)	245	State v. Dlugozima (74 A. 1086)	151
File v. Wilmington City R. Co. (80 A. 623)	463	State v. Fulman (74 A. 1)	123
Flieth v. Cunningham (76 A. 607)	97	State v. Hartnett (74 A. 82)	204
Gorman v. Carr (78 A. 845)	292	State v. Kimball (77 A. 412)	146
Hagey v. City of Wilmington (77 A. 963)	315	State v. McCallister (76 A. 226)	301
Johnson v. Wilmington City R. Co. (76 A. 961)	5	State v. Morahan (77 A. 488)	494
Johnstone v. Kelly (74 A. 1099)	119	State v. Powell (76 A. 601)	2
Joseph v. Johnson (82 A. 30)	468	State v. Short (80 A. 631)	408
Knowles v. Waller (78 A. 611)	220	State v. Short (75 A. 787)	205
		State v. Sigerella (82 A. 31)	311
		State v. Wiggins (76 A. 632)	127
		State v. Woods (77 A. 490)	490

7 PEN. (Del.)—Continued.		Page		Page
State ex rel. Brumley v. Jessup & Moore	Paper Co. (72 A. 1057).....	397	Wagner v. People's R. Co. (73 A. 610)....	333
State ex rel. Lindsay v. Jessup & Moore	Paper Co. (72 A. 1057).....	397	Ward v. Ward (75 A. 611).....	364
State ex rel. Ward v. Lewis (78 A. 877)...		211	Welch v. Baltimore & O. R. Co. (76 A. 50) 140	
State ex rel. City of Wilmington v. Sayers	(77 A. 965).....	258	Welch v. Wilmington City R. Co. (80 A. 634)	458
Townsend v. Wilmington City R. Co. (78 A. 635).....		255	White v. Granfield (76 A. 602).....	355
Truman v. Wilmington City R. Co. (78 A. 636)		192	Williams v. Armour Car Lines (79 A. 919) 273	
United States, for Use of Lanham, v. Carpenter (81 A. 1135).....		417	Wilmington v. Wilmington City R. Co. (76 A. 965).....	40
Verderama v. Smith (75 A. 786).....		78	Wilmington City R. Co. v. Cox (76 A. 1117) 1	
Voigtmann v. Wilmington Trust Bldg. Corp. (78 A. 920).....		265	Wilmington City R. Co. v. Lynch's Ex'rs (72 A. 983).....	197
			Wilmington City R. Co. v. Truman (72 A. 983)	197
			Yates v. Philadelphia, B. & W. R. Co. (82 A. 27).....	472

VOL. 107, MAINE REPORTS

Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.	Me. Rep.	Atl. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
17	78	101	127	77	641	242	78	102	342	78	453	435	78	479	521
19	78	98	130	77	642	247	78	97	345	78	454	439	78	572	521
25	78	100	134	77	696	249	78	283	351	78	456	443	78	574	522
28	76	956	137	77	698	260	78	281	357	78	379	448	78	576	522
33	76	953	155	77	710	264	78	358	362	78	459	451	78	842	523
40	76	958	158	77	697	274	78	450	368	78	462	457	78	838	523
42	77	537	161	77	706	279	78	288	376	78	468	467	78	865	524
53	77	405	170	77	711	286	78	365	382	78	568	474	78	867	526
61	77	409	174	77	713	294	78	362	388	78	570	481	78	900	526
65	78	347	177	77	714	301	78	567	393	78	465	484	78	870	527
92	77	544	182	77	716	304	78	290	401	78	470	488	78	901	528
95	77	541	185	77	778	306	78	291	408	78	898	494	79	6	529
101	77	636	195	77	782	311	78	368	412	78	473	506	78	977	530
104	77	637	207	77	787	317	78	374	418	78	475	508	78	977	531
108	77	692	220	77	834	325	78	370	425	78	478	520	80	1131	531
117	77	776	223	77	835	334	78	377	429	78	481	520	80	1134	532
120	77	638	227	77	938	337	78	378							

VOL. 107, MAINE REPORTS

	Page		Page
Adams v. Burton (77 A. 835).....	223	Espeargnette v. Merrill (78 A. 290).....	304
Albany, Inhabitants of, v. Inhabitants of Norway (77 A. 713).....	174	Fall v. Fall (81 A. 865).....	539
Alden v. Camden Anchor-Rockland Mach. Co. (78 A. 977).....	508	Farnum, Appeal of (78 A. 901).....	488
Alden v. Camden Anchor-Rockland Mach. Co. (81 A. 866).....	540	French v. Maine Cent. R. Co. (80 A. 1132).....	521
Allen v. Trustees of Nasson Institute (77 A. 638).....	120	Fuller v. Smith (77 A. 706).....	161
American Ice Co. v. South Gardiner Lumber Co. (79 A. 6).....	494	Galeo v. State (78 A. 867).....	474
Anderson v. Dyer (78 A. 453).....	342	Gallant v. American Shoe Finding Co. (80 A. 1132).....	522
Anderson v. Gile (78 A. 370).....	325	Gilmore v. Penobscot County (78 A. 454).....	345
Arons v. Cummings (78 A. 98).....	19	Goodale v. Goodale (78 A. 507).....	301
Barrett v. Lewiston, B. & B. St. R. Co. (80 A. 1130).....	536	Goodwin v. Hodgkins (77 A. 711).....	170
Bartlett v. Harmon (78 A. 842).....	451	Gordon v. Conley (78 A. 365).....	286
Berman v. Fraternities Health & Accident Ass'n (78 A. 462).....	368	Griffith v. Brown (80 A. 1132).....	533
Bicknell v. Maine Cent. R. Co. (80 A. 1131).....	534	Haley v. Palmer (78 A. 368).....	311
Bisbee v. Mt. Battie Mfg. Co. (77 A. 778).....	185	Harvey v. Donnell (81 A. 865).....	541
Bliss v. Junkins (78 A. 478).....	425	Hatch v. Rose (77 A. 716).....	182
Boston Art Metal Co. v. F. W. Cunningham & Sons (80 A. 1131).....	534	Hayford v. Davis (81 A. 1132).....	541
Bourgeois v. Penobscot Savings Bank (80 A. 1131).....	526	Hix v. Eastern S. S. Co. (78 A. 379).....	357
Carter v. White (80 A. 1131).....	538	Hobbs v. Bennett (78 A. 362).....	294
Cass v. Atlantic Shore Line Ry. (78 A. 481).....	429	Holman v. Lewis (76 A. 956).....	28
C. A. Weston Co. v. Colby (77 A. 637).....	104	Hughes v. Hughes (80 A. 1132).....	529
Charles C. Wilson & Son v. Harrisburg (77 A. 787).....	207	Hurley v. Farnsworth (78 A. 291).....	306
Cilley v. Limerock R. Co. (77 A. 776).....	117	Inhabitants of Albany v. Inhabitants of Norway (77 A. 713).....	174
Clark v. Clark (77 A. 696).....	134	Inhabitants of Monroe v. Condon (80 A. 1132).....	532
Clark v. Clark (78 A. 977).....	505	Jensen v. Maine Eye & Ear Infirmary (78 A. 898).....	408
Collins v. City of Lewiston (77 A. 834).....	220	Kimball v. North East Harbor Water Co. (78 A. 865).....	467
Conant v. Jordan (77 A. 938).....	227	Knowlton v. Wing (78 A. 870).....	484
Coombs v. King (78 A. 468).....	376	Ladd v. Richardson (80 A. 1132).....	533
Crawford v. Grant (80 A. 1131).....	526	Langley v. Chabot (80 A. 1132).....	523
Currier v. B. G. & C. M. March (80 A. 1131).....	523	Langton v. Langton (80 A. 1133).....	526
Curtis v. Auburn Paper Box Co. (80 A. 1131).....	528	Leavitt v. Tasker (78 A. 953).....	33
Davidson v. Linn Woolen Co. (80 A. 1131).....	530	Leighton's Estate, In re (78 A. 901).....	488
Davis v. Reynolds (77 A. 409).....	61	L'Houx v. Union Const. Co. (77 A. 636).....	101
Doten v. Bartlett (78 A. 456).....	351	Light v. E. A. Strout Co. (81 A. 867).....	543
Drummond v. Foster (78 A. 470).....	401	McCann v. Inhabitants of Town of Minot (78 A. 465).....	393
Dudley v. Nickerson (78 A. 100).....	25	McGuire v. Murray (77 A. 692).....	108
Dummer Academy v. Banks (81 A. 1132).....	545	McIlheron v. Lewiston, A. & W. St. R. Co. (77 A. 541).....	95
Dunn v. LeBlanc (80 A. 1131).....	520	Malia v. Lewiston, A. & W. St. R. Co. (77 A. 541).....	95
Dyer v. Vaughn (80 A. 1132).....	537	March v. Barnfield (76 A. 958).....	40
Elliott v. Sawyer (77 A. 782).....	195	Mather v. Cunningham (78 A. 102).....	242
Emmons v. Clark (77 A. 693).....	134	Mehaylo v. Great Northern Paper Co. (80 A. 1133).....	521

107 ME.—Continued.		Page		Page
Miller v. Meservey (77 A. 697).....	158	State v. Bornstein (78 A. 281).....	290	
Miller v. Spaulding (78 A. 358).....	264	State v. Bridges (80 A. 1134).....	327	
Mitchell v. Page (78 A. 570).....	388	State v. Fogg (77 A. 714).....	177	
Monroe v. Clark (77 A. 696).....	134	State v. Friel (80 A. 1134).....	327	
Monroe, Inhabitants of, v. Condon (80 A. 1132).....	532	State v. Hersey (80 A. 1134).....	327	
Moran v. Southard (81 A. 1132).....	545	State v. Ouellette (77 A. 544).....	32	
Mott v. Mott (78 A. 900).....	481	State v. Phillips (78 A. 283).....	249	
Oakland Electric Co. v. Union Gas & Electric Co. (78 A. 288).....	279	State v. Reed (78 A. 479).....	47	
O'Connor v. Lewiston, A. & W. St. Ry. (80 A. 1133).....	522	State v. Wise (78 A. 101).....	17	
O'Neil v. Conley (78 A. 365).....	286	State Treasurer v. Penobscot County (78 A. 454).....	345	
Paine v. Folsom (78 A. 378).....	337	Stevens v. Parsons (80 A. 1135).....	327	
Parsons v. Stevens (78 A. 347).....	65	Stewart v. Hurd (78 A. 838).....	457	
Peabody v. Republican City Committee of Portland (80 A. 1133).....	524	Tainter v. Wentworth (78 A. 572).....	475	
People's Nat. Bank v. Kennebec Water Dist. (81 A. 806).....	542	Taylor v. Morgan & Co. (78 A. 377).....	331	
Perkins v. Blethen (78 A. 574).....	443	Thurlow v. Perry (77 A. 641).....	127	
Philadelphia Trust, Safe Deposit Co. v. Allison (80 A. 1133).....	531	Towle v. Dirigo Mut. Fire Ins. Co. (78 A. 374).....	317	
Philbrick v. Atlantic Shore Line Ry. (78 A. 481).....	429	Trask v. Chase (77 A. 698).....	137	
Porteous, Mitchell & Braun Co. v. Miller (77 A. 710).....	155	Treasurer of State v. Penobscot County (78 A. 454).....	345	
Porter v. Thompson (80 A. 1133).....	524	Tremblay v. Garcelon (80 A. 1135).....	511	
Robbins v. Lewiston, A. & W. St. Ry. (77 A. 537).....	42	Tremblay v. Kimball (77 A. 405).....	53	
Robinson v. Robinson (80 A. 1134).....	535	Trustees of Dummer Academy v. Banks (81 A. 1132).....	545	
Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co. (78 A. 459)...	362	Twitchell v. Conley (78 A. 365).....	289	
Sargent, In re (80 A. 1134).....	520	United States v. Burrill (78 A. 568).....	382	
Smith, Appeal of (78 A. 97).....	247	Vumbaca v. West (77 A. 642).....	139	
Southard v. Southard (80 A. 1134).....	538	Webster v. Clark (77 A. 696).....	134	
Sproul v. Randell (78 A. 450).....	274	Weston Co. v. Colby (77 A. 637).....	164	
		White v. Lewiston, A. & W. St. Ry. (78 A. 473).....	412	
		Wilson & Son v. Harrisburg (77 A. 787)...	297	
		Wright v. Fickett (78 A. 576).....	445	
		Wright v. Fraternities Health & Accident Ass'n (78 A. 475).....	415	

VOL. 78, NEW JERSEY EQUITY (8 BUCHANAN) REPORTS

N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.	N.J.E. Rep.	Atl. Rep.					
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.					
1	78	393	120	79	85	251	78	185	299*	82	22	378	79	539	471	79	533	571	80	471
13	78	633	138	78	672	256	79	336	300	81	1134	396	79	295	484	81	571	576	79	340
20	78	235	142	78	14	263	79	435	301	81	1132	410	79	304	488	79	611	578	80	508
33	78	806	146	78	762	266	79	437	302*	81	1098	415	79	620	498	79	351	579	81	1135
42	81	565	165	78	670	270	79	419	303*	82	14	423	79	261	507	80	119	580	81	1133
47	78	687	170	78	194	277	78	746	304*	81	1126	427	79	309	517	76	1076	581	81	1132
52	78	249	173	78	799	281	78	150	305	81	1133	430	79	268	527	79	270	582	81	1132
74	78	206	189	78	749	283	79	357	306	81	1133	434	79	326	532	80	545	583*	81	1114
78	81	573	199	78	793	292	78	1135	307	79	275	437	79	260	539	80	557	584*	81	1110
81	78	240	215	78	162	293*	81	1118	316	79	1060	439	79	365	544	80	550	585	81	1134
96	78	668	217	78	188	294	81	1133	319	79	1044	445	79	616	549	80	500	586	81	1133
101	78	689	221	78	742	295	81	1133	329	79	440	453	79	615	557	80	491	587	81	1133
110	77	1041	225	78	813	296	81	1133	346	79	93	458	79	608	560	80	559	588*	81	1111
112	77	1062	237	79	687	297	81	1134	365	81	568	464	79	1065	568	80	456	589	81	1134
114	78	246	244	78	232	298	81	1132	371	78	1065									

*Reported in full in the Atlantic; not reported in full in the Official Reports.

VOL. 78, NEW JERSEY EQUITY (8 BUCHANAN) REPORTS

	Page		Page
Arnold v. Searing (78 A. 762).....	146	Hazard v. Phoenix Woodworking Co. (80 A. 456)	508
Ashby v. Yetter (78 A. 799).....	173	Henry v. Thompson (78 A. 14).....	142
Atlantic City R. Co. v. Wood (81 A. 1132).....	298	Hibbler, Matter of (78 A. 188).....	217
Atlantic Refining Co. v. Stokes (81 A. 1132).....	301	Higbee Fishing Club v. Atlantic City Electric Co. (79 A. 326).....	434
Aumack v. Jackson (78 A. 749).....	189	Hotovitsky v. Little Russian Greek Catholic St. Peter & Paul Church of Jersey City (79 A. 340).....	576
Bache v. Central Leather Co. (81 A. 571).....	484	Huston v. Roe (78 A. 162).....	215
Bayonne v. Borough of North Arlington (79 A. 357).....	283	Imperial Realty Co. v. West Jersey & S. R. Co. (77 A. 1041).....	110
Bayview Cemetery Ass'n v. Cole (81 A. 1132).....	581	Jarman v. Freeman (79 A. 1063).....	464
Beck v. Beck (80 A. 550).....	544	Johnson v. Johnson (80 A. 119).....	507
Bennett v. Association to Provide and Maintain a Home for the Friendless (81 A. 1098).....	*302	Jourdan v. Burstow (81 A. 1133).....	587
Bijur v. Standard Distilling & Distributing Co. (81 A. 1132).....	582	Kayhart v. Whitehead (81 A. 1133).....	580
Blanchard v. Prudential Ins. Co. of America (79 A. 533).....	471	Kelley v. Schwinghammer (79 A. 260).....	437
Bloom v. Terwilliger (78 A. 742).....	221	Kelsey v. Agricultural Ins. Co. of Watertown, N. Y. (79 A. 539).....	378
Boulanger v. Hetzel (78 A. 150).....	231	Krah v. Radcliffe (81 A. 1133).....	305
Bowker v. Cunningham (79 A. 608).....	458	Lane v. J. El. Roach's Banda Mexicana Co. (79 A. 365).....	439
Braddock v. Hinchman (79 A. 419).....	270	Lehman v. Lehman (79 A. 1060).....	316
Camden Safe Deposit & Trust Co. v. Schellenger (78 A. 672).....	138	Leyden v. Lawrence (79 A. 615).....	453
Carling v. Carling (81 A. 565).....	42	Lionel C. Simpson Plumbing & Heating Co. v. Geschke (81 A. 1133).....	306
Cartun v. Myers (82 A. 14).....	*303	Ludy v. Larsen (79 A. 687).....	237
Carver v. Southern Iron & Steel Co. (78 A. 240).....	81	McAndrews & Forbes Co. v. City of Camden (78 A. 232).....	244
City of Bayonne v. Borough of North Arlington (79 A. 357).....	283	McCarter v. Lehigh Valley R. Co. (79 A. 93).....	346
Clark v. Clark (81 A. 1126).....	*304	McGee v. McGee (79 A. 268).....	430
Coffin v. Watson (79 A. 275).....	307	McGrath v. Norcross (79 A. 85).....	120
Collier v. Tully (80 A. 491).....	557	McMillan v. Kuehnle (78 A. 185).....	251
Cook v. Jack (81 A. 1110).....	*584	McNulty v. McCarthy (81 A. 568).....	365
Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co. (81 A. 1133).....	294	McNulty v. McCarthy (81 A. 1134).....	585
Davis v. Palmer (81 A. 573).....	78	Martin v. Martin (79 A. 261).....	423
Doutney v. Lambie (78 A. 746).....	277	Massey v. Camden & T. R. Co. (80 A. 557).....	539
Edwards v. Oakes (81 A. 1133).....	295	Mayer v. West Side Development Co. (79 A. 620).....	415
Ewald v. Ortynsky (79 A. 270).....	527	Moyer v. Moyer (81 A. 1111).....	*588
Faitoute v. Wright (80 A. 559).....	560	Nichols v. Older (78 A. 689).....	101
First Italian Building & Loan Ass'n v. De Niscia (82 A. 22).....	*299	Nowak v. Baier (77 A. 1062).....	112
Fraser v. Fraser (81 A. 1133).....	296	Ocean View Land Co. v. Loudenslager (80 A. 471).....	571
Gilson v. Appleby (78 A. 668).....	96	Page v. Asbury Methodist Episcopal Church (78 A. 246).....	114
Goetz v. Carlow (81 A. 1133).....	586		
Grattan's Estate, Matter of (78 A. 813).....	225		

*Reported in full in Atlantic; not reported in full in New Jersey Reports.

*Reported in full in Atlantic; not reported in full in New Jersey Reports.

78 N. J. Eq. (8 Buchanan)—Cont'd Page

Partridge v. Mechanics' Nat. Bank of Burlington (81 A. 1134).....	297
People's Brewing Co. of Trenton v. Levin (81 A. 1114).....	*583
Public Service R. Co. v. Board of Chosen Freeholders of Hudson County (78 A. 235).....	20
Radley v. Radley (78 A. 194).....	170
Rector v. Rector (79 A. 295).....	386
Rennebaum v. Rennebaum (79 A. 309)....	427
Riker & Son Co. v. United Drug Co. (79 A. 1044).....	319
Robert Williams & Co. v. Auto Express Co. (78 A. 670).....	165
Rogers v. Bailey (81 A. 1134).....	589
Schuhardt v. Witteke (78 A. 1135).....	292
Security Trust Co. v. Lovett (79 A. 616)....	445
Sherman v. Cameron (80 A. 545).....	532
Simpson Plumbing & Heating Co. v. Gescheke (81 A. 1133).....	306
Somerville Water Co. v. Borough of Somerville (78 A. 793).....	199
Staheli, Matter of (78 A. 206).....	74
Stickle v. High Standard Steel Co. (80 A. 500).....	549
Stickle v. High Standard Steel Co. (80 A. 503).....	578

*Reported in full in Atlantic; not reported in full in New Jersey Reports.

Straus v. Norris (79 A. 611).....	458
Swinley v. Force (78 A. 249).....	72
Taylor v. Public Service Corp. of New Jersey (81 A. 1134).....	388
Tittsworth v. Tittsworth (78 A. 687).....	47
Trustees of Princeton University v. Wilson (78 A. 393).....	1
Van Riper v. Hilton (78 A. 1055).....	371
Vreeland v. Vreeland (79 A. 336).....	279
Wagner v. Phillips (78 A. 806).....	33
Walton v. American Baptist Publication Soc. (79 A. 435).....	263
Walton v. Taylor (79 A. 437).....	266
White v. Young's Pier & Hotel Co. (79 A. 351).....	498
William B. Riker & Son Co. v. United Drug Co. (79 A. 1044).....	319
Williams v. Williams (78 A. 693).....	13
Williams v. Young (81 A. 1118).....	*266
Williams & Co. v. Auto Express Co. (78 A. 670).....	165
Wilson v. East Jersey Water Co. (79 A. 440).....	329
Woodruff v. White (79 A. 304).....	410
Woolsey v. Woolsey (76 A. 1076).....	517
Woolsey v. Woolsey (81 A. 1135).....	579

*Reported in full in Atlantic; not reported in full in New Jersey Reports.

VOL. 80, NEW JERSEY LAW (51 VROOM) REPORTS

N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.	N.J.L. Rep.	Atl. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	77	466	92	77	532	176	75	438	288	78	203	437	78	162	510
4	77	471	94	77	513	180	76	309	295	78	227	441	78	225	511
7	77	469	98	77	611	181	77	478	298	78	215	447	78	160	514
10	77	468	101	77	801	185	76	1012	306	74	954	452	78	212	516
11	77	470	104	76	321	191	76	329	311	78	703	459	78	1134	519
15	77	1026	106	77	627	193	76	332	319	77	50	460	77	517	520
21	77	523	112	76	888	196	78	330	321	79	340	461	78	211	528
29	76	339	115	77	473	199	78	346	328	78	152	461	78	1134	530
34	76	322	117	77	792	202	76	343	333	78	9	463	78	1134	532
35	76	322	119	77	515	206	76	310	337	78	17	464	79	1119	535
38	76	324	124	76	1024	214	76	328	342	79	354	464	78	1134	542
39	76	325	126	76	315	216	76	328	349	78	200	465	78	258	545
41	76	446	128	76	335	217	76	455	353	78	219	466	78	1135	547
45	77	805	137	78	1010	224	76	326	364	78	190	467	78	144	549
48	76	344	133	76	1063	227	77	88	369	79	361	468	78	1135	553
52	76	341	136	76	458	236	77	1068	378	79	316	469	78	190	557
56	76	544	143	78	1009	240	77	466	382	78	179	471	79	287	561
63	76	450	146	78	327	246	76	338	390	78	174	475	79	315	564
67	78	331	148	77	533	250	76	347	398	78	144	478	79	423	567
70	75	472	151	81	262	252	76	321	403	79	293	482	79	257	572
72	76	334	152	76	338	253	75	939	406	78	164	484	79	257	582
74	76	326	156	78	333	258	77	795	411	78	177	486	79	458	586
76	76	453	158	76	444	265	77	802	416	78	196	496	78	743	592
81	81	264	163	76	323	269	78	217	425	78	166	500	78	660	596
83	77	609	166	77	86	273	78	228	432	78	223	506	79	331	600
88	77	531	171	76	448	282	78	169							

VOL. 80, NEW JERSEY LAW (51 VROOM) REPORTS

Atlantic & S. R. Co. v. State Board of Assessors of New Jersey (77 A. 609).....	83
Austrian v. Laubheim (78 A. 1134).....	459
Avon-by-the-Sea v. Monmouth County Board of Taxation (78 A. 1134).....	459
Bailey v. Osborn (78 A. 9).....	333
Barlow v. Atlantic City (78 A. 11).....	510
Basilea & Calandra v. Spagnuolo (77 A. 531).....	88
Basilea & Calandra v. Spagnuolo (77 A. 532).....	92
Bayliss v. Borough of North Arlington (76 A. 1024).....	124
Bellamy v. Wessels (77 A. 1034).....	630
Bisbing v. Asbury Park (78 A. 196).....	416
Black v. Board of Chosen Freeholders of Atlantic County (76 A. 339).....	29
Blum v. Parson Mfg. Co. (78 A. 174).....	390
Borough of Avon-by-the-Sea v. Monmouth County Board of Taxation (78 A. 1134).....	459
Borough of Mountainside v. Board of Equalization of Taxes (76 A. 824).....	38
Brady v. Public Service R. Co. (79 A. 287).....	471
Brewster v. New York Cent. R. Co. (78 A. 160).....	447
Brooks Co. v. Delaware, L. & W. R. Co. (78 A. 51).....	676
Brown v. Winter (77 A. 1021).....	632
Castelli v. Jereissati (78 A. 227).....	295

80 N. J. LAW (51 Vroom)—Cont'd Page	Page
Centré Bridge Co. v. Collector of Borough of Stockton (76 A. 315).....	126
Christiansen v. W. H. & F. W. Cane (77 A. 517).....	460
City of Newark v. Board of Equalization of Taxes of New Jersey (77 A. 795).....	258
City of Rahway v. Board of Health of New Jersey (77 A. 86).....	166
Clausen v. De Medina (77 A. 1045).....	634
Coles v. McKenna (76 A. 344).....	48
Collier v. De Brigard (77 A. 513).....	94
Colonial Land Co. v. Asmus (77 A. 1022).....	637
Colton v. Delaware, L. & W. R. Co. (77 A. 1020).....	502
Connolly v. North Jersey St. R. Co. (78 A. 1134).....	461
Conover v. Old (77 A. 1070).....	535
Conover v. Public Service R. Co. (78 A. 187).....	681
Cook v. Borough of Manasquan (76 A. 310).....	206
Cook v. City of Bayonne (77 A. 1048).....	596
Cottentin v. Me... (76 A. 341).....	52
Cottrell v. Fo... (76 A. 465).....	1
Cox v. Americ... Co. (77 A. 1025).....	645
Crossan v. Ventnor City (78 A. 12).....	511
Darling v. Jersey City (78 A. 10).....	514
Davis v. Minch (76 A. 328).....	214
DeMateo v. Perano (78 A. 162).....	437
Deubel v. Millard Const. Co. (77 A. 611).....	98
Dierkes v. Hauxhurst Land Co. (79 A. 361).....	369
Dilts v. Board of Exrcise Com'rs of Jersey City (79 A. 315).....	475
Dodd v. Central R. Co. of New Jersey (76 A. 544).....	56
Dunwoody v. North Jersey St. R. Co. (78 A. 211).....	461
Egerter v. Central R. Co. of New Jersey (77 A. 471).....	4
Eggert v. McIlrose (77 A. 801).....	101
E. J. Brooks Co. v. Delaware, L. & W. R. Co. (78 A. 51).....	676
Eldridge v. Philadelphia & R. R. Co. (79 A. 423).....	478
Fagan v. State Board of Assessors (77 A. 1023).....	516
Fairfield Dairy Co. v. Peer (77 A. 1077).....	649
Fay v. Thornton (76 A. 321).....	104
Fischblatt v. Atlantic City (78 A. 217).....	269
French v. Armstrong (76 A. 336).....	152
Furstenberg v. North German Lloyd (77 A. 1087).....	519
Gallagher v. Benson (77 A. 478).....	181
Garrison v. Seckendorff (78 A. 1134).....	463
Georgetti v. Steuber (79 A. 257).....	482
Gerli v. National Mill Supply Co. (78 A. 1134).....	464
Gerli & Co. v. Mistletoe Silks Mills (76 A. 335).....	128
Gilson v. Appleby (77 A. 1084).....	542
Goeller Iron Works v. Carey (77 A. 527).....	106
Goodrich v. Thomas Cort (77 A. 1049).....	653
Gottuso v. Baker (77 A. 1038).....	520
Grantwood Lumber & Supply Co. v. Abbott (78 A. 1046).....	564
Guggenheim v. City of Long Branch (76 A. 338).....	246
Hart v. City of Newark (77 A. 1086).....	600
Hartman v. Dobar (76 A. 347).....	250
Hill v. Adams Exp. Co. (77 A. 1073).....	604
Hoberg v. Collins, Lavery & Co. (78 A. 166).....	425
Hopkins v. Byard (76 A. 333).....	156
Hudson & M. Telephone & Telegraph Co. v. Township Committee of Linden Tp. (76 A. 444).....	158
Inderlied v. Bullen (77 A. 469).....	7
Institute of Holy Angels v. Borough of Fort Lee (77 A. 1035).....	545
International Watch Co. v. Delaware, L. & W. R. Co. (78 A. 49).....	553
Jaqui v. Benjamin (77 A. 468).....	10
Jersey City v. City of Bayonne (76 A. 1010).....	131
Jersey City v. Davis (76 A. 969).....	609
Kiernan v. Jersey City (78 A. 228).....	273
Kirtland v. McCloud (78 A. 17).....	337
Kruse v. Rabe (79 A. 316).....	378
Kupferschmidt v. Agricultural Ins. Co. of Watertown, New York (78 A. 225).....	441
Kupfersmith v. Delaware Ins. Co. of Philadelphia (76 A. 329).....	191
Kupfersmith v. Law Union & Crown Ins. Co. (78 A. 223).....	432
Kursheedt v. Standard Bleachery Co. (76 A. 322).....	34
Kuttner v. Central R. Co. of New Jersey (77 A. 470).....	11
Lauer v. Atha (75 A. 888).....	112
Lawrence v. Union Ins. Co. of Philadelphia (76 A. 1053).....	133
Leeds v. Atlantic City (79 A. 312).....	557
Lehigh Val. R. Co. v. City of Dover (76 A. 450).....	63
Lehigh Val. R. Co. of New Jersey v. Jersey City (78 A. 215).....	298
Loffand v. Hilton (78 A. 16).....	528
Lott v. Leventhal (76 A. 328).....	216
Loudenslager v. Atlantic City (77 A. 1060).....	658
Louon v. Public Service Co. (76 A. 321).....	252
McDermott v. DeMeridor Co. (76 A. 331).....	67
McMichael v. Eastern Hydraulic Press Brick Co. (78 A. 144).....	398
Mahoney v. Metropolitan Life Ins. Co. (76 A. 458).....	136
Mally v. Elliott (75 A. 472).....	70
Manchester Building & Loan Ass'n v. Allee (76 A. 1012).....	185
Manning v. Metropolitan Life Ins. Co. (76 A. 334).....	72
Manning v. New Jersey Short Line R. Co. (78 A. 200).....	349
Marten v. Brown (76 A. 1009).....	143
Marter v. Repp (77 A. 1030).....	530
Mazarin v. Hudson County Real Estate & Building Co. (76 A. 322).....	35
Merkle v. Schaeffer (76 A. 326).....	74
Midland Tp. v. Borough of Maywood (76 A. 453).....	76
Milner v. City of Trenton (75 A. 939).....	253
Mountainside v. Board of Equalization of Taxes (76 A. 324).....	38
Mullin v. Leamy (79 A. 257).....	484
Murphy v. Schmidt (79 A. 293).....	403
Murphy v. W. H. & F. W. Cane (76 A. 323).....	163
National Cash Register Co. v. Daly (76 A. 325).....	39
National Packing Co. v. Garven (78 A. 708).....	311
National Union Fire Ins. Co. of Pittsburgh, Pa. v. Empire State Surety Co. (78 A. 164).....	405
Newark v. Board of Equalization of New Jersey (77 A. 795).....	258
New Jersey Imperial Road Co. v. Board of Chosen Freeholders of Gloucester County (77 A. 1022).....	640
New Jersey Suburban Water Co. v. Town of Kearny (77 A. 50).....	319
New York Bay R. Co. v. City of Newark (76 A. 327).....	146
New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County (74 A. 954).....	305
Ocean City Hotel & Development Co. v. Sooy (76 A. 446).....	41
Ocean Grove Camp Meeting Ass'n of Methodist Episcopal Church v. Reeves (79 A. 1119).....	404

80 N. J. LAW (51 Vroom)—Cont'd Page		Page
Ochs v. Public Service R. Co. (77 A. 533)	148	Stephens v. Schmidt (76 A. 332)..... 193
Pavan v. Worthen & Aldrich Co. (78 A. 658)	567	Sternberg & Co. v. Lehigh Val. R. Co. (78 A. 1135)..... 488
Paul Gerli & Co. v. Mistletoe Silks Mills (76 A. 335).....	128	Stone Post Co. v. Corcoran (77 A. 1031).... 541
Penrose v. Ventnor City (77 A. 1061).....	547	Streuli v. Wolowitz (76 A. 309)..... 180
Pfeiffer v. Peters (77 A. 1076).....	661	Strock v. City of East Orange (77 A. 1051) 619
Pomeroy Ink Co. v. Pomeroy (76 A. 326)....	224	Sypherd v. Myers (79 A. 340)..... 321
Porter Screen Mfg. Co. v. United Contractors Corp. (77 A. 473).....	113	Tarlucki v. West Jersey & S. R. Co. (78 A. 149)..... 688
Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County (77 A. 1046).....	614	Taylor v. New York & L. B. R. Co. (78 A. 169)..... 282
Pray v. Werksman (79 A. 274).....	561	Thomson v. Central Passenger R. Co. (78 A. 152)..... 324
Presbytery of Jersey City v. Trustees of First Presbyterian Church of Weehawken (78 A. 207).....	572	Tier v. Miller (79 A. 417)..... 691
Prince v. Ireland (77 A. 802).....	265	Township of Midland v. Borough of Maywood (76 A. 453)..... 76
Public Service R. Co. v. Board of Equalization of Taxes of New Jersey (78 A. 8)....	533	Trowbridge v. Denning (77 A. 1068)..... 226
Quigley v. Lehigh Val. R. Co. of New Jersey (79 A. 458).....	486	Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church of Weehawken (78 A. 207)..... 572
Rahway v. Board of Health of New Jersey (77 A. 86).....	166	United States Transfer Advertising Co. v. Young (81 A. 262)..... 151
Riley v. Wortendyke (77 A. 1035).....	663	United & Globe Rubber Mfg. Co. v. Conard (78 A. 203)..... 286
Rivers v. Pennsylvania R. Co. (76 A. 455).....	217	Van Slyke v. Van Slyke (78 A. 179)..... 382
Rosencrans v. Eatontown Tp. (77 A. 88)....	227	Verdon v. Crescent Automobile Co. (76 A. 346)..... 199
St. Columba's Church of Newark v. Public Service R. Co. (78 A. 219).....	353	Voorhees v. Borough of North Wildwood (81 A. 264)..... 61
Sandford v. Miller (78 A. 177).....	411	Walker v. Hancock Mut. Life Ins. Co. (79 A. 354)..... 342
Shiloh Turnpike Co. v. Bates (76 A. 448)....	171	Waskiewics v. Public Service R. Corp. (78 A. 159)..... 694
Silberstein v. Guttridge (77 A. 792).....	117	Weatherby v. Newfield Smyrna Rug Co. (78 A. 190)..... 364
Simmons Pipe Bending Works v. Seymour (78 A. 258).....	465	Weinberger v. Agricultural Ins. Co. of Wassertown, New York (76 A. 343)..... 292
State v. Clement (77 A. 1067).....	669	Williams v. Voorhees (77 A. 515)..... 119
State v. Codrington (78 A. 743).....	496	Wilson v. Borough of Collingswood (77 A. 1033)..... 628
State v. Coleman (77 A. 1026).....	15	Wilson v. Fromm (78 A. 193)..... 582
State v. DeLorenzo (78 A. 660).....	500	Woglom v. City of Perth Amboy (78 A. 190) 489
State v. Geyer (77 A. 805).....	45	Woodward v. Lishman (78 A. 701)..... 598
State v. Kelsey (77 A. 1028).....	641	Wormser-Goodman Const. Co. v. Borough of Belmar (77 A. 466)..... 240
State v. Kind (75 A. 438).....	176	Zabriskie v. Sullivan (77 A. 1075)..... 673
State v. Kind (78 A. 1135).....	466	Zellers v. Delany (78 A. 212)..... 452
State v. Leo (77 A. 523).....	21	
State v. Lieberman (79 A. 331).....	506	
State v. Martini (78 A. 12).....	685	
State v. Reiners (76 A. 330).....	196	
State v. Wilson (78 A. 144).....	467	

VOL. 230, PENNSYLVANIA REPORTS

Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	79	171	86	79	163	162	79	254	266	79	561	359	79	644	472
6	79	226	90	79	228	165	79	410	271	79	499	364	79	635	475
9	79	156	95	79	153	176	79	408	273	79	556	366	79	635	480
10	79	157	98	79	246	189	79	235	289	79	567	368	79	636	481
12	79	160	106	79	249	192	79	255	295	79	511	374	79	653	481
16	79	233	109	79	253	197	79	499	299	79	626	387	79	645	496
22	79	234	117	79	250	204	79	498	305	79	624	392	79	657	498
24	79	167	122	79	244	206	79	496	312	79	569	397	79	634	500
29	79	23	127	79	414	210	79	416	312	79	569	399	79	638	502
39	79	156	132	79	403	212	79	505	316	79	570	407	79	628	506
41	79	166	136	79	400	228	79	501	319	79	561	419	79	671	511
44	79	150	141	79	243	240	79	496	328	79	575	423	79	708	515
49	79	154	145	79	242	244	79	550	333	79	569	426	79	661	516
55	79	161	148	79	402	246	79	548	335	79	571	431	79	670	518
60	79	164	153	79	405	249	79	549	344	79	511	434	79	659	528
65	79	229	158	79	246	251	79	552	346	79	632	453	79	647	528
75	79	226	160	79	235	261	79	547	351	79	564	467	79	667	536
79	79	240													

VOL. 230, PENNSYLVANIA REPORTS

	Page		Page
A. L. Roumfort Co. v. Delaney (79 A. 653)	374	Fidelity Title & Trust Co. of Pittsburgh v. West Side Belt R. Co. (79 A. 235).....	160
Ancient Order of United Workmen v. Mooney (79 A. 233).....	16	First Nat. Bank v. McBride (79 A. 547).....	261
A. & S. Wilson Co. v. Reighard (79 A. 243)	141	Fleming v. McDonald (79 A. 226).....	75
Barclay v. Barclay (79 A. 667).....	467	Fox Estate v. Colonial Trust Co. (79 A. 153).....	95
Bell v. Ricketson (79 A. 548).....	246	Gilbert's Estate, In re (79 A. 715).....	502
Bell's Estate, In re (79 A. 644).....	359	Graeser's Estate, In re (79 A. 242).....	145
Black v. City of Pittsburgh (79 A. 569).....	312	Green v. Sumby (79 A. 712).....	500
Blackburn v. Adams Exp. Co. (79 A. 760).....	635	Harton v. Hildebrand (79 A. 571).....	335
Boulevard from Second St. to Rhawn St., In re (79 A. 716).....	491	Herron v. American Steel & Wire Co. (79 A. 228).....	90
Brackston v. Montooth Coal Co. (79 A. 160)	12	Hodder v. Hogg (79 A. 156).....	9
Breining v. Born (79 A. 187).....	24	Hodges v. McGovern (79 A. 636).....	368
Brennan v. Pittsburgh & C. R. Co. (79 A. 501).....	228	Hoffman v. Consolidated Traction Co. (79 A. 490).....	271
Brinton v. Pennsylvania R. Co. (79 A. 671)	419	Hood v. Kensington Nat. Bank (79 A. 714)	508
Brode v. City of Philadelphia (79 A. 659).....	434	Hopkins v. Rettinger (79 A. 255).....	192
Brown v. Chester Traction Co. (79 A. 713)	498	Ingber v. Tradesmen's Nat. Bank (79 A. 751).....	511
Bullitt v. City of Philadelphia (79 A. 752)	544	Joyce v. Baltimore & O. R. Co. (79 A. 171)	1
Byers v. Youghiogheny & Ohio Coal Co. (79 A. 157).....	10	Jutte's Estate, In re (79 A. 569).....	333
Campbell v. City of Philadelphia (79 A. 718).....	516	Kearns v. Carnegie Steel Co. (79 A. 575).....	328
Carmichael, Appeal of (79 A. 569).....	312	Kennedy v. City of Pittsburgh (79 A. 550)	244
Catanzaro v. Pennsylvania R. Co. (79 A. 624).....	305	Kenworthy's Estate, In re (79 A. 803).....	606
City of Philadelphia v. Triplett (79 A. 703)	481	Kucker v. Sunlight Oil & Gasoline Co. (79 A. 747).....	528
City of Pittsburgh v. First Nat. Bank of Sheraden (79 A. 406).....	176	Kuntz's Estate, In re (79 A. 755).....	557
City of Pittsburgh v. Goshorn (79 A. 505).....	212	Kunzman v. Pittsburgh Rys. Co. (79 A. 635)	364
City of Pittsburgh v. Pittsburgh & C. St. R. Co. (79 A. 235).....	189	Lafferty's Estate, In re (79 A. 711).....	496
City of Pittsburgh v. Rhodes (79 A. 634).....	397	Law v. Waldron (79 A. 647).....	458
Clark's Estate, In re (79 A. 246).....	158	Lee v. Marsh (79 A. 564).....	551
Coles, In re (79 A. 254).....	162	Lockard v. Vane (79 A. 802).....	391
Coll v. Westinghouse Electric & Mfg. Co. (79 A. 163).....	86	Lyons v. Benney (79 A. 250).....	117
Commonwealth v. Burke (79 A. 670).....	431	McDermott v. Blank (79 A. 657).....	392
Commonwealth v. Molten (79 A. 638).....	399	McKean v. Riter-Conley Mfg. Co. (79 A. 561).....	319
Commonwealth v. Spence (79 A. 775).....	571	McKinley v. C. Jutte & Co. (79 A. 244).....	122
Connelly v. Pittsburgh Rys. Co. (79 A. 635)	366	McLane v. Pittsburgh Rys. Co. (79 A. 237)	29
C. P. Mayer Brick Co. v. D. J. Kennedy Co. (79 A. 246).....	98	McLaughlin v. Kelly (79 A. 552).....	251
Crooks v. McMichael (79 A. 156).....	39	McNulty's Estate, In re (79 A. 645).....	387
Danko v. Pittsburgh Rys. Co. (79 A. 511).....	295	Marshall v. Clause (79 A. 511).....	344
Dauler's Estate, In re (79 A. 498).....	204	Mayer Brick Co. v. D. J. Kennedy Co. (79 A. 246).....	98
Davidson v. Adams Exp. Co. (79 A. 760).....	635	Meyer v. Safe Deposit & Trust Co. of Pittsburgh (79 A. 249).....	106
Dollar Sav. Fund & Trust Co. v. Bellevue Borough (79 A. 496).....	240	Morgan v. Gamble (79 A. 410).....	165
Dugan v. Arthurs (79 A. 626).....	299	Muckle v. Westinghouse Electric & Mfg. Co. (79 A. 707).....	472
Eisler v. Marshall (79 A. 496).....	208	Neilson, Appeal of (79 A. 709).....	540
Elliott v. Diamond Coal & Coke Co. (79 A. 708).....	423		

230 PA.—Continued.		Page			Page
Osterling v. Carpenter (79 A. 405).....		153	Stoiber v. Independent Brewing Co. (79 A. 416).....		210
Peterson v. Wiggins (79 A. 767).....		631	Suburban Rapid Transit St. R. Co. v. Monongahela Natural Gas Co. (79 A. 252).....		109
Philadelphia, City of, v. Tripple (79 A. 703).....		480	Supreme Council of Royal Arcanum v. Mooney (79 A. 234).....		22
Pittsburg, City of, v. First Nat. Bank of Sheraden (79 A. 406).....		176	Sutton v. Pennsylvania R. Co. (79 A. 719).....		323
Pittsburg, City of, v. Goshorn (79 A. 505).....		212	Tarentum Realty Co. v. McClure (79 A. 551).....		206
Pittsburg, City of, v. Pittsburg & C. St. R. Co. (79 A. 235).....		189	Tarentum Water Co. v. Tarentum Borough (79 A. 402).....		14
Pittsburg, City of, v. Rhodes (79 A. 634).....		397	Taylor's Estate, In re (79 A. 632).....		346
Point Bridge Co. v. Pittsburg & W. E. R. Co. (79 A. 567).....		289	Thomas Fox Estate v. Colonial Trust Co. (79 A. 153).....		95
Pollock v. Standard Steel Car Co. (79 A. 400).....		136	United Electric Light Co. v. East Pittsburg Borough (79 A. 229).....		65
Provident Life & Trust Co. v. Hammond (79 A. 628).....		407	United Workmen, Ancient Order of, v. Mooney (79 A. 233).....		16
Reich's Estate, In re (79 A. 151).....		55	Vadas v. Pittsburg, M. & Y. R. Co. (79 A. 166).....		41
Ritter v. Pittsburg Rys. Co. (79 A. 549).....		249	Vaughan's Estate, In re (79 A. 750).....		534
Robb v. Millers' Mut. Fire Ins. Co. (79 A. 150).....		44	Vervaeke v. Adams Exp. Co. (79 A. 764).....		647
Rocap v. Bell Tel. Co. (79 A. 769).....		597	Way v. Fraser (79 A. 154).....		49
Rosenblatt v. Weinman (79 A. 710).....		536	Weller v. Potts (79 A. 226).....		6
Rosenstiel v. Pittsburg Rys. Co. (79 A. 556).....		273	West v. Dyson (79 A. 782).....		619
Roumfort Co. v. Delaney (79 A. 653).....		374	West Homestead Borough v. Erbeck (79 A. 570).....		316
Rowland v. Martin (79 A. 765).....		518	Whitehead v. Pittsburg Rys. Co. (79 A. 240).....		79
Royal Arcanum, Supreme Council of, v. Mooney (79 A. 234).....		22	Williamsport Nat. Bank v. Kreamer (79 A. 713).....		515
Sanders v. Brock (79 A. 772).....		609	Wilson Co. v. Reighard (79 A. 243).....		141
Sarver v. Sarver (79 A. 164).....		60	Woods v. Pittsburg Coal Co. (79 A. 490).....		197
Sheaffer's Estate, In re (79 A. 651).....		426	Wright v. Adams Exp. Co. (79 A. 760).....		635
Shields v. Merchants' & Miners' Transp. Co. (79 A. 804).....		624			
Sloan v. Klein (79 A. 403).....		132			
Stewart v. Mark (79 A. 809).....		626			
Stewart v. Stewart (79 A. 609).....		475			
Stock v. German Catholic Press Co. (79 A. 414).....		127			

VOL. 231, PENNSYLVANIA REPORTS

Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.	Pa. Rep.	Atl. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
79	874	106	79	984	213	80	58	307	80	253	393	80	886
8	79	814	112	80	532	219	80	643	308	80	254	396	80
16	79	810	117	80	63	232	80	537	311	80	255	398	80
21	79	874	129	80	568	237	80	55	312	80	255	404	80
24	79	812	140	80	56	239	80	60	315	80	534	412	80
28	79	896	141	80	576	245	80	527	319	80	539	417	80
39	79	878	164	80	57	251	80	361	325	80	528	423	80
46	79	928	155	80	56	256	79	513	329	80	565	431	80
56	79	922	157	80	71	261	80	647	332	80	566	441	80
60	79	921	163	80	55	271	80	531	333	80	565	446	80
63	79	877	164	80	77	277	79	514	343	80	571	449	80
66	79	877	170	80	78	281	80	174	357	80	535	454	80
68	79	924	180	80	73	284	80	253	362	80	525	461	80
80	79	932	186	80	57	286	80	175	367	80	529	463	80
82	79	982	191	80	69	290	80	566	371	80	879	464	80
88	79	980	196	80	68	297	80	173	376	80	870	466	80
93	79	982	200	80	75	299	80	363	378	80	877	473	80
94	80	541	208	80	63	306	80	254	386	80	866		

VOL. 231, PENNSYLVANIA REPORTS

Allentown v. Roth (80 A. 56).....	140	Cape May Real Estate Co. v. Henderson (79 A. 982).....	82
Ashworth v. Pittsburg Rys. Co. (80 A. 981).....	539	Castor v. Castor (80 A. 868).....	412
Atlantic Refining Co. v. Sylvester (80 A. 1091).....	491	Charles J. Webb & Co. v. Novelty Hosiery Co. (80 A. 173).....	297
Bank v. Poore (80 A. 525).....	362	City of Allentown v. Roth (80 A. 56).....	140
Beck v. Dech (80 A. 1129).....	636	City of Philadelphia v. Fidelity & Deposit Co. of Maryland (80 A. 62).....	208
Bethlehem City Water Co. v. Bethlehem Borough (80 A. 984).....	454	City of Philadelphia v. Townsend (80 A. 69).....	191
Borough of Mahanoy City v. Hersker (80 A. 539).....	319	Clear Springs Water Co. v. Catasauqua Borough (80 A. 566).....	290
Brown v. City of Scranton (80 A. 1113).....	593	Commonwealth v. Casey (80 A. 78).....	170
Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co. (80 A. 508).....	129	Commonwealth v. Colandro (80 A. 571).....	343
Butterfield v. Snellenburg (79 A. 980).....	88	Commonwealth v. Endrukut (80 A. 1049).....	529
		Commonwealth v. Hickman (80 A. 254).....	305

231 PA.—Continued.	Page		Page
Commonwealth v. Patson (79 A. 928)....	46	Miller v. Cockins (80 A. 1055).....	449
Commonwealth v. Sharets (80 A. 1100)...	525	Miller v. Philadelphia Rapid Transit Co.	
Cooper v. Altoona Concrete Construction		(80 A. 1108).....	627
& Supply Co. (80 A. 1047).....	557	Mint Realty Co. v. Wanamaker (79 A. 514)	277
Corcoran v. Huey (80 A. 881).....	441	Mouer v. Cumberland Valley R. Co. (80 A.	
Corey Coal Co. v. New York & C. Gas		1130).....	638
Coal Co. (79 A. 812).....	24	Moyer v. Rentschler (81 A. 52).....	620
Cornog v. Wilson (80 A. 174).....	281	Muderspaugh's Estate, In re (80 A. 870)...	376
Crock's Estate, In re (80 A. 531).....	271		
Crowley v. Pennsylvania R. Co. (80 A. 175)	286	Newlin's Estate, In re (80 A. 255).....	312
		Nicholson v. Ertel (79 A. 984).....	105
Dale v. City of Scranton (80 A. 1110).....	604	Nivin v. Chester County Trust Co. (80 A.	
Dempster v. Baxmyer (79 A. 805).....	28	534).....	315
Desch v. Lehigh County (80 A. 902).....	511	Norris v. Breakwater Co. (80 A. 55).....	163
D'Jorko v. Berwind-White Coal Min. Co.		North Shore R. Co. v. Pennsylvania Co.	
(80 A. 77).....	164	(80 A. 253).....	307
Dolan's Estate, In re (80 A. 73).....	180		
Dougherty v. Briggs (79 A. 924).....	68	Paul v. Philadelphia & R. R. Co. (80 A.	
		365).....	338
Fegley v. Lycoming Rubber Co. (80 A. 870)	446	Pauza v. Lehigh Valley Coal Co. (80 A.	
Feighan v. Sobers (80 A. 1090).....	463	1126).....	577
Frantz v. Citizens' Electric Co. (80 A. 1106)	589	Pellio v. Bulls Head Coal Co. (80 A. 71)...	157
Freas' Estate, In re (79 A. 513).....	256	Pentony v. Pennsylvania R. Co. (80 A.	
		1052).....	464
Gehringer v. Lehigh County (80 A. 987)...	497	People's Nat. Bank of Pensacola v. Haz-	
Genese v. H. K. Mulford Co. (79 A. 932)...	80	ard (80 A. 1094).....	552
Glauser, Appeal of (80 A. 886).....	393	Perovich v. Domansky (79 A. 877).....	66
Gordon v. Prudential Ins. Co. of America		Philadelphia v. Fidelity & Deposit Co. of	
(80 A. 882).....	404	Maryland (80 A. 62).....	208
Green v. Duffee (80 A. 886).....	393	Philadelphia v. Townsend (80 A. 69).....	191
Hancock Ice Co. v. Perkiomen R. Co. (80		Reed v. American Dyewood Co. (80 A. 873)	431
A. 63).....	117	Reeder v. Lehigh Valley Coal Co. (80 A.	
Haynes v. Penfield (80 A. 565).....	329	1121).....	563
Heck v. Collins (80 A. 535).....	367	Rodell v. Adams (80 A. 253).....	284
Heffner v. Albright (80 A. 887).....	396	Roebing's Sons Co. v. American Amuse-	
Hood v. Connell Anthracite Min. Co. (81		ment & Construction Co. (80 A. 647)....	261
A. 56).....	647	Rymowich v. Schuylkill R. Co. (80 A.	
Hoopes v. Bradshaw (80 A. 1098).....	485	1107).....	582
Hoopes' Estate, In re (80 A. 537).....	232		
Howall's Estate, In re (80 A. 58).....	213	Schmitt, Appeal of (80 A. 980).....	473
Hower v. United Traction Co. (80 A. 1129)	626	Scott's Petition, In re (80 A. 255).....	311
Hughes' Estate, In re (80 A. 1104).....	475	Sheaff's Estate, In re (80 A. 361).....	251
		Sinnott's Estate, In re (80 A. 363).....	299
Interstate Securities Co. v. Third Nat.		Sloan v. Philadelphia & R. R. Co. (80 A.	
Bank (80 A. 888).....	422	366).....	332
		Smith v. Chester Traction Co. (80 A. 254)	308
Jaffe v. Cooperman (80 A. 55).....	237	Smith v. Piper (80 A. 877).....	378
John A. Roebing's Sons Co. v. American		Solt v. Williamsport Radiator Co. (80 A.	
Amusement & Construction Co. (80 A.		1119).....	585
647).....	261	Staae v. Pennsylvania R. Co. (80 A. 1102)	466
John Hancock Ice Co. v. Perkiomen R. Co.		Stem v. Bethlehem Borough (80 A. 984)...	461
(80 A. 68).....	117		
		Taussig v. United Security Life Ins. &	
Kaufman v. National Lumber Ins. Co. (81		Trust Co. (79 A. 810).....	16
A. 53).....	642	Thompson v. Prettyman (79 A. 874).....	1
Kemmerer Iron & Steel Co. v. Bittenben-		Tilton v. Philadelphia Rapid Transit Co.	
der (80 A. 57).....	154	(79 A. 877).....	63
		Umbel's Election, In re (80 A. 541).....	94
Lehigh Valley Coal Co. v. Girard Trust Co.		Urban v. Focht (81 A. 55).....	623
(80 A. 60).....	239		
Lehigh & Wilkes-Barre Coal Co. v. Luzerne		Vautier v. Atlantic Refining Co. (79 A.	
County (80 A. 1003).....	481	814).....	8
Lewis' Estate, In re (79 A. 921).....	60		
Liberty Bell Lodge, No. 42, In re (80 A.		Walsh v. Pennsylvania Coal Co. (80 A.	
582).....	112	1053).....	518
Liggett v. Kaufmann (80 A. 871).....	398	Warner v. Coatesville Borough (80 A. 576)	141
Lloyd v. Fendick (80 A. 529).....	367	Waslee v. Rossman (80 A. 643).....	219
London Guarantee & Accident Co. v. Ogels-		Wayne v. Pennsylvania R. Co. (80 A. 1097)	512
by (80 A. 57).....	186	Weaver v. Phillips (80 A. 526).....	325
		Webb v. City of Philadelphia (79 A. 874)	21
McGrath v. Thompson (80 A. 1109).....	631	Webb & Co. v. Novelty Hosiery Co. (80	
McNeas v. Sims (80 A. 866).....	386	A. 173).....	297
Mahanoy City v. Hersker (80 A. 539).....	319	Weisfield v. Beale (79 A. 878).....	39
Malone v. Pierce (80 A. 979).....	534	Westervelt v. Dives (80 A. 1054).....	548
Malone v. Riedenaue (80 A. 885).....	417	White v. Philadelphia Rapid Transit Co.	
Marcus v. Gimbel Bros. (80 A. 75).....	200	(79 A. 982).....	93
Melot's Estate, In re (80 A. 1061).....	520	Woodruff v. Lehigh Valley R. Co. (80 A.	
Merchants' & Mechanics' Bank of Scranton		1128).....	640
v. Poore (80 A. 625).....	362		
Merritt v. Poli (80 A. 1116).....	611	Yaukey v. Forney (80 A. 879).....	371
Miles Land Co. v. Pennsylvania Coal Co.		Yerger v. Hunn (80 A. 527).....	245
(80 A. 56).....	155		
Miller v. City of Philadelphia (80 A. 68)...	196	Zenatello v. Hammerstein (79 A. 922).....	56

VOL. 32, RHODE ISLAND REPORTS

R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.	R.I. Rep.	Ati. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	78	263	163	78	548	255	78	1041	318	79	829	383	79	817	432	80	18
5	78	258	177	78	554	266	79	482	323	79	831	386	79	960	445	80	11
10	78	265	186	78	497	282	79	488	326	79	826	389	79	941	447	79	1101
16	78	242	192	78	631	295	79	577	333	79	940	392	79	960	449	79	1106
23	78	339	197	78	625	291	79	681	335	79	825	394	80	12	453	80	12
34	78	337	213	78	834	292	79	678	338	79	818	396	79	945	463	79	1107
41	78	524	224	78	1015	299	79	785	342	79	942	400	79	1105	471	79	1108
53	78	506	231	78	1009	307	79	789	347	79	940	402	79	819	475	80	10
56	78	499	237	78	1012	309	79	788	349	79	821	406	79	969	477	79	1111
72	78	535	245	78	1041	311	79	787	361	79	972	415	79	962	486	79	1102
104	78	507	248	79	1	313	79	822	378	79	834	424	79	968	488	79	1118
145	78	528															

VOL. 32, RHODE ISLAND REPORTS

	Page		Page
Adams, In re (78 A. 524).....	41	Masterson v. Namquit Worsted Mills (78 A. 258).....	5
American Electrical Works v. Devaney (79 A. 678).....	292	Mohr v. Prudential Ins. Co. of America (78 A. 554).....	177
Atlantic Mills v. Superior Court (79 A. 577).....	235	Monast v. Manhattan Life Ins. Co. (79 A. 932).....	557
Barber v. Barber (79 A. 482).....	266	Moran v. Lavell (79 A. 818).....	338
Barbour v. Hall (78 A. 1041).....	245	Needle v. H. C. Biddle & Co. (79 A. 942).....	342
Baxter v. Patenaude (78 A. 625).....	197	Newport Trust Co. v. Van Rensselaer (78 A. 1009).....	231
Blake v. Rhode Island Co. (78 A. 834).....	213	Nock v. Lloyd (79 A. 832).....	313
Bolotow v. Barnes (79 A. 940).....	333	Pawtucket Baking Co. v. Rhode Island Co. (80 A. 665).....	517
Cambio v. Ibello (79 A. 789).....	307	Peck v. Rhode Island Co. (79 A. 1106).....	449
Chabot v. Paulhus (79 A. 1103).....	471	Peloso v. Francis (79 A. 488).....	282
Chapin v. Stone (79 A. 788).....	309	Perry v. Hall (79 A. 785).....	290
Chapin v. Stone (79 A. 787).....	311	Pettine v. Rhode Island Co. (79 A. 1118).....	488
Churchill v. Hebden (78 A. 337).....	34	Phillips v. Rhode Island Co. (78 A. 342).....	16
Curtis v. New York, N. H. & H. R. Co. (80 A. 127).....	542	Podrat v. Narragansett Pier R. Co. (78 A. 1041).....	253
Dawlski v. Natick Mills (78 A. 263).....	1	Premium Tea Co. v. Mallovelle (79 A. 825).....	335
East Greenwich, Town of, v. Guenond (78 A. 1015).....	224	Pyper v. Whitman (80 A. 6).....	510
Eddy v. Mathewson (78 A. 506).....	53	Read v. Gardner (79 A. 1102).....	486
Eisenberg v. Gallagher (79 A. 941).....	389	Rhode Island Hospital Trust Co. v. Humphrey (79 A. 829).....	318
Fales v. McDonald (79 A. 969).....	406	Roberts v. White (78 A. 497).....	185
First Nat. Bank of Pawtucket v. Dispeau (79 A. 945).....	396	Roberts v. White (80 A. 123).....	522
Greene v. Rathbun (78 A. 528).....	145	St. John v. Rhode Island Co. (79 A. 1101).....	447
Guenond v. Superior Court (78 A. 1015).....	224	Sheldon v. Wilbur (78 A. 631).....	192
Hall, In re (79 A. 966).....	424	Smith v. Hunt (79 A. 820).....	326
Higham v. T. W. Waterman Co. (80 A. 178).....	578	Sprague v. Stevens (79 A. 972).....	361
Horgan v. Town Council of Jamestown (80 A. 271).....	528	State v. Almy (79 A. 962).....	415
Horton v. Amoral (78 A. 265).....	10	State v. Badnelley (79 A. 834).....	378
Horton v. Amoral (80 A. 124).....	520	State v. Battey (80 A. 10).....	475
Horton v. Stone (80 A. 1).....	499	State v. Buchanan (79 A. 1114).....	490
Humes Const. Co. v. Philadelphia Casualty Co. (79 A. 1).....	246	State v. Gaines (79 A. 1107).....	462
Irons v. Greene (79 A. 817).....	383	State v. Hand Brewing Co. (78 A. 499).....	56
Lindgren v. Doughty (80 A. 125).....	524	State v. Karagavoorian (79 A. 1111).....	477
Lizotte, In re (79 A. 960).....	386	State v. Papa (80 A. 12).....	453
McCommsiskey v. Greene (79 A. 819).....	402	Sweeney v. McKendall (79 A. 940).....	347
McDuff Coal & Lumber Co. v. Del Monaco (79 A. 831).....	323	Talbot v. Talbot (78 A. 535).....	72
McHugh v. Providence Gas Co. (80 A. 12).....	394	Town of East Greenwich v. Guenond (78 A. 1015).....	224
McMahon v. Rhode Island Co. (78 A. 1012).....	237	Town of Warwick v. Barber (80 A. 11).....	445
McParlin v. Thompson (79 A. 681).....	291	Walker v. Walker (78 A. 339).....	29
Manierre v. Welling (78 A. 507).....	104	Warwick, Town of, v. Barber (80 A. 11).....	445
Martin v. Rhode Island Co. (78 A. 548).....	162	Welch v. Cummings (79 A. 1106).....	400
		Wells v. Knight (80 A. 16).....	432
		Whitford, Bartlett & Co. v. Townsend (79 A. 960).....	392
		Williams & Flash Co. v. Carpenter (79 A. 821).....	349

